1-1-2000

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Original Citation
Jeffrey A. Parness, Abortions of the Parental Prerogatives of Unwed Natural Fathers: Deterring Lost Paternity, 53 Okla. L. Rev. 345 (2000).

OKLAHOMA LAW REVIEW

VOLUME 53 FALL, 2000 NUMBER 3

ABORTIONS OF THE PARENTAL PREROGATIVES OF UNWED NATURAL FATHERS: DETERRING LOST PATERNITY

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I. Introduction

A "natural father's biological relationship with his child"[1] is often insufficient by itself to trigger the father's parental rights recognized within the "substantial protection" of the Due Process Clause of the Fourteenth Amendment[2] or within comparable protections afforded by other federal or state laws.[3] Rather, there is often required "an actual relationship"[4] involving the assumption of parental responsibility, at least where there is no legal presumption of paternity or a certain affirmative act by an alleged natural father.[5] Determinations of actual relationships are frequently necessary and quite difficult where the natural father is not married to the natural mother.[6] Typically, an "actual relationship" arises for an unwed natural father[7] where he "demonstrates a full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child,"[8] meaning at a minimum that he "accepts some measure of responsibility for the child's future."[9] Yet at times, even an actual relationship may be insufficient to trigger parental rights for an unwed natural father, as where the natural mother is married to another man.[10]

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1. Lehr v. Robertson, 463 U.S. 248, 258 (1983).

2. *See id.* at 261.

3. While protections afforded certain federal due process parental rights (fundamental) are minimally required of all state governments, more significant protections can be accorded under state constitutional, statutory, regulatory, or common law or under federal statutory, regulatory, or common law (nonfundamental). Such supplementary state laws can trigger federal constitutional procedural due process protections, prompting federal court inquiry (as per 42 U.S.C. § 1983) that can present difficult interpretive issues. *See, e.g.*, Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409 (1999) (discussing abstention when state constitutional rights are urged in federal courts).

4. *Lehr*, 463 U.S. at 260 (sufficient for federal constitutional due process protection).

5. Consider, e.g., state law paternal rights arising from the placement of the name of an alleged natural father on a putative father registry or birth certificate. *See generally, e.g.*, Rebeca Aizpuru, *Protecting the Unwed Father's Opportunity to Parent: A Survey of Paternity Registration Statutes*, 18 REV. LITIG. 703 (1999) (reviewing and criticizing existing laws).

6. *See Lehr*, 463 U.S. at 260 n.16 (suggesting that a natural father's "marriage with the mother" validates the "father's paternal claims"). Even here, at times actual relationships become important as where the presumptions involving marriage can be rebutted solely through DNA evidence, but where custody and visitation determinations can favor de facto (or equitable) fathers if the best interests of the children are served.

7. Herein, unwed natural father or natural father will be used to refer to a natural father who is not married to the natural mother, though he may be married to another and though the natural mother may be married to another. The parameters of natural motherhood and of marriage under law are not herein addressed. Nor are the parental prerogatives afforded to natural mothers or to men married to natural mothers when they conceive, carry, or bear children. In addition, the parameters of any legal rights afforded children involving parental associations or responsibilities are not addressed.

8. *Lehr*, 463 U.S. at 261 (noting sufficient for federal constitutional due process protection) (citing Caban v. Mohammed, 441 U.S. 380, 392 (1979)).

9. *Id.* at 262 (sufficient for federal constitutional due process protection).

10. Thus, a natural father who actually comes forward and participates in the rearing of his child born into an extant marriage may not enjoy a presumption of parental responsibility. *See* Michael H. v. Gerald D., 491 U.S. 110, 133-36 (1989) (Stevens, J., concurring) (suggesting that a state court finding

By contrast, federal and state law protections of parental rights generally are accorded automatically to unwed natural mothers who conceive, carry, and bear.[11] The U.S. Supreme Court has justified the differing treatment of an unwed natural father and an unwed natural mother, in part, because for the mother the "parental relationship is clear."[12] The continuing vitality of this justification in some settings, however, is questionable as new technologies make early determinations about natural fatherhood inexpensive and accurate.[13]

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on a child's best interests could negate any federal constitutional protection that an unwed natural father may have in a familial relationship with the child who was conceived within and born into an extant marital union that wishes to embrace the child). Or, in the alternative, this same father will not receive federal substantive due process parental prerogatives. *See id.* at 126-27 (Scalia, J., plurality opinion) (no "parental prerogatives" for an unwed natural father who did come forward where the child was conceived within and born into an extant marital union that wishes to embrace the child because traditionally states have not awarded substantial parental rights to such men); *see also, e.g.*, Dawn D. v. Superior Court, 952 P.2d 1139, 1144-45 (Cal. 1998) (alleged unwed natural father had no federal constitutional liberty interest in forming parental relationship with child born into an existing marital unit); Strauser v. Stahr, 726 A.2d 1052, 1055-56 (Pa. 1999) (state law presumption favoring husband is irrebuttable where marriage is intact and married couple objects to challenge by alleged unwed natural father).

