Grasping Fatherhood in Abortion and Adoption

MALINDA L. SEYMORE*

Biology makes a mother, but it does not make a father. While a mother is a legal parent by reason of her biological relationship with her child, a father is not a legal parent unless he takes affirmative steps to grasp fatherhood. Being married to the mother at the time of conception or at the time of birth is one of those affirmative steps. But if he is not married to the mother, he must do far more before he will be legally recognized as a father. Biology is often presented as a sufficient reason for this dichotomy—it is easy to identify the mother of each child. But aside from the biological, there are historical, social, and political reasons for recognizing mothers as legal parents while disregarding legal parenthood for nonmarital fathers.

This Article seeks to unpack the distinctions drawn between biological mothers and biological fathers in decisions about abortion and adoption placement. Both decisions are given to the sole discretion of the mother under current law, while such unilateral decisionmaking seems to make sense only in the context of abortion. Once a child is born, and a decision is being made about whether to parent the child or to place the child for adoption, there is less justification for excluding the biological father. This Article explores notions of fatherhood and how fatherhood has changed in society to show how the legal standards have lagged behind those societal changes. The Article concludes with a proposal on how courts should address birth fathers' rights in adoption to provide greater protection for those rights.

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* Professor of Law, Texas A & M University School of Law. I am very appreciative of the support of my institution in many ways, and in particular through a very generous research grant. A special thanks to the students in my Fatherhood & the Law seminar, who eagerly engaged in this topic—and many other topics—so relevant to American families today. I also appreciate the input of participants at the 2016 Adoption Initiative Conference co-sponsored by St. John's University and Montclair State University; your comments on an earlier draft were extremely helpful. As is the custom in adoption research, I wish to acknowledge my place in the adoption constellation: I am the single adoptive mother of two children. We have no daddy in our family, but my children's' birth parents, both mothers and fathers, are still felt in their absence. This Article is dedicated to Patrick, who set me on this path.

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> [F]atherhood is a social invention.
> —Margaret Mead[1]

> [T]he obvious natural law that every child born into the world has a right to fatherhood, as well as to motherhood, has not yet been recognized.
> —W. Clark Hall[2]

> Adoption seems to be like abortion. The final decision seems to be with the woman and not with the man. A part of me it angers, and a part of me feels like there is nothing you can do about that. The difference is biological.
> —Don, a birth father[3]

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1. James Garbarino, *The Soul of Fatherhood*, *in* FATHERHOOD: RESEARCH, INTERVENTIONS AND POLICIES 11, 13 (H. Elizabeth Peters et al. eds., 2000) (quoting MARGARET MEAD, MALE AND FEMALE: A STUDY OF THE SEXES IN A CHANGING WORLD 170 (Perennial ed. 2001)).

2. Rebecca Probert, *Recording Births: From the Reformation to the Welfare Reform Act*, *in* BIRTH RITES AND RIGHTS 171, 171 (Fatemeh Ebtehaj et al. eds., 2011) (internal citation omitted) (quoting W. CLARKE HALL, THE STATE AND THE CHILD 133 (1917)).

3. MARY MARTIN MASON, OUT OF THE SHADOWS: BIRTHFATHERS' STORIES 33 (1995).

> This is it. This is the life I want and the life I got. In fact, it's the life I never thought I'd get. An Avenger. Someone's father. And in love with you.
> —Luke Cage, Avenger[4]

INTRODUCTION

Biology makes a mother, but it does not make a father. A mother is a legal parent by reason of her biological relationship with her child. A father is not a legal parent unless he takes affirmative steps to grasp fatherhood.[5] Being married to the mother at the time of conception or at the time of birth is one of those affirmative steps.[6] If he is not married to the mother, he must do far more before he will be legally recognized as a father.[7]

There are certainly practical reasons for this dichotomy—it is easy to identify the mother of each child while the child is in utero and as she gives birth to the child, while it is far more difficult to identify the father, who could be anywhere while the mother is pregnant and at the time of birth.[8] Aside from the biological, there are historical, social, and political reasons for recognizing mothers as legal parents while disregarding legal parenthood for nonmarital fathers. This Article seeks to unpack the distinctions drawn between biological mothers and biological fathers in decisions about abortion and adoption placement. Both decisions are given to the sole discretion of the mother under current law, while such unilateral decisionmaking seems to make sense only in the context of abortion. Once a child is born, and a decision is being made about whether to parent the child or to place the child for adoption, there is less justification for excluding the biological father. Yet, adoption law regularly ignores the biological father. He is viewed as the spoiler, the person destined to spoil the adoption plans of the birth mother and prospective adoptive parents, not as the parent.[9] The standard for legal

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4. Jeffrey A. Brown, *Superdad: Luke Cage and the Heroic Fatherhood Ideal in the Contemporary Marvel Universe*, *in* MARVEL COMICS' CIVIL WAR AND THE AGE OF TERROR: CRITICAL ESSAYS ON THE COMIC SAGA 134 (Kevin Michael Scott ed., 2015) (quoting Luke Cage's words from Brian Michael Bondis' *The Pulse #14* (2006), in an essay discussing the centrality of fatherhood to this Avenger hero).

5. *See, e.g.*, Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2557 (2013); Lehr v. Robertson, 463 U.S. 248, 261 (1983); Caban v. Mohammed, 441 U.S. 380, 391 (1979); Quilloin v. Walcott, 434 U.S. 246, 256 (1978); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

6. Richard Collier, *Fatherhood, Law and Fathers' Rights: Rethinking the Relationship Between Gender and Welfare*, *in* RIGHTS, GENDER AND FAMILY LAW 119, 122 (Julie Wallbank et al. eds., 2010).

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

8. As with so many issues, medical advances are changing this fact. In utero paternity testing has been available since 1997. Y. M. Dennis Lo et al., *Presence of Fetal DNA in Maternal Plasma and Serum*, 350 LANCET 485, 486 (1997). Since 2009, a noninvasive test of a pregnant woman's blood can reveal paternity. Jasenka Wagner et al., *Non-Invasive Prenatal Paternity Testing from Maternal Blood*, 123 INT'L J. LEGAL MED. 75, 78 (2009).

9. *See* Elizabeth Brandt, *Cautionary Tales of Adoption: Addressing the Litigation Crisis at the Moment of Adoption*, 4 WHITTIER J. CHILD & FAM. ADVOC. 187, 196 (2005); *see* Charlene E. Miall &

fatherhood seems to rest on an assumption that fathers are generally uninterested in their children.

This Article will explore notions of fatherhood and how fatherhood has changed in society to show how the legal standards have lagged behind those societal changes. Next, this Article will examine how decisions by fathers have been and should be treated in abortion and adoption. Finally, this Article will posit a new theory of fatherhood that should change the legal landscape for fathers seeking a decisionmaking role in parenting or placing a child for adoption.

I. FATHERHOOD

The story we tell about fatherhood is full of contradictions.[10] We recite a history of the patriarch, who owned his child and had sole authority to control that child, a right often exercised cruelly.[11] We televise the "Father Knows Best" world of a fatherhood comprised of distant bread-winning and advice-giving.[12] We profess an evolutionary biology theory of fatherhood that emphasizes procreation, not parenting.[13] We

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Karen March, *Community Attitudes Toward Birth Fathers' Motives for Adoption Placement and Single Parenting*, 54 FAM. REL. 535, 543 (2005) ("[U]nwed birth fathers have historically been stigmatized as rogues, scoundrels, unscrupulous cads, Don Juans, phantom fathers, troubled fathers, or fathers who cause trouble.").

10. DEBORAH LUPTON & LESLEY BARCLAY, CONSTRUCTING FATHERHOOD: DISCOURSES AND EXPERIENCES 9 (1997) ("[F]atherhood is a phenomenon around which there currently exist many and often competing discourses."); Richard Collier, *Fathers, Birth and Law*, *in* BIRTH RITES AND RIGHTS 151 (Fatemeh Ebtehaj et al. eds., 2011) ("Work has explored the diverse and often contradictory nature of the ideas about fatherhood that circulate across a range of institutional and cultural contexts pertaining to law."); ESTHER DERMOTT, INTIMATE FATHERHOOD: A SOCIOLOGICAL ANALYSIS 7 (2008) (describing the three paradoxes of fatherhood); Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 970 (1994) ("[J]udicial decisions and the statutes they interpret reveal a profound ambivalence about fatherhood . . . .").

11. LUPTON & BARCLAY, *supra* note 10, at 14 (citing Joseph Pleck, *American Fathering in Historical Perspective*, *in* CHANGING MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY 83–97 (Michael S. Kimmel ed., 1987)). There are sources that argue that patriarchs during the sixteenth and nineteenth centuries "took on nurturing as well as protective qualities." BRID FEATHERSTONE, CONTEMPORARY FATHERING: THEORY, POLICY AND PRACTICE 41 (2009). Featherstone argues that, while there were class differences, fathers of that era were "actively engaged in nurturing and educating their children." *Id.*

12. LUPTON & BARCLAY, *supra* note 10, at 14 (citing Joseph Pleck, *American Fathering in Historical Perspective*, *in* CHANGING MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY 83–97 (Michael S. Kimmel ed., 1987)).

13. ROBERT TRIVERS, NATURAL SELECTION AND SOCIAL THEORY: SELECTED PAPERS OF ROBERT TRIVERS (2002); PETER B. GRAY & KERMYT G. ANDERSON, FATHERHOOD: EVOLUTION AND HUMAN PATERNAL BEHAVIOR (2010); FEATHERSTONE, *supra* note 11, at 90 (quoting David Popenoe, *Life Without Father*, *in* LOST FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA 36 (Cynthia R. Daniels ed., 1998) ("Men are not biologically as attuned to being committed fathers as women are to being committed mothers. The evolutionary logic is clear. Women, who can bear only a limited number of children, have a great incentive to invest their energy in rearing children, while men, who can father many offspring, do not. Left culturally unregulated, men's sexual behavior can be promiscuous, their paternity casual, their commitment to families weak.")).

ascribe a desire to avoid parenthood to most men.[14] And we accept a view of fatherhood that posits a high level of disinterest in children, and especially in the day-to-day parenting of children.[15] At the same time, we advance a romanticized version of fatherhood that dooms the children of single mothers,[16] that valorizes even minor efforts at parenting by fathers,[17] and that fails to recognize as family those family-like units that lack a father.[18] It is likely impossible to formulate a unitary theory of fatherhood or to construct a singular history that accounts for fatherhood across time. However, there are some consistent threads.

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14. Annette Holland, *Fatherhood in Transition: Men Finding Their Feet as Fathers*, 20 AUSTL. J. EARLY CHILDHOOD 7, 8 (1995); Anne B. Brodzinsky, *Surrendering an Infant for Adoption: The Birthmother Experience*, *in* THE PSYCHOLOGY OF ADOPTION 295, 315 (David M. Brodzinsky & Marshall D. Schecter eds., 1990) (speculating that the vast majority of birth fathers are "continuing in the centuries-old tradition of abdication of responsibility").

15. See, for example, *Stanley v. Illinois*, 405 U.S. 645, 654 (1972), where the Court notes that Illinois deemed that "most unmarried fathers are unsuitable and neglectful parents." Fathers who desire to engage in more involved caretaking often face pervasive "cultural forces that discourage paternal caregiving." Holning Lau, *Shaping Expectations About Dads as Caregivers: Toward an Ecological Approach*, 45 HOFSTRA L. REV. 181, 183 (2016).

> We are surrounded by a culture that continues to treat childcare as the domain of women. Consider when a man prepares to become a father. He will likely learn that his employer offers no paternity leave, even though it grants leave to new mothers. If the father decides to stay home anyway, he will probably search for activities to enjoy with his child and encounter numerous classes called "Mommy and Me," as though fathers do not belong. While running errands with his little one, he may need to take a diaper changing break, only to find that changing tables are located exclusively in women's restrooms. As the father shops for baby supplies, he will surely discover countless advertisements deploying "mothers know best" rhetoric that questions the competency of fathers. All of these moments produce cultural messages that men are not suited for—or are not expected to perform—caregiving.

Id. at 182–83.

16. VALERIE POLAKOW, LIVES ON THE EDGE: SINGLE MOTHERS AND THEIR CHILDREN IN THE OTHER AMERICA (1993); Sara McLanahan et al., *The Causal Effects of Father Absence*, 39 ANN. REV. SOC. 339 (2013) (finding negative effects of father absence on offspring well-being, in particular for outcomes such as high school graduation, children's social-emotional adjustment, and adult mental health); ANNA GAVANAS, FATHERHOOD POLITICS IN THE UNITED STATES: MASCULINITY, SEXUALITY, RACE, AND MARRIAGE (2004) (discussing studies related to fatherlessness).

17. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 163 (1992). It notes that in child custody cases using the primary caregiver standard judges tend to reward fathers: "68% of the cases appealed involved fathers who received custody at the trial court level even though the mother seems to have been the primary caretaker and fit." *Id.* at 194. Becker found that judicial bias in favor of fathers was most likely to occur when "(1) the fathers did more than the average father; (2) the mothers 'voluntarily' separated from the children at some point for some reason; (3) the mothers were sexually active outside the marriage." *Id.* at 195–96 (internal citations omitted). *But see* Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making—How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 114 (1998) (finding that women are more likely to receive custody under the primary caretaker presumption).

18. Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 113 (2013) (citing REGINA G. KUNZEL, FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890–1945 129 (1995)).

A. A Nonmarital Fatherhood in Law

"Marriage has . . . historically played a central role in how law has sought to attach men to their children."[19] Absent marriage, men had no legal connection to their children. Under English common law, an out-of-wedlock child was "the son of no one," with no rights of inheritance, and "the son of the people," whose only custodian was the church.[20] By the end of the eighteenth century, unwed mothers had the right to custody of their nonmarital children, but unwed fathers were excluded.[21] Since unwed fathers had no legal rights or obligations to their nonmarital children, unwed mothers had sole decisionmaking authority, including decisions about adoption of their children.[22] Chief Justice Warren Burger of the Supreme Court explained why he found it appropriate to exclude unwed fathers from legal parenthood:

> I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers. While these, like most generalizations, are not without exceptions, they nevertheless provide a sufficient basis to sustain a statutory classification whose objective is not to penalize unwed parents but to further the welfare of illegitimate children in fulfillment of the State's obligations as parens patriae.[23]

It was not until a series of Supreme Court cases starting in the 1970s that unwed fathers—at least some of them—were recognized as legal fathers.

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19. Collier, *supra* note 6, at 122; Lehr v. Robertson, 463 U.S. 248, 256–57 (1982) ("The institution of marriage has played a critical role . . . in defining the legal entitlements of family members . . . ."); Collier, *supra* note 10, at 153 ("Marriage has played a pivotal role in how law has historically attached men to their children.").

