DePaul Law Review

Volume 33
Issue 2 *Winter 1984*

Article 6

Lehr v. Robertson: Procedural Due Process and Putative Fathers' Rights

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RECENT CASES

LEHR V. ROBERTSON: PROCEDURAL DUE PROCESS AND PUTATIVE FATHERS' RIGHTS

The state, as parens patriae,[1] has an interest in promoting and protecting the welfare of children. When acting in this parental capacity, the state substitutes its authority for that of the natural parents. When child custody or adoption is at issue, conflicts often arise between parental rights and the state's interest in the welfare of children. In resolving these conflicts, the courts generally apply a "best interest of the child" standard.[2] Although this standard is incapable of precise definition, it embodies several social, psychological, and economic factors including the parents' fitness and children's preference.[3] Thus, while parents' rights to the custody and con-

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1. The term "parens patriae" is literally defined as "parent of the country." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). Traditionally, this term referred to the state's role as sovereign and guardian of legally disabled persons. *Id.* This protective doctrine originally extended only to the mentally incompetent. *See* Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195 (1978). The state's power over children did not arise out of the crown's protective or paternal interest. Rather, it resulted from the feudal tenurial system which made the wardships of minor heirs very profitable to the crown. *Id.* at 196-99.

Gradually, the scope of the parens patriae doctrine was increased to include children as well as mental incompetents. By the early nineteenth century, the king's parens patriae power was exercised to promote the physical and moral welfare of all children, regardless of their wealth or their parents' status. *Id.* at 206. The use of the doctrine to serve broad humanitarian principles has continued in American law. *Id.* at 207.

2. By the nineteenth century, the best interest of the child standard was firmly established in the common law. *See* J. SCHOULER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 47 (5th ed. 1895). In applying the best interest standard in a custody or neglect proceeding, the court's primary objective is to secure the welfare of the child. Regardless of the parents' claims, the child's welfare is treated as paramount. *Id.* § 248.

The best interest standard was first explicitly articulated by an American court in Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925). In the case, Justice Cardozo explained the role of the court in a child custody dispute:

> [The chancellor] acts as *parens patriae* to do what is best for the interest of the child. . . . He is not determining rights "as between a parent and child" or as between one parent and another. . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.

Id. at 433-34, 148 N.E. at 626.

3. The factors most often utilized by the courts in applying the best interest standard are illustrated by the Uniform Marriage and Divorce Act:

> The Court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
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> (1) the wishes of the child's parent or parents as to his custody;
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> (2) the wishes of the child as to his custodian;
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> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

trol of their children were once absolute as to third parties,[4] these rights now may be subordinated to the state's interest in the children's welfare.

The state's power to intervene in the parent-child relationship, however, is limited by the parents' constitutional rights to due process and equal protection.[5] The United States Supreme Court has ruled that family autonomy[6] and parents' interests in raising their children[7] give rise to a liberty interest[8] protected by due process. Additionally, equal protection guarantees

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(4) the child's adjustment to his home, school, and community; and

(5) the mental health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 197 (1979 & Supp. 1983). For a further discussion of the criteria used by courts in applying this standard, see Foster & Freed, *Child Custody,* 39 N.Y.U. L. REV. 423, 438-43 (1964).

4. The parental rights doctrine provides that a natural parent, unless proven unfit, has an absolute right over a non-parent to the custody of his or her child. McGough & Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Disputes,* 27 EMORY L.J. 209, 212 (1978). The doctrine's presumption of the natural parent's right to custody may be subordinated, however, to the best interests of the child standard. *Id.* For detailed discussion and recommendations concerning the modern tension between the parental rights doctrine and the best interests of the child standard, see Foster & Freed, *supra* note 3; McGough & Shindell, *supra.*

5. The fourteenth amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Supreme Court also has limited the state's intervention into family relationships through reliance on the first amendment right to freedom of religion. *See, e.g.,* Yoder v. Wisconsin, 406 U.S. 205 (1972) (compulsory education statute violates right of Amish parents to raise children according to their own religious principles). Moreover, the Court has found a right to privacy in family matters to exist in a "penumbra" emanating from other amendments. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (right of privacy, whether derived from fourteenth or ninth amendment, encompasses woman's right to choose to terminate her pregnancy); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (Bill of Rights creates zone of privacy which the state violated by prohibiting the use of contraceptives by married couples).

6. Moore v. City of E. Cleveland, 431 U.S. 494, 499-500 (1977) (zoning ordinance that prohibits extended family violates due process rights of family members to decide living arrangements); Prince v. Massachusetts, 321 U.S. 150, 166 (1944) (recognizing "private realm of family life which the state cannot enter").

7. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (parent has protected interest in "companionship, care, custody, and management of his or her children"); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (statute mandating public education unreasonably interferes with liberty of parents to direct upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (liberty guaranteed by fourteenth amendment includes freedom to marry, establish family, and raise children).

8. The term "liberty," as used in the due process clause, has been broadly construed by the Court. *See, e.g.,* Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972) (liberty is a broad, majestic term gathering meaning over time). Although it has never been strictly defined, liberty encompasses many different interests. The concept of due process liberty includes

> 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 . . . as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The historical development of the concept of

extend to family members who are discriminated against on the basis of gender[9] or illegitimacy.[10]

The rights of putative fathers[11] regarding their illegitimate children have been adjudicated by the Supreme Court over the last decade.[12] Recently, in *Lehr v. Robertson,*[13] the Court held that when a putative father fails to establish a significant relationship with his child, the father has neither a right to actual notice of, nor a right to be heard prior to, the adoption of his illegitimate child.[14] In determining substantive and procedural due process guarantees, the *Lehr* Court relied foremost on the extent to which a parent-child relationship had developed; accordingly, *Lehr* deemphasized the importance of a biological relationship between parent and child. Basing its decision on a questionable reading of federal precedent,[15] the Court failed to articulate a clear standard for determining what constitutes a "significant relationship." Consequently, *Lehr* provided courts and legislatures with little assistance in deciding when notice to putative fathers is required. The *Lehr* decision also alleviates the state's burden of notifying putative fathers prior to the adoption of their illegitimate children. Thus, the Court's ruling will have a significant impact on putative fathers who wish to establish and maintain relationships with their children.

