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Family Law—Putative Fathers and the Presumption of Legitimacy—Adams and the Forbidden Fruit: Clashes between the Presumption of Legitimacy and the Rights of Putative Fathers in Arkansas

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FAMILY LAW—PUTATIVE FATHERS AND THE PRESUMPTION OF LEGITIMACY—ADAMS AND THE FORBIDDEN FRUIT: CLASHES BETWEEN THE PRESUMPTION OF LEGITIMACY AND THE RIGHTS OF PUTATIVE FATHERS IN ARKANSAS.

I. IN THE BEGINNING

We have come a long way since *Adams's* day. *Adams v. State*¹ that is, in which a jury made a determination of paternity after examining an illegitimate child to see whether she bore any resemblance to her putative father.² Paternity suits have since been stripped of many of their quasi-criminal characteristics,³ and, thanks to DNA testing, we certainly have more reliable means of determining paternity⁴ than having a jury take a comparative gander at the illegitimate child and his or her putative father. Scientific certainty, however, is not the same as moral certainty, and the increased scientific certainty with which we can now determine biological paternity has actually decreased the moral certainty husbands can have in their legal status as father to the children born into the marital family.⁵ In our day a test may prove conclusively that a child born to a married couple

1. 93 Ark. 260, 124 S.W. 766 (1910).

2. *Id.* at 263, 124 S.W. at 767. A putative father is "any man not deemed or adjudicated under the laws of the jurisdiction of the United States to be the father of genetic origin who claims or is alleged to be the father of genetic origin of the child." ARK. CODE ANN. § 9-9-501(11) (LEXIS Repl. 2002).

3. HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 109 (1971). Although the Arkansas Supreme Court held as early as 1885 that paternity actions—then referred to as proceedings to affiliate a bastard child—were civil and not criminal in nature, the court also acknowledged that:

Bastardy proceedings have many of the characteristic features of a criminal prosecution. The State is the Plaintiff. A warrant issues for the apprehension of the reputed father. When arrested he is required to give bail for his appearance.

The prosecuting attorney conducts the suit on behalf of the State, and officers of the court are allowed fees as in criminal cases.

Chambers v. State, 45 Ark. 56, 58 (1885).

4. Because detailed discussion of the reliability of blood or DNA tests is beyond the scope of this note, the reader who seeks such information is referred to the following sources: Am. Med. Assoc. et al., *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247 (1976), reprinted in SANFORD N. KATZ & MONROE L. INKER, *FATHERS, HUSBANDS AND LOVERS* 15 (1979); E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1 (1993). For an Arkansas case holding blood test results sufficiently conclusive to rebut the presumption of legitimacy, see *Richardson v. Richardson*, 252 Ark. 244, 251, 478 S.W.2d 423, 428 (1972).

5. See generally Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 550 (2000) (noting that paternity determination on the sole basis of genetic testing may suddenly grant a man outside the legal family structure paternal rights over one or more of the marital children).

is not the biological child of its presumed father and, by the same token, may establish a paramour's standing to seek parental rights.⁶ The stage is now set for marital fathers, who have nurtured and cared for their presumed children, to be declared legal strangers to those same children through no fault or unfitness of their own.⁷ Until relatively recently, such a result would have been nearly impossible in Arkansas. Prior to 1981 putative fathers simply had no cause of action allowing them to seek a determination of paternity.⁸ Furthermore, the legal relationship between married parents and children born into the marriage was protected by a vigorous common law presumption that all such children were legitimate.⁹

Although Arkansas still retains the presumption of legitimacy, it has undoubtedly lost much of its vigor.¹⁰ In 2001 a divided court announced in *R.N. v. J.M.*¹¹ that any man who claims or is alleged to be the genetic father of a child has standing to file a paternity suit regarding the child, even if the child already has a presumed father and is part of a marital family.¹² Oddly enough, although a putative father faces no time limits on his right to bring a paternity suit regarding a child born to married parents,¹³ he may be barred from bringing a paternity suit one year after his child is put up for adoption without ever having received actual notice of the proceeding.¹⁴ Why is it

6. Battle Robinson & Susan Paikin, *Who Is Daddy? A Case for the Uniform Parentage Act* (2000), 19 DEL. LAW. 23, 23–24 (2001); cf. *R.N. v. J.M.*, 347 Ark. 203, 211, 61 S.W.3d 149, 154 (2001) (holding that a putative father who had an adulterous relationship with a married woman had standing under section 9-10-104 of the Arkansas Code Annotated to petition for a determination of paternity of a child born into the marital family and presumed to be legitimate).

7. Glennon, *supra* note 5, at 551; cf. Jill Handley Andersen, *The Functioning Father: A Unified Approach to Paternity Determinations*, 30 J. FAM. L. 847, 847 (1991–1992) (discussing the threat of displacement faced by functional fathers).

8. *Roque v. Frederick*, 272 Ark. 392, 398–99, 614 S.W.2d 667, 670 (1981); Janet A. Flaccus, *A Grab Bag of Recent Arkansas Cases*, 1999 ARK. L. NOTES 25, 36 n.18.

9. *Thomas v. Pacheco*, 293 Ark. 564, 567–68, 740 S.W.2d 123, 125 (1987) (noting that the presumption of legitimacy was very difficult to rebut and one of the strongest known to the law).

10. There is no doubt that “the presumption of legitimacy has been withering and shrinking in the face of scientific advances.” *Richardson v. Richardson*, 252 Ark. 244, 248, 478 S.W.2d 423, 426 (1972) (quoting *Anonymous v. Anonymous*, 150 N.Y.S.2d 344 (N.Y. App. Div. 1956)).

11. 347 Ark. 203, 61 S.W.3d 149 (2001).

12. *Id.* at 210–11, 61 S.W.3d at 152–54.

13. Section 9-10-102(b) of the Arkansas Code Annotated provides:

Actions brought in the State of Arkansas to establish paternity may be brought at any time. Any action brought prior to August 1, 1985, but dismissed because of a statute of limitations in effect prior to that date, may be brought for any person for whom paternity has not yet been established.

ARK. CODE ANN. § 9-10-102(b) (LEXIS Repl. 2002).

14. Section 9-9-216(b) of the Arkansas Code Annotated provides, in pertinent part:

that putative fathers are barred from bringing a paternity suit regarding an adopted child after only one year, but remain free to bring a paternity suit anytime regarding a child born to and raised by married parents? Do the parental rights of adoptive parents merit more constitutional or legislative protection than those of marital parents? This note suggests some possible answers.

Part II begins with a broad historical overview of the presumption of legitimacy and the common law treatment of those parents and children who fell beyond its pale. Next it outlines United States Supreme Court decisions that redefined this area of the law and which gave rise to the rights of putative fathers. Afterwards, this note details some of the Arkansas Supreme Court cases that followed in the wake of these decisions. With special attention to *R.N.*, it examines the court's current doctrine regarding the clash between the rights of putative fathers and the presumption of legitimacy. It closes by outlining some of the concerns voiced by the concurring and dissenting Justices. Part III discusses implications of *R.N.* for children, families, and the institution of marriage. It also articulates reasons why the legislature might want to reconsider current policy and proposes some changes that may better secure the best interest of children and the integrity of families. Part IV offers summary answers to the questions posed in the introduction and concludes the note.

II. BACKGROUND

A. A Brief History of the Presumption of Legitimacy: From Early Civil and Common Law to the Modern Age

The presumption of legitimacy dates back to Roman civil law.¹⁵ Roman law summed up the presumption with the following maxim: *Pater est quem nuptiae demonstrant* (marriage establishes who the father is).¹⁶ The

[U]pon the expiration of one (1) year after an adoption decree is issued, the decree cannot be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter unless, in the case of the adoption of a minor, the petitioner has not taken custody of the minor or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period.

Id. § 9-9-216(b) (LEXIS Repl. 2002); Kathryn A. Sampson et al., *Arkansas's Putative Father Registry and Related Adoption Code Provisions: Inadequate Protection for Thwarted Putative Fathers*, 1997 ARK. L. NOTES 49, 50.

15. *Kennedy v. State*, 117 Ark. 113, 116, 173 S.W. 842, 843 (1915).

16. JOHN BRYDALL, *LEX SPURIORUM: OR THE LAW RELATING TO BASTARDY* 83 (Garland Publ'g 1978) (1703). Brydall translates the maxim thus: "That he is the Father, whom Wedlock declareth." *Id.* Alternatively, in *Dennis v. Department of Health & Rehabilitative*

common law adopted this rule and generally admitted no proof challenging the legitimacy of a child born into a marital family unless circumstances clearly left no reasonable room for doubt.¹⁷ Accordingly, evidence of a child's illegitimacy was admissible where (1) a woman's husband was beyond the four seas (i.e., beyond the jurisdiction of the King of England) or "so far absent from his Wife, or imprisoned" so as to bar any possibility of physical intimacy between the married couple at the time of conception; (2) the husband was so grievously sick or disabled that he "could not lie with his Wife" at the time of conception; (3) the husband had "an apparent Impossibility of Procreation, as if the Husband be but eight years old, or under the Age of Procreation;" or (4) the wife left her husband and did "altogether cohabit" with an adulterer.¹⁸ In this last circumstance, however, evidence of illegitimacy was inadmissible if the husband still had "Access unto the Mother" at the time of conception.¹⁹ Even in the face of blatant infidelity, the presumption of legitimacy required the husband to support marital children as his own unless his paternity was a patent impossibility.²⁰ If a man married a woman "great with Child by another," his marriage to her had the effect of making him the child's legal father as long as the child was born after the wedding.²¹

One policy justification for the presumption of legitimacy is that it prevented marital children from being "bastardized" on grounds as tenuous as the child's dissimilarity to the *paterfamilias*.²² Caution called for erring on the side of presuming a child's legitimacy due to the severity of the disabilities imposed upon a child deemed illegitimate.²³ The common law regarded an illegitimate child as *filius populi* and *quasi nullius filius*²⁴ (son of the people, and as if the son of no one).²⁵ As the legal child of no one, the illegitimate child was no one's legal heir.²⁶ As a child of the people, the

Services, the court provides the following translation: "The nuptials show who is the father." 566 So. 2d 1374, 1376 (Fla. Dist. Ct. App. 1990).

17. See BRYDALL, *supra* note 16, at 83-84; WILFRID HOOPER, *THE LAW OF ILLGITIMACY* 153-54 (1911).

18. BRYDALL, *supra* note 16, at 87-89.

19. *Id.*

20. *Id.* at 86 ("Albeit the Wife were as common as the Cart-way, making open Profession of her Filthiness; yet the Husband, if he be not altogether out of his Guard, shall be adjudged the only Father.").

21. *Id.* at 83-84. In this respect marriage seemed to operate as an adoption.

22. *Paterfamilias* means head of the household or head of the family. JOHN C. TRAUPMAN, *THE NEW COLLEGE LATIN & ENGLISH DICTIONARY* 213 (1966).