20. Ruth-Arlene W. Howe, *Legal Rights and Obligations: An Uneven Evolution*, *in* Young Unwed Fathers: Changing Roles and Emerging Policies 141, 143 (Robert I. Lerman & Theodora J. Ooms eds., 1993); Bonnie Steinbock, *Defining Parenthood*, *in* Freedom and Responsibility in Reproductive Choice 107, 119 (J. R. Spencer & Antje du Bois-Pedain eds., 2006); Ruth Deech, *The Rights of Fathers: Social and Biological Concepts of Parenthood*, *in* Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century 19, 20 (John Eekelaar & Petar Sarcević eds., 1993) ("[T]he illegitimate child historically was *filius nullius*").

21. Howe, *supra* note 20, at 143; Mary Lyndon Shanley, Making Babies, Making Families: What Matters Most in an Age of Reproductive Technologies, Surrogacy, Adoption, and Same-Sex and Unwed Parents 48–49 (2001).

22. Steinbock, *supra* note 20, at 119.

23. Stanley v. Illinois, 405 U.S. 645, 665–66 (1972) (Burger, C.J., dissenting).

Stanley v. Illinois is the seminal case in recognizing parental rights of unwed fathers.[24] Peter Stanley sought recognition as a legal father after the death of the mother of his three children, with whom he "lived . . . intermittently for 18 years."[25] Peter Stanley and Joan Stanley were not married. As the Court noted, "[i]t is undisputed that he is the father of these children, that he lived with the two children whose custody is challenged all their lives, and that he has supported them."[26] After the death of Joan Stanley, the State of Illinois began dependency proceedings and declared the children wards of the state because they had no living parent.[27] As an unwed father, Peter Stanley was not a parent under Illinois law.[28] The Supreme Court recognized that "the private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[29] The Court rejected the State's claim that "Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children."[30] Instead, if the State wished to declare Stanley unfit, it would have to do so after a hearing where he was proven unfit.[31]

The Court's explanation of why Stanley qualified as a legal parent with constitutionally protected rights was sparse. It appeared to be more than biology, as the Court noted that he both "sired" and "raised" his children.[32] And in dissent, Chief Justice Burger described him as "a somewhat unusual unwed father, namely, as one who has always acknowledged and never doubted his fatherhood of these children. He alleges that he loved, cared for, and supported these children from the time of their birth until the death of their mother."[33] Were these attributes necessary to Stanley's claim of legal fatherhood? It seemed so in the Supreme Court's next case examining the rights of unwed fathers.

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24. *See id.*

25. *Id.* at 646.

26. *Id.* at 650 n.4. In dissent, Chief Justice Burger takes a more jaundiced view of Stanley as an involved father, noting that he had already found another family to take custody of his children after the death of his wife, and that he "seemed, in particular, to be concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children." *Id.* at 667. Furthermore, at a time when the State of Illinois believed that the Stanleys were married, one child had been removed from their care for neglect. *Id.*

27. *Id.*

28. *Id.* at 650 (quoting ILL. REV. STAT. ch. 37, § 701-14 (defining a parent as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent.")). Natural fathers of an illegitimate child—the category into which Stanley fit—were not defined as parents. *Id.*

29. *Id.* at 651.

30. *Id.* at 653.

31. *Id.*

32. *See id.* at 651. Using the term "sired" suggests the Court views Stanley as a biological progenitor. Saying, in addition, that he "raised" the children suggests a more significant parenting relationship.

33. *Id.* at 666.

Leon Webster Quilloin was the father of a child born out of wedlock to Ardell Williams.[34] That child lived exclusively with his mother, and when the child was almost three years old his mother married Randall Walcott.[35] When the child was eleven, Walcott sought to adopt the child with his mother's consent.[36] Quilloin desired to block the stepparent adoption.[37] If Quilloin had been married to the mother of his child, his consent would have been required before the child could be adopted.[38] However, as an unwed father, he had no authority under state law to block the adoption.[39] The Court found no due process right for Quilloin, stating:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interests of the child."[40]

The Court also rejected Quilloin's equal protection request to be treated the same as a married father separated or divorced from the mother of his child.[41] The Court held that his situation was distinguishable from a married father since he had "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[42] As a result, Quilloin's due process and equal protection rights were severely restricted because, unlike Peter Stanley, he had not assumed custodial responsibilities for his child.

In another case decided by the Supreme Court, Abdiel Caban did have custodial responsibilities for the children he had with Maria Mohammed.[43] The couple lived together for five years and held themselves out to be husband and wife, though they were not legally

34. Quilloin v. Walcott, 434 U.S. 246, 247–48 (1978).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 255–56.
40. *Id.* at 255 (alteration in original) (internal citation omitted).
41. *Id.* at 256.
42. *Id.*
43. Caban v. Mohammed, 441 U.S. 380 (1979).

married.[44] Mohammed separated from Caban, taking the children with her, but he visited with the children weekly thereafter.[45] Mohammed's mother took the children to Puerto Rico, and Caban stayed in contact through his parents, who resided there.[46] Later, Caban went to Puerto Rico and took the children back to New York with him.[47] After a legal custody battle, the children were placed in Mohammed's custody with visitation rights granted to Caban and his new wife.[48] Mohammed, who had also remarried, petitioned for her husband to adopt the children.[49] Caban then cross-petitioned for his wife to adopt the children.[50] The trial court terminated Caban's parental rights and granted Mohammed's petition to adopt, noting the limited rights of unwed fathers in adoption proceedings.[51] Caban argued that the New York statute, which treated unwed mothers and unwed fathers differently with regard to consent to adoption, violated the Equal Protection Clause.[52]

The Supreme Court agreed. First, they rejected the State's argument that the "distinction is justified by a fundamental difference between maternal and paternal relations—that 'a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does.'"[53] They noted that in this case mother and father lived together with the children as a family unit, each participating in the care and support of the children.[54] Thus, the Court rejected the argument that "the broad, gender-based distinction of [the statute] is required by any universal difference between maternal and paternal relations at every phase of a child's development."[55]

The Court also rejected the State's second argument: that its interest in promoting the adoption of illegitimate children would be served best by blocking unwed fathers from withholding the "blessings of adoption" from children who would therefore forever suffer from the stigma of illegitimacy.[56] The Court recognized the legitimacy of this state interest, but found that there was no substantial relationship between that interest and the gender distinction in the statute. The Court concluded:

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44. *Id.* at 382. Caban could not have married Mohammed, since he was married to another woman at the time. *Id.*
45. *Id.*
46. *Id.* at 383.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 384.
52. *Id.*
53. *Id.* at 388.
54. *Id.* at 389.
55. *Id.*
56. *Id.* at 394.

> In sum, we believe that [the statute] is another example of "overbroad generalizations" in gender-based classifications. The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. [The statute] both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.[57]

While recognizing that Caban's rights could not be so easily terminated, the Court agreed that requiring consent of all unwed fathers "would pose a strong impediment for adoption because often it is impossible to locate unwed fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children."[58] The Court distinguished the case of newborn adoption, where identifying unwed fathers at birth might justify a legislative distinction between mothers and fathers, from Caban's situation involving older children with whom the father had already developed a relationship.[59] Further, the Court stated that when a father "never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."[60]

Four years later, the Court decided *Lehr v. Robertson*.[61] Jonathan Lehr and Lorraine Robertson lived together prior to their child's birth, and Lehr visited mother and child, Jessica, in the hospital at the time of birth. They did not live together after the child's birth, and Lehr "never provided them with any financial support, and he has never offered to marry [the mother]."[62] Lehr claimed that he was unable to do so because Robertson concealed her whereabouts from him after leaving the hospital with the child.[63] When he was able to discover her whereabouts, he "visited with her and her children to the extent she was willing to permit it."[64] He hired a private detective at one point to help him in locating his child, and when he located her, he discovered that Robertson

57. *Id.* at 392 (internal citation omitted).
58. *Id.*
59. *Id.* at 391.
60. *Id.* at 392.
61. Lehr v. Robertson, 463 U.S. 248 (1983).
62. *Id.* at 252.
63. *Id.* at 265.
64. *Id.* at 269.

had married.[65] "Lehr asserts that at this time he offered to provide financial assistance and to set up a trust fund for Jessica, but that Lorraine refused.[66] Lorraine threatened Lehr with arrest unless he stayed away and refused to permit him to see Jessica."[67] Lehr retained counsel, who contacted Robertson requesting visitation and threatening legal action. In response, Robertson and her husband filed for a stepparent adoption.[68] One month later, apparently unaware of the adoption proceeding, Lehr filed a paternity action in another court seeking reasonable visitation and an order of support.[69] Robertson was served in that action, and informed the adoption court of the paternity action in the other court. Nonetheless, the adoption court judge issued an order of adoption.[70]

The Supreme Court upheld the adoption over Lehr's due process claim that he was entitled to prior notice and an opportunity to be heard before the adoption was approved.[71] While recognizing the constitutional rights of parents, the Court noted that those rights were limited for the fathers of children born out of wedlock.[72] "The mere existence of a biological link"[73] is not deserving of the same constitutional protection afforded a father who "demonstrates a full commitment to the responsibilities of parenthood."[74] As the Court describes it:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.[75]

So, Lehr was not a legal father—he only had an opportunity to become a legal father, and he failed to do so because he "never had any significant custodial, personal, or financial relationship" with his child.[76]

Of course, much of the opportunity for a father to develop a relationship with an infant is dependent on the cooperation of the mother. The Court noted that the most effective way for a father to develop a

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65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 252.
70. *Id.* at 250.
71. *Id.*
72. *Id.* at 261.
73. *Id.*
74. *Id.*
75. *Id.* at 262.
76. *Id.*

relationship is "provided by the laws that authorize formal marriage and govern its consequences. But the availability of that protection is, of course, dependent on the will of both parents of the child."[77] The Court further noted that the State of New York had provided one avenue for unwed fathers to assert their interests in a child that was outside the control of the mother—the putative fathers' registry:

> After this Court's decision in *Stanley*, the New York Legislature appointed a special commission to recommend legislation that would accommodate both the interests of biological fathers in their children and the children's interest in prompt and certain adoption procedures. The commission recommended, and the legislature enacted, a statutory adoption scheme that automatically provides notice to seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children. If this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica. The possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself.[78]

Though the mother and the adoption court knew that Lehr had filed a paternity action in another court, his failure to file in the putative fathers' registry meant he was not entitled to notice of the adoption proceedings as a matter of due process.[79] The existence of the putative fathers' registry "adequately protected appellant's inchoate interest in establishing a relationship" with his child.[80]

The Court gave short shrift to Lehr's equal protection argument as well, finding that he was not similarly situated to the mother of the child since he had no developed relationship with the child. Thus, the Equal Protection Clause did not prevent the state from treating them differently.[81]

In a final case involving unwed fathers, the Supreme Court had to decide whether a biological father could rebut the presumption that the child of a married couple was the child of the husband.[82] Michael H. had an affair with Carole D., who was married.[83] She gave birth to a child, and DNA established that Michael was the father.[84] Nonetheless, Carole's

77. *Id.* at 263.
78. *Id.* at 263–64.
79. *Id.* at 265.
80. *Id.*
81. *Id.* at 267–68.
82. Michael H. v. Gerald D., 491 U.S. 110 (1989).
83. *Id.* at 113.
84. *Id.* at 114.

husband, Gerald D., held out the child as his own.[85] At times during the marriage, Carole and Gerald separated and Carole and Michael cohabited with the child.[86] During those times, Michael held out the child as his.[87] At other times, Carole cohabited with another man, not her husband.[88] When his attempts to visit with his child were rebuffed, Michael filed a paternity action and requested legal visitation.[89] Gerald resisted the action, citing the legal presumption that a child of a marriage is conclusively the child of the husband.[90]

Michael asserted a due process claim, relying on *Stanley*, *Quilloin, Caban*, and *Lehr*, since he had an established relationship with his child.[91] The Court disagreed, reading those cases as resting on "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family."[92] The unitary family deserving of protection here was the one between husband and wife and child, not the one formed between Michael and his biological child:

> Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and [his wife] has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.[93]

Having grasped his opportunity interest in being a father, Michael might have had a due process claim absent Carole's marriage to Gerald at the time the child was conceived and born. However, when an unwed father's rights conflict with those of a marital father, the unwed father's rights are deemed not to be deserving of constitutional protection.[94]

The series of Supreme Court decisions discussed thus far marked a change in the traditional position of at least some unwed fathers. The common law position that all unwed fathers lacked legal rights gave way to constitutional protection for those fathers who managed to navigate the intricacies of developing a relationship with their child, even when the mother objected. Despite the modest expansion of unwed fathers'

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85. *Id.* at 113–14.
86. *Id.* at 114.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 117 ("[T]he issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.").
91. *Id.* at 121.
92. *Id.* at 123.
93. *Id.* at 124.
94. *Id.* at 126.

rights in these cases, little has changed in public perception of unwed fathers: "[U]nwed birth fathers have historically been stigmatized as rogues, scoundrels, unscrupulous cads, Don Juans, phantom fathers, troubled fathers, or fathers who cause trouble."[95] There has, however, been considerable societal change in attitudes toward fatherhood since the series of cases from the Supreme Court in the 1970s and 1980s just discussed.

B. Changing Attitudes Toward Fatherhood

Much of law ascribes to men the desire to avoid fatherhood and a basic disinterest in their children. Is there data to support these assumptions? One study noted that little "research has been conducted in the area of men's aspirations, expectations, and attitudes towards having children and being parents."[96] The few studies that exist show men are indeed interested in parenthood. In an Australian study, university students expressed the desire to be fathers and exhibited a willingness to sacrifice work and financial wealth to achieve happiness equated with being fathers.[97] "In explaining their desire for fatherhood, some men expressed a view that having children brought joy, happiness, love and fulfilment."[98] This study concluded:

> Broadly, the findings of this study challenge persisting gender stereotypes about young men's interest in fatherhood and desire for involvement in their families. These young men generally had well considered fatherhood preferences, attitudes and aspirations and shared them readily and articulately. Most of the men viewed being a father as fundamental to their future happiness and, counter to stereotypes, described their imagined families in some detail.[99]

The prospective fathers in this study were imagining fatherhood as part of a couple, not single fatherhood. Still, the study is significant in suggesting that men, as well as women, imagine themselves as future parents.

With women's entry into the work force in large numbers in the past several decades, men's role in the family has also changed considerably.[100] In the past fifty years, there has been a seismic shift in attitudes about fatherhood. The "Father Knows Best" paradigm of distant fatherhood

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95. Miall & March, *supra* note 9, at 543.

96. Rachel Thompson et al., *Imagining Fatherhood: Young Australian Men's Perspectives on Fathering*, 12 Int'l J. Men's Health 150, 151 (2013).

97. *Id.* at 155.

98. *Id.* at 156.

99. *Id.* at 162–63.