Further, an unwed natural father whose sperm was used during artificial insemination may not receive parental prerogatives though there has developed an actual parent-child relationship. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 40/3(b) (West 1999) ("The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife shall be treated in law as if he were not the natural father of a child thereby conceived."). *But see* McIntyre v. Crouch, 780 P.2d 239, 244 (Or. Ct. App. 1989) (unwed semen donor has federal constitutional parental interests where mother agreed to his fatherhood rights in order to secure his donation).

11. Given new human reproduction technologies, interesting issues have arisen as to which other mothers should receive protections of parental rights under law. *See generally, e.g.*, R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998) (reviewing state surrogacy laws).

12. *Lehr*, 463 U.S. at 260 n.16 (quoting *Caban*, 441 U.S. at 397 ("The mother carried and bears the child, and in this sense her parental relationship is clear.") (Stewart J., dissenting)); *see also* Miller v. Albright, 523 U.S. 420 (1998), wherein Justice Stevens said:

> There is no doubt that ensuring reliable proof of a biological relationship between the potential citizen and its citizen parent is an important governmental objective. Nor can it be denied that the male and female parents are differently situated in this respect. The blood relationship to the birth mother is immediately obvious and is typically established by hospital records and birth certificates; the relationship to the unmarried father may often be undisclosed and unrecorded in any contemporary public record. Thus, the requirement that the father make a timely written acknowledgment under oath, or that the child obtain a court adjudication of paternity, produces the rough equivalent of the documentation that is already available to evidence the blood relationship between the mother and the child.

Id. at 436 (joined by Rehnquist, C.J.) (citation omitted).

13. *See, e.g.*, Miller v. Christopher, 96 F.3d 1467, 1472 (D.C. Cir. 1996) ("[r]ecent developments in DNA technology may have removed many of the difficulties that once plagued the proof of paternity"), *affirmed in Miller*, 523 U.S. at 423, 445, 452 (three separate opinions, each commanding two Justices).

There are other settings wherein differing legal treatments of unwed mothers and fathers appear troublesome. In Arkansas the high court recently enforced a statute providing that an illegitimate child shall be in the custody of the natural mother unless there is a court order and that a natural father can only obtain custody, even where the natural mother has left, if he shows fitness, an assumption of parental responsibilities, and the child's best interests. *See* Freshour v. West, 971 S.W.2d 263, 265 (Ark.

As well, courts generally accord federal and state law protections of parental rights automatically to certain men, including some who are not natural fathers. Natural fathers who were married to the natural mothers at the time of conception, pregnancy, and birth usually receive parental rights.[14] Comparable parental rights for men who have not established actual relationships with their children or have not taken certain affirmative acts also arise automatically for men who are not natural fathers, as long as they were married to the natural mothers at some relevant time prior to or at the time of birth. Unlike married natural fathers, however, these men may only be accorded presumptive parental rights, with the presumption being rebuttable.[15]

Thus, under federal substantive due process an unwed natural father may have "an opportunity that no other male possesses to develop a relationship with his offspring."[16] While American lawmakers may not negate, and in fact must safeguard

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1998).

Further, consider whether a state recognizing mental anguish tort claims for prospective natural mothers whose fetuses are stillborn due to defendants' misconduct can disallow similar claims for prospective natural fathers. *See* Parham v. Hughes, 441 U.S. 347 (1979) (noting no equal protection violation for wrongful death statute treating differently natural mothers and natural fathers of illegitimate children); Parvin v. Dean, 7 S.W.3d 264 (Tx. App. 1999) (noting state constitutional equal rights violation if married males and females are treated differently). *See generally* Weinberger v. Wiesenfield, 420 U.S. 636, 652 (1975) ("It is no less important for a child to be cared for by its . . . parent when that parent is male rather than female."); Stanley v. Illinois, 405 U.S. 645, 651 (1972); *In re* Adoption of B.G.S., 556 So. 2d 545, 551 (La. 1990) ("parent has a natural right to his biological child and . . . a child likewise has a right to his parent").