BACKGROUND

Through a series of cases, the Supreme Court has attempted to outline the parameters of putative fathers' substantive and procedural rights regard-

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due process liberty is explored in Warren, *The New "Liberty" Under the Fourteenth Amendment,* 39 HARV. L. REV. 431 (1926). The application of substantive due process principles as a source of constitutional protection of family rights is discussed thoroughly in *Developments in the Law: The Constitution and the Family,* 93 HARV. L. REV. 1156, 1166-87 (1980).

9. *See* Caban v. Mohammed, 441 U.S. 380 (1979) (New York statute giving right to veto adoption to mother, but not to father, of illegitimate child violated equal protection clause); Orr v. Orr, 440 U.S. 268 (1979) (Alabama statute providing for alimony payments to women but not to men violated equal protection clause); Quilloin v. Walcott, 434 U.S. 246 (1977) (Georgia statute giving right to veto adoption to married or divorced father, but not to putative father, did not violate equal protection clause).

10. *See* Trimble v. Gordon, 430 U.S. 762 (1979) (statute that permits illegitimate children to inherit from mother, but not from father, denies them equal protection); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972) (equal protection requires that illegitimate, as well as legitimate, children be eligible to recover benefits for parent's disability under workers' compensation statute); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (mother may sue in tort for wrongful death of illegitimate as well as legitimate child); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimate children have same right as legitimate children to sue in tort for wrongful death of mother).

11. A putative father is defined as "the alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979).

12. The first Supreme Court case that addressed the rights of putative fathers was Stanley v. Illinois, 405 U.S. 645 (1972). For a further discussion of *Stanley,* see *infra* notes 16-21 and accompanying text.

13. 103 S. Ct. 2985 (1983).

14. *Id.* at 2987.

15. *Id.* at 2992-93.

ing their children. In *Stanley v. Illinois,*[16] the Supreme Court invalidated a state statute that created an irrebuttable presumption that a putative father was unfit to have custody of his children after the mother's death.[17] The Court found that although Stanley never married the children's mother, he had a liberty interest in maintaining custody over them.[18] According to the Court, this interest derived from both the putative father's biological relationship to his children and the substantial role he played in raising them.[19] Thus, the *Stanley* Court held that due process and equal protection required that Stanley be allowed to challenge this presumption before the state could deprive him of custody.[20] Moreover, the Court emphasized that these constitutional guarantees did not depend upon the existence of a legal relationship, such as marriage.[21] The Court failed, however, to indicate whether either a father's biological relationship to his children or his role in their upbringing would be sufficient to extend due process rights to a putative father.

Six years later, in *Quilloin v. Walcott,*[22] the Court indicated that a putative father's role in raising his children, rather than the biological relationship between them, was the focus for determining the father's substantive due process guarantees.[23] The *Quilloin* Court upheld a Georgia statute that granted to both parents of legitimate children, but only to mothers of illegitimate children, the right to withhold consent to adoption.[24] The appellant, a putative father, sought unsuccessfully to block the adoption of his illegitimate child by the child's step-father.[25] The Supreme Court found that because Quilloin

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16. 405 U.S. 645 (1972).

17. *Id.* at 649. In *Stanley,* an unmarried couple lived together for 18 years and raised several children. Upon the mother's death, the children were declared wards of the state and placed with court-appointed guardians. Illinois law did not recognize putative fathers as parents. ILL. REV. STAT. ch. 37, §§ 701-714 (1965). Thus, Stanley's children were automatically removed from his custody because he was presumed unfit to keep them. 405 U.S. at 650.

18. 405 U.S. at 651.

19. *Id.* Stanley's due process liberty interest was defined as "that of a man in the children he has sired and raised." *Id.*

20. *Id.* at 657-58. The *Stanley* Court characterized the removal of Stanley's children as "procedure by presumption." *Id.* at 647. Although it may be more efficient to make a presumption than an individual determination in every case, the Court concluded that when a procedure "explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child." *Id.* at 656-67.

21. *Id.* at 651-52.

22. 434 U.S. 246 (1978).

23. *See infra* note 32. Two distinct rights are derived from the due process clause. The first is a substantive right that protects the individual's liberty or property interest. The second is a procedural right that requires that notice and a hearing be held before a protected interest can be taken away by the government.

24. 434 U.S. at 256. Georgia law requires the consent of each living parent who has not abandoned the child or otherwise surrendered parental rights. GA. CODE § 74-403 (1975). An exception is created for the adoptions of illegitimate children; only the mother's consent is required. *Id.* § 74-403(3).

25. 434 U.S. at 247.

had not developed a parental relationship with his child, he did not attain a liberty interest that would require his consent to the child's adoption.[26] Thus, *Quilloin* concluded that the appellant's substantive due process rights were not violated when the Court allowed the step-father to adopt without ruling on the appellant's fitness as a parent.[27] It is significant to note that because Quilloin had been able to assert his liberty interest at a previous hearing, the Court did not address the issue of a putative father's procedural due process guarantees.[28]

In discussing Quilloin's equal protection challenge to the Georgia statute, the Court ruled that the state may presume that married or divorced fathers have a greater commitment to their children than do putative fathers.[29] Thus, the *Quilloin* Court concluded that a distinction between married or divorced fathers, and putative fathers, for purposes of granting the power to prevent adoptions, did not violate the equal protection clause.[30]

Although the *Quilloin* Court limited its decision to the unusual facts presented in the case, the ruling appeared to subordinate the biological relationship to the substantial parental role in the child's development.[31] The Court held that a putative father must establish a material role in the child's upbringing before he can be attributed substantive due process rights

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26. *Id.* at 251. Unlike Stanley, Quilloin had never lived with his son or his son's mother. Although Quilloin was listed as the father on his son's birth certificate and occasionally visited his son, he only provided financial support on an irregular basis. *Id.* at 249 & n.6. When the child was two years old, his mother married the appellee, Walcott. Nine years later, the mother consented to Walcott's adoption of the child. Quilloin was notified of Walcott's adoption petition by the Georgia Department of Human Resources. *Id.* at 250 n.7. Subsequently, he filed a petition to legitimate the child and secure visitation rights. The petitions for adoption and legitimation were consolidated, and a hearing was held at which both parties offered extensive evidence. *Id.* at 250.