100. Katrina McLaughlin & Orla Muldoon, *Father Identity, Involvement and Work-Family Balance: An In-Depth Interview Study*, 24 J. Community & Applied Soc. Psychol. 439 (2014); Natasha J. Cabrera et al., *Fatherhood in the Twenty-First Century*, 71 Child Dev. 127, 127 (2000); Glenda Wall & Stephanie Arnold, Research Report, *How Involved Is Involved Fathering? An Exploration of the Contemporary Culture of Fatherhood*, 21 Gender & Soc'y 508, 508–09 (2007).

comprised of breadwinning and advice-giving has given way to one of involved fatherhood.[101] Mid-twentieth century fathers were seen "primarily as familial 'breadwinners.'"[102] As Richard Collier puts it, "[a] significant shift has occurred, in short, described as a move from 'cash to care' in how fathers have been repositioned within law and policy, a development that reflects changing understandings of the place of the father within child welfare and development."[103] Esther Dermott describes the change as follows:

> [O]ur current ideals of fatherhood no longer have, as central elements, the roles of disciplinarian, educationalist and moral authority. These have been replaced by a focus on the nurturing elements of parental care, especially engagement with children in leisure activities and the carrying out of practical childcare tasks. Most commentators are in broad agreement as to the decline of the former set of characteristics and, albeit with perhaps greater differences of opinion, the rise of the latter group of attributes in the construction of contemporary fatherhood.[104]

Fathers are now expected to be involved in pregnancy and daily child care.[105] "[E]ncapsulated in the idea of the 'new fatherhood,' it has been widely suggested that contemporary fathers are now expected to have, and to desire, a closer, more emotionally involved and nurturing relationship with their children."[106] That desire for more nurturing relationships for fathers is illustrated in a recent Pew Research Center study, where fathers were about as likely as mothers (fifty-seven percent to fifty-eight percent) to say that parenting is extremely important to their identity and just as many working fathers as working mothers say they would prefer to stay home with their children.[107] Still, conceptions of the "good father" tend to incorporate both breadwinning and child care.[108]

Despite the sea of change in fatherhood and studies that illustrate that men are indeed interested in being fathers, the Supreme Court has not spoken directly to the constitutional rights of fathers since its series of cases in the 1970s and 1980s. In a recent case involving a father's rights under the Indian Child Welfare Act, the Court did address a single

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101. Collier, *supra* note 6, at 123.

102. *Id.*

103. *Id.*

104. DERMOTT, *supra* note 10, at 27.

105. Collier, *supra* note 6, at 123.

106. *Id.*

107. Kim Parker & Gretchen Livingston, *6 Facts About American Fathers*, PEW RES. CTR. (June 16, 2016), http://www.pewresearch.org/fact-tank/2016/06/16/fathers-day-facts/.

108. McLaughlin & Muldoon, *supra* note 100, at 443. Despite the current conceptual "new father" as directly involved in intimate child rearing, there is little evidence that actual fathering is achieving what the cultural representations depict. "Although there are indications that fathers are spending more time with their children than they did 30 years ago, their involvement in caregiving, especially with young children, is still a fraction of that undertaken by mothers." Wall & Arnold, *supra* note 100, at 509.

father's parental rights.[109] However, the Court showed little change in attitudes about unwed fathers.

C. The Baby Veronica Case and Fatherhood Today

Although the child is not named in the case of *Adoptive Couple v. Baby Girl*,[110] the media reported it as the "Baby Veronica Case."[111] Baby Veronica's parents, Dusten Brown and Christinna Maldonado, became engaged to be married in December 2008.[112] At the time, they were not living together since Brown was actively serving in the U.S. Army and was stationed four hours away, but they both resided in Oklahoma.[113] In January, Maldonado told Brown that she was pregnant. Brown said at trial that he was very happy when he learned they were expecting a child.[114] Maldonado testified that Brown "didn't really have a reaction" to the news of the baby.[115] But they both agree he "began pressing [Maldonado] to get married sooner."[116] Maldonado said he only wanted to get married so that his Army pay would increase for "family living."[117] Brown said he did not want the baby to be born out of wedlock.[118] The relationship deteriorated, and Maldonado broke off the engagement in May 2009 via text message because Brown was pressuring her to get married.[119] She cut off all contact with Brown at that point.[120]

It is undisputed that the couple was not living together and that Brown did not support Maldonado financially or pay for pregnancy-related expenses.[121] Maldonado testified that she asked Brown for money before her first prenatal doctor's visit, and that he said he would not assist her financially unless they were married.[122] Brown testified that Maldonado never asked for financial assistance, and that he would have supported her if she had asked.[123] In June 2009, Maldonado sent a text message to Brown "asking if he would rather pay child support or

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109. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013).

110. *Id.* at 2552.

111. *See, e.g.*, Kristi Eaton, '*Baby Veronica*' *Handed over to Adoptive Parents*, USA Today (last updated Sept. 24, 2013, 1:01 PM), http://www.usatoday.com/story/news/nation/2013/09/23/cherokee-child-custody/2858431/; Brent Kendall, *Supreme Court Backs Couple in 'Baby Veronica' Adoption Case*, Wall St. J. (June 25, 2013, 6:04 PM), http://www.wsj.com/articles/SB10001424127887323998604578567911903251562.

112. *Adoptive Couple*, 133 S. Ct. at 2558.

113. Adoptive Couple v. Baby Girl, 731 S.E.2d 550, 553 (S.C. 2012), *rev'd*, 133 S. Ct. 2552 (2013).

114. *Id.* at 553 n.3.

115. *Id.* at 553.

116. *Id.*

117. *Id.* at 553 n.3.

118. *Id.*

119. *Id.* at 553.

120. *Id.*

121. *Id.*

122. *Id.* at 553 n.4.

123. *Id.*

surrender his parental rights."[124] Brown responded by text saying he would surrender his rights, but he testified that he thought he was surrendering his rights to Maldonado and had no idea she was planning to place the child for adoption.[125] He explained: "In my mind I thought that if I would do that I'd be able to give her time to think about this and possibly maybe we would get back together and continue what we had started."[126]

In June 2009, Maldonado connected with Matt and Melanie Capobianco, a couple from South Carolina seeking to adopt.[127] The couple knew that Brown, the birth father, was a registered member of the Cherokee Nation, and had sought to confirm his status with the tribe.[128] Relying on information from Maldonado, a lawyer contacted the Cherokee Nation but misspelled Brown's name and gave the wrong date of birth.[129] Thus, the tribe responded that they could not verify membership based on the information given.[130]

Veronica was born on September 15, 2009.[131] When Maldonado went to the hospital to give birth, she requested to be placed on a status such that the hospital would report her as not admitted if anyone had tried to find out if she was there.[132] She had done this in her two previous births, "primarily to prevent the father from contacting her."[133] Maldonado testified that Brown did not contact her while she was in the hospital, nor in the months thereafter, though he knew her due date.[134] Brown testified that he asked friends and family if they had seen Maldonado because she would not respond to his text messages.[135] Brown's mother testified that she attempted to contact Maldonado a number of times before the birth of the baby, and left a voicemail offering money and gifts for the baby, but never heard from her.[136] Maldonado testified that none of Brown's family members contacted her about gifts for the baby.[137]

The day after Veronica's birth, Maldonado signed forms to relinquish her parental rights and consent to the adoption.[138] Eight days

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124. *Id.* at 553.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 554.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 554 n.7.
134. *Id.* at 554–55.
135. *Id.* at 555 n.9.
136. *Id.*
137. *Id.*
138. *Id.* at 554.

later, Veronica's prospective adoptive parents took her to their home in South Carolina.[139] Though they had filed for Veronica's adoption in South Carolina three days after her birth, the Capobiancos did not serve or otherwise notify Brown of the adoption until four months after the child's birth.[140] At that time, Brown was days away from deploying with the U.S. Army to Iraq.[141] He was served with legal papers, which stated that he was not contesting the adoption, and he initially signed them because he thought he was relinquishing his parental rights to Maldonado. When he realized they were adoption papers, Brown testified, "I then tried to grab the paper up. [The process server] told me that I could not grab that [sic] because . . . I would be going to jail if I was to do any harm to the paper."[142] After consulting with his parents and a Judge Advocate General ("JAG") lawyer, Brown hired his own attorney who requested a stay of the adoption proceedings under the Servicemember's Civil Relief Act.[143] Brown's lawyer also filed an action in Oklahoma to establish paternity, child custody, and support.[144] Four days later, Brown deployed to Iraq and did not return to the United States until nearly a year later.[145]

While Brown was out of the country, his father acted as power of attorney.[146] The South Carolina adoption case was amended to note Brown's Cherokee heritage and thus the applicability of the Indian Child Welfare Act ("ICWA").[147] The Cherokee Nation intervened in the adoption, as was their prerogative under ICWA.[148] Paternity testing also conclusively established Brown as Veronica's biological father.[149] Trial was set for September 2011.

After a four day trial, the trial court concluded that ICWA applied, that Brown had not voluntarily relinquished his parental rights or consented to the adoption, and that "[a]ppellants failed to prove by clear and convincing evidence that Father's parental rights should be terminated or that granting custody of Baby Girl to Father would likely

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139. *Id.* The eight-day wait was necessitated by the Interstate Compact on the Placement of Children ("ICPC"), which requires approval from the state before a child can be moved across state lines for purposes of adoption. The ICPC paperwork was filled out improperly, neglecting to list Veronica's Cherokee heritage. If it had been listed, the Cherokee Nation would have been contacted, and the Capobiancos would not have been given permission to remove Veronica from Oklahoma. *Id.* at 555 n.8.

140. *Id.* at 555.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* The South Carolina court noted that Dusten "served honorably in both Operation Iraqi Freedom and Operation New Dawn and received a Bronze Star for his service." *Id.* at 553 n.2.

146. *Id.* at 555.

147. *Id.*

148. *Id.*

149. *Id.* at 555–56.

result in serious emotional or physical damage to Baby Girl."[150] The trial court thus denied the adoption and ordered that Veronica be transferred to her father's custody. After some appellate wrangling, the Capobiancos handed over Veronica to Brown and his parents, who immediately took her home to Oklahoma. She was two years old at the time.[151] The South Carolina court ultimately upheld the trial court's grant of custody to Brown[152] and the case went to the U.S. Supreme Court.[153] The only question before the Court was the applicability of ICWA.

While this case was actually about the Indian Child Welfare Act, there is no doubt that the case is important with regard to birth fathers' rights more broadly. A close reading of the case reveals much about the current Court's attitudes about the rights of unwed fathers to parent their children.[154] The case illustrates that little has changed since its fatherhood cases thirty or more years ago.

The Court first notes, "[i]t is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law."[155] The Court then goes on to hold that ICWA was inapplicable in the case because it only applied to cases of "the *continued custody* of the child by the parent."[156] Since Brown never had legal or physical custody of Veronica, the Court held that ICWA was not applicable.[157] Further, the Court considered Brown's conduct as abandoning Veronica prior to birth.[158] The Court expressed concern that granting rights to birth fathers in Brown's situation would dissuade prospective adoptive couples from adopting, and thus "place vulnerable Indian children at a unique disadvantage in finding a permanent and loving home."[159]

Justice Breyer concurred, and raised issues about the majority's interpretation of the statute. He expressed concern for future fathers "who had next-to-no involvement with his child in the first few months of her life. That category of fathers may include some who would prove

150. *Id.* at 556.

151. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2554–57 (2013).

152. *Adoptive Couple*, 731 S.E.2d at 567.

153. *Adoptive Couple*, 133 S. Ct. at 2552.

154. The case was really about whether ICWA provided greater rights to this birth father than did the Constitution. After all, no statute can derogate constitutional rights. In holding that the father did not have a right to fatherhood under ICWA, the Supreme Court also implicitly ruled that the Constitution did not provide the birth father with protection of his rights, either.

155. *Id.* at 2559.

156. *Id.* at 2560.

157. *Id.* at 2562.

158. *Id.*

159. *Id.* at 2564. In her dissent, Justice Sonia Sotomayor notes that it was in fact Congress's intent in passing ICWA to stop "a trend of 'plac[ing] [Indian children] in non-Indian . . . adoptive homes" and chides the majority for seeking to undo Congressional intent. *Id.* at 2572 (Sotomayor, J., dissenting) (alterations in original).

highly unsuitable parents, some who would be suitable, and a range of others in between."[160] While he joined the majority's interpretation of ICWA, he concluded that there was "the risk that, from a policy perspective, the Court's interpretation could prove to exclude too many" fathers.[161]

Justices Scalia and Sotomayor dissented. Justice Scalia stated:

> The Court's opinion, it seems to me, needlessly demeans the rights of parenthood. It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is "in the best interest of the child." It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do. This father wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.[162]

Justice Scalia seemed prepared not just to rule differently under ICWA, but also to revisit the Court's previous jurisprudence on fathers' rights. Justice Sotomayor, joined by Justices Ginsburg, Kagan, and Scalia (in part), also appeared ready to do the same. Justice Sotomayor faults the majority for viewing "a family bond that does not take custodial form" as "not a family bond worth preserving."[163]

Justice Sotomayor reviewed the protections that ICWA provides parents, including the requirement that Brown's consent would have been valid only if written and executed before a judge and that Brown would have been permitted to revoke his consent up until the adoption became final.[164] Justice Sotomayor concludes, "[t]hese protections are consonant with the principle, recognized in our cases, that the biological bond between parent and child is meaningful."[165] While recognizing that prior authority required more than mere biology for an unwed father to have rights, Justice Sotomayor finds no difficulty in arguing that Brown was entitled to fatherhood, at least under ICWA.[166] She chides the majority for viewing the parent-child bond between Brown and Veronica "as insufficiently substantial to deserve protection" based on the "hotly contested facts of this case."[167]

Justice Sotomayor then reviews more generally the rights of unwed fathers, first noting that the majority seems to think that Brown was seeking "an undeserved windfall: in the majority's words, an 'ICWA

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160. *Id.* at 2571 (Breyer, J., concurring).

161. *Id.*

162. *Id.* at 2572 (Scalia, J., dissenting).

163. *Id.* (Sotomayor, J., dissenting).

164. *Id.* at 2574 (Sotomayor, J., dissenting). Of course, Dusten's consent was not executed before a judge. The closest thing to consent was sent to the birth mother via text. And, Dusten did withdraw any consent before the adoption was final.

165. *Id.* (Sotomayor, J., dissenting).

166. *Id.* (Sotomayor, J., dissenting).