14. A natural father married to a woman at the time of both the conception and birth of her child usually has parental prerogatives even before he participates in the rearing of the child born of the marriage. The "historic respect . . . traditionally accorded to the relationships that develop within the unitary family" leads to the married natural father's "ability to claim paternity" without a showing that he has stepped forward, *Michael H.*, 491 U.S. at 123, 125 (Scalia, J., plurality opinion), meaning that federal constitutional protection follows. *See Lehr*, 463 U.S. at 260 n.16 (Stewart, J., dissenting) ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's paternal claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother." (quoting *Caban*, 441 U.S. at 397)).

This is not to suggest that all men married to women who conceive, carry, and bear a child during marriage receive parental prerogatives. Married natural fathers who forcibly rape their wives may not receive parental prerogatives.

15. A married man who is not the natural father of the child his wife delivers usually has parental prerogatives even if he has not stepped forward, though this failure to step up might make him more vulnerable later to a rebuttal of his presumed paternity, which he opposes, or to the loss of parental prerogatives in a parental rights termination proceeding. *See, e.g.*, 750 ILL COMP. STAT. ANN. 45/5(a)(1) (West 1999) ("A man is presumed to be the natural father of a child if . . . he and the child's natural mother are or have been married to each other . . . and the child is born or conceived during such marriage"); 750 ILL COMP. STAT. ANN. 5/5(b) (West 1999) (this presumption "may be rebutted only by clear and convincing evidence"); Turner v. Whisted, 607 A.2d 935 (Md. 1992) (finding it is more difficult to rebut a presumption of paternity where a married man who is not the natural father has nevertheless assumed parental responsibilities, with paramount concern being the child's best interests); *see also* B.E.B. v. R.I.B., 979 P.2d 514 (Alaska 1999) (discussing paternity by estoppel); Cochran v. Cochran, 717 N.E.2d 892, 894 (Ind. Ct. App. 1999) (recognizing different state approaches to paternity presumptions arising out of marriage, including variations on paternity by estoppel).

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

to some extent,[17] the opportunity of certain unwed natural fathers to step up to these "parental prerogatives,"[18] they may also expand the opportunities for unwed natural fathers to achieve parental rights.[19]

In settings where the federal constitution and supplementary federal and state laws afford unwed natural fathers opportunities to step up to parenthood, often there is little guidance on which men and how men may successfully come forward. Particularly difficult issues arise where there exist competing interests, including the parental prerogatives of the natural mothers, the best interests of children, extant marital unions, and fiscal concerns. Determinations as to the appropriate levels of governmental safeguarding of the parenthood opportunities of unwed natural fathers are especially difficult where these fathers may be unaware of their newborn children through no fault of their own; where they would likely step forward if they did know; and, where more overall good than harm would likely, or at least might, arise if they did step up.[20] The abortion of such parenthood opportunities due to inadequate governmental safeguards receives attention here; to date, there has been little commentary, much confusion, and conflicting laws.

Focusing on governmental safeguarding of the parenthood opportunities of unwed natural fathers requires inquiries into the acts of natural mothers. Natural mothers can thwart unwed natural fathers eligible to step up and thereby acquire parental prerogatives. Laws can help reduce lost opportunities for male parenthood by regulating the conduct of natural mothers. Laws can operate both while the opportunities for male parenthood remain open and after such opportunities have passed. Thus, laws can prompt prevention as well as compensation and deterrence. Prevention can be built, for example, into existing laws on birth certificates and putative father registries. Past conduct can be addressed, for example, through new or expanded civil claims involving fraud or infliction of emotional distress. Of course, outside of any laws, many natural fathers[21] should continue to be able to decide to

17. *See id.* at 262-63 (discussing concern with whether state "has adequately protected" an unwed father's "opportunity to form such a relationship" with his biological offspring).

18. *Michael H.*, 491 U.S. at 126-27 (Scalia, J., plurality opinion).