The trial court found that although Quilloin was not an unfit parent and had not abandoned his child, the best interests of the child would be served by granting Walcott's petition for adoption. *Id.* at 251. The Georgia Supreme Court, relying on the state's policy in favor of raising children in a family setting, affirmed the decision of the trial court. Quilloin v. Walcott, 238 Ga. 230, 232 S.E.2d 246 (1977).

27. 434 U.S. at 256. The *Quilloin* Court indicated that the due process clause would certainly be offended if the state were attempting to break up an established family unit without a showing of parental unfitness. *Id.* at 255. The Court emphasized, however, that Quilloin had never had, nor sought, custody of his child and that the adoption gave "full recognition to a family unit already in existence, a result desired by all concerned, except the appellant." *Id.*

28. *Id.* at 253.

29. *Id.* at 256.

30. *Id.* The only equal protection issue raised in *Quilloin* concerned the difference in the state's treatment of putative fathers and fathers of legitimate children, whether married or divorced. The Court did not consider Quilloin's claim that the statute made an invidious gender-based distinction, because the claim was not properly presented in his jurisdictional statement. *Id.* at 253 n.13.

31. *Id.* at 254. The Court phrased the issue very narrowly, confining it to the particular facts of the case. It is unusual that the determination of a child's legal father would not be made until the child was 11 years old. The time span involved may have been significant in the Court's determination of Quilloin's due process interest. *See* Note, *A Putative Father's Parental Rights: A Focus on "Family,"* 58 NEB. L. REV. 610, 617 (1979).

equivalent to those of married or divorced fathers. Thus, a putative father's biological link, in the absence of additional considerations, affords him few substantive guarantees.[32]

In a further attempt to establish when a parent-child relationship gives rise to a substantive due process liberty interest, the Court examined the theory of psychological parenthood[33] in *Smith v. Organization of Foster Families for Equality and Reform*[34] (*OFFER*). Decided the same term as *Quilloin, OFFER* explored the constitutional significance of a psychological parental relationship when a biological link did not exist. OFFER and individual foster parents challenged New York's statutory procedure for removing children from foster homes.[35] The procedure allowed foster parents to request an evidentiary hearing but did not grant one automatically.[36] OFFER and the foster parents contended that their liberty interests, guaranteed by substantive due process, required that a hearing be granted automatically when the state planned to remove children who had been with a foster family for over one year.[37]

The Court considered the argument that ties may develop between children and their foster parents, making the foster family the true "psychological family."[38] OFFER contended that a psychological family has a liberty interest, under the due process clause, in remaining together.[39] Although the *OFFER* Court neither affirmed nor denied the existence of that liberty interest,[40] the Court assumed its presence.[41] Despite this assumption, however, the Court held that the state's procedures for removing children from foster homes were constitutionally adequate to protect this liberty interest.[42] Thus,

32. In *Quilloin,* the following factors together were insufficient to extend substantive due process protection to a putative father: an acknowledgment of paternity, naming on the birth certificate, irregular financial support, occasional visits and gifts for the child, no finding of parental unfitness, and a desire to continue visitation. One commentator has described these attributes as characterizing "[a]t best, an uncle-nephew relationship." Note, *Unwed Fathers and the Adoption Process,* 22 WM. & MARY L. REV. 85, 98-99 (1980).

33. Under the theory of psychological parenthood, the psychological relationship that develops between a child and a stable, loving parent figure is much more important to the child's well-being than the biological link between parent and child. J. GOLDSTEIN, A. FREUND & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 9-13 (1973). A psychological parent is defined as "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." *Id.* at 98. Thus, any person may be a psychological parent. *Id.*

34. 431 U.S. 816 (1977).

35. N.Y. SOC. SERV. LAW §§ 383(2), 400 (McKinney 1976); N.Y. ADMIN. CODE tit. 18, § 450.10 (1976).

36. N.Y. ADMIN. CODE tit. 18, § 450.10 (1976).

37. 431 U.S. at 839-40.

38. *Id.* at 839.

39. *Id.* The appellants relied on Moore v. City of E. Cleveland, 431 U.S. 494 (1977), which held that an extended family (consisting of two brothers, a cousin, and their grandmother) has a liberty interest protected by the due process clause in remaining together as a family unit.

40. 431 U.S. at 847.

41. *Id.*

42. *Id.* The liberty interest assumed to exist by the *OFFER* Court was "one rooted in the emotional attachments that develop over time between a child and the adults who care for him." *Id.* at 854.

the Court intimated that a psychological relationship, without the biological link between parent and child, may give rise to a liberty interest worthy of due process protection.[43]

Subsequently, in *Caban v. Mohammed,*[44] the Court addressed the distinction between psychological and biological associations in examining the relationship between a putative father and his child. The *Caban* Court invalidated a state statute that allowed the mother, but not the putative father, of an illegitimate child to block the child's adoption by withholding consent.[45] When both parents had attained a similar status, by developing significant custodial relationships with their child, the Court determined that a gender-based distinction would violate the equal protection clause.[46] The *Caban* Court noted

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43. *Id.* at 843. Three elements, discussed in dicta, define the Court's concept of family: the biological relationship, marriage, and the "emotional attachments that derive from the intimacy of daily association." *Id.* at 843-44. The Court stated that "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Id.* at 843. Marriage was defined as "the basic foundation of the family in our society." *Id.* Regarding the third factor, the Court stressed that a biological link is not necessary to the development of a "deeply loving and interdependent relationship between an adult and the child in his or her care." *Id.* at 844; *see also* J. GOLDSTEIN, A. FREUND & A. SOLNIT, *supra* note 33, at 98.