167. *Id.* at 2576 (Sotomayor, J., dissenting).

trump card' he can 'play . . . at the eleventh hour to override the mother's decision and the child's best interests.'"[168] She notes with approval that in at least fifteen states, Brown would have been protected to the same extent that ICWA provides.[169] She concludes:

> Without doubt, laws protecting biological fathers' parental rights can lead—even outside the context of ICWA—to outcomes that are painful and distressing for both would-be adoptive families, who lose a much wanted child, and children who must make a difficult transition. On the other hand, these rules recognize that biological fathers have a valid interest in a relationship with their child. And children have a reciprocal interest in knowing their biological parents. These rules also reflect the understanding that the biological bond between a parent and child is a strong foundation on which a stable and caring relationship may be built.[170]

Justice Sotomayor also recommended rehabilitating Brown after the majority suggested that he was "responsible for the painful circumstances in this case, suggesting that he intervened 'at the eleventh hour.'"[171] Yet, she notes, Brown "took action to assert his parental rights when Baby Girl was four months old, as soon as he learned of the impending adoption."[172] Justice Sotomayor further notes that if the law had been followed initially, there would not have been the trauma of removing a twenty-seven-month-old child from her adoptive parents. She also addresses the common problem in contested adoptions, that there has been a tendency to reward the parent-in-possession, and strongly suggests that it should not: "[T]he law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'"[173]

Justice Sotomayor was the only justice who spoke directly to the impact of the Court's ruling on Baby Veronica:

> Baby Girl has now resided with her father for 18 months. However difficult it must have been for her to leave Adoptive Couple's home when she was just over 2 years old, it will be equally devastating now if, at the age of 3 ½ , she is again removed from her home and sent to live halfway across the country.[174]

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168. *Id.* at 2581 (Sotomayor, J., dissenting).

169. *Id.*

170. *Id.* at 2582 (Sotomayor, J., dissenting) (internal citations omitted).

171. *Id.* at 2585 (Sotomayor, J., dissenting). By "rehabilitation," Justice Sotomayor means efforts to reunify a family where a child might have been removed from the home because of abuse or neglect, a primary requirement of ICWA. *See* 25 U.S.C. § 1912(d). She points to numerous state programs that work for reunification of unwed fathers with children who were not previously in their custody. *Adoptive Couple*, 133 S. Ct. at 2780 n.10.

172. *Id.* (Sotomayor, J., dissenting).

173. *Id.* (Sotomayor, J., dissenting) (internal citations omitted).

174. *Id.* at 2586 (Sotomayor, J., dissenting).

The Baby Veronica case gives us a glimpse of the Supreme Court's current view of fatherhood. And it appears that little has changed since its earliest pronouncements in the series of fatherhood cases that began with *Stanley v. Illinois* in 1972. Despite profound changes in public perceptions of fatherhood—and men's expectations of fatherhood—the Court still holds as suspect unwed fathers who do not immediately assume the "responsible fatherhood" model it expects. These expectations of fatherhood undoubtedly inform the Supreme Court's views on the role of fathers in both abortion and adoption, as well as the actions of lower courts.

II. Fathers and Abortion Decisionmaking

Abortion is a highly contested issue in the United States and elsewhere in the world. In a previous article, I discussed some of the similarities and differences in decisionmaking with respect to abortion and adoption for minor women.[175] In that article, I identified aspects of a minor's decision that were given differential treatment, while also finding three similarities between minors' abortion and adoption-related decisions:

> The differential treatment of a minor's decision to have an abortion and a minor's decision to relinquish parental rights and consent to adoption is striking. Are the decisions so dissimilar as to justify this difference? Three reasons are commonly given for why minors should not be making the decision about abortion on their own: 1) health risks associated with all medical procedures, including abortion, 2) emotional fallout after abortion, and 3) the seriousness of the decision. The decision about relinquishment of parental rights and consent to adoption seem to share these characteristics with the abortion decision.[176]

For fathers, of course, there are no health risks comparable to the health risks of pregnancy, childbirth, and abortion for women. That is perhaps the most powerful difference that leads to differential treatment of fathers in the abortion decision. However, fathers are often affected by the seriousness of the decision and the emotional fallout after abortion.

A. Men and Abortion Decisionmaking

In one large study of college students, respondents strongly supported the statement, "[i]t is important for a female to inform her male partner about a pregnancy as soon as she realizes she is pregnant."[177] Respondents who had a pro-choice orientation were less likely to approve of male involvement in the abortion decision, especially those who saw it as strictly a

175. *See generally* Seymore, *supra* note 18 (describing minor girls' decisionmaking in the abortion and adoption processes).

176. *Id.* at 134.

177. Priscilla K. Coleman & Eileen S. Nelson, *Abortion Attitudes as Determinants of Perceptions Regarding Male Involvement in Abortion Decisions*, 47 J. Am. C. Health 164, 168 tbl.5 (1999).

female issue.[178] Even so, "[o]n average, pro-choice participants contended that men should have a fairly strong voice in abortion decisions."[179] In another study, "men generally thought they had a right to share in the decision of whether or not to continue or terminate a pregnancy."[180] Strong majorities of men felt they had a right to be informed of the decision and to an active role in the decision.[181] Most men in the study felt that "it was acceptable for the man to encourage his partner to carry to term if he was willing to assume sole responsibility for the child."[182] From this, the researchers concluded that men in the study were "more open to the idea of raising a child alone or are simply in favor of having the opportunity to exercise this choice if they desire."[183]

Studies show that the vast majority of women inform their male sexual partner about their intention to have an abortion.[184] A Swedish study of men whose partners were having abortions indicates that the decisionmaking about abortion precedes pregnancy: "[M]ore than half

178. *Id.* at 169; *see* Raymond Kyle Jones, *Male Involvement in the Abortion Decision and College Students' Attitudes on the Subject*, 43 SOC. SCI. J. 689, 690–91 (2006) (finding similar results to those found in the study conducted by Priscilla Coleman and Eileen Nelson).

179. Coleman & Nelson, *supra* note 177, at 170; *see* Jones, *supra* note 178, at 692 (finding similar levels of positive attitudes toward male involvement in the abortion decision). Of course, public opinion cannot change constitutional rights.

180. Eileen S. Nelson et al., *Attitudes Toward the Level of Men's Involvement in Abortion Decisions*, 35 J. HUMANISTIC EDUC. & DEV. 217, 222 (1997); *see also* Ella Sharp et al., *"Um . . . I'm Pregnant." Young Men's Attitudes Towards Their Role in Abortion Decision-Making*, 12 SEXUALITY RES. SOC. POL'Y 155, 157 (2015) (finding in an Australian study that young men "wanted more involvement in the [abortion] decision-making process . . . as the length of the relationship increased."). In one study of men whose partners had abortions, some had not informed them until after the fact. These men "each said that they would not have done anything to dissuade the woman from having an abortion, but they wished they could have been involved." Jennifer A. Reich & Claire D. Brindis, *Conceiving Risk and Responsibility: A Qualitative Examination of Men's Experiences of Unintended Pregnancy and Abortion*, 5 INT'L J. MEN'S HEALTH 133, 142 (2006).

181. Nelson et al., *supra* note 180, at 222.

182. *See id.*

183. *See id.*

184. Marcelle Christian Holmes, *Reconsidering a "Woman's Issue:" Psychotherapy and One Man's Postabortion Experiences*, 58 AM. J. PSYCHOTHERAPY 103, 103 (2004) (finding that eighty-six percent of women inform their partner of abortion before the fact); Nelson et al., *supra* note 180, at 222–23 ("The majority (88.8% of men and 80.5% of women) disagreed or strongly disagreed" with the proposition that abortion was strictly a women's issue, leading the researchers to conclude that "neither men nor women were willing to leave the abortion issue 'strictly' to women."); Elisabeth J. Woodhams et al., *Describing Abortion Attitudes Among Young, African American Men*, 94 CONTRACEPTION 134, 134 (2016) (noting that adolescent women report that their male partners are influential in making the abortion decision); Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 205–06 (1992) (finding that seventy-eight percent of young women seeking abortion involve their male partner in decisionmaking). But in one recent study, over half the women had already decided to have an abortion before informing their partner of the pregnancy. Dustin J. Costescu & John A. Lamont, *Understanding the Pregnancy Decision-Making Process Among Couples Seeking Induced Abortion*, 35 J. OBSTETRICS & GYNAECOLOGY CAN. 899 (2013); Reich & Brindis, *supra* note 180, at 144; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 888 (1992) ("The vast majority of women consult their husbands prior to deciding to terminate their pregnancy . . . .").

the men had talked with their partner before she became pregnant concerning what to do in the event of pregnancy, and more than 50% had decided to have an abortion if a pregnancy should occur . . . ."[185]

B. Men and Abortion Aftermath

Various studies have shown that some women experience psychosocial issues following abortion.[186] For most of these women, the effects are mild and temporary.[187] There have been far fewer studies of men's reactions post-abortion, and most seem to mirror results for women. In one study of men whose partners had an abortion a year earlier, the men expressed contradictory emotions about the abortion. The most commonly chosen words to express their feelings were responsibility, maturity, guilt, relief, powerlessness, and regret/doubt.[188] Some representative comments by male respondents included:

> "I wonder if it was right or not. Simultaneously, I feel it was the best thing to do, after all . . . I have had feelings of guilt when I think like that."
>
> "It is negative when one violates nature by having an abortion . . . it is not right . . . when I think of it I feel guilt – emptiness . . . killed something."
>
> "I have mourned that there was no child. Short moments I still feel that way. . . why?"[189]

But, the researchers note, "[e]xperiences of ambivalence did not imply that the respondents regretted the decision to have an abortion or regarded it as wrong."[190] The same respondents quoted above also said:

> "The decision to have an abortion was right . . . I have experienced that it is possible to take difficult decisions and survive. It is possible to heal and mourn . . . the crisis has strengthened me."
>
> "Abortion was probably the best solution . . . I have faced the seriousness of life, the first adversity . . . learnt something."
>
> "[N]othing I regret. We did the right thing. We are doing well together . . . do not know if the relationship would have survived a fulfilled pregnancy."[191]

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185. A. Kero et al., *The Male Partner Involved in Legal Abortion*, 14 Hum. Reprod. 2669, 2674 (1999).

186. Brenda Major & Catherine Cozzarelli, *Psychosocial Predictors of Adjustment to Abortion*, 48 J. Soc. Issues 121, 137–38 (1992); Nancy E. Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 Am. J. Orthopsychiatry. 446, 446 (1975); Wendy J. Quinton et al., *Adolescents and Adjustment to Abortion: Are Minors at Greater Risk?*, 7 Psychol. Pub. Pol'y & L. 491, 499 (2001) (finding little difference in reaction of minors and adults).

187. Zoë Bradshaw & Pauline Slade, *The Effects of Induced Abortion on Emotional Experiences and Relationships: A Critical Review of the Literature*, 23 Clinical Psychol. Rev. 929, 939 (2003) (finding, in review of multiple studies, little long-term emotional effect attributable to abortion).

188. A. Kero & A. Lalos, *Ambivalence – A Logical Response to Legal Abortion: A Prospective Study Among Women and Men*, 21 J. Psychosomatic Obstetrics & Gynecology 81, 87 (2000).

189. *Id.* at 86 tbl.3.

190. *Id.* at 84.

191. *Id.* at 86 tbl.3.

In a study analyzing men's narrative accounts of abortion, researchers discovered the unsurprising fact that different men experience abortion differently.[192] In an online pilot study, men expressed post-abortion feelings of grief, persistent thoughts about the baby, helplessness, relationship problems, anger, guilt, isolation, difficulty concentrating, anxiety, difficulty sleeping, sadness at times of the year relating to the abortion or potential birthday, confusion about the male role, sexual problems, disturbing dreams or nightmares, increased risk taking and alcohol or drug abuse.[193] In another study, there was a high rate (43.4%) of clinical diagnosis of Post-Traumatic Stress Disorder ("PTSD") among men whose partners had abortions.[194] Disagreement with their partner about the abortion decision was "associated with a 4,248% . . . increased risk of post-abortion-related anger,"[195] and predicted meeting the clinical criteria for a PTSD diagnosis.[196]

In a Swedish study, and one of the few studies to follow men from the pre-abortion decisionmaking to four and twelve months post-abortion, most participants said that they were satisfied with the abortion decision, expressing feelings of relief.[197] Half the men, however, expressed feelings of guilt four months post-abortion and a quarter expressed feelings of powerlessness about the abortion decision.[198] One man said, four months later, "I still think of the baby every day . . . ."[199] Twelve months after their partner's abortion, "none regretted that they had been in favor of the abortion" and "none reported any mental disturbances related to the abortion."[200] At the one-year mark, half the men said they never or almost never thought about the abortion.[201]

192. Reich & Brindis, *supra* note 180, at 135.

193. Catherine T. Coyle, *An Online Pilot Study to Investigate the Effects of Abortion on Men*, 19 RES. BULL. 1, 6 (2006).

194. Catherine T. Coyle et al., *Inadequate Preabortion Counseling and Decision Conflict as Predictors of Subsequent Relationship Difficulties and Psychological Stress in Men and Women*, 20 TRAUMATOLOGY 1, 5 tbl.1 (2010). The authors note that one limitation of the study is the self-selected sample, which limits generalizability. The high rate of PTSD suggested a traumatized sample—the rate of PTSD in men in this study of 43.4% is higher than the 31% among Vietnam veterans with high combat exposure. *Id.* at 9–10.

195. *Id.* at 6.

196. *Id.* at 8.

197. A. Kero & A Lalos, *Reactions and Reflections in Men, 4 and 12 Months Post-Abortion*, 25 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 135, 138 (2004).

198. *Id.*

199. *Id.* at 139.

200. *Id.*

201. *Id.*

C. Men's Legal Rights in Abortion

When the Supreme Court decided *Roe v. Wade*,[202] it explicitly recognized a mother's right to privacy in deciding to terminate her pregnancy. The Court refused, however, to address "the father's rights, if any exist in the constitutional context, in the abortion decision."[203] *Roe* followed in 1973, the year after the Court recognized Peter Stanley's constitutional interest in being a father in the *Stanley* decision.[204] That case did not appear to answer for the Court the question of fathers' rights in abortion. State courts addressed the issue in a variety of cases brought by fathers seeking to enjoin a woman's abortion. For example, in *Doe v. Doe*, an estranged husband sought to enjoin his estranged wife's abortion.[205] He asserted a constitutional right to determine that his child not be aborted. The Massachusetts Supreme Court stated that while there were various rights guaranteed to marital relationships by the Constitution, those rights "involved a shield for the private citizen against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens."[206] The court also rejected the argument that there were statutory or common law rights that the father could assert to prevent the abortion.[207]

In *Jones v. Smith*, an unwed father—or, in the court's terms, "a potential putative father"—sought to enjoin the abortion of his pregnant girlfriend.[208] He presented a multitude of arguments, including arguing that the woman had waived her right to privacy to make the abortion decision by consenting to sex with him;[209] that her desire to terminate the

202. Roe v. Wade, 410 U.S. 113 (1973). *But see* Brenda Major et al., *Psychological Responses of Women After First-Trimester Abortion*, 57 Archive Gen. Psychiatry 777, 777 (2000) ("Most women do not experience psychological problems or regret their abortion 2 years postabortion, but some do. Those who do tend to be women with a prior history of depression."); *see generally* D. G. Foster et al., *A Comparison of Depression and Anxiety Symptom Trajectories Between Women Who Had an Abortion and Women Denied One*, 45 Psychol. Med. 2073 (2015) (noting little difference in mental health outcomes for the two cohorts).