23. See *infra* notes 24-27 and accompanying text.

24. BRYDALL, *supra* note 16, at 18.

25. TRAUPMAN, *supra* note 22, at 116, 197, 233, 256.

26. BRYDALL, *supra* note 16, at 15-19. An illegitimate child could not claim either "Honour or Arms from the Father or Mother," effectively barring any claim to nobility that would otherwise have passed to the child through his or her biological ancestry. *Id.* at 15.

illegitimate child was a ward of the public, and legal custody of the child rested with the public authorities.²⁷

B. Beyond the Presumption: Children Born Outside of Wedlock

With no legally recognized parents, extramarital children generally had no legal right to support from their natural or putative parents.²⁸ The impact of this was softened somewhat by the common law presumption that parents who cohabitated and who represented themselves as husband and wife were legally married.²⁹ Consequently, children born to such couples were presumed to be legitimate.³⁰ And even though an extramarital child had no legal claim on his natural parents as *filius nullius*, as *filius populi* he could lay claim to support from the community he was born into.³¹ Eventually the Poor Law Acts, enacted in the sixteenth and nineteenth century, shifted the duty of maintenance from the community to the natural parents of the ex-

Nor could an illegitimate child enter the ranks of the priesthood. *Id.* at 20. This did not prevent illegitimate children from rising to prominence on their own accord, as demonstrated by William the Conqueror, who honestly and unabashedly styled himself "William the Bastard." HOOPER, *supra* note 17, at 5.

27. HOOPER, *supra* note 17, at 125. The introduction of Lord Mansfield's rule in *Goodright v. Moss*, 98 Eng. Rep. 1257, 1258 (1777), made the presumption of legitimacy even more difficult to rebut. HOOPER, *supra* note 17, at 202. Lord Mansfield's rule was a common law rule of evidence that prevented both the husband and wife from testifying as to whether or not they had access to each other at the time one of their presumably legitimate children was conceived. *Id.* Lord Mansfield declared that the rule was one founded on "decency, morality, and policy," and expressed his opinion that parents, especially mothers, should not be allowed to claim after a marriage that their marital children were in reality illegitimate. *Id.*

Arkansas adopted Lord Mansfield's rule in 1915. *See Kennedy v. State*, 117 Ark. 113, 173 S.W. 842 (1915); *see also Thomas v. Pacheco*, 293 Ark. 564, 567, 740 S.W.2d 123, 124 (1987). In a delightful passage from *Kennedy*, the court justified the ban on spousal testimony as a means of preventing spouses from "proclaim[ing] their own lechery and their infidelity to each other and reveal[ing] secrets that are so purely delicate and personal as to make it grossly indecent to advertise them to the world." 117 Ark. at 116, 173 S.W. at 843. It explained that allowing spouses to do so would "not only scandalize the sacred marital relation, but [also] cast a cloud upon the life of the unoffending child, and subject it to handicaps and embarrassments that are always most hurtful and most difficult to overcome." *Id.*, 173 S.W. at 843.

As of 1989 Lord Mansfield's rule is no longer the rule in Arkansas. *Leach v. Leach*, 57 Ark. App. 155, 158, 942 S.W.2d 286, 288 (1997). The doctrines of *res judicata* and collateral estoppel, however, are currently employed to keep divorcing and divorced parents from "bastardizing" the children of the marriage, effectively advancing some of the same policy goals advanced by Lord Mansfield's rule. *See Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 995 S.W.2d 338 (1999).

28. HOOPER, *supra* note 17, at 101.

29. *Id.* at 147.

30. *Id.*

31. *Id.* at 125.

tramarital child.³² Under the Poor Law Acts, mothers—the most readily identifiable natural parents—were held primarily responsible for the maintenance of their extramarital children, but they could also obtain a court order requiring a child's natural father to provide maintenance support.³³

Legislatures on this side of the Atlantic enacted statutes to the same effect in what were commonly referred to as Bastardy Acts.³⁴ In 1838 Arkansas passed its own Bastardy Act,³⁵ under which the putative father of an illegitimate child could be prosecuted and ordered to pay for the "lying-in expenses of the mother not less than five nor more than fifteen dollars, and for the support of the child a monthly sum of not less than one nor more than three dollars."³⁶ These provisions were intended "for the benefit of the fallen mother and unfortunate child, as well as for the protection of the public," and for "punishment of the guilty father."³⁷ Such proceedings, although resulting in a determination of paternity, sought to secure support for illegitimate children, not to secure state assistance for putative fathers who needed help tracking down and identifying their natural children so that they could claim parental prerogatives.³⁸

Despite granting illegitimate children the right to financial support from their putative fathers, state laws still generally denied them many of the privileges normally accorded to other children.³⁹ Some states denied them the right to inherit from their father or the right to their decedent parent's wrongful death and workers' compensation benefits.⁴⁰ Among these states was Arkansas, which allowed extramarital children to inherit from their mother, but denied them the right to inherit from their fathers.⁴¹

The United States Supreme Court provided impetus for reform by declaring several such statutes unconstitutional.⁴² In 1952 some of the mem-

32. *Id.* at 102–03.

33. *Id.*

34. Robert E. Rodes, Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643, 649 (2001).

35. *Jackson v. State*, 29 Ark. 62, 64 (1874).

36. *Id.* at 68.

37. *Id.*

38. Rodes, *supra* note 34, at 649.

39. Laurence C. Nolan, "Unwed Children" and Their Parents Before the United States Supreme Court from Levy to Michael H.: *Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 6–7 (1999).

40. Flaccus, *supra* note 8, at 26. As noted in the article, this changed largely due to a series of United States Supreme Court cases that struck down unconstitutional state statutes unreasonably burdening illegitimate children. *Id.*

41. *Roque v. Frederick*, 272 Ark. 392, 396, 614 S.W.2d 667, 669 (1981) (citing *Frakes v. Hunt*, 266 Ark. 171, 583 S.W.2d 497 (1981); *Lucas v. Handcock*, 266 Ark. 142, 583 S.W.2d 491 (1979)).

42. *Gomez v. Perez*, 409 U.S. 535 (1973) (holding that denial of child support to illegitimate children was illogical, unjust, and unconstitutional); *Weber v. Aetna Cas. & Sur.*

bers of the Court indicated their belief that the doctrine of *filius nullius* was not generally applicable outside of inheritance law,⁴³ and by 1972 the Court implicitly rejected the doctrine by recognizing that a legally cognizable parent-child relationship existed between extramarital children and their natural parents.⁴⁴ The Arkansas Supreme Court took its cue from these cases and declared its state law disallowing paternal inheritance for illegitimate children unconstitutional.⁴⁵

C. The Rise of Paternal Rights for the Putative Father

1. 1972: *Opening the Door for the Rights of Natural Fathers*

Legal recognition of the filial relationship between illegitimate children and their natural fathers not only helped advance the rights of extramarital children, but also had the corollary effect of endowing putative fathers with parental privileges they had never enjoyed under the common law.⁴⁶ In *Stanley v. Illinois*,⁴⁷ the Court opened the door to the recognition of parental rights in putative fathers. *Stanley* arose when the unmarried mother of three children died, and her children became wards of the state.⁴⁸ Peter Stanley, the natural father of the three children, sought to retain custody of them, but as he was an unwed father, the State of Illinois did not recognize the familial relationship.⁴⁹ Despite the fact that he had lived with the children for eighteen years, the State of Illinois effectively presumed him to be unfit, removed the children from his custody, and placed them with court-appointed guardians.⁵⁰ The Court held that the Fourteenth Amendment's Equal Protection Clause prohibited Illinois from dismantling a natural family without first providing the natural father a hearing and proving him unfit.⁵¹

Co., 406 U.S. 164 (1972) (holding that denial of workers' compensation benefits to dependent illegitimate children was unconstitutional); *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding a Louisiana statute denying illegitimate children the right to recover for the wrongful death of their mother unconstitutional).

43. *DeSylva v. Ballentine*, 351 U.S. 570, 584 (1956) (Douglas, J., concurring).

44. *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

45. *Roque*, 272 Ark. at 396, 614 S.W.2d at 669.

46. *See Stanley*, 405 U.S. at 645; *Roque*, 272 Ark. at 392, 614 S.W.2d at 667.

47. 405 U.S. at 645.

48. *Id.* at 646.

49. *Id.*

50. *Id.* at 646, 658.

51. *Id.* at 658.

2. *1978: The Rights of Natural Fathers Versus the Rights of a Formal Family Unit*

Although *Stanley* established that the private interest of an unwed father in children he had "sired and raised" warranted deference and protection,⁵² *Quilloin v. Walcott*⁵³ clarified that the interest of unwed fathers who had never exercised care or custody of their children did not warrant the same protection.⁵⁴ Leon Quilloin, an unwed father, sought to block the adoption of his natural child by its stepfather.⁵⁵ When the putative father argued that he was entitled to "an absolute veto over adoption of his [natural] child, absent a finding of his unfitness as a parent," the Court informed him otherwise.⁵⁶

Before making its determination, the Court noted that Leon had rarely visited the child and had offered scant support.⁵⁷ On the other hand, it noted that the marital family was already intact and that allowing the stepfather to adopt the child would merely give full recognition to a family unit already in existence.⁵⁸ The Court also noted that the child himself expressed a desire to be adopted by his stepfather and that the stepfather had been found to be a fit and proper person to adopt the child.⁵⁹ Rejecting Leon's contention that he was entitled to the same procedural safeguards that would have applied to a marital father, the Court pointed out that, unlike a married father, he had never exercised actual or legal custody, nor shouldered "any significant responsibility with respect to the daily supervision, education, protection, or care of the child."⁶⁰ The Court further noted that legal custody of children was "a central aspect of the marital relationship" and that even a divorced father "will have borne full responsibility for the rearing of his children" during the marriage.⁶¹ On the basis of these distinctions, the Court held that it was within the state's power to afford differing levels of procedural protection to marital and putative fathers based on the extent of their commitment to the welfare of their children.⁶²

52. *Id.* at 651.

53. 434 U.S. 246 (1978).

54. *Id.* at 255.

55. *Id.* at 247.

56. *Id.* at 253.

57. *Id.* at 251.

58. *Id.*

59. *Quilloin*, 434 U.S. at 251.

60. *Id.* at 256.

61. *Id.*

62. *Id.*

3. *1979: The Rights of Natural Fathers with Developed Relationships*

A different result was obtained in *Caban v. Mohammed*,⁶³ where the unwed father had previously dwelt with his two children and their mother and had developed a substantial relationship with the children.⁶⁴ Abdiel Caban, Maria Mohammed, and their children had lived together as a family from 1968 to 1973.⁶⁵ "Caban and Mohammed represented themselves as being husband and wife,"⁶⁶ and both contributed to the "care and support of the children."⁶⁷ The Court determined that Caban's parental rights warranted constitutional protection because he had come "forward to participate" in the rearing of his children; therefore Caban was able to block the adoption of his children by his ex-mate's husband.⁶⁸ The Court held that New York's statutory scheme, which required adoptive parents to obtain the consent of a child's natural mother but did not require the consent of the natural father, denied equal protection to men and women, and was therefore unconstitutional.⁶⁹

4. *1983: Solidifying the Developed Relationship Test*

Stanley, *Quilloin*, and *Caban* suggest that the strongest constitutional protection is not reserved for the genealogical relationship that arises from certain proof of biological paternity, but for the parent-child relationship that arises from the assumption of parental duty and the interaction of parent and child. This principle finds open expression in *Lehr v. Robertson*,⁷⁰ where Jonathan Lehr sought to vacate the adoption of his putative daughter Jessica.⁷¹ Jonathan was not named as Jessica's father on the birth certificate, and he had never contributed any financial support to her.⁷² When Jessica was only eight months old, Jessica's mother Lorraine married Richard

63. 441 U.S. 380 (1979).

64. *Id.* at 389.

65. *Id.* at 382.

66. *Id.*

67. *Id.* at 389.

68. *Id.* at 392. Although *Stanley* and *Caban* were decided on constitutional grounds, it is interesting to note that the same result could have been obtained under the combined effect of common law marriage and the presumption of legitimacy. The cohabitating couples would have been presumed married, and the offspring of the presumptively married cohabitants would have been presumed the legitimate children of the marriage. See HOOPER, *supra* note 17, at 147.