Recognizing the foster family's important role in providing psychological parenthood, the *OFFER* majority concluded that the foster family cannot be dismissed "as a mere collection of unrelated individuals." 431 U.S. at 844-45; *cf.* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (group of unrelated roommates do not have protected due process liberty interest in living together). Justice Stewart, however, in a concurrence joined by Chief Justice Burger and Justice Rehnquist, declared that the interest asserted by the foster parents was not protected by the due process clause. 431 U.S. at 858 (Stewart, J., concurring). The concurring opinion noted that the purpose of foster care is to provide only a temporary home for the child who is awaiting adoption or return to his or her natural parents. *Id.* at 856 (Stewart, J., concurring). Accordingly, Justice Stewart agreed with the New York Court of Appeals in rejecting the notion that "third-party custodians may acquire some sort of squatter's rights in another's child." *Id.* at 857 (Stewart, J., concurring) (quoting Bennett v. Jeffreys, 40 N.Y.2d 543, 552 n.2, 356 N.E.2d 277, 285 n.2, 387 N.Y.S.2d 821, 829 n.2 (1976)).

44. 441 U.S. 380 (1979).

45. The statute provided:

> 1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:
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> . . . .
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> (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;
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> (c) Of the mother, whether adult or infant, of a child born out of wedlock;
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> . . . .
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> 2. The consent shall not be required of a parent who has abandoned the child. . . . For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a finding that such parent has abandoned such child.

N.Y. DOM. REL. LAW § 111 (McKinney 1975). Since *Caban,* the statute has been amended to include certain putative fathers. *See* N.Y. DOM. REL. LAW § 111(1)(e) (McKinney 1977 & Supp. 1983-1984).

46. 441 U.S. at 394. The appellant, Caban, and the appellee, Mohammed, had lived together for five years and had two children. Although he was never married to the appellee, Caban was listed as the father on both of the children's birth certificates; he also contributed to the family's support. *Id.* at 382. When the appellee left with the children, then aged four and

that a state may not assume that maternal and paternal roles are significantly different.[47] Nevertheless, the Court cautioned that the equal protection clause will extend equivalent substantive rights only to a putative father whose parental relationship is similar to that of the mother.[48] The Court noted in dicta that a putative father who has either abandoned his child or never come forward to participate in child rearing need not be granted the privilege of vetoing an adoption.[49] Moreover, the Court declined to address the difficulties inherent in the adoption of newborns when the putative father has not had an opportunity to develop a relationship with the baby.[50]

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six, to get married, the appellant continued to have contact with the children. *Id.* Two years later, the appellee and her husband filed an adoption petition. The appellant, who also had married, responded by filing a cross-petition in which he and his wife sought adoption of the children. *Id.* at 383. The Surrogate Court of Kings County held a consolidated adoption hearing at which both couples presented evidence. The court granted the Mohammeds' petition over the objection of the Cabans, *id.* at 383-84, terminating all of the natural father's rights, including visitation. *See* N.Y. DOM. REL. LAW § 117 (McKinney 1977).

Relying on the unsuccessful constitutional challenge to § 111 in *In re* Malpica-Orsini, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975), *appeal dismissed sub nom.* Orsini v. Blasi, 423 U.S. 1042 (1976), both the Appellate Division and the New York Court of Appeals affirmed the lower court's decision. *In re* David Andrew C., 56 A.D.2d 627, 391 N.Y.S.2d 846, *aff'd,* 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977). The *Orsini* court of appeals had upheld the statute, reasoning that to require consent of all putative fathers could lead to delays in child placement, failure of children to be legitimized, the discouragement of potential husbands from marrying women with illegitimate children, extortion by the putative fathers, and harassment of the adoptive families. *Orsini,* 36 N.Y.2d at 572-74, 331 N.E.2d at 489-90, 370 N.Y.S. 2d at 516-17.

The Supreme Court dismissed *Orsini* for lack of a substantial federal question. 423 U.S. 1042 (1976). Three years later, however, the Court found a federal question in the parallel case of *Caban.* The Court explicitly overruled *Orsini* to the extent that its dismissal was inconsistent with the Court's decision in *Caban.* 441 U.S. at 390 n.9.

47. 441 U.S. at 389. The Court rejected the notion that there is a universal difference between maternal and paternal roles at every phase of child development. *Id.*

48. *Id.* at 394.

49. *Id.* at 392.

50. *Id.* at 392 n.11. The Court indicated that the special difficulties of identifying and locating putative fathers at the births of their children may justify a statute that sets more stringent requirements for acknowledging paternity or a stricter definition of abandonment. *Id.* Arguably, the state has a higher interest in promoting the speed and finality of newborn adoptions, because newborn children comprise the group that is most attractive to potential adoptive parents. *See* Comment, Caban v. Mohammed: *Extending the Rights of Putative Fathers,* 46 BROOKLYN L. REV. 93, 113 & n.117 (1979). On the other hand, it has been argued that taking additional time to find the putative fathers of newborns will best serve the interests of both the father and the child by securing the father's input at an adoption hearing. Note, *Putative Fathers: Unwed But No Longer Unprotected,* 8 HOFSTRA L. REV. 425, 439 (1980).

The New York adoption statute, amended after *Caban,* affords special consideration to putative fathers of children who were under the age of six months when placed for adoption. If the father openly lived with the mother, or if in the six months prior to the birth he held himself out to be the father and paid a fair amount of medical expenses incurred by the birth, his consent is required for the child's adoption. N.Y. DOM. REL. LAW § 111(1)(e) (McKinney 1977 & Supp. 1983-1984).

Thus, the *Caban* Court limited its ruling to those situations involving older children.[51]

Although the Court's decisions prior to *Lehr* acknowledged a putative father's potential liberty interest in his relationship with his child, several significant issues remained unanswered. First, no sufficient criteria were established for determining the minimum standard that a putative father must meet to protect his due process liberty interest in his child. Second, there was no indication of whether the standard required for developing a substantial relationship was the same for both procedural and substantive due process guarantees. Finally, a putative father's right to receive actual notice and a hearing concerning the adoption of his illegitimate child remained uncertain.