19. Both federal and state laws recognize at times parental rights for natural fathers who have failed to step forward to, and who have in fact purposefully shunned, parenthood. Thus, where a natural father does not come forward in a timely manner to participate in the rearing of his child, he may still attain parental prerogatives. For example, where a mother, a child, or a governmental agency successfully prosecutes a paternity action against an unwed natural father based upon biological ties, this father usually gains legal protections involving opportunities for custody or visitation as well as financial and other responsibilities, regardless of the lack of any prior child-parent relationship. A natural father cannot choose to preclude responsibilities for his offspring simply by choosing not to pursue a parent-child relationship. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 45/1.1 (West 1999) (recognizing the right of every child to the monetary support of his or her parents). Thus, a natural father can be held financially accountable long after his own opportunity to step up to parenthood has passed. *See, e.g.*, Idaho v. Annen, 889 P.2d 720 (Idaho 1995) (notifying man of child support obligation in 1980, which he denied and then was allowed to sue in 1990 for reimbursement of the child support payments he made in 1989 because no prejudice was shown).

20. *See, e.g., Lehr*, 463 U.S. at 263-64 (discussing legislative scheme on adoption of children of unwed natural fathers that may be "procedurally inadequate" where it was "likely to omit many responsible fathers" in settings "beyond the control of an interested putative father").

21. A few (such as some child abusers and violent rapists) are affirmatively prohibited under law

act as fathers though they have no (and may never be able to attain) recognition of paternity under law.[22]

In focusing on the inadequate governmental safeguarding of the parenthood opportunities of unwed natural fathers, this article initially explores U.S. Supreme Court decisions and supplementary federal and state laws. Part II demonstrates how high court decisions leave unresolved many important issues that other contemporary laws then fail to address or to address well. It suggests that confusion over the differences between federal substantive and procedural due process rights may explain certain failings. Part III then briefly reviews key issues involving eligibility and techniques for stepping up to paternity under law that remain open under federal precedents. Finally, Part IV of the article more fully reviews the adequacy of governmental safeguards of the federal due process parental interests of unwed natural fathers, including in settings in which women easily can, and sometimes do, abort male parental prerogatives. It suggests reforms that provide clearer guidance, that encourage and permit more unwed natural fathers to step up to parenthood, and that provide remedies to those unwed natural fathers whose parenthood opportunities under law have been wrongfully aborted. The article posits that certain reforms are, in fact, required by federal constitutional procedural due process principles operating both before and after possible male parental prerogatives have been aborted.

II. Parental Prerogatives of Unwed Natural Fathers

A. U.S. Supreme Court Precedents

1. The Contraception Cases: Griswold and Eisenstadt

In *Griswold v. Connecticut*[23] the U.S. Supreme Court in 1965 held that the privacy inherent in a marital relationship must be afforded federal constitutional protection from governmental intrusion.[24] Appellants Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and Buxton, a physician and a League Medical Director, were convicted under Connecticut statutes prohibiting the rendering of assistance or counseling in the use of contraceptives.[25]

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from forming significant relationships with their children. *See* 750 ILL. COMP. STAT. ANN. 40/3(b) (West 1989) (semen donor for artificial insemination of a woman who is not the donor's wife is treated in law as not being the natural father); *see also* Pena v. Mattox, 84 F.3d 894, 901 (7th Cir. 1996) (violent male rapist who is the natural father is entitled to no parental rights, even where statutes are silent; judge-crafted rulings necessary "to avoid absurd results").

22. De facto fatherhood may or may not, by itself, turn into legal fatherhood after a certain time passes like a de facto marriage may or may not turn into a marriage under law (often via common law). For example, a de facto father may never become a father under law where some other man maintains the status as legal father; and, a de facto marriage may never become a marriage recognized by law where one of the two people may remain married under law to another or where the two people are of the same sex.

23. 381 U.S. 479 (1965).

24. *See id.* at 485-86.

25. *See id.* at 480. The statutes in question provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned"

The court noted that "specific guarantees in the Bill of Rights have penumbras" and that these guarantees "create zones of privacy."[26] The right of marital privacy, Justice Goldberg noted in his concurrence, although not mentioned specifically in the Constitution, was embraced within the due process concept of liberty, supported by precedent, and further recognized through the Ninth Amendment.[27] Justice Goldberg found that the due process clauses protected those liberties that were "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[28] Those liberties included "the right . . . to marry, establish a home and bring up children."[29] Writing for the majority, Justice Douglas said that the case involved "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees" and "a law which, in forbidding the use of contraceptives . . . seeks to achieve its goals by means having a maximum destructive impact upon that relationship."[30] The Connecticut policy was stricken, with Justice Goldberg finding that the statute "obviously" encroached upon "a fundamental personal liberty" and that Connecticut had failed to demonstrate how the law served any compelling state interest or was "necessary to the accomplishment of a permissible state policy."[31]