203. *Roe*, 410 U.S. at 165 n.67.

204. Stanley v. Illinois, 405 U.S. 645, 649 (1972). The Court had also previously found that a father had a constitutional right to procreate, where the State of Oklahoma forced sterilization of habitual criminals. Skinner v. Oklahoma, 316 U.S. 535, 543 (1942).

205. Doe v. Doe, 314 N.E.2d 128, 129 (Mass. 1974).

206. *Id.* at 130.

207. *Id.* at 130–32. Two justices wrote separate dissenting opinions. Justice Hennessey stated that a father's rights are "as old as civilization itself" and "are surely among the fundamental rights protected by the Constitution." *Id.* at 134 (Hennesey, J., dissenting). Justice Reardon contended that the father's interests were natural rights, and that the wife's interests were temporary since her "association with and responsibility for the child could have ended at birth." *Id.* at 138 (Reardon, J., dissenting). Against that temporary impediment for the mother, Justice Reardon weighed the fact that the father "will never experience the satisfaction, the comfort, the affection, or the sense of fulfillment" of the birth and growth of his child. *Id.* at 139 (Reardon, J., dissenting).

208. Jones v. Smith, 278 So. 2d 339 (Fla. Dist. Ct. App. 1973).

209. *Id.* at 342.

pregnancy was proof of parental unfitness and tantamount to abandonment of the child, which would grant a putative father custodial rights;[210] and that an implied contract arose upon the woman's consensual sex with him, with his offer to support the child providing consideration for the contract.[211] The court rejected all of the arguments, holding that the woman's right to privacy trumped any interest of the putative father: "[A]ny interest that a natural father may have, whether married or unmarried, would certainly be subservient to the health of the pregnant woman and the potentiality of human life."[212]

The Supreme Court finally addressed the question of fathers' rights in abortion in *Planned Parenthood v. Danforth* in 1976.[213] In *Danforth*, the Court reviewed a Missouri statute that required "the prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless 'the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.'"[214] The Court noted "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying,"[215] but nonetheless held that a husband could not veto a wife's abortion decision: "Notwithstanding these factors, we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right."[216]

Some fathers still sought injunctions to prevent abortions even after the decision in *Danforth*.[217] In *Rothenberger v. Doe*,[218] for example, an unwed father asserted that the abortion in question would interfere with his right to procreate.[219] The court held, however, that a woman's right to privacy to make the decision to abort the fetus was "not conditioned upon consent of the husband or natural father."[220] The court found

210. *Id.* at 343.

211. *Id.*

212. *Id.* at 341. As to the rights of an unwed father, the court went on to say: "This court is familiar with and has examined the various treatises and cases dealing with the expanding rights of unwed fathers; we are, however, unable to conclude that such expansion is sufficiently broad so as to embrace any right to prevent termination of pregnancy." *Id.* at 344.

213. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

214. *Id.* at 67–68.

215. *Id.* at 69.

216. *Id.* at 70.

217. *See, e.g.*, Conn v. Conn, 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd*, 526 N.E.2d 958 (Ind. 1988), *cert. denied*, 488 U.S. 955 (1988); Doe v. Smith, 527 N.E.2d 177, 177 (Ind. 1988); Steinhoff v. Steinhoff, 531 N.Y.S.2d 78 (N.Y. Sup. Ct. 1988); Coleman v. Coleman, 471 A.2d 1115 (Md. Ct. Spec. App. 1984), *cert. denied*, 469 A.2d 1274 (1984); Rothenberger v. Doe, 374 A.2d 57, 58 (N.J. Super. Ct. Ch. Div. 1977).

218. *Rothenberger*, 374 A.2d at 57.

219. *Id.* at 58.

220. *Id.*

Danforth controlling, even though there was no statute barring the abortion absent consent, since "any compulsion by a state court to require consent of a natural father would constitute unauthorized and unconstitutional state interference."[221] The court also expressed serious concerns with enforcement of an order enjoining an abortion, even if the law mandated that the father should prevail:

> Assuming, *arguendo*, that the law were not settled against the contentions advanced by plaintiff—and I find that it is—the court would be faced with a serious problem of enforcement. Counsel for plaintiff has argued that the sole remedy it seeks in this action is an injunction against the planned abortion. The only possible way that the court could enforce such an injunction would be to confine. . . . The court sees no possible way, from a practical viewpoint, of enforcing such an injunction . . . .[222]

Fathers did not succeed in private attempts to enjoin abortions after the Court's ruling in *Danforth*.[223] But after the Supreme Court's emphatic rejection of claims that the husband/father should have a veto in the abortion decision, litigation turned to the constitutionality of statutes requiring spousal notification rather than spousal consent. For example, in *Poe v. Gerstein*, the challenge was to a Florida spousal notification law justified as necessary to protect the father's interest in the fetus which the mother seeks to abort."[224] In *Poe*, the Fifth Circuit found that the father's interests were quite limited at common law: "The husband's interest in the fetus with which his wife is pregnant is exceedingly difficult to evaluate. The common law recognized no rights of the father in the fetus, and neither the criminal law nor tort law has been particularly concerned with protecting the father's interest in the fetus."[225]

But, the court noted, there had been changes since that time, including the Supreme Court's recognition in *Stanley* of the rights of some unwed fathers.[226] The court concluded: "However, the limited, yet expanding, recognition of paternal interests in the children which a father has sired by no means disposes of this case."[227] The court noted that *Stanley* spoke of a father's interest in children, and since a "fetus is not a person, neither is it a 'child.'"[228]

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221. *Id.* at 59.

222. *Id.*

223. *See, e.g.*, Conn v. Conn, 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd*, 526 N.E.2d 958 (Ind. 1988), *cert. denied*, 488 U.S. 955 (1988); Doe v. Smith, 527 N.E.2d 177, 177 (Ind. 1988); Steinhoff v. Steinhoff, 531 N.Y.S.2d 78 (N.Y. Sup. Ct. 1988); Coleman v. Coleman, 471 A.2d 1115 (Md. Ct. Spec. App. 1984), *cert. denied*, 469 A.2d 1274 (1984); *Rothenberger*, 374 A.2d at 58.

224. Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975).

225. *Id.* at 795 (internal footnotes omitted).

226. *Id.* at 795–96.

227. *Id.* at 796.

228. *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973), for the proposition that a fetus is not a person) (internal citation omitted).

Later, in *Planned Parenthood v. Casey*, the Supreme Court addressed the constitutionality of spousal notice statutes, declaring unconstitutional a Pennsylvania statute that required a married woman to affirm that she had notified her husband of her intended abortion before the abortion would be performed.[229] Although the Pennsylvania statute did not give a husband an absolute veto, as did the Missouri statute in *Danforth*, the Court still found a spousal notification requirement unconstitutional.[230]

The Court noted its line of fatherhood cases,[231] but was careful to limit their reach to a father's interest in children that "he has fathered *and raised*."[232] The Court was unwilling to extend equal treatment to fathers and mothers before there was "a living child raised by both."[233] The Court observed that:

> It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's. The effect of state regulation on a woman's protected liberty is doubly deserving of scrutiny in such a case, as the State has touched not only upon the private sphere of the family, but upon the very bodily integrity of the pregnant woman. The Court has held that "when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[234]

Casey essentially ended the spate of cases by fathers to stop abortions by asserting a constitutional right to fatherhood. Courts had uniformly concluded that whatever right the father might have, it was clearly trumped by the "far greater impact" of pregnancy on the mother than on the father.[235] That conclusion seems inescapable in fact. Pregnancy affects women's health, bodily integrity, and life choices in ways that do not affect men. Once the child is born, however, one could argue that the calculus changes in significant ways. When the question is about adoption placement, rather than abortion, can the father be fairly excluded?

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229. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 900 (1992).
230. *Id.* at 900–01.
231. *Id.* at 895.
232. *Id.* (emphasis added).
233. *Id.* at 895–96.
234. *Id.* at 896 (internal citation omitted).
235. *Id.* at 838.

III. Fathers and Adoption

Birth fathers are frequently ignored in law, by adoption authorities, and by researchers.[236] The little attention paid to birth fathers in law seems to rest on assumptions that they are innately disinterested in their children. As one writer puts it, "[p]erhaps commonly held knowledge assumes that they wanted nothing to do with either their pregnant partners or their infants . . . ."[237] But as is often the case, commonly held knowledge may not actually reflect the truth.

A. Attitudes Toward Birth Fathers

Attitudes toward birth fathers from other members of the adoption triad, and from the general public, are often negative. In one study, adoptive parents, birth mothers, and adoptees overwhelmingly viewed birth fathers as "exploitative and irresponsible."[238] In another study of community attitudes toward birth fathers, respondents saw birth fathers as choosing adoption as a way to avoid responsibility,[239] while viewing the birth mother's choice as a selfless act.[240] Men in the study, however, were more likely to see birth fathers as having little choice in the adoption decision. One respondent replied, "[t]hey don't have any rights if they're not married to the mother."[241] Study participants were also more likely to view the mother-child bond as natural and instinctual, while seeing the father-child bond as one that was learned, not instinctual.[242] Perhaps for this reason, respondents "expressed concern about the birth father's ability to parent alone."[243]

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236. Gary Clapton, Birth Fathers and Their Adoption Experiences 29 (2003) ("[S]tudies of birth fathers and their experiences are virtually non-existent."); Celia Witney, *Original Fathers: An Exploration into the Experiences of Birth Fathers Involved in Adoption in the Mid-20th Century*, 28 Adoption & Fostering 52, 52 (2004) (Birth fathers "are not included in adoption research."); Eva Y. Deykin et al., *Fathers of Adopted Children: A Study of the Impact of Child Surrender on Birthfathers*, 58 Am. J. Orthopsychiatry 240, 240 (1988) ("The fathers of children relinquished for adoption have been almost invisible and, until recently, largely ignored."); Miall & March, *supra* note 9, at 535; Gary Clapton, *Birth Fathers, the Adoption Process and Fatherhood*, 21 Adoption & Fostering 29, 29 (1997) (noting the many studies of birth mothers showing that adoption is a "lifelong process" for birth mothers, but that "the responses and overall experiences of such men [birth fathers] are not nearly as well charted as those of birth mothers.").

237. Witney, *supra* note 236, at 52.

238. Paul Sachdev, *Achieving Openness in Adoption: Some Critical Issues in Policy Formulation*, 61 Am. J. Orthopsychiatry 241, 247 (1991).

239. Miall & March, *supra* note 9, at 535. The study described some typical responses: "They just don't want to deal with the responsibility [laugh];" "To get out of the financing [laughter]." *Id.* at 540. Others described the birth father's reaction as merely "run[ning] away." *Id.* at 540–41; *see also* Brodzinsky, *supra* note 14, at 315 (speculating that the vast majority of birth fathers are "continuing in the centuries-old tradition of abdication of responsibility.").

240. Miall & March, *supra* note 9, at 540.

241. *Id.* at 541.

242. *Id.* at 539.

243. *Id.* at 540.

So while some studies show that the general public is skeptical about birth fathers' commitment to their children, and believe they are eager to place their children for adoption to avoid the responsibilities of parenting, other studies suggest that "a birth father's apparent lack of interest in the adoption process might mask his true need for stronger social and institutional support than is presently provided."[244] Because "birth fathers may take a less confrontational or interventionist approach once the birth mother has made a placement decision," adoption professionals may assume, incorrectly, that he is not interested in the child.[245] Social workers and other adoption professionals encourage fathers to relinquish parental rights, often based on typical gendered perceptions that fathers are not nurturing or innately capable of parenting.[246] Birth fathers in one study reported that social workers and other professionals involved in the adoption were, in the words of one:

> [B]iased and biased and biased, she (the social worker) was in favour of the adoption. No matter what you asked her it was always "in the long term he will go to a good home. He will be brought up by good parents". [sic] What right did she have saying that? I am a good parent.[247]

There have been few studies to counteract these gendered assumptions of birth fathers held by adoption professionals,[248] but those few studies of birth fathers who have lost a child to adoption show that disinterest in fatherhood was not the reason for adoption placement or for the failure to assert parental rights.[249]

B. Birth Fathers' Attitudes Toward Adoption

For many birth fathers, "external pressures from family, doctors, lawyers, or adoption agencies" was the reason given for placing a child for adoption.[250] For others, unpreparedness for fatherhood and/or a feeling that adoption was in the best interest of the child were the reasons given.[251] It is interesting that unpreparedness for fatherhood is such a strong reason given for adoption placement or lack of involvement, since it is such a

244. *Id.* at 543.

245. *Id.*

246. *Id.* at 535; Deykin et al., *supra* note 236, at 241 (noting that negative attitudes toward birth fathers held by some adoption agency workers "contribute to exclude the birthfather from the adoption process"). A member of the adoption panel for a large British adoption agency notes: "Social workers, then, as now, were often overworked and their prior concern was to find accommodation and care for the young women who found themselves unmarried and pregnant. They had little time to consider the child's original father." Witney, *supra* note 236, at 52.

247. Clapton, *supra* note 236, at 114.

248. Witney, *supra* note 236, at 52.

249. Deykin et al., *supra* note 236, at 243.

250. *Id.* at 242; Clapton, *supra* note 236, at 90.

251. Deykin et al., *supra* note 236, at 242.

familiar feeling in first-time fathers.[252] One study of fathers generally—not solely birth fathers—identified four factors men presented as important to their readiness to parent:

> 1) whether or not the man intended to become a father at some point in his life; 2) the man's appraisal of the stability of the couple [sic] relationship; 3) the presence or absence of relative financial security; and, 4) a sense of having completed the childless period of his life.[253]

This is certainly echoed in the words of one study participant who explained why young men might be more likely to place a child for adoption:

> I think that has a lot to do with age. . . . Men . . . I think . . . in their early years, the level of maturity is just [laughs] . . . not so much thinking about being a father. But, thinking about "I don't want to be in a family kind of thing" . . . when you're young.[254]

In studies of birth fathers after adoption, birth fathers described the adoption as producing deep and long-lasting feelings, saying that the adoption "'looms large' in their lives many years later."[255] The findings of one study contradicted the common conception of birth fathers as disinterested and irresponsible:

> The notion of feckless young men who abandon both mother and baby is far from confirmed, even at this early point in their experiences [learning of the pregnancy and the birth of the baby]. Three defining features emerge: first, that the time of pregnancy and birth was an extraordinary and impactful life event. Second, that most of the group were involved in events that left them with a substantial sense of loss, and third, that there is evidence of a constellation of feelings and behaviours that indicate the development of a sense of fatherhood.[256]

In particular, men who developed a sense of fatherhood during the pregnancy experienced emotional distress after the adoption.[257] For some, they reported that as long as five years post-adoption they still experienced significant distress.[258] The fathers exhibited grief reactions to the adoption similar to that experienced with a loved one's death.[259] "Death and bereavement were used as yardsticks with which to measure their feelings regarding having given up a child for adoption."[260] One

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252. Katharyn A. May, *Factors Contributing to First-Time Fathers' Readiness for Fatherhood: An Exploratory Study*, 31 FAM. REL. 353, 354 (1982).