FACTS AND PROCEDURAL HISTORY[52]

An unmarried couple, Lehr and Robertson, lived together for approximately two years until Robertson gave birth to a daughter.[53] Lehr alleged that for the next two years he diligently tried to establish a relationship with his daughter, but his efforts were continually frustrated by the mother.[54] Finally, he threatened to take legal action if he was not allowed to see the child.[55] Robertson, who was married by that time, refused Lehr's demands and consented to the adoption of the child by her husband.[56] Mr. and Mrs. Robertson filed an adoption proceeding in the family court for Ulster County, New York. Because Lehr did not fall within the statutory classification of putative fathers to whom notice must be given,[57] he did not receive notice of the

51. 441 U.S. at 392. The *Caban* Court did not define the term "older child." The Caban children were ages four and six when the adoption proceeding was initiated.

52. Because Lehr was neither notified of, nor extended an opportunity to, participate in the adoption proceeding, his allegations were never adjudicated. His version of the facts, recorded in the dissenting opinion, 103 S. Ct. at 2997 (White, J., dissenting), was ignored by the majority. For that reason, much of the factual background will be cited to Justice White's dissent.

53. *Id.* (White, J., dissenting). Lehr alleged that he and Robertson cohabited prior to the child's birth. Robertson did not deny this allegation or Lehr's assertion of paternity.

54. *Id.* (White, J., dissenting). Lehr asserted that Robertson and the baby disappeared upon their release from the hospital. He persistently searched for them over the next year. When he finally found them, he visited with the child to the extent permitted by the mother. Shortly thereafter, Robertson and the baby vanished again. Lehr then hired a private detective who found the mother and child one year later. By this time, Robertson had married Mr. Robertson. She refused Lehr's offers of financial assistance and threatened to call the police if Lehr tried to see the child. Lehr then retained an attorney, who wrote to the child's mother requesting that Lehr be allowed to see the child and threatening legal action if she refused. The Robertsons responded by initiating the adoption proceeding. *Id.* (White, J., dissenting).

55. *Id.* at 2997-98 (White, J., dissenting).

56. *Id.* at 2987-88.

57. N.Y. DOM. REL. LAW § 111-a (1977). This statute was passed in response to *Stanley* in an attempt to provide notice to putative fathers when such notice was constitutionally required. *See* 103 S. Ct. at 2994 & n.20. Section 111-a, in pertinent part, provides:

> 2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

proceeding and was allegedly unaware of it.[58]

After the Robertsons had initiated the adoption action, Lehr filed a petition seeking visitation rights and a declaration of his paternity from the family court in Westchester County, New York.[59] The mother was served with notice of Lehr's suit and requested an order from the Ulster County court to change

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(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 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.

N.Y. DOM. REL. LAW § 111-a (McKinney 1977).

The putative father registry was established by New York Social Services Law § 372-c:

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. . . .

. . . .

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 1977).

The putative father registry was designed to reduce the following: (1) casework time formerly spent conducting searches for the putative fathers; (2) costs of notifying putative fathers by providing for notice by mail rather than by publication; and (3) public costs of foster care by freeing up children for adoption more quickly. Brief for Appellant at D-4, Lehr v. Robinson, 103 S. Ct. 2985 (1983) (letter from Sen. J. Pisani to Governor's Counsel). There is some indication in the legislative history of § 111-a that the sponsors of the bill assumed that notice would be required to a putative father, like Lehr, who had filed a paternity claim. One sponsor explained that a putative father who used the registry "has elected not to avail himself of his right (established by the bill) to institute a paternity proceeding, but, rather, has chosen the less involved procedure of filing a 'notice of intent' which will *also* protect his right to notice of subsequent proceedings affecting the child." *Id.* at D-8 (emphasis added).

58. 103 S. Ct. at 2989.

59. *Id.* at 2988-89.

the venue of the paternity action from Westchester to Ulster County.[60] The Ulster County court issued an order to show cause why venue should not be changed to allow the adoption and paternity petitions to be heard together.[61] Lehr learned of the adoption proceeding for the first time when he was served with the Ulster County court order.[62] He sought to stay the adoption until his paternity suit was resolved, but learned that the Ulster County court had signed the adoption decree five days prior to the return date it had established on the change of venue order.[63] Thereafter, Lehr's paternity petition was dismissed without prejudice by the Westchester County court on the Robertsons' motion. Lehr appealed the adoption order and sought to vacate the decree.[64] The Ulster County court issued a memorandum decision denying relief to Lehr,[65] which was affirmed by both the Appellate Division[66] and the New York Court of Appeals.[67]

The court of appeals determined that there had been no abuse of discretion by the Ulster County court either in finalizing the adoption without notifying Lehr, or in refusing to vacate the decree.[68] Lehr, however, claimed that the New York statute violated the due process clause by terminating his parental rights without a hearing and violated the equal protection clause by extending greater procedural rights to mothers and to classes of putative fathers that did not include him.[69]

THE DECISION

Justice Stevens, writing for the majority,[70] denied relief to Lehr on both his due process and equal protection claims.[71] The majority held that Lehr's undeveloped relationship with his child resulted in a minimal liberty interest that was protected adequately by the New York statutory scheme.[72] Through

60. *Id.* at 2989.

61. *Id.*

62. *Id.* at 2988-89.

63. *Id.* at 2989. On February 26, 1979, the Ulster County court signed the order to show cause, submitted by the appellees, to change the venue of the paternity proceeding to Ulster County. The return date on the motion was March 12, 1979. Lehr was served with notice of the order on March 3, 1979. Four days later, Lehr's attorney telephoned the Ulster County court and informed the judge of Lehr's intention to seek a stay of the adoption proceeding. The judge said he had signed the adoption decree earlier that day. *Id.*

64. *Id.*

65. *In re* Martz, 102 Misc. 2d 102, 423 N.Y.S.2d 378 (1979).

66. *In re* Jessica XX, 77 A.D.2d 381, 434 N.Y.S.2d 772 (1980).

67. *In re* Jessica XX, 54 N.Y.2d 417, 430 N.E.2d 896, 446 N.Y.S.2d 20 (1981). Lehr relied on *Caban* to support his equal protection claim, but because *Caban* was decided 48 days after the adoption decree was signed, the court of appeals declined to apply it retroactively. *Id.* at 424, 430 N.E.2d at 898-99, 446 N.Y.S.2d at 22-23.