In 1972, four members of the court expanded upon *Griswold*, finding comparable protections for unmarried persons. In *Eisenstadt v. Baird*,[32] Baird was convicted under a statute making it a felony to furnish birth control devices to unmarried persons.[33] Four Justices, including Justice Douglas, found that the "effect of the ban on distribution of contraceptives to unmarried persons has at best a marginal relation to the proffered objective" of deterring premarital sex.[34] They struck down the statute, finding that "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion

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and that "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender. *Id.* at 480 (quoting General Statutes of Connecticut, §§ 53-32 and 54-196 (1958 rev.)).

26. *Id.* at 484.

27. *See id.* at 486-87 (Goldberg, J., concurring).

28. *Id.* at 487 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

29. *Id.* at 488 (Goldberg, J., concurring) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1928)).

30. *Id.* at 485. Justice Douglas further argued: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marital relationship." *Id.* at 485-86.

31. *Id.* at 497-98 (Goldberg, J., concurring) (citations omitted).

32. 405 U.S. 438 (1972) (no one opinion commanded a majority).

33. *See id.* at 440-42.

34. *Id.* at 448 (Justices Douglas, Marshall, and Stewart joined Brennan in the opinion). The Court noted that the Massachusetts statute (like the Connecticut statute in *Griswold*) did nothing to regulate the distribution of contraceptives used to prevent the spread of disease, thus rendering the rationale of deterring premarital and extramarital sex "dubious." *See id.* at 448-49 (quoting *Griswold*, 381 U.S. at 498) (Goldberg, J., concurring). The Court found strange the fact that the statute in question made distributing contraceptives to unmarried persons a felony, punishable by five years in prison, while the evil the state claimed the statute was designed to prevent, fornication, was a misdemeanor carrying a maximum 90-day sentence. *See id.* at 449.

into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[35] Thus, at least for some Justices, decisions about having children were for married couples, unmarried couples, and single individuals.

2. Stanley v. Illinois

Shortly after *Eisenstadt*, the U.S. Supreme Court explored the rights of individuals as well as married and unmarried couples to make decisions about children. In *Stanley v. Illinois*,[36] it found that significant social changes justified the expansion of the protections normally accorded those in traditional families to those in nontraditional, nonmarital families.[37] In the case, Peter Stanley challenged the automatic termination of his parental rights upon the death of the natural mother of his three children with whom he had lived on and off for eighteen years.[38] The children had become wards of the state upon her death because under the statute the children had "no surviving parent or guardian."[39] Stanley, the natural father,[40] was not even permitted a hearing to determine his fitness as a parent before losing custody; he was presumed unfit because he had never been married to the mother.[41] Stanley appealed, arguing an equal protection denial in that there was no hearing to determine his fitness as a parent[42] as there would have been had he been married. The Court recognized that Stanley had a "cognizable and substantial" interest in the custody and upbringing of his children.[43] The Court found both equal protection and due process violations.[44] In doing so, it seemingly placed unwed natural fathers on the same constitutional plane as other natural parents.[45]

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35. *Id.* at 453. Justices Blackmun and White found that Baird could not be convicted for distributing contraceptives to a married person. *See id.* at 464-65. They did not decide whether Baird could be convicted for distributing contraceptives to an unmarried person. Marital status had been deemed irrelevant by the state in the case and thus the record was not clear on the young woman's circumstances. *See id.*

36. 405 U.S. 645 (1972). *Stanley v. Illinois* was decided less than two weeks after *Eisenstadt* in an opinion delivered by Justice White and fully joined by Justices Brennan, Marshall, and Stewart, where Justice Douglas joined except for the equal protection analysis.

37. The Court acknowledged that the bonds in nonmarital families "were often as warm, enduring, and important as those arising within a more formally organized family unit." *Id.* at 652.

38. *See id.* at 646.

39. *Id.* at 649.

40. *See id.* at 646 n.1 (uncontradicted testimony of Peter); *see also In re* Stanley, 256 N.E.2d 814 (Ill. 1970) (recognizing Peter as the "natural father," with no indication that his name was on the birth certificate or that he had pursued or been pursued in a paternity action).

41. *See Stanley*, 405 U.S. at 650.

42. *See id.* at 646.

43. *Id.* at 652.