69. *Caban*, 441 U.S. at 394.

70. 463 U.S. 248 (1983).

71. *Id.* at 252.

72. *Id.*

Robertson.⁷³ When Jessica was two years old, the marital couple filed for adoption.⁷⁴ Because Jonathan was not Jessica's father of record and had not added his name to the putative father registry, Jonathan was never given any formal notice of the adoption proceeding.⁷⁵ He only learned of it when he filed a "visitation and paternity" petition and was informed that he could not proceed with his paternity suit because the adoption had already been granted.⁷⁶ Jonathan unsuccessfully sought to vacate the adoption at both trial court and appellate court.⁷⁷ Jonathan appealed to the United States Supreme Court and argued that the New York statutory scheme was unconstitutional because a "putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law" and that as a putative father "he had a constitutional right to prior notice and an opportunity to be heard before he was deprived of that interest."⁷⁸ Jonathan drew support for his contention from *Stanley and Caban*.⁷⁹

The Court defined the issue as "whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth."⁸⁰ The Court distinguished between the substantive due process rights of married parents to maintain their parental relationships with their children⁸¹ and those of unwed fathers whose only relationship was biological.⁸² The majority emphasized the valuable role that the "institution of marriage" played in both "defining the legal entitlements of family members and in developing the decentralized structure of our democratic society" and noted that state laws almost universally expressed an "appropriate preference" for the formal family.⁸³ The Court even went as far as to state that, in some cases, "the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships" and that "the rights of parents are a counterpart of the responsibilities they have assumed."⁸⁴

According to the Court, the holding of *Stanley* was that the Due Process Clause "was violated by the automatic destruction of the custodial rela-

73. *Id.* at 250.

74. *Id.*

75. *Id.* at 252.

76. *Lehr*, 463 U.S. at 252-53.

77. *Id.* at 254-55.

78. *Id.* at 255.

79. *Id.* at 250 (citing *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972)).

80. *Id.* at 249-50.

81. *Id.* at 257-58.

82. *Lehr*, 463 U.S. at 261.

83. *Id.* at 256-57.

84. *Id.* at 257.

tionship without giving the father any opportunity to present evidence regarding his fitness as a parent."⁸⁵ The Court also noted that *Caban* involved the conflicting claims of two natural parents who both had developed custodial relationships with their natural children.⁸⁶ Contrasting the developed parent-child relationships that existed in *Stanley* and *Caban* with the biological relationships that existed in *Quilloin* and in the case before it, the Court concluded that:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the due process clause But the mere existence of a biological link does not merit equivalent constitutional protection. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association"⁸⁷

Accordingly, the Court found that New York's putative father registry adequately protected the interests of Jonathan (and of putative fathers like him), who had "never had any significant custodial, personal, or financial relationship with" his biological daughter.⁸⁸ The Court further noted that "[t]he most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences."⁸⁹

5. *1989: The Rights of Putative Fathers Versus the Rights of Marital Fathers*

No other Supreme Court case deals as directly with the clash between the rights of putative fathers and the rights of marital parents as does *Michael H. v. Gerald D.*⁹⁰ In *Michael H.*, the Court was faced with a putative father who had engaged in an adulterous relationship and who later sought to establish his paternity and visitation privileges regarding the child he believed had sprung from his liaison.⁹¹ Gerald D. and Carole D. married in 1976 and were living together in Playa del Rey, California.⁹² During the summer of 1978, Carole began having an affair with her neighbor, Michael

85. *Id.* at 259.

86. *Id.* at 259-60.

87. *Id.* at 261 (alterations in original) (citations omitted) (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977)).

88. *Lehr*, 463 U.S. at 262.

89. *Id.* at 263.

90. 491 U.S. 110 (1989).

91. *Id.* at 114.

92. *Id.* at 113.

H.⁹³ Carole conceived a child, Victoria, to whom she gave birth in 1981.⁹⁴ Gerald was listed as Victoria's father on the birth certificate, and he held her out to the world as his daughter.⁹⁵ Shortly after Victoria's birth, however, Carole informed Michael that he might be Victoria's biological father.⁹⁶ Blood tests, conducted later at Carole's behest, indicated a 98.07% probability that he was.⁹⁷

In November of 1982, Carole refused to allow Michael to visit Victoria, and Michael filed an action to establish his paternity and to secure visitation rights.⁹⁸ The court appointed a guardian ad litem for Victoria, who filed a cross-complaint on Victoria's behalf asserting that Victoria was entitled to maintain filial relationships with both of her fathers.⁹⁹ Carole filed a motion for summary judgment in 1983, but later withdrew her motion when she began living with Michael.¹⁰⁰ In 1984, after reconciling with Carole, Gerald intervened and successfully moved for summary judgment.¹⁰¹ Gerald claimed that there were no issues of fact for trial because Victoria was presumed legitimate as a child of the marriage, and the presumption could only be rebutted by either the husband or the wife.¹⁰² The California Court of Appeal affirmed the judgment and upheld the constitutionality of the pertinent statutes.¹⁰³ After the appellate court denied a rehearing, the California Supreme Court denied discretionary review, and the United States Supreme Court granted certiorari.¹⁰⁴

Michael asserted it would be an unconstitutional violation of due process for the state to terminate his liberty interest in his relationship with his daughter without providing him an opportunity to establish his paternity in an evidentiary hearing.¹⁰⁵ He also contended as a matter of substantive due process that, given his established parental relationship with Victoria, the state interest in protecting Gerald and Carole's marital union was insuffi-

93. *Id.*

94. *Id.*

95. *Id.*

96. *Michael H.*, 491 U.S. at 114.

97. *Id.*

98. *Id.*

99. *Id.* at 114-15.

100. *Id.* at 114.

101. *Id.* at 115.

102. *Michael H.*, 491 U.S. at 115-16 (citing to CAL. EVID. CODE ANN. § 621(a) (West Supp. 1989), which only allowed the husband or wife to rebut the presumption if the husband was impotent, sterile, or they were no longer cohabitating with each other).

103. *Id.* at 116.

104. *Id.*

105. *Id.* at 119.

cient to support termination of his relationship with his biological daughter.¹⁰⁶

The plurality of the Court began its analysis by clarifying that Michael was “seeking to be declared *the* father of Victoria,” ostensibly to obtain visitation rights.¹⁰⁷ Naturally, in seeking to be declared Victoria’s father, Michael was also seeking all other parental rights inherent in parental status.¹⁰⁸ Noting that California had no provision for dual fatherhood, the plurality also emphasized that Michael’s legal status as Victoria’s father could only come at the expense of Gerald’s.¹⁰⁹ It rejected Michael’s procedural due process argument as being based on a fundamental misconception of the true nature of California’s codified presumption of legitimacy.¹¹⁰ Quoting the California Court of Appeals, the plurality explained that the

presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned.¹¹¹

The plurality indicated that Michael was effectively objecting to the substantive policies of the state and noted that the real issue was not whether the presumption denied him adequate procedures, but whether there was an adequate fit between the classifications set up by the law and the policy that the classifications were supposed to advance.¹¹² The plurality opined that the presumption both stated and furthered the substantive policy of the state by “excluding inquiries into the child’s paternity that would be destructive of family integrity and privacy.”¹¹³

Turning its attention to Michael’s contention that the state interest in protecting Carole and Gerald’s marriage was not sufficient to justify its termination of his relationship with Victoria, the plurality concluded that Michael never had a constitutionally protected liberty interest in his relationship with Victoria to begin with.¹¹⁴ Instead it found that the protected interests lay with the marital family.¹¹⁵ The plurality observed that the presump-

106. *Id.* at 121.

107. *Id.* at 118.

108. *Michael H.*, 491 U.S. at 118.

109. *Id.*

110. *Id.* at 119.

111. *Id.* at 119–20.

112. *Id.* at 121.

113. *Id.* at 120.

114. *Michael H.*, 491 U.S. at 124.

115. *Id.*

tion of legitimacy was "a fundamental principle of the common law"¹¹⁶ and held that where a "child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter."¹¹⁷

D. The Rise of Parental Rights for Putative Fathers and Permutations of the Presumption of Legitimacy in Arkansas

1. *Arkansas Adopts Stanley and Quilloin*

In 1981 both the General Assembly and the Arkansas Supreme Court independently concluded that a putative father had the right to petition for a determination of paternity.¹¹⁸ The General Assembly passed Act 664 of 1981,¹¹⁹ which granted any man the right to file a petition for a determination of paternity, and Act 665 of 1981,¹²⁰ which provided that any man declared to be the father of an illegitimate child could petition for custody.¹²¹ Possessed by the same zeitgeist as the General Assembly, the Arkansas Supreme Court held in *Roque v. Frederick* that natural fathers had "basic rights" concerning the welfare of their children¹²² and declared Arkansas's paternity statute unconstitutional because it granted the mother of an illegitimate child the right to petition for a determination of paternity without granting putative fathers the same right.¹²³

Roque arose when a California couple who had been living together and who had a child out of wedlock, separated.¹²⁴ After the separation, Andrew, the natural father, paid child support and visited regularly.¹²⁵ Deborah, the child's mother, moved to Arkansas with her child when the baby was nearly twenty months old.¹²⁶ Andrew sought a determination of paternity and visitation privileges.¹²⁷ Deborah moved to dismiss Andrew's petition on the grounds that putative fathers had no standing to file such a peti-

116. *Id.*

117. *Id.* at 129.

118. *Roque v. Frederick*, 272 Ark. 392, 393 n.1, 614 S.W.2d 667, 667 n.1 (1981).

119. Act of Mar. 23, 1981, No. 664, 1981 Ark. Acts 1517 (codified at ARK. CODE ANN. § 9-10-104 (LEXIS Repl. 2002)).

120. Act of Mar. 23, 1981, No. 665, 1981 Ark. Acts 1518 (codified at ARK. CODE ANN. § 9-10-113 (LEXIS Repl. 2002)).

121. *Id.*, 614 S.W.2d at 667 n.1.

122. *Id.* at 398, 614 S.W.2d at 670.

123. *Id.*, 614 S.W.2d at 670.

124. *Id.* at 394, 614 S.W.2d at 668.

125. *Id.*, 614 S.W.2d at 668.

126. *Roque*, 272 Ark. at 394, 614 S.W.2d at 668.

127. *Id.*, 614 S.W.2d at 668.

tion under Arkansas law.¹²⁸ Andrew argued that the Arkansas paternity statute violated equal protection because it granted natural mothers standing to petition for a determination of paternity but did not grant putative fathers the right to file a suit to establish their own paternity.¹²⁹ He also argued that Arkansas law would violate his right to due process if it did not grant him a hearing on the question of paternity and visitation.¹³⁰

The Arkansas Supreme Court, expressly relying on *Stanley* and *Quilloin*,¹³¹ held that fathers of illegitimate children have basic—albeit undefined—rights where the welfare of their children is concerned¹³² and granted Andrew the right to petition for a determination of paternity without ever identifying whether it was doing so on either equal protection or due process grounds.¹³³ Justice Hickman, in the opinion of the court, remarked that the laws concerning illegitimate children and the rights of the natural parents had been harsh for centuries, and he provided a snippet from Deuteronomy 23:2 as an example.¹³⁴ In a paean to the new morality, he wrote:

The law has changed because it must. Whatever wrongs the parents did are no fault of the child, and whatever wrong the parents did should not forever deny them the privileges that other parents enjoy. People should be allowed to acknowledge their mistakes and try to rectify them. So the law has changed from discrimination against illegitimate children and unwed parents to a more tolerant view.¹³⁵

2. 1988: Arkansas Adopts *Lehr* in the Context of Adoptions

Although the Arkansas Supreme Court held that fathers of illegitimate children had basic rights regarding their children,¹³⁶ the court later clarified in *In re Adoption of S.J.B.*¹³⁷ that these rights only arose where said father had established relationships with their children.¹³⁸

128. *Id.*, 614 S.W.2d at 668.