253. *Id.* at 356.

254. Miall & March, *supra* note 9, at 541.

255. CLAPTON, *supra* note 236, at 67.

256. *Id.* at 83.

257. *Id.* at 111. The study found that "in the group of men that felt pain and distress after the adoption, there were more who felt like fathers than in the group for whom there were no such negative after-effects." *Id.*

258. *Id.* at 111–12.

259. *Id.* at 116.

260. *Id.*

birth father described his loss of a child to adoption as worse than his own father's death:

> That hurt. But you know that's something that's dead, it's gone. I think it's worse when it's something that's gone but you know is alive, and hopefully well somewhere. I think that's harder to cope with than someone who has a bereavement or loses a baby. That's sad, but that's something that goes away, you live with it, you cope with it. You don't walk down the street and turn round a corner and see a young girl and think "I wonder", [sic] "could be". [sic][261]

Thus, studies suggest that adoption placement is a time of high emotion for birth fathers, contradicting the common notion that birth fathers are indifferent about their children and the adoption. As one birth father put it, "[t]he adoption rubbed me out legally but not emotionally."[262]

Even years after the adoption placement, birth fathers still reported "the regular presence of the child in their thoughts."[263] Birthdays and contact with children of the same age as the placed child were often triggers for these thoughts.[264] Feelings about the adoption itself were usually described as powerlessness, anger, and grief, while feelings about the child included curiosity, parenthood, worry, responsibility, love, loss, guilt, regret, and connectedness.[265] Most of the men in that study reported hope for contact with the child placed for adoption in the future.[266] Ten of thirty-one of those men were in contact already, while sixteen were awaiting contact and five were actively seeking contact.[267] The reasons given for desiring contact included curiosity about how the child turned out; concern or worry about the child, including anxiety that the child might feel abandoned; desire for something that approximated a father-child relationship; and a hope to make amends for the adoption placement as a way to alleviate guilt.[268]

Excluding birth fathers from the adoption process, not surprisingly, negatively influenced their attitudes toward the adoption. "Birthfathers who either openly or tacitly approved of adoption were predominately those who were permitted to participate in the proceedings, whereas those who opposed adoption were mainly those who had been excluded."[269] Fathers excluded from the adoption process report their negative feelings regarding the adoption to be long-lasting. As one birth father put it: "I have never quite recovered from this experience. My

261. *Id.* at 117.
262. *Id.* at 122.
263. *Id.* at 127.
264. *Id.* at 128.
265. *Id.* at 129–30.
266. *Id.* at 155.
267. *Id.* at 156–58.
268. *Id.* at 159.
269. Deykin et al., *supra* note 236, at 243; CLAPTON, *supra* note 236, at 92–93; Sachdev, *supra* note 238.

father was upset and we never resolved it before he died. I feel guilty, selfish, sad, lost, confused, and upset whenever I think of her [the child]."[270] In one study, rather than expressing disinterest in the child, ninety-six percent of the birth fathers reported that they had considered searching for their adopted child and sixty-seven percent had actually searched.[271] A majority of birth fathers (seventy-two percent) in one study expressed current negative feelings about placing their child for adoption, with those who felt pressured to place a child for adoption five times as likely to still be harboring negative feelings.[272]

C. Legal Rights of Birth Fathers

Many, though not all, of the Supreme Court decisions about the rights of unwed fathers involved adoption.[273] The clear holding of those cases is that a biological father must grasp his opportunity to be a legal father, and if he fails to do so he will not be able to assert any legal rights if the mother decides to place the child for adoption.[274] As lower courts have interpreted these cases, a father cannot veto the mother's adoption placement even if his failure to grasp his opportunity to be a parent was because he did not know she was pregnant.[275] A father who fails to grasp his opportunity to parent because the mother told him she had an abortion cannot block the adoption.[276] A father's failure to grasp his opportunity will not be excused because he was actually told that he was not the father.[277] In a recent case, a trial court held that the father had failed to demonstrate a commitment to the child, not forgiven by the fact that the mother had told him that the child had died shortly after birth (a decision ultimately reversed by the Alabama Supreme Court).[278] As these cases demonstrate, it can be difficult for a father who is unmarried

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270. Deykin et al., *supra* note 236, at 243.

271. *Id.* at 244.

272. *Id.* at 246.

273. *See supra* cases cited at note 217.

274. *See supra* cases cited at note 217.

275. *In re* Baby Girl "U," 638 N.Y.S.2d 253 (N.Y. App. Div. 1996) (finding father not entitled to veto adoption even though mother fraudulently concealed child's birth); Robert O. v. Russell K., 604 N.E.2d 99, 100–01, 103 (N.Y. 1992) (concluding that the father failed to timely grasp his opportunity to be a parent, even though he did not know his fiancé gave birth to his child until ten months after the adoption and immediately took legal steps after he discovered she had given the child up).

276. *In re* Adoption of A.A.T., 196 P.3d 1180, 1180 (Kan. 2008) (finding that the father failed to act though he had doubts of the truthfulness of the mother when she claimed she had an abortion).

277. *In re* A.S.B., 688 N.E.2d 1215, 1218–19, 1222–23 (Ill. App. Ct. 1997) (finding the putative father did not grasp his opportunity interest, since he did nothing to demonstrate interest in the child). The father, however, explained that his failure was because the mother and her relatives told him he was not the father, and that another named individual was the father. *Id.* Yet the court ruled that his failure to express interest in the child was not excused by his belief that the child was not his. *Id.*

278. *Ex parte* J.W.B. and J.J.B., No. 1150075, 2016 WL 3568870, at *1–6, 8 (Ala. 2016).

to the mother to block an adoption despite how hard he may have tried to grasp his opportunity to be a father.

1. Actions During Pregnancy

Fathers can fail to acquire parental rights based solely on conduct during the pregnancy—or because of their lack of conduct during the pregnancy. By failing to be sufficiently supportive during pregnancy, both financially and emotionally, courts will conclude that the birth father has failed to grasp his opportunity to be a legal father.[279]

In a Florida case, the court considered whether a child could be adopted without her father's consent based on the father's lack of emotional support for the mother during pregnancy.[280] The mother described the father as having very little reaction when she told him she was pregnant, and that he was an "ice cube" when he accompanied her to one prenatal visit.[281] He said, in contrast, that he was "overjoyed about becoming a father."[282] The mother testified that the father had a drinking problem, called her names, and verbally abused her, and that he once grabbed her, shook her, and spit at her for using his razor.[283] He "even resumed a sexual relationship with a former girlfriend while the birth mother was pregnant."[284] When she moved out of the house they shared she did receive telephone calls from the father, but believed that they were made to annoy her.[285]

While the majority found ample evidence based on this record that the father abandoned the child prior to birth, the dissenting judge decried a ruling that relied on prebirth conduct of the father:

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279. *See, e.g.*, *In re* Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995) (ruling that the father's failure to provide financial and emotional support to the mother during pregnancy was grounds to ignore the father's objection to placement of the child for adoption).

280. *Id.* at 965.

281. *Id.* at 964.

282. *Id.* at 965. The court also found little financial support for the mother during pregnancy. The mother testified that she received little financial support from the father, while he testified that he earned $300 to $400 per week and paid for food and shelter for both the mother and her child from a previous relationship. The mother also received food stamps and Aid to Dependent Children, and the trial court characterized the family's financial arrangements not as jointly pooling resources, but as the father "living off of her food stamps and demanding her Aid to Dependent Children check to supplement his earnings." *Id.* at 964–65.

283. *Id.* at 964.

284. *Id.* at 965.

285. *Id.* at 969.

> I am entirely unwilling to say that purely prenatal conduct ever can demonstrate abandonment *with respect to the child* absent clear and convincing proof that the biological father either (a) unequivocally, by word or deed, indicated a complete and unconditional prenatal abandonment of the child upon which others have reasonably relied, or (b) recklessly or intentionally engaged in conduct that posed a significant risk of detriment to the fetus above and beyond what may be attributable to simple lack of socioeconomic resources. In the absence of such evidence I believe the father must be given a postnatal chance to exercise his opportunity interest . . . .[286]

Requiring that fathers be extremely engaged during pregnancy in order to avoid losing parental rights seems to ignore typical fathers' reactions to pregnancy. Fathers in general report feeling excluded from pregnancy: "Of their experiences of the pregnancy, many men spoke of their lack of knowledge about the process, their feelings of isolation, their inability to engage in the reality of the pregnancy and their sense of redundancy."[287]

One study described participants' general feelings about their partners' pregnancies as "on the inside looking in" and "present but not participating."[288] Participants expressed feelings of "relative distance between themselves and their child," because they lacked the physical connection to the child that the mother experienced during pregnancy.[289] In another study, men expressed "frustrations at not being able to directly feel what their partners were feeling," leading to a feeling of being in limbo while transitioning into fatherhood.[290] Men described feeling like "interlopers," "on the outskirts," and "surplus" to the pregnancy.[291] One study divided fathers-to-be reactions to pregnancy into three phases, and it was only in the last phase that a man was "likely to begin to regard himself as a father."[292] In another, men did not feel like fathers until after the baby was born and brought home, where homecoming "marked men's transition to the status of fatherhood."[293]

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286. *Id.* at 977.

287. Jan Draper, *Men's Passage to Fatherhood: An Analysis of the Contemporary Relevance of Transition Theory*, 10 NURSING INQUIRY 66, 70 (2003); *see* ROSEMARY MANDER, MEN AND MATERNITY 7 (2004) ("The involvement of the man in childbirth has long and extensively been taboo."); Omar Kowlessar et al., *The Pregnant Male: A Metasynthesis of First-Time Fathers' Experiences of Pregnancy*, 33 J. REPROD. & INFANT PSYCHOL. 106, 118 (2015) ("Despite knowing their partner was pregnant, the majority of men felt distant and separate from the pregnancy experience, as the pregnancy was grounded in their partner's body[.]").

288. Jonathan Ives, *Men, Maternity and Moral Residue: Negotiating the Moral Demands of the Transition to First Time Fatherhood*, 36 SOC. HEALTH & ILLNESS 1003, 1008 (2014).

289. *Id.*

290. Draper, *supra* note 287, at 70.

291. Ives, *supra* note 288, at 1009; Kowlessar et al., *supra* note 287.

292. MANDER, *supra* note 287, at 71 (citing Katharyn Antle May, *Three Phases of Father Involvement in Pregnancy*, 31 NURSING RES. 337 (1982)).

293. Draper, *supra* note 287, at 72.

A meta-analysis of thirteen studies revealed that men overwhelmingly expressed worry and conflicting emotions upon learning of the pregnancy.[294] They felt distant from the pregnancy, at least until they could see physical changes in their partner in the second trimester:

> Expectant fathers started to accept the pregnancy as real because they started to *see* evidence of the pregnancy in their partner's body, which was catalysed by them seeing and feeling the movements of their unborn baby. Consequently, they were able to relate to their unborn baby and pregnancy experience in a different way, and started to develop an emotional attachment to their unborn baby. This superordinate theme marked a significant transitional shift for men, where they moved from feeling emotionally distant to feeling involved and a part of the pregnancy process. This theme marked the end of the moratorium phase, as men became more psychologically involved in the pregnancy.[295]

One might expect, then, the opposite to be true when the partner was absent. If the father could not experience those physical changes, it might be more difficult to become involved in the pregnancy. A father who feels distant from the pregnancy, and thus does not present himself as sufficiently emotionally involved in the pregnancy runs the risk of losing parental rights.[296]

Adoption law does not allow mothers to relinquish parental rights prior to the birth of the child.[297] After all, "no parental rights can be terminated for a child that does not exist."[298] The law recognizes that the baby may not seem real to the mother until after the child is born, and that the mother should be given some opportunity after the child is born to decide whether she really wants to place the child for adoption.[299] Yet fathers can lose a child to adoption based solely on prebirth conduct.

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294. Kowlessar et al., *supra* note 287, at 115.

295. *Id.* at 119.

296. *See, e.g.*, *In re* Adoption of Baby E.A.W., 658 So. 2d 961 (Fla. 1995).

297. UNIF. ADOPTION ACT § 2-404(a) (1994) ("A parent whose consent to the adoption of a minor is required by Section 2-401 may execute a consent or a relinquishment only after the minor is born."). The Comment to this section of the Uniform Adoption Act notes:

> This section is consistent with the rule in every State that a birth parent's consent or relinquishment is not valid or final until some time after a child is born. Many States provide that a valid consent may not be executed until at least 12, 24, 48, or, more typically, 72 hours after the child is born.

Id. See CYNTHIA HAWKINS DEBOSE, MASTERING ADOPTION LAW AND POLICY 44 (Russell Weaver ed., 2015); JOAN HEIFETZ HOLLINGER, 1–2 ADOPTION LAW AND PRACTICE § 2.11 (2015); David M. Smolin, *Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children*, 43 PEPP. L. REV. 265, 267 (2016). Cases where an adoption consent prior to birth is considered void include: *In re* Adoption of N.J.G., 891 N.E.2d 60 (Ind. Ct. App. 2008) (mother's prebirth consent void); People *ex rel.* Anonymous v. Anonymous, 530 N.Y.S.2d 613 (N.Y. App. Div. 1988) (holding mother's prebirth consent void even though signed before a judge); Doe v. Clark, 457 S.E.2d 336 (S.C. 1995) (holding void prebirth consent that was given five days before the baby's birth).

298. Polina M. Dostalik, *Embryo "Adoption"? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y. L. SCH. L. REV. 867, 885 (2010).

299. HOLLINGER, *supra* note 297.

Prebirth attitudes of all fathers—being conflicted about the pregnancy, feeling disconnected from the fetus, not feeling like a father—seems likely to lead to the prebirth conduct that strips fathers of their parental rights. If prebirth consent to adoption is not valid for mothers, it should not be valid for fathers, either.

2. *Putative Father Registries*

In *Lehr*, the Supreme Court recognized that it can be difficult for a father to grasp his opportunity to be a parent without the cooperation of the mother of the child.[300] The classic way for a father to become a legal parent—marrying the mother—cannot be accomplished without the mother's cooperation.[301] She controls access to the child and can effectively cut out the father from involvement with the pregnancy or the child.[302] Thus, the Court expressed satisfaction with New York's putative fathers' registry—a mechanism by which a father can express interest in parenting that is not within the control of the mother:[303]

> After this Court's decision in *Stanley*, the New York Legislature appointed a special commission to recommend legislation that would accommodate both the interests of biological fathers in their children and the children's interest in prompt and certain adoption procedures. The commission recommended, and the legislature enacted, a statutory adoption scheme that automatically provides notice to seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children. If this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica. The possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself.[304]

Putative father registries, which exist in some thirty-five states, allow men to file forms asserting a parental interest in a child.[305] In those states, an adoption cannot be completed unless there is a certification that the putative father registry has been searched and that no match can be

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300. *See supra* notes 43–60 (discussing the facts underlying *Caban v. Mohammed*, 441 U.S. 380 (1979)).