68. *Id.* at 429-30, 430 N.E.2d at 901-02, 446 N.Y.S.2d at 25-26.

69. *Id.* at 423-24, 430 N.E.2d at 898, 446 N.Y.S.2d at 22.

70. Justice Stevens was joined by Chief Justice Burger and Justices Brennan, Powell, Rehnquist, and O'Connor.

71. 103 S. Ct. at 2987.

72. *See supra* note 57.

its putative father registry, the state had placed Lehr's right to receive notice completely within his control.[73] In addition, the Lehr Court held that because Lehr had not established a relationship with his child equivalent to that established by the custodial mother, he was not similarly situated; therefore, the equal protection clause was not violated.[74] The state was not prevented from treating the two parents differently in guaranteeing the rights to veto and receive prior notice of an adoption.[75]

Focusing on Lehr's due process challenge, the Court examined the precise nature of the liberty interest threatened by the state.[76] The majority distinguished between two types of relationships that a putative father may have with his child. First, a relationship merely consisting in a biological link was described as inchoate;[77] it had the potential for developing into a full relationship. Second, when a putative father "demonstrate[d] a full commitment to the responsibilities of parenthood,"[78] the relationship was deemed to be developed. Emphasizing that parents' liberty interests depend on the responsibilities they assume toward their children, the *Lehr* Court ruled that a biological relationship alone merely provides the father with an opportunity to develop a substantial parent-child relationship.[79] The Court reasoned that when a putative father has failed to develop such a relationship, his biological relationship does not give rise to a liberty interest worthy of the same protection as that of a parent who has assumed significant parental duties.[80] Thus, the majority concluded that Lehr's liberty interests did

73. 103 S. Ct. at 2995. The putative father registry protects the father's interest by thwarting the efforts of an uncooperative mother. It also protects the anonymity and privacy of the mother, while serving the interests of the state and the child in speedy and final adoptions by eliminating the need for extensive searches and investigations. Nonetheless, there are disadvantages to a putative father registry such as New York's. For example, its purpose in ensuring notice to putative fathers may be easily defeated in the absence of an interstate cross-referral system. Thus, a mother and stepfather who wished to defeat the putative father's interest in the child could simply move out of state for the adoption. In addition, the putative father registry may protect the interests of efficiency and maternal privacy at too high a cost to the rights of fathers and best interests of their children. *See* Note, *The "Strange Boundaries" of* Stanley, 59 VA. L. REV. 517, 528-31 (1973) [hereinafter cited Note, *Strange Boundaries*].

74. 103 S. Ct. at 2996.

75. *Id.* at 2996-97. The Court distinguished the maternal and paternal relationships in *Lehr* in the following manner:

> Whereas appellee had a continuous custodial responsibility for Jessica, appellant never established any custodial, personal, or financial relationship with her. 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.

Id.

76. *Id.* at 2990-94.

77. *Id.* at 2987.

78. *Id.* at 2993.

79. *Id.* In support of its ruling, the majority quoted Justice Stewart's dissent in *Caban:* "Parental rights do not spring full blown from biological connection between parent and child. They require relationships more enduring." *Id.* at 2992 (quoting *Caban,* 441 U.S. at 397 (Stewart, J., dissenting)).

80. *Id.* at 2992-93. Although the Court determined that those who develop a significant parent-child relationship will be afforded a greater degree of constitutional protection, the Court

not require the state to include him automatically in a hearing to determine the child's best interests.[81]

The *Lehr* Court then examined New York's statutory scheme to determine whether the procedures adequately protected Lehr's liberty interest in establishing a responsible relationship with his child.[82] Focusing on the classification of putative fathers entitled to notice, the majority found that notice would be withheld from very few responsible fathers.[83] The Court noted that any interested father could secure a right to notice by mailing a postcard to the putative father registry.[84] According little significance to the fact that Lehr may have been unaware of the registry scheme, the Court concluded that his liberty interests were adequately protected.[85] Moreover, the Court rejected Lehr's contention that he deserved special notice because the Ulster County court had knowledge of his paternity proceeding in Westchester County.[86]

After determining that there was no due process violation, the Court addressed Lehr's equal protection claim. Although the statutory scheme would always provide notice to the mother of an illegitimate child,[87] only certain categories of putative fathers would receive notice.[88] Lehr asserted that excluding certain putative fathers from receiving notice amounted to gender-based discrimination in violation of equal protection.[89]

Examining the New York statute, the *Lehr* Court noted that the legislature established adoption procedures that promoted the child's best interests, protected the parent's rights, and ensured finality and promptness of adoptions.[90]

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implied that a putative father who has only a biological link to his child is entitled to some lesser protection. Accordingly, the Court stated that "the mere existence of a biological link does not merit equivalent constitutional protection." *Id.* at 2993.

The link between parental rights and parental duty had previously been established by the Court. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[parents'] primary function and freedom include preparation for obligations the state can neither supply nor hinder"); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (parents have "a right, coupled with the high duty, to recognize and prepare [their children] for additional obligations"). This concept was derived from the common law. *See, e.g.,* 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 452 (1st Amer. ed. 1771) (rights of parents in their children derive from their duties toward their children).

81. 103 S. Ct. at 2994.

82. *Id.* at 2994-95.

83. *Id.*

84. *Id.* at 2995.

85. *Id.* Interestingly, the *Quilloin* decision espoused a different view of ignorance of the law. The *Quilloin* Court declined to base its holding on the proposition that Quilloin had lost any constitutionally protected interest by failing to petition for legitimation. The Court pointed to evidence in the record that Quilloin was unaware of the legitimation procedure, which, if successful, would have secured him the right to block his child's adoption. 434 U.S. at 224.

86. The Court reasoned that putative fathers were "presumptively capable of asserting and protecting their own rights." 103 S. Ct. at 2995. According to the majority, special notice was not required because the registry scheme was sufficient to protect Lehr's liberty interest. *Id.*

87. N.Y. DOM. REL. LAW § 111(c) (McKinney 1977).

88. *See supra* note 57.

89. 103 S. Ct. at 2990.