129. *Id.* at 394–95, 614 S.W.2d at 668.

130. *Id.*, 614 S.W.2d at 668.

131. *Id.* at 397–98, 614 S.W.2d at 669–70 (citing *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972)).

132. *Roque*, 272 Ark. at 398, 614 S.W.2d at 670.

133. *Id.*, 614 S.W.2d at 670.

134. *Id.* at 395, 614 S.W.2d at 669 (“No bastard shall enter the Assembly of the Lord.”).

135. *Id.* at 396, 614 S.W.2d at 669.

136. *Id.* at 398, 614 S.W.2d at 670.

137. 294 Ark. 598, 745 S.W.2d 606 (1988), *superseded by statute as stated in R.N. v. J.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001).

138. *Id.* at 601, 745 S.W.2d at 608.

Baby Roe, the subject child of *S.J.B.*, was born on July 9, 1987, to June Roe, who was fifteen years old and unmarried.¹³⁹ According to June, the pregnancy resulted from an isolated sexual encounter.¹⁴⁰ June refused to disclose the identity of the biological father and made no effort to notify him of the child's birth.¹⁴¹ Shortly after Baby Roe was born, June and her court appointed guardian ad litem executed a "Consent to Adoption and Waiver and Entry of Appearance" in favor of Adoption Services, Inc.¹⁴² The adoption agency placed the child with D.J.B. and K.B.B., who filed a petition for adoption in the Pulaski County Probate Court.¹⁴³ At the adoption hearing, the trial court found that the adoption was proper in all respects save for the fact that the father had not been given notice.¹⁴⁴ Although the court noted that the applicable Arkansas statutes did not require notice to the father in such a case,¹⁴⁵ on its own initiative the court held that failing to give notice to the father violated both due process and equal protection.¹⁴⁶ The court stayed the adoption proceeding "until such time as evidence of notice to the father of its pendency is submitted to the [c]ourt," effectively terminating the proceeding.¹⁴⁷

The Arkansas Supreme Court formulated the issue on appeal as being "whether under the circumstances of this case notice to the father is mandated by the Equal Protection and Due Process Clauses of the United States Constitution."¹⁴⁸ The majority held that the Equal Protection and Due Process Clauses of the Federal Constitution did not require notice to be given to the putative father.¹⁴⁹ Because the language of the Arkansas statutes did not require notice of an adoption proceeding to be given to a putative father unless he had "otherwise legitimated" the child,¹⁵⁰ the court also concluded

139. *Id.* at 599, 745 S.W.2d at 607.

140. *Id.*, 745 S.W.2d at 607.

141. *Id.*, 745 S.W.2d at 607.

142. *Id.*, 745 S.W.2d at 607.

143. *S.J.B.*, 294 Ark. at 599, 745 S.W.2d at 607.

144. *Id.*, 745 S.W.2d at 607.

145. ARK. CODE ANN. §§ 9-9-206 to -207 (LEXIS Repl. 2002). Section 9-9-206 enumerates those persons who are required to consent to an adoption; subsection (a)(2) requires the written consent of the father of the minor "if the father was married to the mother at the time the minor was conceived or at any time thereafter, the minor is his child by adoption, he has custody of the minor at the time the petition is filed, or he has otherwise legitimated the minor according to the laws of the place in which the adoption proceeding is brought." *Id.* § 9-9-206. Section 9-9-207 lists persons to whom notice and consent are not required; subsection (a)(3) reads: "The father of a minor if the father's consent is not required by 9-9-206(a)(2)." *Id.* § 9-9-207.

146. *S.J.B.*, 294 Ark. at 600, 745 S.W.2d at 607.

147. *Id.*, 745 S.W.2d at 607.

148. *Id.*, 745 S.W.2d at 607.

149. *Id.* at 602-03, 745 S.W.2d at 608.

150. *Id.* at 600, 745 S.W.2d at 607.

that Daddy Doe did not meet any of the statutory criteria that would have entitled him to notice.¹⁵¹ The court distinguished the case before it from *Stanley* and *Caban* by pointing out that it was not dealing with a putative father who had developed a substantial relationship, but “with the situation where the father is merely ‘the biological link’ which brought the child into existence.”¹⁵² The court cited *Stanley* as standing for the proposition “that the Due Process Clause was violated by the automatic destruction of the parental rights of a father who had had a custodial relationship with his children without giving the father any opportunity to present evidence regarding his fitness as a parent.”¹⁵³ It also drew support from *Quilloin* by noting that the Court upheld the constitutionality of a “statute that authorized the adoption of a child over the objection of the natural father who had never legitimated the child.”¹⁵⁴ From *Caban*, the court drew the rule that adoption statutes violated the Equal Protection Clause when they distinguished “between a mother and father who are in fact similarly situated with regard to their relationship with the child.”¹⁵⁵ Citing to *Lehr*, the court noted that “an unmarried father lacking a custodial, personal, or financial relationship with [a] child was not constitutionally entitled to notice of the child’s adoption proceeding.”¹⁵⁶ After reviewing the aforementioned cases, the Arkansas Supreme Court held:

The parent-child relationship is a basic fabric of our society. There can be no doubt that this relationship merits constitutional protection unless the circumstances are exceptional Society has always expressed a preference for formal families, and married parents generally have been considered to have equal authority over, and rights to, their children. It is clear from the foregoing discussion and the circumstances of this case that this father’s inchoate relationship with his child is not entitled to “equivalent constitutional protection” under the Due Process Clause.

....

. . . [I]t is clear from *Lehr* that a parent lacking a custodial, personal, or financial relationship with his child is not constitutionally entitled to notice. We agree with the appellants’ statement that the question is not

151. *Id.* at 603, 745 S.W.2d at 609.

152. *S.J.B.*, 294 Ark. at 600–01, 745 S.W.2d at 608.

153. *Id.* at 601, 745 S.W.2d at 608 (citing to *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972)).

154. *Id.*, 745 S.W.2d at 608.

155. *Id.*, 745 S.W.2d at 608.

156. *Id.*, 745 S.W.2d at 608 (citing *Lehr v. Robertson*, 463 U.S. 248 (1983)).

so much whether the state may terminate the father's parental rights without notice, but whether parental rights attached in the first place.¹⁵⁷

Later in the same year, in *Willmon v. Hunter*,¹⁵⁸ without any mention of a preference for formal families, the Arkansas Supreme Court held that it was not against the public policy of Arkansas to allow a putative father to establish his paternity of a child conceived during the mother's marriage to another man and that the presumption of legitimacy did not preclude litigating the issue of paternity in such circumstances.¹⁵⁹ *Willmon* announced a marked turn in favor of the rights of putative fathers and a turn away from a strong presumption of legitimacy. Only the year before in *Thomas v. Pacheco*,¹⁶⁰ the court had stated that:

Marriage is still considered an honorable institution; children born during marriage should be deemed legitimate, and legal efforts to declare such children illegitimate are not and should not be made easy.

Belief in that principle is so great that we have created a legal presumption to protect it. This presumption, that a child born during marriage is the legitimate child of the parties to that marriage, is one of the strongest presumptions recognized by the law. It can be overcome, but not easily. We have consistently held that the presumption is rebuttable only by the strongest type of conclusive evidence, such as the husband's impotence, or the non-access of the parties.¹⁶¹

Both *Willmon* and *Thomas* were decided a few years prior to *Michael H.* and under a different paternity statute than that which is currently in effect.¹⁶² The current paternity statute,¹⁶³ enacted under the heading "[s]uit to determine paternity of illegitimate child,"¹⁶⁴ allows a putative father to peti-

157. *Id.* at 602-03, 745 S.W.2d at 609. Justice Glaze, although concurring in the result, expressed his concern that the Arkansas statutory scheme was constitutionally deficient because it did not protect a putative father's opportunity to develop a relationship with his child. *Id.* at 604, 745 S.W.2d at 609 (Glaze, J., concurring). Specifically, he noted that Arkansas did not have a putative father registry as New York did in *Lehr*. *Id.* at 606, 745 S.W.2d at 611. (Glaze, J., concurring). In 1989 the Arkansas General Assembly addressed this concern by enacting the Putative Father Registry. Sampson, *supra* note 14, at 49. An unregistered putative father has no right to notice of a pending adoption. *In re Adoption of Reeves*, 309 Ark. 385, 831 S.W.2d 607 (1992).

158. 297 Ark. 358, 761 S.W.2d 924 (1988).

159. *Id.* at 359, 761 S.W.2d at 925.

160. 293 Ark. 564, 740 S.W.2d 123 (1987).

161. *Id.* at 567-68, 740 S.W.2d at 125 (internal citation omitted).

162. *R.N. v. J.M.*, 347 Ark. 203, 215, 61 S.W.3d 149, 156 (2001).

163. ARK. CODE ANN. § 9-10-104 (LEXIS Repl. 2002).

164. *Id.*

tion for a determination of paternity “at any time.”¹⁶⁵ Although at first blush the plain language of the heading appears to limit the statute’s application to illegitimate children, in *R.N. v. J.M.*,¹⁶⁶ the Arkansas Supreme Court construed the statutory language as granting putative fathers standing to seek a determination of paternity regardless of whether the child in question is illegitimate.¹⁶⁷ *R.N.* merits special attention because of the issues it raises, the issues it avoids, and the ideological divisions it reveals among the justices regarding putative fathers and the definition of family.

3. *R.N. v. J.M.: Dueling Initials*

a. Substantive facts of *R.N. v. J.M.*

J.M. and B.M. married in 1992.¹⁶⁸ Four years into the marriage J.M. became involved in an adulterous relationship with R.N.—a relationship that supposedly ended sometime in the early part of 1997.¹⁶⁹ During her involvement with R.N., J.M. also continued to have sexual relations with her husband.¹⁷⁰ On August 17, 1997, J.M. gave birth to a baby girl, A.M., who was presumably the legitimate child of B.M.¹⁷¹ After being released from the hospital, A.M. went to the home of her marital parents.¹⁷² Although R.N. and J.M. discussed the possibility that he was the biological father of A.M., R.N. never established a relationship with the child.¹⁷³ He did see the child on two occasions: once at the home of B.M. and J.M. and once again at his office.¹⁷⁴ According to his later testimony, he would have established a relationship with the child if J.M. had allowed him to see her.¹⁷⁵

b. Procedural facts and legal issues

On April 7, 1998, R.N. filed a petition for a determination of paternity, and on April 20, 1998, he filed a motion for paternity testing pursuant to section 9-10-108 of the Arkansas Code Annotated.¹⁷⁶ In her reply J.M. de-

165. *Id.* § 9-10-102(b) (LEXIS Repl. 2002).

166. 347 Ark. at 203, 61 S.W.3d at 149.

167. *Id.* at 211, 61 S.W.3d at 154.

168. *Id.* at 207, 61 S.W.3d at 151.

169. *Id.*, 61 S.W.3d at 151.

170. *Id.*, 61 S.W.3d at 151.

171. *Id.*, 61 S.W.3d at 151.

172. *R.N.*, 347 Ark. at 207, 61 S.W. 3d at 151.

173. *Id.*, 61 S.W.3d at 151.

174. *Id.*, 61 S.W.3d at 151.

175. *Id.*, 61 S.W.3d at 151.