301. *See supra* notes 44–61; *see also* Rebeca Aizpuru, *Protecting the Unwed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 715 (1999) (noting that both marriage and placing the man's name on the birth certificate provide "some degree of legal protection" of his parental rights, but that both require the mother's cooperation).

302. *See supra* notes 44–61.

303. DEBOSE, *supra* note 297, at 50.

304. Lehr v. Robertson, 463 U.S. 248, 263–64 (1983).

305. DEBOSE, *supra* note 297, at 50.

made.[306] If there is a match, then the putative father is entitled to notice of the adoption proceeding.[307]

Putative father registries are often presented as "helpful tools in balancing the interests of all the parties involved in an adoption."[308] There are, however, a number of serious problems with putative father registries. First, they assume that fathers are aware of the existence or birth of the child and are aware of the existence of the putative father registry.[309] Second, since there is no national putative father registry, confusion can exist as to where to file when the birth mother leaves the state where the birth father might be expected to file.[310] Third, a successful filing only grants the birth father the right to notice of any adoption proceeding but does not endow him with parental rights. His ability to challenge the adoption will still require a showing that granting him parental rights is in the child's best interest.[311]

Paternity registries may give men as little as five days after the birth of the child to file.[312] "Courts tend to strictly construe these time limitations."[313] If a man does not know that the mother is pregnant or does not know that the child was born, the tight timelines of the registry can be difficult. Some states make exceptions where there is active concealment of the pregnancy or birth,[314] but many state: "[A] lack of knowledge of the pregnancy or birth is not an acceptable reason for failure to register."[315] These provisions make clear that even filing in the paternity registry relies to a considerable extent on the cooperation of the mother. The putative fathers' registry is not quite as independent of the mother as the *Lehr* Court suggests.

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306. *Id.*; Laurence C. Nolan, *Preventing Fatherlessness Through Adoption While Protecting the Parental Rights of Unwed Fathers: How Effective are Paternity Registries?*, 4 WHITTIER J. CHILD & FAM. ADVOC. 289, 309 (2005).

307. Aizpuru, *supra* note 301, at 715; Nolan, *supra* note 306, at 317.

308. Aizpuru, *supra* note 301, at 726.

309. *Id.*

310. *Id.* at 727.

311. *Id.* at 720.

312. NEB. REV. STAT. § 43-104.02 (2016) (filing must be made "at any time during the pregnancy and no later than five business days after the birth of the child . . . ."). Nebraska has the shortest timeline for filing, with a thirty day deadline most usual. Aizpuru, *supra* note 301, at 716.

313. Aizpuru, *supra* note 301, at 717.

314. *Id.* at 724 (citing Robert O. v. Russell K., 604 N.E.2d 99 (N.Y. 1992)). In *Robert O.*, the New York court created an exception for cases of fraud, deception, or concealment, but found that it did not apply to the father who did not know of the child's existence because the mother did nothing to conceal the pregnancy or her whereabouts. *Robert O.*, 604 N.E.2d at 100.

315. 750 ILCS 50/12.1(g) (2016). Florida takes the position that a man, "by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding regarding that child may occur . . . ." FLA. STAT. ANN. § 63.088(1) (2016). Thus, the father is presumed to know that he needs to file with the registry. Timothy L. Arcaro, *No More Secret Adoptions: Providing Unwed Biological Fathers with Actual Notice of the Florida Putative Father Registry*, 37 CAP. U. L. REV. 449, 453 (2008).

It is fair to say that most men are unaware of paternity registries, despite state presumptions to the contrary. As one commentator put it:

> The notion that an unwed male should intuitively know that when he engages in sexual intercourse with an unmarried woman he must also contact the state and report this private conduct to preserve a claim to his offspring holds no place in the history and traditions of American jurisprudence. The legislative presumption that unwed fathers are presumed to know of their obligation to register is not only inconsistent with deeply imbedded notions of privacy, but also unrealistic.[316]

To compound the problem, few states provide resources to publicize the existence of paternity registries.[317]

> Paternity registries have not been widely publicized thus far. As long as this remains the case, only those men who have the resources to stay abreast of legal technicalities will be protected by the registry system. Because many unwed fathers do not have access to legal resources, and because a paternity registry should minimize the effects of socioeconomic class on one's ability to make a parental claim, this must change.[318]

Even if a putative father knows that he is obligated to file in the registry, it can be difficult to determine where to file. Since there is no federal family law, it is perhaps not surprising that there is no national putative father registry.[319] Instead, there is a patchwork of registries in the various states that enact them, leaving fathers vulnerable to filing in the wrong state:

> The reality of our mobile society is that a father may register in the state where he thinks an adoption is likely to occur, and then may discover that the adoption is occurring or has occurred in another state. He has not registered in the adopting state. It may now be too late to register in the adopting state.[320]

A Utah case illustrates this problem: John Wyatt and Emily Colleen Fahland had a relationship that led to the birth of a child in Virginia.[321] John and Emily discussed raising the child together, but Emily, with the help of her parents, decided to place their child for adoption with an agency based in Utah. She made false statements to John, at the urging of the adoption attorney, so that he would not try to prevent the

316. Arcaro, *supra* note 315, at 465.

317. Aizpuru, *supra* note 301, at 727. Each year in my Adoption Law class, I ask students if they are aware of the existence of the putative father registry, and only one or two students will raise their hands. I frequently receive calls from lawyers asking for advice in their representation of a birth father and I will ask first if he has filed in the putative father registry, and the frequent answer from the lawyer is, "What's that?" When even lawyers are unaware of the putative father registry, it is fair to say that laymen cannot be expected to be aware of the process needed to protect their parental rights.

318. Aizpuru, *supra* note 301, at 727. Only three states—Georgia, Missouri, and Oklahoma—have statutorily authorized publicity for their putative father registries. *Id.* at 727–28. Arcaro, *supra* note 315, at 450 (adding Florida to the list of states that statutorily authorize publicity).

319. DEBOSE, *supra* note 297, at 50.

320. Nolan, *supra* note 306, at 318.

321. *In re* Adoption of Baby E.Z., 266 P.3d 702, 704–05 (Utah 2011).

adoption or protect his rights.[322] The baby was born two weeks early, and Emily concealed the fact that she was in labor when she spoke to John on the phone.[323] He was not informed of the birth.[324] Once the baby was born, the prospective adoptive parents, who lived in Utah, traveled to Virginia to take custody of the child and then traveled back to Utah.[325] John, not knowing of the adoption plans, filed custody and visitation proceedings in Virginia and later also filed in the Virginia putative father registry.[326] The prospective adoptive parents filed a petition for adoption in Utah.[327] Although the Virginia court granted John custody of Baby E.Z., the Utah courts held that he had not strictly complied with the Utah adoption statutes and thus could not block the adoption.[328] A national putative father registry might have prevented the confusion in this—and countless other—cases.[329] The current state-by-state registries, however, leave birth fathers vulnerable to losing parental rights when the birth mother moves.[330]

Finally, even if a birth father has managed to file in the putative father registry in the right place within the timeline prescribed, the registry provides only limited protection. He receives notice of the adoption, but filing does not secure his parental rights.[331] He has a right to be heard, but does not have the right to be considered a legal father. Legal fathers are, except where unfit, entitled to custody of their children over all strangers.[332] A putative father who files in the registry is only entitled to a hearing on whether it is in the best interest of the child to be adopted rather than to have him as its father.[333] While mothers are presumptively fit and need not prove best interests to retain custody of

322. Wyatt v. McDermott, 725 S.E.2d 555, 557 (Va. 2012) (certifying a question to the Virginia Supreme Court from the federal district court where John Wyatt filed actions against the adoption attorney and adoption agency for tortious interference with parental relationship).

323. *Id.*

324. *Id.*

325. *In re Adoption of Baby E.Z.*, 266 P.3d at 705.

326. *Id.*

327. *Id.*

328. *Id.*

329. There have been several attempts to pass a national putative father registry. *See, e.g.*, Protecting Rights of Unknowing Dads and Fostering Access to Help Encourage Responsibility (Proud Father) Act of 2006, S. 3803, 109th Cong. (2006); The Protecting Adoption and Promoting Responsible Fatherhood Act of 2009, S. 939, 111th Cong. (2009); Protecting Adoption and Promoting Responsible Fatherhood Act of 2013, H.R. 2439, 113th Cong. (2013). None have passed. *See* DEBOSE, *supra* note 297, at 50–51; Mary Beck, *A National Putative Father Registry*, 36 CAP. U. L. REV. 295 (2007) (providing background on the attempts to enact a federal registry for putative fathers).

330. Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L.Q. 153, 177 (2006) ("Interstate cases, in general, can complicate the efforts of an unmarried father to assert or protect an interest in his child.").

331. Aizpuru, *supra* note 301, at 720.

332. Troxel v. Granville, 530 U.S. 57 (2000).

333. Aizpuru, *supra* note 301, at 720.

their children, the disparate treatment of fathers is justified by their differential relationship to the child as a result of the mother's pregnancy.[334] Once the child is born, however, there is no longer a differential between the mother and the child in that respect.

3. *Thwarted Fathers and Tortious Interference with Parental Relations*

Fathers can have difficulty in grasping their opportunity to parent because they did not know of the pregnancy or that they were the father of the child—excuses courts usually fail to credit.[335] Or, they may not be able to grasp their opportunity to parent because of the deliberate actions of others.

a. Fraud

In some states, even deliberate fraud gives no relief:

> In Florida, the legislature has expressly stated that it has found no practical way to remove all risk of fraud or misrepresentation in adoption proceedings, and that in balancing the rights and interests of the state, the child, the adoptive parents, and the unwed biological father, it becomes apparent that the unwed father is in the best position to prevent or ameliorate the effects of fraud. Therefore, in Florida, the burden of fraud should be borne by an unwed father who fails to comply with available statutory methods for preserving his rights.[336]

In the Kansas case *In re Adoption of A.A.T.*, the mother lied to the father, telling him that she had an abortion.[337] She also lied to her family, telling them the baby had died at birth, and she lied to the adoption agency, telling them she did not know the father's surname or address.[338] She lied to the adoption court by filing an affidavit that falsely stated the father's surname and saying he knew about and acquiesced in the adoption.[339] The Kansas Supreme Court noted:

> There is no disagreement with the findings that N.T. [mother] lied to M.P. [father] and took extraordinary measures to prevent him from knowing about the birth of his child. Nor is it disputed that N.T. falsified her affidavit and gave false information to the court regarding the identity of the putative father.[340]

But the court also accepted the trial court's finding that "M.P. 'should have known and did suspect [N.T.] was still pregnant with his child and she gave birth to his child' and that he took no action to protect his

334. *Id.* at 721.
335. Deykin, *supra* note 236, at 242–43.
336. HOLLINGER, *supra* note 297, § 2.04A[8](a).
337. *In re* Adoption of A.A.T., 196 P.3d 1180, 1184 (Kan. 2008).
338. *Id.*
339. *Id.* at 1185.
340. *Id.* at 1188.

parental rights."[341] So, the court rejected the father's argument that he had sufficiently grasped his opportunity to be a parent under the constitutional framework that the U.S. Supreme Court created in the previously discussed series of cases starting with *Lehr*.[342] Further, it rejected the father's argument that another standard should apply "when the natural mother is an active agent in preventing actual notice to the natural father."[343]

A Utah father had slightly more luck alleging fraud by the birth mother as a reason to excuse his failure to grasp his opportunity to be a legal parent.[344] The parents had a relationship and the child was conceived in Colorado. The father consistently told the mother that he was opposed to any adoption and would raise the child himself if necessary, and, in fact, refused to sign papers when contacted by a Colorado adoption agency.[345] The mother told the father that she was going to Utah for a short visit with her sick father, but that she would be back in Colorado shortly and would then sit down with him to talk about his opposition to an adoption.[346] The trial court found that she intended all along to give birth in Utah and place the child for adoption there, and had deliberately misled the father about her intentions.[347] The father filed a paternity action in Colorado, and expressed concern that the mother might try to place the child for adoption out of state. The mother filed an answer to that paternity action, denying any intention of placing the child out of state.[348] Nonetheless, two days after arriving in Utah, the mother's brother and sister-in-law signed a petition for adoption of the child and the mother began exploring hospital and midwife options in Utah. The baby was born in Utah six weeks premature.[349]

Four days after the baby's birth, the mother called the Colorado court where she was expected to appear for a hearing on the father's paternity action and said she could not be there because she was out of town caring for a sick relative.[350] She did not inform the Colorado court of the baby's birth or that she was appearing that day before a court in Utah to give her consent to adoption of the child by her brother and sister-in-law.[351] She also failed to inform the Utah court of the action in Colorado. The Colorado court issued a judgment recognizing the father's

341. *Id.*
342. *Id.* at 1203.
343. *Id.* at 1196.
344. *In re* Adoption of Baby B., 270 P.3d 486 (Utah 2012).
345. *Id.* at 489.
346. *Id.*
347. *Id.*
348. *Id.* at 490.
349. *Id.*
350. *Id.*
351. *Id.*

paternity and the next day, the father filed in the Utah court to dismiss the adoption petition.[352] After a two day bench trial where the mother "testified of her multiple efforts to keep [father] in the dark regarding her plans to give birth to the baby and give her up for adoption [to her brother and sister-in-law] in Utah," the trial court concluded that the court should not accept the mother's consent to the adoption.[353] However, the court also concluded that the father had failed to take steps in Utah to grasp his opportunity to parent in accordance with Utah statutes and that his failure to do so was not excused because he was aware of the possibility that the mother might place the child in Utah.[354]

On appeal, the Utah Supreme Court sided with the father.[355] The court first noted that "the child's mother is under no obligation to share information regarding her intent" with regard to adoption and that a mother's "fraudulent representation is not a defense to strict compliance with the requirements of" Utah law.[356] Though he may have been suspicious of the mother's intentions to place the child for adoption in Utah, the court concluded that "there is no basis in the record for a finding that [father] knew or reasonably could have known" of the mother's intention to move to Utah to have the baby and place it for adoption.[357] There was no evidence that the father knew, as is shown by the fact that he filed his paternity action in Colorado and called Colorado hospitals to try to find the baby when he learned the mother was no longer pregnant.[358] And, the court concluded, he could not have reasonably known since the mother took deliberate steps to deceive him.[359]

Fraud that will vitiate the adoption is often a hard sell for judges, who will often blame the mother but exonerate the adoption agency, adoption lawyers, and adoptive parents from the fraud and thus let the adoption stand. Some fathers have succeeded, however, in suing