90. *Id.* at 2996; *see also* Brief for Appellant at D-3 to D-4, Lehr v. Robinson, 103 S. Ct. 2985 (1983) (letter enumerating the statute's purposes from Sen. J. Pisani, sponsor of the legisla-

The Court further noted that a substantial parental relationship was a relevant criterion in evaluating both the rights of a parent and the best interests of a child.[91] The majority found that the mother in *Lehr* had continuous custody of, and an established relationship with, her child.[92] In contrast, Lehr had not established a custodial, personal, or financial relationship with his child.[93] Consequently, because the mother and father were not similarly situated in their parental relations with their child, the Court held that the equal protection clause did not prevent the state from according the two parents different rights.[94]

Writing for the dissent, Justice White disagreed with the majority's due process rationale.[95] The dissent rejected the proposition that a biological relationship merely provided an opportunity to develop a relationship that would receive substantial due process protection.[96] Justice White maintained that it was improper to examine the quality of the parent-child relationship in order to determine whether the putative father possessed a constitutionally protected interest in that relationship.[97] Instead, the dissent reasoned that a biological relationship alone creates the protected liberty interest, and it should not be subordinated to the rights of a parent who has established a substantial relationship with the child.[98] In addition, Justice White noted that Lehr was never allowed to take part in a hearing; consequently, it was unfair to judge the quality of his parent-child relationship in the absence of a complete record.[99] The dissent stated that although due process would not require actual notice to all putative fathers when an extensive search would be necessary, there must be at least a reasonable attempt to identify and notify such fathers.[100]

In considering the adequacy of the state's procedure, Justice White found it unnecessary to consider the facial challenge to the statute.[101] By filing suit to establish his paternity, Lehr had given notice to the adoption court of his action and interest.[102] Accordingly, the dissent reasoned that denying Lehr

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tion, to Governor's Counsel). The intention of the statute was to "codify the *minimum* protections for the putative father which *Stanley* would require." *Id.* at D-2 (emphasis in original).

91. 103 S. Ct. at 2996.

92. *Id.*

93. *Id.*

94. *Id.* at 2997. The Court also rejected the assertion that the statutory distinctions among classes of putative fathers violated the equal protection clause. *Id.* at 2997 n.27. Moreover, the Court determined that such distinctions were rational and constitutionally permissible. *Id.*

95. *Id.* at 2997-3001 (White, J., dissenting). Justices Marshall and Blackmun joined the dissent.

96. *Id.* at 2999 (White, J., dissenting).

97. *Id.* (White, J., dissenting).

98. *Id.* (White, J., dissenting). Justice White asserted that it was "quite untenable to conclude that a putative father's interest in his child is lacking in substance, . . . or ultimately that the father's interest is not entitled to the same minimum procedural protections as the interests of other putative fathers." *Id.* (White, J., dissenting).

99. *Id.* at 2998 (White, J., dissenting).

100. *Id.* at 2999 (White, J., dissenting).

101. *Id.* at 3001 (White, J., dissenting).

102. *Id.* at 3000 (White, J., dissenting).

a hearing because he failed to notify the court by placing his name in the parental registry amounted to sheer formalism.[103] The *Lehr* dissent concluded that the state's interests in the speed and finality of adoptions were not substantially served by failing to notify a putative father whose identity and location were known.[104]

ANALYSIS AND IMPACT

The *Lehr* Court's rationale for determining a putative father's liberty interest was based on a questionable application of federal precedent. Additionally, the *Lehr* decision continues a trend initiated in *Quilloin,* which stresses the putative father's social or psychological attachment, rather than his genetic contribution, to his child. Moreover, by substituting a subjective standard that focuses on the extent to which a relationship has developed for an objective examination of a biological relationship, the *Lehr* ruling erodes a putative father's liberty interest in his child. After *Lehr,* it is uncertain when a relationship is sufficient to establish a putative father's liberty interest.

In determining whether due process guarantees apply, the Court traditionally has focused on the nature of the liberty interest involved.[105] After determining the existence of such an interest, the Court engages in a weighing process to determine the form of the hearing and notice required.[106] Contrary to this general analysis, the *Lehr* Court employed a weighing process to determine the nature of Lehr's liberty interest.[107] As a result, the majority concluded that Lehr's liberty interest was of lower quality than that of a "developed" father.[108] This approach ignores the holding in *OFFER* that an interest which may be insufficient to receive substantive due process protection nonetheless may give rise to full procedural protection.[109]

The *Lehr* Court's rationale puts a putative father who seeks to assert a liberty interest in his child in a difficult position. A putative father must prove that he is entitled to a substantive liberty interest *before* the state must provide him with notice of a pending adoption proceeding. Yet, it will be difficult, if not impossible, for a putative father to demonstrate his liberty

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103. *Id.* (White, J., dissenting).

104. *Id.* at 3001 (White, J., dissenting).

105. *See, e.g., id.* at 2998 (White, J., dissenting); Smith v. OFFER, 431 U.S. 816, 839-42 (1977); Ingraham v. Wright, 430 U.S. 651, 672 (1977); Meachum v. Fano, 427 U.S. 215, 224 (1976); Goss v. Lopez, 419 U.S. 565, 575-76 (1974); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

106. *See supra* note 105.

107. 103 S. Ct. at 2992-93. The dissent criticized the majority's approach. *Id.* at 2998 (White, J., dissenting).

108. *Id.* at 2993-94.

109. Smith v. OFFER, 431 U.S. 816, 842-43 n.48 (1977). The *OFFER* Court specifically noted that "recognition of a liberty interest . . . for purposes of the procedural protections of the Due Process clause would not necessarily require that [developed relationships] be treated as fully equivalent to biological [relationships] for purposes of substantive due process review." *Id.*

interest when, as was the case in *Lehr,* he is not afforded an opportunity to present evidence of a developed parent-child relationship. Ironically, under the *Lehr* rationale, the mere mailing of a postcard to the New York putative father registry establishes a sufficient parental relationship entitling the father to notice.[110] At best, this analysis appears "grudging and crabbed"[111] when one considers that the adoption court had notice of Lehr's paternity claim yet denied him an opportunity to establish his liberty interest.