176. *Id.*, 61 S.W.3d at 151 (citing to ARK. CODE ANN. § 9-10-108).

nied that R.N. was A.M.'s father and moved to dismiss the action on three grounds: (1) R.N. lacked standing because A.M. was presumed legitimate, and the Arkansas paternity statutes were only applicable to illegitimate children; (2) R.N. had no constitutionally protected interest as he had never established a relationship with A.M.; and (3) R.N. was equitably estopped from bringing the paternity action because he did not file his petition until nine months after A.M.'s birth.¹⁷⁷ B.M. intervened on June 29, 1999, and joined his wife in her motion to dismiss R.N.'s paternity suit.¹⁷⁸ On August 31, 1999, the trial court granted J.M. and B.M.'s motion to dismiss.¹⁷⁹ The trial court adopted J.M.'s legal arguments as its conclusions of law.¹⁸⁰ Accordingly, the court determined that R.N. lacked standing to bring the paternity action as a matter of law and that he was equitably estopped from bringing the action.¹⁸¹ R.N. appealed, and the case came before the Arkansas Supreme Court.¹⁸²

On appeal R.N. argued that, as a putative father, he had standing under section 9-10-104 of the Arkansas Code Annotated to petition the court for a determination of A.M.'s paternity.¹⁸³ He also contended that section 9-10-108 required the trial court to order DNA testing upon motion of either party.¹⁸⁴ In reply J.M. and B.M. argued that if section 9-10-104 did grant R.N. standing to petition for a determination of paternity, then section 16-43-901 required the trial judge to consider the best interest of the child before ordering a paternity test.¹⁸⁵ J.M. and B.M. also argued that section 9-10-104 only granted a putative father standing to seek a determination of paternity for an "illegitimate child" and was obviously inapplicable to their daughter, who, as a child of the marriage, was presumed to be legitimate.¹⁸⁶ R.N. countered that the phrase "[s]uit to determine paternity of illegitimate child" was merely a descriptive heading and did not have the effect of law.¹⁸⁷

177. *Id.* at 207-08, 61 S.W.3d at 151.

178. *R.N.*, 347 Ark. at 208 n.2, 61 S.W.3d at 151 n.2.

179. *Id.* at 208, 61 S.W.3d at 151.

180. *Id.*, 61 S.W.3d at 151.

181. *Id.*, 61 S.W.3d at 151.

182. *Id.* at 207, 61 S.W.3d at 151.

183. *Id.* at 208, 61 S.W.3d at 151.

184. *R.N.*, 347 Ark. at 208-09, 61 S.W.3d at 151-52.

185. *Id.* at 208, 61 S.W.3d at 151.

186. *Id.*, 61 S.W.3d at 151.

187. *Id.* at 210, 61 S.W.3d at 153.

c. The reasoning of the court

The court reasoned that it needed to “interpret and harmonize” sections 9-10-104, 9-10-108, and 16-43-901 of the Arkansas Code Annotated¹⁸⁸ to determine whether a putative father had standing to petition the court for a determination of paternity regarding a child born to a marital family.¹⁸⁹ The court found that R.N. fell within the statutory definition of a “putative father,” which includes any man who is not legally presumed or adjudicated to be the biological father of the child, but who claims or is alleged to be the biological father of the child.¹⁹⁰ It also noted that section 9-10-104 gave putative fathers standing to bring suit to determine the paternity of an illegitimate child.¹⁹¹ Although agreeing with R.N. that descriptive headings in the code are not law,¹⁹² the court pointed out that the General Assembly amended section 9-10-104 in 1995 and included the heading “[s]uit to determine paternity of illegitimate child” in the 1995 enactment of the statute, “thus making the heading itself part of the statute.”¹⁹³ The court also observed that, absent the reference to illegitimate children in the heading, the statute would “clearly grant” R.N. standing to seek a paternity determination for A.M.¹⁹⁴ Apparently, the fact that the statute did refer to illegitimate children did not clearly deny R.N. standing because the court proceeded to determine “whether the language in the descriptive heading that is now a part of the statute effectively denies R.N. standing to petition for the establishment of A.M.’s paternity.”¹⁹⁵

The court prefaced its inquiry into the term “illegitimate child” by stating that the purpose of statutory interpretation is to give effect to the intent of the General Assembly¹⁹⁶ and that it seeks the legislature’s intent by giving the words of the statute “their ordinary and usual meaning in common

188. *Id.* at 207, 61 S.W.3d at 151. Section 9-10-104 of the Arkansas Code Annotated reads: “Suit to determine paternity of illegitimate child. Petitions for paternity establishment may be filed by: (1) A biological mother; (2) A putative father; (3) A person for whom paternity is not presumed or established by court order; or (4) The Office of Child Support Enforcement.” ARK. CODE ANN. § 9-10-104 (LEXIS Repl. 2002).

189. *R.N.*, 347 Ark. at 207, 61 S.W.3d at 151.

190. *Id.* at 210, 61 S.W.3d at 152 (citing to ARK. CODE ANN. §§ 9-9-501(11), 9-27-303(42), 16-43-901(h), 20-18-701(5)).

191. *Id.*, 61 S.W.3d at 152–53.

192. *Id.*, 61 S.W.3d at 152–53 (“Unless otherwise provided in this Code, . . . the descriptive headings or catchlines immediately preceding or within the text of the individual sections . . . do not constitute part of the law and shall in no manner limit or expand the construction of any section.” (quoting ARK. CODE ANN. § 1-2-115(b))).

193. *Id.*, 61 S.W.3d at 153.

194. *See id.*, 61 S.W.3d at 153.

195. *R.N.*, 347 Ark. at 210, 61 S.W.3d at 153.

196. *Id.* at 209, 61 S.W.3d at 152 (citing *Ford v. Keith*, 338 Ark. 487, 996 S.W.2d 20 (1999)).

language.”¹⁹⁷ Consequently, the court noted that it did not resort to rules of statutory construction where the plain meaning of the statutory language is clear and unambiguous.¹⁹⁸ Without any express consideration of the “ordinary and usual” meaning of the phrase “illegitimate child,” the court proceeded to indicate that the term was not defined anywhere in the Arkansas statutes and then turned to the definition that it gave in *Willmon*: “An illegitimate child is a child who is born at the time that his parents, though alive, are not married to each other.”¹⁹⁹ Considering rulings it made under a prior version of the paternity statute, which included the term “illegitimate child” within its text, the court noted that it had allowed parties to litigate paternity even where the child was presumed legitimate.²⁰⁰ With this point established, the court articulated its presumption that the General Assembly possessed full knowledge of the Arkansas Supreme Court’s prior decisions, implying that the General Assembly must have meant the term “illegitimate child” to have the same effect that the court gave the term in its earlier decisions (i.e., none at all).²⁰¹ This train of thought led the court to conclude “that the plain language of section 9-10-104 grants R.N. standing to petition to determine the paternity of A.M.”²⁰²

Although the court found that R.N. had standing to petition for a determination of paternity, it went on to hold that section 16-43-901(e)(1), which makes DNA testing permissive, rather than section 9-10-108, which makes DNA testing mandatory upon a motion by either party, applied spe-

197. *Id.*, 61 S.W.3d at 152 (citing *Stephens v. Ark. Sch. for the Blind*, 341 Ark. 939, 20 S.W.3d 397 (2000)).

198. *Id.*, 61 S.W.3d at 152.

199. *Id.* at 210, 61 S.W.3d at 153 (citing *Willmon v. Hunter*, 297 Ark. 358, 360, 761 S.W.2d 924, 925 (1988)).

200. *Id.* at 211, 61 S.W.3d at 153 (citing *Willmon*, 297 Ark. at 358, 761 S.W.2d at 924; *Thomas v. Pacheco*, 293 Ark. 564, 740 S.W.2d 123 (1987)). The court failed to distinguish either *Willmon* or *Thomas* from the one before it despite the fact that *Willmon* involved a child born to a divorced mother ten months after her former spouse had commenced divorce proceedings, and it was the husband and wife who were testifying as to the illegitimacy of their child over the objections of the putative father in *Thomas*. See *Willmon*, 297 Ark. at 359, 761 S.W.2d at 925; *Thomas*, 293 Ark. at 565–67, 740 S.W.2d at 123–25.

201. *R.N.*, 347 Ark. at 211, 61 S.W.3d at 153. In other words, the legislature presumably knew that the court had previously allowed the legitimacy of a child born into a marriage to be litigated and had not acted to change things when it enacted the paternity statute. *Id.*, 61 S.W.3d at 153. The fact that the legislature amended the paternity statute after *Willmon* and *Thomas* so as to give the words “paternity of illegitimate child” legal force was apparently an insufficient change to indicate a legislative intent to restrict application of the paternity statute to illegitimate children. See *id.* at 210, 61 S.W.3d at 153.

202. *Id.* at 211, 61 S.W.3d at 154. Any reader who feels that the majority’s train of thought got derailed somewhere along the tracks may feel a sense of camaraderie with Justice Thornton, who confessed that he had “great difficulty in comprehending the reasoning employed by the majority in conferring standing upon R.N.” *Id.* at 220, 61 S.W.3d at 159 (Thornton, J., concurring).

cifically to paternity challenges where the subject child was already presumed legitimate.²⁰³ The court noted that the discretionary language of section 16-43-901(e)(1) allowed a judge to consider the best interest of a child "before ordering a paternity test that could forever change a child's life, perhaps merely because the adults who caused such a tumultuous situation are curious to know the results of their infidelity."²⁰⁴ Recognizing that the presumption of legitimacy would lose "any real meaning if a putative father . . . has the ability, by merely requesting a paternity test, to forever change the presumed legitimacy of a child born of a marriage," the court stated that it was unwilling to "minimize" the presumption in this way.²⁰⁵ Consequently, it held that once a paternity suit is initiated under section 9-10-104 regarding a subject child who is presumed to be legitimate, the trial court is to apply section 16-43-901 as opposed to section 9-10-108, and is only to order paternity testing if it determines after a hearing that it is in the child's best interest to do so.²⁰⁶

The court quickly dispatched J.M. and B.M.'s argument that R.N. should be equitably estopped from bringing a paternity action because he had waited until A.M. was almost nine months old before initiating the action.²⁰⁷ Identifying B.M. as the proper party to raise the equitable estoppel claim, the court found that he failed to carry his burden of proving each of the four elements of equitable estoppel.²⁰⁸ The court contended that there was no proof in the record regarding the extent of B.M.'s knowledge of the relevant facts, the point at which he learned that there was a question about A.M.'s paternity, and that he relied on R.N.'s conduct to his detriment.²⁰⁹ Dotting its last "i," the court announced that it did not need to determine whether R.N. had a constitutionally protected interest that granted him standing to bring a paternity suit because it had already decided that R.N. had statutory standing to do so.²¹⁰

203. *Id.* at 211-12, 61 S.W.3d at 154.

204. *Id.* at 213-14, 61 S.W.3d at 155.

205. *Id.* at 214, 61 S.W.3d at 156.

206. *Id.* at 215-16, 61 S.W.3d at 156-57.

207. *R.N.*, 347 Ark. at 216-17, 61 S.W.3d at 157.

208. *Id.* at 217, 61 S.W.3d at 157. Namely, that:

(1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his or her conduct be acted on or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the latter must be ignorant of the true facts; and (4) the latter must rely on the former's conduct to his or her injury.

Id., 61 S.W.3d at 157.

209. *Id.*, 61 S.W.3d at 157.