44. *See id.* at 658 (finding lower court's rationale for presuming Stanley unfit under due process insufficient when "the issue at stake is the dismemberment of his family"); *see also id.* (finding that equal protection ensures that "all Illinois parents are constitutionally entitled to a hearing on fitness before their children are removed").

45. *See id.* ("married parents, divorced parents and unmarried mothers"; the court did not discuss how at least some of these parents under law may not be biologically linked to their children).

Stanley was involved significantly in his children's lives over a long period; thus, he was both a natural father and a social father. Because he was a father within a family in every sense but formal marriage,[46] the Court did not say whether his rights could have exclusively stemmed from his biological links, his relationships with his children, his quasi-marriage to their mother, or the mere presence of an existing, though nontraditional, "family unit."

3. Quilloin v. Walcott

Six years after *Eisenstadt*, the Supreme Court in *Quilloin v. Walcott*[47] upheld a Georgia statute permitting the adoption of a child, Darrell Quilloin,[48] who was born out of wedlock on the consent of the natural mother alone and over the objection of the unwed natural father. The unwed father had his name on the child's birth certificate,[49] but had not taken steps to legitimate[50] the child. The adoption was allowed as long as it served the best interests of the child.[51] The mother had married another man when the child was three years old and her husband petitioned to adopt the child eight years later.[52] Upon notice,[53] the natural father, Leon Quilloin, sought to block the adoption,[54] arguing equal protection and due process. Relevant Georgia law required consent to adoption from both natural parents only when the child was legitimate[55] and consent solely from the natural mother when the child was illegitimate.[56]

A unanimous Court rejected the equal protection claim because an unwed natural father was different from a divorced or separated natural father.[57] The Court dismissed the due process claim since upholding the adoption would recognize "a family unit already in existence, a result desired by all concerned," except Leon Quilloin.[58]

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46. *See id.* at 651-52 (suggesting that the "familial bonds" between Stanley and the children were "as warm, enduring, and important as those arising within a more formally organized family unit").

47. 434 U.S. 246 (1978) (unanimous opinion delivered by Justice Marshall).

48. *See id.* at 249 n.6.

49. *See id.* (stating that Leon appears to have consented to the entry of his name).

50. *See id.* at 248-49 (explaining that under relevant Georgia law Quilloin could have prompted legitimacy by marrying the mother and acknowledging the child as his own or by obtaining a court order).

51. *See id.* at 248, 253-54.

52. *See id.* at 247.

53. *See id.* at 250 n.7.

54. *See id.* at 247. Leon did not seek custody of the child, but merely sought visitation rights and to restrain the husband of the child's mother, with whom the child had lived for most of the child's life, from adopting the child. *See id.*

55. *See id.* at 248-49.

56. *See id.* at 248.

57. *See id.* at 256.

58. *Id.* at 255. The Court impliedly distinguished *Stanley* when allowing the state to invoke the best-interests-of-the-child standard, noting that due process would be offended if the state tried to break up an existing natural family. *See id.* However, this standard usually cannot be used as the basis for terminating parental rights without a showing of parental unfitness. *See id.* One interpretation given *Quilloin* is that the natural father, for federal constitutional law purposes, was not the "parent" of the

Obviously, biological ties alone did not entitle an unwed natural father to the same parental rights during an adoption proceeding as are accorded a married father or a natural mother. Further, the existence of a social relationship between the child and the unwed natural father was also by itself deemed insufficient to prompt the "substantial protection"[59] of due process. Not only did Leon Quilloin visit the child often, but also he was never deemed "an unfit parent"[60] and his child had expressed a desire to continue the parent-child relationship.[61] Yet prior to the adoption proceeding, Leon Quilloin never sought to "legitimate his offspring, either by marrying the mother and acknowledging the child as his own . . . or by obtaining a court order declaring the child legitimate . . . ."[62] The Court may have viewed Leon's involvement with his child as insufficient to warrant federal constitutional protection,[63] may have been troubled by his failure to establish a family unit with the mother and child,[64] may have been swayed by his failure to legitimate the child earlier through available state procedures,[65] or may have acted to protect an existing family unit.[66]

4. Caban v. Mohammed

A year later, the Supreme Court struck down another adoption statute requiring consent only from an unwed natural mother. In *Caban v. Mohammed*,[67] it held that the law exemplified unconstitutional "overbroad generalizations" in gender-based

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child. *See* John Lawrence Hill, *What Does It Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 355, 377 (1991).