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352. *Id.* at 491.
353. *Id.*
354. *Id.* at 493.
355. *Id.* at 508.
356. *Id.* at 501–02.
357. *Id.* at 503.
358. *See id.*
359. *Id.* at 491. The court remanded for further proceedings to determine if the father appropriately grasped his opportunity to be a parent. *Id.* at 508. Six years after he began legal proceedings, the father still had not gained full custody of his daughter. Faith Mangan & Alicia Acuna, *Father Fighting Utah Adoption Law to Get Custody of His Daughter*, FOX NEWS U.S. (Apr. 15, 2014), http://www.foxnews.com/us/2014/04/15/families-fight-utah-adoption-law.html. The father also filed a class action suit as part of a class of "at least three hundred" other unmarried biological fathers and their minor children, claiming that the Utah statutory scheme "created such a complex process for unwed fathers to preserve their interest in their children that it violates both the father's and the children's rights." Manzanares v. Reyes, 2015 U.S. Dist. LEXIS 136437, at *2 (D. Utah Sept. 14, 2015). In litigation in Colorado, a court of appeals issued an unpublished opinion that allowed the prospective adoptive parents to continue their suit to maintain custody of the child rather than give the child to her father. *In re* K.A.B., No. 14CA0692, 2015 WL 4943985 (Colo. App. Aug. 20, 2015).

adoption professionals as well as adoptive parents and the birth mother, for tortious interference with parental rights.

b. Tortious Interference

Fathers have had some success, not in blocking an adoption, but in receiving money damages when deceitful actors prevent them from securing their parental rights. In *Kessel v. Leavitt*,[360] the father sued the adoption attorney, the birth mother, and her parents and brother (who happened to be an attorney), alleging fraud in placing his child for adoption, civil conspiracy to deprive him of his rights, and tortious interference with his parental rights.[361] The jury ruled in his favor, awarding two million dollars in compensatory damages and $5.85 million in punitive damages.[362] The Supreme Court of West Virginia upheld the judgment, saying, "we cannot condone the actions of the defendants in this case who, by their conduct, wrongfully interfered with John's ability to establish and assert his parental rights."[363] The court further recognized a cause of action for tortious interference with the father's parental rights, a "cause of action novel to the jurisprudence of this State."[364]

The case is a particularly egregious one, with the birth mother actively evading the birth father. She moved from state to state in an apparent attempt to prevent the birth father from finding her.[365] In California, she contacted a lawyer who assured her the adoption could be accomplished without contacting the father.[366] She ultimately placed the child in Canada in order to make it even more difficult for the birth father to assert his rights.[367] The birth mother—an adult—was helped in her avoidance of the father by her parents and her brother, an attorney, who knew that the father had filed a paternity action in their home state.[368] The California attorney even conspired with the brother attorney to stall the birth father in discovering that the child was in Canada so that the Canada courts would affirm the adoption.[369] The brother attorney also prevented his parents from appearing at a deposition in the birth father's case, landing them in contempt of court.[370]

360. Kessel v. Leavitt, 511 S.E.2d 720, 734 (W. Va. 1998).

361. *Id.* The court dismissed the cause of action against the birth mother because her equal custody rights meant that she could not tortiously interfere with the father's rights. *Id.* at 766.

362. *Id.* at 734.

363. *Id.* at 756.

364. *Id.* at 754.

365. *Id.* at 735.

366. *Id.*

367. *Id.* at 736.

368. *Id.*

369. *Id.* at 738; *see id.* at 738 n.13.

370. *Id.* at 737.

John Wyatt brought suit in federal court against the adoption attorneys and adoption agency that facilitated the adoption of his child without his knowledge.[371] He asserted a variety of claims, including claims for assault, battery, and kidnapping; denial of civil rights under 42 U.S.C. § 1983; and a declaratory judgment under the Parental Kidnapping Prevention Act.[372] All these claims were dismissed on the defendants' motion.[373] However, the district court allowed to stand other claims for conspiracy, fraud, and constructive fraud.[374] The federal court certified to the Virginia Supreme Court the question of whether Virginia recognized a cause of action for tortious interference with parental relationships.[375] In this case of first impression, the Virginia court recognized the common law tort "cause of action against third parties who seek to interfere with" a "parent's right to form a relationship with his or her child."[376] Citing *Kessel*,[377] the court set forth the following elements for tortious interference with parental rights:

> (1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's consent, or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference.[378]

The court recognized that available damages included "both tangible and intangible damages, including compensatory damages for the expenses incurred in seeking the recovery of the child, lost services, lost companionship, and mental anguish."[379] The court further noted that punitive damages would also be available under this tort.[380]

There is one significant limitation with respect to an action for tortious interference—it is not a mechanism to seek return of a wrongfully adopted child. The Virginia court put it as follows: "We acknowledge that the most direct and proper remedy, the return of the child and restoration of the parent-child relationship, may never be achieved through a tort

371. *See supra* notes 294–301. For an explanation of the facts underlying Wyatt's adoption dispute that led to the filing of this federal case, see the previous discussion in Part III.C.2.

372. Wyatt v. McDermott, 725 S.E.2d 555, 557 n.1 (2012).

373. *Id.*

374. *Id.*

375. *Id.* at 558.

376. *Id.* at 692.

377. Kessel v. Leavitt, 511 S.E.2d 720, 720 (W. Va. 1998).

378. *Wyatt*, 725 S.E.2d at 562.

379. *Id.* at 563.

380. *Id.*

action."[381] Further, in discussing available damages, the court noted, "[e]quitable remedies such as injunctions or custody orders may not be awarded under this cause of action."[382] Bringing a tort action for interference with parental rights will not achieve a birth father's aim of stopping an adoption, but such actions, especially against adoption agencies, might lead to a change in behavior that better protects fathers' rights. Thus, to borrow a phrase from Marianne Wesson, birth fathers should bring lawsuits everywhere.[383]

CONCLUSION

Margaret Mead, well-known anthropologist, viewed fathers as a social invention.[384] Our social invention of fatherhood is a contradictory one, both reviling and deifying fathers. The law is equally contradictory; for example:

> As a constitutional matter, when the state seeks to impose parental obligations on such a man, such as support, proof of biology alone suffices. On the other hand, when a putative father seeks to protect his personal interests in his child, he only enjoys constitutional protection if he can meet a "biology 'plus'" standard, which requires him to step forward and grasp the opportunity to develop a relationship with his child.[385]

A mother can terminate her pregnancy even against the wishes of the father,[386] but the father will be obligated to pay child support if she continues the pregnancy against his wishes.[387]

With regard to men and abortion, there are compelling reasons to treat men's role in abortion decisionmaking as extremely limited. Men and women are not similarly situated when it comes to pregnancy.[388] While men are generally included in the abortion decisions women make,[389] there can only be one final decisionmaker, and since women are more directly affected by pregnancy and childbirth the decision properly rests with her. This is not to say men's interests are insubstantial. Studies show that men are often deeply affected when their potential for

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381. *Id.* at 559.

382. *Id.* at 563.

383. Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, 60 U. CHI. L. REV. 845, 845 (1993).

384. MEAD, *supra* note 1.

385. Oren, *supra* note 330, at 153–54.

386. *See supra* notes 175–216 (discussing the role of birth fathers in abortion decisions).

387. Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to the Unborn Child*, 7 J.L. & POL'Y 1, 5 (1998). In this provocative article, the author argues that the father should be able to "terminate" his support obligations by offering to pay for the abortion. *Id.* at 41.

388. *See supra* notes 149–150, 210.

389. *See supra* note 158 and accompanying discussion.

fatherhood is terminated by abortion.[390] Still, on balance, the only way to resolve a conflict between a man and a woman about whether to have an abortion is to vest the woman with the sole decisionmaking authority.

Once the baby is born, however, there are less compelling arguments to exclude the father and vest sole decisionmaking authority in the mother. Some argue that the experience of pregnancy—even after the pregnancy is concluded by birth—still gives the mother greater authority because of her previous intimate connection to the child. As Justice Burger puts it, "the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child" than the bonds between father and child.[391] This view of biology negates the genetic connection between father and child and is used, oddly enough, to justify placing the child with a biological stranger in adoption.

Fathers' rights in adoption are often framed, not as one between the mother and father, but as balancing permanency through adoption for children versus a father's interest in parenting.[392] In striking the balance, however, courts give short shrift to the father's interest in parenting. Courts seem to view fathers as generally disinterested in fatherhood, with Justice Burger voicing the prevailing view that unwed pregnancies are the result of "the male's often casual encounter," and "unwed fathers rarely burden either the mother or the child with their attentions or loyalties."[393] Justice Burger was speaking in 1972, but the Court has not modernized their view of fatherhood since that time, as evidenced by the recent ruling in *Adoptive Couple v. Baby Girl*.[394] There, the Court held suspect unwed fathers who do not immediately grasp the opportunity to parent even in the face of a biological mother who is deliberately deceptive.[395] The remedy the Court has recognized for fathers excluded by the mother—the putative father registry—offers little protection.[396]

When fathers' rights are not addressed early—and preferably prior to birth—the time of adoption is haunted by the specter of litigation, increased expense, and delay.[397] More troubling, it may lead to disruption later in the child's life when custody is transferred over to the biological father who is a virtual stranger.[398] If not addressed early, the father who has done everything right might still lose out because a court is reluctant

390. *See supra* notes 188–201 and accompanying text (discussing the post-abortion reactions of birth fathers).

391. Stanley v. Illinois, 405 U.S. 645, 665 (1972) (Burger, C.J., dissenting).

392. HOLLINGER, *supra* note 297.

393. *Stanley*, 405 U.S. at 665–66 (Burger, C.J., dissenting).

394. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2565 (2013).

395. *See generally id.*

396. *See supra* notes 300–334 and accompanying text (discussing the nature of putative father registries).

397. Brandt, *supra* note 9, at 196.

398. See *supra* discussion of the Baby Veronica case at notes 110–174 and accompanying text.

to remove a child from the only family it has ever known.[399] There are a number of reforms needed to prevent these negative outcomes.

First, there should be a national putative father registry. However, that is not an adequate solution unless there are resources to publicize the existence of the registry.[400] While a national registry avoids some of the interstate adoption problems,[401] it needs to do more than the current state registries. For example, registering should grant more than notice rights. A father who grasps his opportunity to parent by registering should have the full legal rights of a legal parent, meaning that he would be entitled to custody over strangers seeking to adopt.[402]

Second, all potential fathers should be entitled to actual notice of the adoption. As Justice Sotomayor noted in the Baby Veronica case, fifteen states at the time ICWA was passed and a number of states today require actual notice to potential fathers of an adoption petition and that they have the right to seek custody.[403] The number of states that require actual notice has declined over the years, which goes hand-in-hand with the tendency to reduce the ability of birth mothers to change their minds and withdraw consent. As Professor Elizabeth Samuels has noted, there is a recent tendency to streamline adoption to satisfy the needs of adoptive parents who want permanency as quickly as possible.[404] The Texas statutes are instructive of this pattern—prior to 2008, personal service of the alleged father was required, but the statute now reads:

> The termination of the rights of an alleged father under Subsection (b)(2) or (3) rendered on or after January 1, 2008, does not require personal service of citation or citation by publication on the alleged father, and there is no requirement to identify or locate an alleged father who has not registered with the paternity registry under Chapter 160.[405]

Thus, a jurisdiction that once required actual notice is now satisfied in terminating a parent's parental rights without service of process. Actual notice allows early litigation of whether the father is in fact interested in parenting, thus avoiding later litigation when a father learns belatedly about the child and wishes to assert his rights.[406] Of course,

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399. See *In re* K.A.B., No. 14CA0692, 2015 WL 4943985 (Colo. App. Aug. 20, 2015), reversing for further proceedings. The Colorado trial court held that the prospective adoptive parents, who had colluded with the birth mother to deceive the father, were the child's "psychological parents" entitled to continued custody. *In re* K.A.B., No. 14CA0692, at 10 (Colo. App. Aug. 20, 2015) (not-for-publication extended opinion on file with Author).

400. *See supra* notes 288–289 and accompanying text.

401. *See supra* notes 319–330 and accompanying text (discussing the problems related to interstate adoption caused by the current system of putative father registries).

402. *See supra* notes 305–307 and accompanying text.

403. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2575 (2013).

404. Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 541 (2005).

405. TEX. FAM. CODE ANN. § 161.002(c-1) (2015).

406. Brandt, *supra* note 9, at 196–97.

actual notice is not alone sufficient to protect fathers' rights to parent. Courts need to consider as realistic that a man might desire to parent his child and that he is capable of doing so. Fathers should receive the same presumption of parental fitness that mothers possess, and thus should not need to justify in court that it is in the child's best interest to have them as a parent.[407]

Third, fathers should not be excluded from parenthood based solely on action—or inaction—during pregnancy.[408] Fathers commonly express feeling disengaged with the child during pregnancy, and yet become excellent fathers upon the birth of the child, when the child finally becomes real for them. Mothers cannot relinquish parental rights in a child before the child is born, and fathers should not be shut out of parenthood before the point of birth, either. Some might argue that this proposal is unworkable for newborn adoption in particular, because prospective adoptive parents gain custody before the father has any time to develop a relationship with his child. That immediate custody is not inevitable, of course. And even if prospective adoptive parents take immediate custody, it is still possible for the law to insist that "the father must be given a postnatal chance to exercise his opportunity interest."[409] It is also possible for adoptive parents to be informed that the placement with them is contingent on the father's post-birth opportunity to exercise his rights. While these proposals might be contrary to the current trend toward immediate permanency, they are in accord with prior adoption law that provided both birth parents with more time to ensure that the adoption decision was voluntary.[410] Dealing with the birth father's rights early in the placement with the prospective adoptive parents is in the child's best interest since it is more likely to avoid later disruption of the adoptive placement.

Finally, jurisdictions should recognize causes of action for fraud and tortious interference with parental rights brought against adoption professionals.[411] While the availability of causes of action for fraud and tortious interference can allow birth fathers to disrupt adoptions, they can also incentivize better behavior from adoption agencies and actors who only get paid if a child is placed with an adoptive family. Bringing lawsuits will increase the cost of doing business in a way that cuts off the rights of birth fathers who wish to parent their children.

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407. *See supra* notes 306–308 and accompanying discussion.

408. *See supra* notes 279–299 and accompanying discussion (discussing the exclusion of fathers based on action or inaction during pregnancy).

409. *In re* Adoption of Baby E.A.W., 658 So. 2d 961, 977 (Fla. 1995). *See supra* notes 254–259 and accompanying discussion.

410. Samuels, *supra* note 404, at 545.

411. *See supra* notes 335–382 and accompanying text (discussing the current state of the law with respect to fraud and tortious interference with a birth father's rights).

Courts need to recognize changing attitudes toward fathers and by fathers. The assumption that fathers are not generally interested in and committed to their children has been refuted by data, and should not be used as a basis to exclude fathers from adoption.[412]

412. *See supra* notes 96–109 (discussing the common notion that birth fathers are disinterested in their children as well as the existing data indicating otherwise).

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