210. *Id.* at 218-19, 61 S.W.3d at 159.

d. Concurrence and dissent

Justice Thornton opined in his concurrence that the majority of the court essentially held “that the legislature did not mean what it said when it enacted Act 1184 of 1995, which clearly states who has standing to bring a paternity action in a suit to determine the paternity of *an illegitimate child*.”²¹¹ Citing to *Thomas v. Pacheco*,²¹² he pointed out that the court had previously declared a strong public policy in support of the presumption of legitimacy.²¹³ He also made the point that the court had previously held that nothing in the paternity statutes purported to do away with the presumption of legitimacy.²¹⁴ After implying that the majority employed less than lucid reasoning when it interpreted the paternity statute,²¹⁵ Justice Thornton wrote that he reluctantly accepted the majority’s decision to confer standing on R.N. to petition for a determination of paternity.²¹⁶ He “wholeheartedly” accepted, however, the majority’s conclusion that the trial court should consider the best interests of the child before ordering a paternity test.²¹⁷

In her dissent Justice Annabelle Clinton Imber agreed with the majority that section 9-10-104 confers standing upon putative fathers to petition for the establishment of paternity.²¹⁸ She disagreed with the majority’s conclusion that paternity testing is discretionary and that it comes after a hearing on the best interest of the child when it concerns presumptively legitimate children.²¹⁹ Instead she insisted that once a putative father had standing to bring a paternity suit he also had a right to mandatory paternity testing without any need for a “best interest” hearing.²²⁰ She also asserted her belief that the majority’s interpretation ran afoul of the United States Constitution because it invidiously discriminated against illegitimate children by denying them a “best interest” hearing before mandating paternity testing for them.²²¹ Justice Brown and Justice Glaze joined Justice Imber in this dissent.²²² In a separate dissent, Justice Brown also recommended that the General Assembly “review [section] 9-10-104 at its next legislative session in light of today’s decision and other recent decisions of this court which relate to who

211. *Id.* at 219, 61 S.W.3d at 159 (Thornton, J., concurring).

212. 293 Ark. 564, 740 S.W.2d 123 (1987).

213. *R.N.*, 347 Ark. at 219, 61 S.W.3d at 159 (Thornton, J., concurring).

214. *Id.*, 61 S.W.3d at 159 (Thornton, J., concurring) (citing *Hall v. Freeman*, 327 Ark. 148, 936 S.W.2d 761 (1997)).

215. *See supra* note 202.

216. *R.N.*, 347 Ark. at 220, 61 S.W.3d at 160 (Thornton, J., concurring).

217. *Id.*, 61 S.W.3d at 160 (Thornton, J., concurring).

218. *Id.* at 222, 61 S.W.3d at 161 (Imber, J., dissenting).

219. *Id.*, 61 S.W.3d at 161 (Imber, J., dissenting).

220. *Id.*, 61 S.W.3d at 161 (Imber, J., dissenting).

221. *Id.* at 225, 61 S.W.3d at 163 (Imber, J., dissenting).

222. *R.N.*, 347 Ark. at 225, 61 S.W.3d at 163.

can raise paternity questions and with respect to what children. This is a major policy issue that cries for clear resolution."²²³

III. PROPOSAL

Although the reasoning of the *R.N.* majority may resemble a Gordian knot, one can easily cut to its central significance: *the legislature needs to be crystal clear if it intends to limit paternity actions to illegitimate children.* If the legislature does not intend to limit paternity actions to illegitimate children, then it should clarify what force and effect the marital presumption of legitimacy is to have, or whether the presumption is to be abandoned altogether as a barrier against claims of putative fathers. At present the presumption inadequately protects the integrity of the marital family and the best interest of children because the mere allegation of possible biological paternity is sufficient to give a putative father standing to seek a determination of paternity.²²⁴ If any such individual comes forward and files a paternity suit regarding a (presumably) legitimate child of a marital family, then upon his motion for a paternity test the marital family and the child are subjected to a "best interest" hearing in which a judge will decide whether to proceed with paternity testing.²²⁵

As innocuous as a "best interest" hearing sounds, exposing a fit marital family to the financial and emotional cost of a hearing upon the motion of a putative father is an unwarranted and unconstitutional state invasion of family privacy and integrity unless done in furtherance of a compelling state interest.²²⁶ The liberty interest that parents have in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests recognized" by the Court.²²⁷ "[T]he Fourteenth Amendment forbids the government to infringe . . . fundamental liberty interests at all, no

223. *Id.* at 222, 61 S.W.3d at 161 (Brown, J., dissenting).

224. See ARK. CODE ANN. § 9-10-104(2) (LEXIS Repl. 2002) (granting standing to a putative father); *Id.* § 9-9-501(11) (LEXIS Repl. 2002) (defining a putative father as any man not deemed or adjudicated under the laws of the jurisdiction of the United States to be the father of genetic origin of a child who claims or is alleged to be the father of genetic origin of the child).

225. *R.N.*, 347 Ark. at 211-12, 61 S.W.3d at 153-54.

226. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

227. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); see also *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting) (recognizing that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (acknowledging "that the relationship between parent and child is constitutionally protected"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (observing that "[t]he child is not the mere creature of the [s]tate; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations").

matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."²²⁸ Absent some parental unfitness, there will "normally be no reason for the State to inject itself into the private realm of the family."²²⁹ Generally, state intrusion into private family matters is only appropriate if it appears that the health or safety of the children is in jeopardy, or where failure to intervene could result in "significant social burdens."²³⁰ To better protect the privacy of the family and the best interest of marital children, the standing of putative fathers to challenge the presumption of legitimacy should be limited. This could be done through a statutory definition of illegitimacy that expressly excludes marital children from the scope of suits brought under the paternity statutes, through a statute of limitations on paternity suits where the child is presumed legitimate, by barring paternity suits upon a finding that the marital father of a child is a fit and willing father, or through a number of methods discussed below.

A. Family Privacy and Integrity Are Entitled to Greater Constitutional Protection Than a Merely Possible Genetic Relationship

There is a clear distinction between the degree of constitutional protection due to "an actual relationship of parental responsibility" and that due to a "mere biological relationship."²³¹ Liberty demands strong constitutional protection for the "relationship of love and duty in a recognized family unit,"²³² and the State may not intervene to terminate established parent-child relationships in the absence of parental unfitness.²³³ The potential relationship of an alleged biological father is not entitled to equivalent protection,²³⁴ and, absent a developed relationship with his child, his right to object to the child's belonging to a legally recognized family is no greater than that of a stranger.²³⁵ The relationship between children and the parents who rear them is the "basic fabric of our society" and "merits constitutional protection unless the circumstances are exceptional";²³⁶ whereas there is some question as to whether the parental rights of a putative father who never developed a "custodial, personal or financial relationship with his child" ever "attached in the first place."²³⁷

228. *Washington*, 521 U.S. at 721 (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

229. *Troxel*, 530 U.S. at 68.

230. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

231. *Lehr v. Robertson*, 463 U.S. 248, 259-60 (1983).

232. *Id.* at 258.

233. *Id.* at 259.

234. *Id.* at 260-61.

235. *Id.* at 262 n.19.

236. *In re Adoption of S.J.B.*, 294 Ark. 598, 602, 745 S.W.2d 606, 609 (1988).

237. *Id.* at 603, 745 S.W.2d at 609.

The right to maintain the integrity of the family unit does not arise from the largesse of the State, but is an intrinsic human right, deeply rooted in our “[n]ation’s history and tradition.”²³⁸ Our nation does not have a similar tradition of allowing adulterous putative fathers to claim parental rights against the wishes, and in derogation of, an intact marital family.²³⁹ The integrity and intimacy of the family unit is protected by the First Amendment,²⁴⁰ “the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.”²⁴¹ Because the integrity and privacy of the family unit are fundamental liberty interests, the Fourteenth Amendment forbids government infringement of those interests, “no matter what process is provided, unless the infringement is narrowly tailored to serve a *compelling state interest*.”²⁴²

B. No Compelling State Interest Presses an Inquiry into the Genetic Origins of a Legitimate Child Whose Marital Parents Are Caring and Providing for That Child

Where an illegitimate child is not receiving any paternal support, the state’s interest in identifying the child’s father and requiring him to contribute to the financial support of his illegitimate child is compelling.²⁴³ Where a child is already receiving support from a fit marital father and mother, however, the state does not have the same compelling interest to inquire into the genetic origins of a child.²⁴⁴ The “curiosity interest” of a putative father regarding the genetic origins of a child presumed legitimate is clearly “subsidiary to the interests of the state, the family, and the child in maintaining

238. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977). Similarly, in *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977), the Court held that the “sanctity of the family” merits constitutional protection because it is an institution “deeply rooted in this [n]ation’s history and tradition.”

239. *Michael H. v. Gerald D.*, 491 U.S. 110, 124–26 (1989).

240. *Bd. of Dirs. of Rotary Inter. v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987).

241. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (internal citations omitted).

242. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (emphasis added).

243. *Caban v. Mohammed*, 441 U.S. 380, 391 (1979) (noting that the “[s]tate’s interest in providing for the well-being of illegitimate children is an important one”); *R.N. v. J.M.*, 347 Ark. 203, 218, 61 S.W.3d 149, 158 (2001) (explaining that the state benefits from establishing the paternity of a child without a legally recognized father because the support obligations will transfer from the state to the genetic father). Likewise, a paternity suit that identifies the father of an illegitimate child will also benefit the child by ensuring that he or she “will also be afforded all of the rights and benefits accorded children who are presumed legitimate.” *R.N.*, 347 Ark. at 218, 61 S.W.3d at 158.

244. See *Stanley*, 405 U.S. at 652–53 (observing that the “[s]tate registers no gain . . . when it separates children from the custody of fit parents”); *In re Marriage of Ross*, 783 P.2d 331, 338–39 (Kan. 1990) (noting that the child’s best interests become a matter for state intervention after the family unit fails to function).

the continuity, financial support, and psychological security of an established parent-child relationship."²⁴⁵

Paternity suits were historically designed to secure paternal economic support for illegitimate children,²⁴⁶ not to secure parental prerogatives for putative fathers at the expense of presumably legitimate children.²⁴⁷ The relatively recent practice of using paternity suits to challenge the legitimacy of marital children actually works at cross-purposes to the original aim of paternity actions. Instead of securing some of the advantages of legitimacy to illegitimate children, it imposes some of the disadvantages of illegitimacy on otherwise legitimate children. A child who has been raised as the legitimate child of her married parents is likely to have formulated her identity accordingly. Where her married parents have lovingly provided her with emotional and financial support, it seems unwise and fiscally inefficient to jeopardize the best interest of the child by allowing a stranger to the marriage to challenge the child's legitimacy.²⁴⁸ Where family bonds have been created through love and the law, the state has no compelling interest to find the child an alternate father.²⁴⁹ Furthermore, where the putative father has not developed any relationship with his alleged child, his interest is subordinate to the integrity of the unitary family and to the best interest of the child.²⁵⁰ Although the paramount consideration is the best interest of the child,²⁵¹ the best interests of the child cannot be presumed to diverge from the interests of his or her parents unless and until they are shown to be unfit.²⁵² Where a child already has a developed relationship with his or her marital parents, the mere fact that a man alleges genetic paternity should not be allowed to threaten the stability of the child's familial and emotional attachments.

245. *Office of Child Support Enforcement v. Williams*, 338 Ark. 347, 351-52, 995 S.W.2d 338, 340 (1999) (citing *Godin v. Godin*, 725 A.2d 904, 910 (Vt. 1998)).

246. *See Jackson v. State*, 29 Ark. 62, 68 (1874).

247. *See Rodes*, *supra* note 34, at 649.