Additionally, the Court's reliance on *Caban,* an equal protection case, to determine Lehr's substantive due process interests is misplaced. Despite its acknowledgement that the *Caban* Court failed to address the due process claim,[112] the *Lehr* majority focused on the *Caban* dissenting opinion to draw a distinction, for purposes of determining Lehr's liberty interest, between a biological relationship and an actual relationship of parental responsibility.[113] The Court's ruling in *Caban,* however, provided little support for the proposition that a liberty interest derives from a developed relationship and not from a biological link. Rather, the *Caban* Court merely ruled that when both a putative father and mother have an established relationship with their child, they cannot be treated unequally.[114]

The *Lehr* Court contrasted Lehr's undeveloped relationship to the developed relationship in *Stanley.*[115] The *Stanley* Court had emphasized that when a putative father sired and raised his children,[116] he had a liberty interest protected by due process. *Stanley,* however, did not indicate that a father's liberty interest resulted more from his psychological than from his biological relationship with his child.[117] Thus, the Court's reliance upon *Caban* and *Stanley* fails to support the notion that for purposes of determining the nature of a liberty interest, there is a distinction between a developed and a biological relationship.

The *Lehr* decision will have a substantial impact on putative fathers who wish to establish or maintain a relationship with their children. According greater weight to a psychological parental relationship than to a biological one, the Court's ruling leaves unclear the extent to which a relationship must have developed before a liberty interest will be recognized.[118] Further, the

110. 103 S. Ct. at 2987-88.

111. *Id.* at 3000 (White, J., dissenting).

112. *Id.* at 2992 (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

113. *Id.* The *Caban* Court stated that because it had found that the challenged statute violated the equal protection clause, it was unnecessary to decide whether the statute also violated the putative father's substantive due process rights. Caban v. Mohammed, 441 U.S. 380, 394 n.16 (1979).

114. 441 U.S. at 387.

115. 405 U.S. 645 (1972).

116. *Id.* at 651.

117. *Id.* at 651-52.

118. There is support for the view that the constitutionally protected family unit should be based on social and psychological relationships with children rather than on biological or marital ties. Poulin, *Illegitimacy and Family Privacy,* 70 NW. U.L. REV. 910, 911 (1976); *see also* Note, *Unwed Fathers and the Adoption Process,* 22 WM. & MARY L. REV. 85, 108 (1980)

ruling apparently requires that a putative father must establish a custodial, personal, or financial relationship before a state must notify him of a pending adoption proceeding.[119] Nevertheless, the majority held that a sufficient parental relationship could be established by merely mailing a postcard or being listed on the birth certificate. Neither of these two factors, however, necessarily indicates the existence of a developed relationship. In ignoring the fact that Lehr took affirmative steps to notify the court of his paternity claim,[120] the decision not only requires that a putative father bear the burden of securing his right to notice, but also that the putative father strictly comply with the state statutory scheme.

The *Lehr* decision gives states greater latitude in simplifying their adoption procedures at the expense of a putative father's interest in his child. States will not have to conduct extensive searches or investigations to locate putative fathers who have neither become responsible parents nor filed with the registry.[121] Moreover, because the *Lehr* rationale presumes that a putative father is capable of protecting his liberty interest,[122] it now may be unnecessary for a mother to reveal the name of the biological father.[123]

CONCLUSION

Lehr continued the Court's recent trend of subordinating the constitutional significance of the biological, to the psychological, parent-child relationship.

(concern for legal or biological claims to child must be subordinated to child's need for "truly familial, psychological relationships that are so essential to his emotional health"). There are, however, no objective standards for measuring the constitutional significance of the psychological relationship. This lack of objective measurement necessitates that arbitrary lines be drawn or that difficult case-by-case determinations be made. Thus, it has been suggested that the constitutional rights of fathers should rest on the objective determinations of either biological or marital ties. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing Individual and Social Interests,* 81 MICH. L. REV. 463, 471 (1983) (favoring marital ties); Note, *Strange Boundaries, supra* note 73, at 522 (favoring biological tie).

Basing a putative father's due process liberty interest on his biological link protects his interest in the future companionship of his child. This interest should not be dependent on the development of a past relationship that may have been influenced by factors beyond the father's control. *Id.* The argument in favor of marriage as the objective boundary of due process protection assumes a societal interest in promoting formal, traditional family units. Thus, according due process protection to a putative father's biological or psychological relationship overlooks and ultimately undermines the ability of the family to perform important societal functions. Hafen, *supra,* at 471.

119. 103 S. Ct. at 2996-97.

120. *Id.* at 2995. The *Lehr* dissent questioned the majority's failure to accord any weight to the fact that Lehr, by filing his paternity suit, provided notice of his interest in the adoption proceeding. *Id.* at 3000 (White, J., dissenting). Justice White found it incredible to "deny notice and a hearing to a father who has not placed his name with the register 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." *Id.* (White, J., dissenting).

121. 103 S. Ct. at 2994-95.

122. *Id.* at 2995.

123. Compelling a mother to identify the putative father of her child may involve a serious infringement of her right to privacy. This tension between the mother's privacy rights and the putative father's due process rights is discussed in Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing* Stanley v. Illinois, 9 FAM. L.Q. 527 (1975).

The Court emphasized that parental rights do not derive solely from a putative father's biological link to his child. Rather, the putative father must show a substantial commitment to psychological parenthood before he acquires a protected liberty interest. The Court found that a putative father registry, which allows such fathers to indicate their intent to claim paternity, provides sufficient protection of a putative father's procedural due process rights because it gives him control over securing a right to notice. Furthermore, the *Lehr* decision recognized the registry as a practical way to ensure a putative father's notification of his child's adoption proceeding.

Nevertheless, the Court supported its due process holding with a questionable application of federal precedent. In addition, the majority failed to articulate a workable standard by which state courts may determine when a putative father's relationship with his child should receive due process protection. As a result, a putative father must act to secure his procedural due process rights or risk the adoption of his child without his knowledge or consent. By limiting the circumstances under which putative fathers must be notified and allowed to participate in adoption proceedings, *Lehr* contributes to defining the parameters of such fathers' fourteenth amendment rights. Those parameters, however, will require further definition.

Jannis E. Goodnow