59. Lehr v. Robertson, 463 U.S. 248, 261 (1983).

60. *Quilloin*, 434 U.S. at 247.

61. *See id.* at 251 n.11.

62. *Id.* at 249. Quilloin did seek to legitimate his child per a court order once the adoption petition was filed; by this time, however, he was only accorded a best interests of the child argument as a means of denying the adoption, not the veto power he would have had if legitimacy had been earlier established. *See id.* at 253-54.

63. *See id.* at 251 ("[T]he trial court found that, although the child had never been abandoned or deprived, appellant had provided support only on an irregular basis."). The natural mother had never pursued a court order of child support from Quilloin so there was no "willful failure to comply with a support order." *Id.* at 251 n.9; *see also* Caban v. Mohammed, 441 U.S. 380, 393 n.14 (1979) (reading in *Quilloin* the importance of the unwed natural father having established "a substantial relationship with the child.").

64. *See id.* at 253 (noting that Quilloin "had never been a de facto member of the child's family unit").

65. *See id.* at 254.

> Appellees suggest that due process was not violated . . . since any . . . interest appellant might have was lost by his failure to petition for legitimation during the 11 years prior to the filing of Randall Walcott's adoption petition. We would hesitate to rest decision on this ground, in light of the evidence . . . that appellant was not aware of the legitimation procedure until after the adoption petition was filed.

Id.

66. Evidently, the adoption petition was prompted because the natural mother had recently concluded that contacts between Leon and Darrell were having "a disruptive effect" on the "entire family unit" of the adopting couple. *Id.* at 251 (noting "unhealthy effects" of visits on Darrell's younger brother).

67. 441 U.S. 380 (1979) (Powell, J.).

classifications.[68] In the case, a natural father, Abdiel Caban, tried to block the adoption of his children, David and Denise Caban. He "was identified as the father on each child's birth certificate . . . ."[69] He had lived with his two children and their natural mother for two years[70] and continued to see his children after their mother left and subsequently married another man.[71] The mother's new husband petitioned to adopt the children, prompting Caban and his new wife to do the same.[72] The trial court severed Caban's parental rights and granted the adoption.[73] Caban appealed, arguing both substantive due process and equal protection violation.[74]

The Court found that the statute created an unacceptable, gender-based classification. Specifically, it found the distinction "invariably" made between unwed natural mothers and unwed natural fathers was not "substantially related to" the purported state interest in facilitating the adoption of illegitimate children.[75] The holding was limited, however, to case settings that did not involve newborns; where early on the identity of the unwed natural father had been established; and where that father had manifested "a significant paternal interest in the child,"[76] meaning that he had "established a substantial relationship with the child"[77] that has continued.[78] As for adoptions of newborns, the Court expressed "no view" on whether distinctions between unwed natural mothers and unwed natural fathers might pass muster.[79]

5. Santosky v. Kramer

Three years after *Caban*, the Court spoke on the minimum procedures required for governmental infringements on parental prerogatives protected under federal constitutional law. In *Santosky v. Kramer*,[80] the Court examined the procedures required for parental rights termination hearings. Under applicable state law, termination could be ordered only upon factual findings that for more than a year after a child entered temporary state custody, the state had made diligent efforts to

68. *Id.* at 394.
69. *Id.* at 382.
70. *See id.*
71. *See id.*
72. *See id.* at 383.
73. *See id.* at 383-84.
74. *See id.* at 384-85.
75. *Id.* at 382. Thus, the Court did not address the alleged unlawful distinctions between married and unmarried fathers or the substantive due process issues involving whether adoptions may proceed over the objection of natural parents never deemed to be unfit. *See id.* at 394 n.16.
76. *Id.* at 394.
77. *Id.* at 393.
78. *See id.* at 392 n.13 (finding that state may deny veto authority over adoption to natural father who abandoned his child).
79. *See id.* at 392 n.11 (suggesting that unwed natural fathers may only be permitted to veto adoptions of newborns where they have acknowledged paternity or have not abandoned their children, even where natural mothers may always have veto power).
80. 455 U.S. 745 (1982) (Blackmun, J.) (Justices Brennan, Marshall, Powell, and Stevens joined Justice Blackmun in the opinion).