248. *See Williams*, 338 Ark. at 351-52, 995 S.W.2d at 340. Shifting the duty of support from a marital father living in the same home to a genetic father living outside the home hardly seems to be in the best interest of the child because a child will generally have more immediate and flexible access to the wealth of his marital father. Any economic support gained by shifting the duty from the marital to the adjudicated father may actually come at considerable cost to a child: the loss of a father, an identity, and a sense of stability. Furthermore, the superfluous support gained thereby may only serve to offset the legal cost to the marital parents of defending against the action.

249. *See id.*, 995 S.W.2d at 340.

250. *See Lehr v. Robertson*, 463 U.S. 248, 258 (1983).

251. *Williams*, 338 Ark. at 351-52, 995 S.W.2d at 340.

252. *See Santosky v. Kramer*, 455 U.S. 745, 760-61 (1982).

C. Granting Adulterous Putative Fathers Parental Status Against the Wishes of a Child's Fit Married Parents Interferes with Their Freedom of Association

The "marriage relationship" is "the basic foundation of the family in our society."²⁵³ It is an intimate association that "promotes a way of life,"²⁵⁴ and accordingly, it is an association protected by the First Amendment.²⁵⁵ The First Amendment provides a haven against unwarranted state interference with those relationships, such as that between husband and wife, that presuppose "deep attachments and commitments to . . . individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."²⁵⁶

The Court has also recognized a substantive due process right "to enter into and carry on certain intimate or private relationships."²⁵⁷ "As with the First Amendment right to associate, the [s]tate may not interfere with the selection of individuals in such relationships."²⁵⁸ More specifically, the state may not alter the structure of a marital family by forcing the inclusion of an unwanted individual who may impair the ability of the marital parents to rear their children according to their views and beliefs.²⁵⁹ Obviously, the right to enter into and maintain intimate relationships carries with it the right to discontinue or avoid entering into certain intimate or private relationships.²⁶⁰ State actions that interfere with a family's associational freedoms are only permitted where they advance compelling state interests and where there are no alternative means of advancing those interests that are significantly less restrictive of associational rights.²⁶¹

The Court has not defined the message or "way of life" that marriage promotes, but implicit in the laws regulating who can marry,²⁶² and on what

253. See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843 (1977).

254. *Id.* at 844.

255. *Bd. of Dirs. of Rotary Inter. v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987).

256. *Id.*

257. *Id.*

258. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 698 n.26 (2000) (Stevens, J., dissenting).

259. See *id.* at 648. In *Boy Scouts of America v. Dale*, the Court indicated that Government actions that may unconstitutionally burden this freedom [of association] may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.

Id. (internal citations omitted); cf. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

260. *Boy Scouts of Am.*, 530 U.S. at 648.

261. See *id.*

262. Arkansas law provides that "[m]arriage shall be only between a man and a woman.

grounds one can obtain a divorce,²⁶³ is the message that marriage is an intimate partnership between one man and one woman. Marriage, generally speaking, not only communicates that each partner has entered into an intimate association with one another, but also conveys a message that they intend to exclude others from that same intimate association.²⁶⁴ The reciprocal commitments between the husband and wife are legally recognized, so much so that that they are often considered contractual in nature²⁶⁵ and by their exclusionary nature lay a foundation for the development of a special and distinctively personal sharing of thoughts, beliefs, and experiences between the married couple. Marriage has also traditionally communicated that both partners intend to rear and share custody of children born into the marriage.²⁶⁶

To erase all distinctions between the legitimacy of parent-child relationships arising from marriage and those arising from extramarital sex is to efface the traditional boundaries and significance of marriage. If a married woman can be sexually involved with multiple men while staying married to one, and each of these men can be adjudicated the legal father of the children that are his genetic offspring, then has the state not effectively sanctioned polyandry? Granting married women the right to establish legally recognized child-rearing partnerships—contemporaneous with and collateral to their marriage—with men other than their husbands would make marriage take a back seat to the naked act of mating as a means of creating legally recognized families. The holding in *R.N.* opens the door to such a

A marriage between persons of the same sex is void.” ARK. CODE ANN. § 9-11-109 (LEXIS Repl. 2002). Section 9-12-101 provides:

No subsequent or second marriage shall be contracted by any person during the lifetime of any former husband or wife of the person unless the marriage with the former husband or wife has been dissolved for some one (1) of the causes set forth in the law concerning divorces by a court of competent authority.

Id. § 9-12-101 (LEXIS Repl. 2002).

263. One of the grounds for divorce is “[w]here either party shall have committed adultery subsequent to the marriage.” *Id.* § 9-12-301(4) (LEXIS Repl. 2002).

264. WILLIAM J. O’DONNELL & DAVID A. JONES, *THE LAW OF MARRIAGE AND MARITAL ALTERNATIVES* 48 (1982).

265. *E.g.*, *Stanley v. Illinois*, 405 U.S. 645, 663 (1972) (Burger, J., dissenting) (noting that marriage “is in law an essentially contractual relationship, the parties to which have legally enforceable rights and duties, with respect both to each other and to any children born to them”). Arkansas’s statute provides that “Marriage is considered in law a civil contract to which the consent of the parties capable in law of contracting is necessary.” ARK. CODE ANN. § 9-11-101 (LEXIS Repl. 2002).

266. *See Quilloin v. Walcott*, 434 U.S. 246, 256 (1978); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (including freedom to “establish a home and bring up children” as part of freedom to marry). That marriage traditionally communicates a desire to raise children is also implicit in the fact that impotence is a recognized ground for divorce. *See* ARK. CODE ANN. § 9-12-301(1) (LEXIS Repl. 2002).

possibility by granting putative fathers standing to bring an action to establish their paternity even if the subject child is presumably the legitimate child of a marital family.²⁶⁷ The commitments of intimacy, exclusivity, and familial association that marriage declares and seeks to create would mean very little if an isolated extra-marital sexual encounter could result in the family lines being redrawn so as to include the paramour without consent from the non-offending spouse.²⁶⁸

Beyond undermining the traditional meaning of marriage, state action compelling a parent-child relationship between an adulterous putative father and a child that had been presumed legitimate risks impairing the ability of the marital parents to effectively impart their values and beliefs to the marital children. A person may choose to marry a person with a similar culture or system of belief in order to better impart those shared values to the marital children he or she anticipates having with his or her spouse. After marriage, on the basis of momentary passions and more immediate considerations, that person may have sex with someone with whom they would not choose to raise children due to that person's incompatible beliefs or values. Where such a tryst results in pregnancy, granting the adulterous paramour legal status as father to the marital child could forcibly interject a person into the family who holds values and beliefs that conflict significantly with those of the marital parents. The adjudicated father would be in a position to undermine and interfere with the ability of the marital parents to teach and instill the fundamental values of their choice.²⁶⁹

If an extramarital sexual encounter accidentally results in conception, should it eclipse the marriage as the means of defining family roles? Allow-

267. Such a generous grant of standing adds extra incentive to adultery. It provides adulterous men with the right to seek legally recognized parental status if they so choose, coupled with an option to forego such status and its attendant costs by allowing both to remain with the marital father.

268. If putative fathers, upon their motion, could require paternity tests to be taken of all parties without a best interest hearing, as dissenting Justice Imber suggests in *R.N.*, not only could adulterers obtain a paternal role in the marital family without or against the consent of the husband but also rapists could literally force their way into a family. See *R.N. v. J.M.*, 347 Ark. 203, 222, 61 S.W.3d 149, 161 (2001). In the intimate realm of bearing and raising children, marriage vows of intimacy and exclusivity between husband and wife could be written in the sand, to be washed away by the first tide of contrary passion.

269. The argument could be raised that acknowledging the paternity of a married woman's lover, former or current, does not militate against her freedom of choice, but merely formalizes her choice to have engaged in sexual relations with a man other than her husband. Freedom of choice in the realm of contracts has never meant that a capable adult is free to make choices contrary to the contract, but that one is free to enter into binding relationships that will be acknowledged and enforced by the state. Although one may later choose to breach a contract, one may not also choose to lay the burden of the breach on the unoffending party. Only the unoffending party is free to waive his or her contractually secured interests.

ing it to do so favors accident and momentary passion over deliberation and marital commitment as the chief architects of family life. Where a married couple seeks to preserve their intimate association, despite extramarital dalliance, the state has no compelling interest to force them to admit another party into the intimate ranks of parenthood in the marital family. On the contrary, the state interest in preserving the intimate association between, and the legitimate expectations of, marital partners runs counter to any state interest in ensuring adulterous putative fathers a right to seek a determination of paternity against the express wishes of the marital couple.²⁷⁰ The general principles of democracy and the state interest in organized freedom are better served by supporting relationships forged by deliberate commitments between men and women who agree to share the responsibilities of child bearing and rearing, where they exist, than they are by imposing non-consensual, adjudicated relationships.

Excluding an adulterous putative father from legal parental status in the family is not unfair or unconstitutional where he knowingly had sex with a married woman because, being aware of the traditional meaning and message of marriage, he knew or should have known that he was not a legitimate member of the marital family and, therefore, had no reasonable or traditional basis to expect that he would be included as an equal partner in the parental roles of the marital family. On the contrary, he knew or should have known that the husband is traditionally and reasonably within his rights to presume himself the legitimate father of any children born to his wife. The rationale that the law should not afford different treatment to legitimate and illegitimate children does not apply to legitimate and adulterous fathers because, unlike children, they have control over their situation. Also, if the adulterous putative father is married, he remains free to have children with his own spouse and receive the same protection for his marital parent-child relationships. If he is single, the law does not prevent him from marrying and similarly securing his interest in becoming a father²⁷¹ or from fathering children with an unmarried woman.

Marriage often entails express public vows, a conspicuous exchange of symbols—such as rings, and is a matter of public record. It stands to reason that the public expression of the intimate association is to alert the public of the special status of the couple so that the members of the public can adjust their behavior and expectations regarding the husband and wife accordingly.

270. See *A v. X, Y, & Z*, 641 P.2d 1222, 1227 (Wyo. 1982) (“It appears that the legislature has carefully weighed the various social values and decided that the biological father’s rights are subordinate to the collective rights of the child, the mother, the presumed father and the family unit.”).

271. See *Lehr v. Robertson*, 463 U.S. 248, 263 (1983) (stating that “[t]he most effective protection of the putative father’s opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences”).

To the degree that marriage is a contractual agreement to associate as co-parents in the rearing of children born into the marriage,²⁷² marital parents may arguably be considered as having a secured interest in parenting the marital children. Marital status puts other potential sexual partners of the husband and wife on notice that the respective individual has a spouse with a prior, legally recognized interest in parenting any children born to the wife during the course of the marriage.

D. A Mandatory Best Interest Test upon Motion of a Putative Father Is an Inadequate Procedural Safeguard of the Liberty and Privacy Interests of a Legitimate Child and Her Family

Because the family has a fundamental liberty interest in preserving its privacy and integrity, even a procedure as apparently benign as a best interest test is constitutionally suspect unless a compelling state interest requires it.²⁷³ Allowing *any* man alleging to be a biological father to bring a paternity suit at *any time* is hardly a narrowly tailored state action in any sense and, where the child's marital parents are fit, may actually imperil the best interests of the child it is supposed to serve. Such a broad grant of standing is not narrowly calculated to secure the best interests of children because it is "applicable to all putative fathers,"²⁷⁴ including those who are financially incapable of supporting the child or who are incarcerated. Common sense is insulted by the notion that it serves the best interest of presumably legitimate children with fit marital fathers to allow such putative fathers the right to compel a best interest hearing upon their motion. *Stanley* suggests that it is improper for a state to disrupt an existing family on the basis of the "best interest" of the child where the child is not imperiled by an unfit parent.²⁷⁵ Because the traditional presumption is that parents are already acting "in the best interest of their child,"²⁷⁶ the party seeking to disrupt the child's present relationship with its presumed father should provide evidence of some material detriment to the child before being allowed to subject a marital family to a best interest hearing.²⁷⁷

272. See *supra* note 265.

273. "[T]he Fourteenth Amendment forbids government to infringe . . . fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

274. *R.N. v. J.M.*, 347 Ark. 203, 215, 61 S.W.3d 149, 156 (2001).

275. *Stanley v. Illinois*, 405 U.S. 645, 653, 657-58 (1972).

276. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

277. When dealing with an established family, the state may only interfere if the parents are endangering the health or safety of the child or are behaving in such a fashion as to create "significant social burdens." *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

The best interest test naturally arises during a divorce,²⁷⁸ but after the divorce proceedings, the family arrangements of the child are not disturbed unless one of the child's parents can establish a material change of circumstances.²⁷⁹ Employing a best interest test during divorce proceedings is appropriate because both parents have the same parental rights with respect to their children. Obviously in a divorce proceeding, the issue is generally not whether either parent is entitled to parental status, but which parent is better suited to retain custody.²⁸⁰ In other words, no one's parental status is normally at stake when the best interest test is employed in the divorce context.

Although the best interest test is appropriate when deciding disputes between parents with legally equivalent relationships to the child, it is inappropriately employed to assess the unproven interest of a putative father as against the constitutionally protected, legally recognized relationships of an extant family.²⁸¹ The state must afford a marital father and his presumed children procedural due process that adequately corresponds to the potentially grievous and irrevocable loss that they face when dissolution of a parental-child relationship is at stake.²⁸² If the state determines that it is in the best interest of the child to compel blood tests of all parties to the suit, then the marital father and his presumed child face the prospect of an irrevocable deprivation. Because the private interests of a fit marital father and his presumed child in maintaining their parent-child relationship are weighty, those interests are due heightened procedural protections where state action threatens to terminate them.²⁸³ In such instances, imprecise standards "that leave determinations unusually open to the subjective values of the judge" are constitutionally inadequate.²⁸⁴ To preserve fundamental fairness, a uniform standard is required where state action threatens to deprive parents of their parental rights.²⁸⁵ A best interest hearing with unspecified factors is obviously inadequate in this regard.²⁸⁶

278. *Norwood v. Robinson*, 315 Ark. 255, 259, 866 S.W.2d 398, 400-01 (1993).

279. *Id.*, 866 S.W.2d at 401.

280. *Id.*, 866 S.W.2d at 401.

281. *See Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977).

282. *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).

283. *See id.* at 758-61.

284. *Id.* at 762.

285. *Id.* at 756-57.

286. *See generally id.* at 745 (holding that New York failed to adequately protect the private interests of a family with a procedure that effected an irrevocable loss of parental status without requiring clear and convincing evidence of parental unfitness).

E. Procedural Safeguards Could Better Protect the Best Interest of Children and the Privacy and Liberty Interests of Their Families

Unless the factors to be considered in the best interest hearing are legislatively or judicially described, then such a hearing is, at best, a spongy procedural safeguard for the marital family and child, and at worst, an invitation to inconsistent, ad hoc family engineering.²⁸⁷ To adequately protect the privacy and liberty interests of the family, the legislature could (1) statutorily define the term "illegitimate child" so as to exclude presumably legitimate children of a marriage from the scope of section 9-10-104 of the Arkansas Code Annotated²⁸⁸ unless the child's parents raise the issue or consent to it being raised;²⁸⁹ (2) give a husband's claim to be the father of his presumed children the same effect as an acknowledgment of paternity;²⁹⁰ (3) temporally limit the standing afforded under section 9-10-104 in regards to children presumed legitimate (i.e., a selective statute of limitations);²⁹¹ (4) require putative fathers who seek a determination of paternity regarding a presumably legitimate child to rebut a presumption that maintaining the subject child's current parent-child relationship is no longer in the child's best interests²⁹² by clear and convincing evidence; (5) conditionally pre-

287. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting) (observing that "the 'best interests of the child' standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values"); Bernadette Weaver-Catalana, *The Battle for Baby Jessica: A Conflict of Best Interests*, 43 BUFF. L. REV. 583, 585 (1995) (noting that the "best interest of the child" standard has been criticized as "an amorphous concept which may serve as a basis for rationalization of any result").

288. *See David V.R. v. Wanda J.D.*, 907 P.2d 1025, 1028 (Okla. 1995) (holding that the provisions of Oklahoma's paternity statute only apply when a child is born out of wedlock and that the presumption of legitimacy will preclude any action under the paternity statute unless one or both of the parents successfully rebut the presumption of legitimacy).

289. *See Michael H. v. Gerald D.*, 491 U.S. 110, 115 (1989) (noting that the presumption was rebuttable by blood tests according to California's statutory scheme, but only if a motion for such tests is made, within two years from the date of the child's birth, either by the husband or, if the natural father has filed an affidavit acknowledging paternity, by the wife).

290. *See generally* ARK. CODE ANN. § 9-10-120 (LEXIS Repl. 2002).

291. The Uniform Parentage Act provides:

(a) Except as otherwise provided in subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father must be commenced not later than two years after the birth of the child. (b) A proceeding seeking to disprove the father-child relationship between a child and the child's presumed father may be maintained at any time if the court determines that: (1) the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and (2) the presumed father never openly treated the child as his own.

UNIF. PARENTAGE ACT § 607 (2000), 9B U.L.A. 341 (2001).

292. *See Norwood v. Robinson*, 315 Ark 255, 258-59, 866 S.W.2d 398, 400-01 (1993) (holding that putative fathers are required to bear the burden of proving a material change in

clude further inquiry into a child's paternity as long as the child's presumed father is found to be a fit and willing parent; (7) statutorily require consideration of the extent to which a marital father and his presumed child have already established a significant and positive personal relationship at the outset of a best interest hearing,²⁹³ and mandate courts to give the existence of such a relationship conclusive effect against the claims of putative fathers who have no developed relationship with the child; or (8) require deference to the desires of the child (where old enough to express them) and his or her fit custodial parents.²⁹⁴

The simple fact that a child has already bonded with his or her presumed father should indicate that it is not in the best interest of the child to disestablish the legal father-child relationship that had been in place since the child's infancy.²⁹⁵ The likelihood of this being traumatic for the child and the marital father increases over time, which is why a statute of limitations makes sense where an established relationship exists. Arkansas already protects adoptive parents and adopted children against untimely claims by putative fathers,²⁹⁶ should the law afford marital parents and their presumably legitimate children less protection? Procedural limits on the standing afforded adulterous putative fathers would cut off untimely petitions coming from a putative father who sat on his rights and would protect the best interest of the child as long as the limitation on standing did not apply to cut off the child's right to seek a determination of paternity when objectively in his or her best interest to do so. Limiting the standing of puta-

circumstances before being allowed to seek visitation or custody arrangements that would disrupt a child's life-long relationship with his or her mother).

293. See *generally* *Roque v. Frederick*, 272 Ark. 392, 399, 614 S.W.2d 667, 671 (1981) (mandating consideration of "past relationship between the parents of the child and the relationship that may have existed between the father and the child," as well as whether "a father has shown any concern or feeling for a child . . . as well as whether the father has supported the child in the past or to what extent he will support the child in the future," when putative father sought paternity determination).

294. See *Quilloin v. Walcott*, 434 U.S. 246, 251 (1978) (taking the desire of the subject child into account when putative father sought to block adoption).

295. See *Roque*, 272 Ark. at 399, 614 S.W.2d at 671 (ordering trial court to consider the past relationship between the parents of the child and the relationship that may have existed between father and child, as well as the extent of past support given or support to be expected in the future when considering the child's best interest).

296. An Arkansas statute provides:

Subject to the disposition of an appeal, upon the expiration of one (1) year after an adoption decree is issued, the decree cannot be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter unless, in the case of the adoption of a minor, the petitioner has not taken custody of the minor or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period.

ARK. CODE ANN. § 9-9-216(b) (LEXIS Repl. 2002).

tive fathers to challenge a child's legitimacy where the child is already an integral member of a fit family recognizes the sanctity of the family and promotes a stability in family relationships that benefits children.²⁹⁷

IV. CONCLUSION

Families are the wellspring of society and, ideally, a source of safety, security, and instruction for children. Marriage, although not the only means of establishing family ties, remains a valuable and traditional means of doing so.²⁹⁸ Not only is it a valuable means, it has often been regarded as the preferred means and is constitutionally protected as such.²⁹⁹ The state cannot constitutionally divest a marital parent or child of the parent-child relationship that exists between them unless it does so by narrowly tailored means in the pursuit of a compelling state interest.³⁰⁰ The inchoate interest of a putative father whose only relationship to his putative child is essentially that of a sperm donor does not enjoy equivalent constitutional protection.³⁰¹ It is also unconstitutional for a state to invade the privacy of a marital family with a "best interest" hearing that threatens to extinguish an existing parent-child relationship whenever any man claiming to be a putative father makes a motion for it, regardless of the amount of time that has passed or whether he has a constitutionally protected interest in the relationship.³⁰² Nonetheless, the Arkansas Supreme Court has opened the door to such hearings in *R.N. v. J.M.*³⁰³

Overemphasizing the rights of adulterous putative fathers to file paternity suits comes at the expense of the rights of the marital family, which are entitled to greater constitutional protection.³⁰⁴ The state should take the countervailing constitutional interests of the marital family into account before it invades the private realm of the family. Because state intervention in family affairs inevitably comes at a cost, wisdom dictates that it be limited to circumstances where the child's current family arrangement threatens the child or the public.³⁰⁵ Furthermore, the Constitution forbids it unless the state has a compelling purpose behind its intrusion into such matters and

297. *McDaniels v. Carlson*, 738 P.2d 254, 261 (Wash. 1987) (noting that "[c]hild development experts widely stress the importance of stability and predictability in parent/child relationships, even where the parent figure is not the natural parent.")

298. *See Lehr v. Robertson*, 463 U.S. 248, 256-57 (1983).

299. *Id.* at 257.

300. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1993).

301. *Lehr*, 463 U.S. at 261.

302. *See Santosky v. Kramer*, 455 U.S. 745, 758 (1982).

303. *R.N. v. J.M.*, 347 Ark. 203, 212-14, 61 S.W.3d 149, 154-55 (2001).

304. *Lehr*, 463 U.S. at 258.

305. *See supra* note 277.

chooses the least invasive and restrictive means available to advance that purpose.³⁰⁶

Forcing married couples to associate with former accomplices to spousal infidelity as co-parents of a child born into and raised as part of the marital family imposes upon the couple's freedom of association.³⁰⁷ Paramours and putative fathers who allege nothing more than a possible biological connection are not interchangeable equivalents to husbands and marital fathers who have a developed relationship with their presumed child. Treating them as such strips marriage of much of its meaning and allows cavalier exploits to eclipse marriage as the preferred means of drawing legally recognized family relationships. Mere sex is not the equivalent of marriage.

When a fundamental liberty interest—such as the fate of an existing parent-child relationship—hangs in the balance, a hearing that employs a subjective standard—such as the child's best interest—offers the threatened interest insufficient procedural protection. For the aforementioned reasons, greater protection should be afforded to the interests of presumably legitimate children and the families that they are a part of from the untimely challenges of adulterous putative fathers. Marital families and the presumably legitimate children thereof will benefit if the state takes measures to better protect the existing emotional and legal bonds between marital parents and their children against third party challenges. After all, children develop emotional attachments on the basis of loving relationships, not on the basis of blood test results.

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306. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48 (2000).

307. See *supra* Part III.C.

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