encourage and strengthen the parental relationship and that notwithstanding these efforts, the child's natural parent had "permanently neglected" the child by failing substantially and continuously or repeatedly to maintain contact with, or plan for the future of, the child although physically and financially able.[81] The state was obligated to support such findings with "a fair preponderance of the evidence."[82] Such findings were made concerning Jed Santosky, who had been first removed from the custody of his married natural parents[83] when he was three days old so as "to avoid imminent danger to his life or health" that arose "as a result of the abusive treatment" of Jed's older sister and brother that had been earlier established.[84]

The Court found the procedures deficient in that for complete and irrevocable termination of parental rights, the state must "support its allegations by at least clear and convincing evidence."[85] The need for constitutionally adequate procedures arose because "[t]he fundamental liberty interest of [the] natural parents" in the "custody" of their child was at stake, even though "blood relationships" were "strained" by the temporary loss of custody.[86] These interests of the natural parents were said to be "far more precious" than any property rights.[87] The procedures relating to burden of proof, unlike those relating to the right to state-supported legal counsel, were deemed to warrant "rules of general application," rather than determinations on "a case-by-case basis."[88]

Every Justice found that the standards of flexible due process articulated in *Mathews v. Eldridge*[89] governed the inquiry into the adequacy of procedures attending parental rights termination proceedings.[90] Under *Mathews*, the Court had regarded the minimum requirements of procedural due process as matters of federal law even though the states may have specified their own procedures in the laws recognizing, and at times even creating, the life, liberty or property interests triggering the federal procedural due process protections.[91]

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81. *Id.* at 748-49.

82. *Id.* at 748.

83. *See id.* at 751 (inferring marriage as parents shared same last name).

84. *Id.* at 781 n.10 (Rehnquist, J., dissenting).

85. *Id.* at 748. *But see* Rivera v. Minnich, 483 U.S. 574, 575 (1987) (finding that due process is satisfied where preponderance of evidence standard is employed in paternity determinations).

86. *Id.* at 753 (interference here "with a fundamental liberty interest" so that "natural parents" must be afforded "constitutionally adequate safeguards").

87. *Id.* at 758-59 (citing Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981).

88. *Id.* at 757 (citing *Lassiter*, 452 U.S. at 31-32) (finding that the federal procedural due process need for counsel at parental status termination proceeding should be determined on a case-by-case basis). *Compare In re* K.L.J., 813 P.2d 276, 283-85 (Alaska 1991) (reviewing state constitutional procedural due process cases requiring state-supported lawyers in all parental status termination cases).

89. 424 U.S. 319 (1976).

90. *See Santosky*, 455 U.S. at 754 (majority opinion); *Id.* at 771 (Rehnquist, J., dissenting).

91. *See id.* at 755 (finding federal procedural due process requirements are "not diminished by the fact that the State may have specified [in] its own procedures that it may deem adequate for determining the preconditions to adverse official action") (citing Vitek v. Jones, 445 U.S. 480, 491 (1980) and Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982)). Thus, *Santosky* rejected a bitter with the sweet approach to state-created interest.

6. Lehr v. Robertson

The Court further explored the scope of the parental prerogatives of unwed natural fathers in 1983 in *Lehr v. Robinson*.[92] Jonathon Lehr was the unwed natural father of Jessica.[93] Several months after Jessica was born, her mother married a man who sought to adopt Jessica after her second birthday.[94] The trial court granted the adoption without legal notice to Lehr.[95] Had certain conditions been found, the relevant state statute would have required the court to give notice to Lehr. Yet, not one of the conditions was shown: Lehr had never lived with Jessica or her mother after her birth (although he had lived with the mother before the birth); Lehr had not been named on the birth certificate; he was not listed on the putative father registry; and he had never been declared by a court to be the father.[96] Lehr had filed a separate paternity petition while the adoption case was pending. That petition was dismissed after the adoption was granted. The U.S. Supreme Court allowed Lehr to argue both equal protection and due process.[97]

The Court held that federal constitutional protections of paternal rights depended on "a full commitment to the responsibilities of parenthood"; to qualify, Lehr should have "come forward to participate in the rearing of his child."[98] The Court said that "the mere existence of a biological link does not merit . . . constitutional protection."[99] Accordingly,

> 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 his 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.[100]

To grasp this opportunity, the Court said that the natural father must establish a "significant custodial, personal, or financial relationship"[101] in the absence of a legal connection.[102] Once the father so grasped the opportunity, protected federal

92. 463 U.S. 248 (1983).

93. *See id.* at 250 n.3 (biological link assumed though never conceded by natural mother).

94. *See id.* at 250.

95. *See id.* at 253 (explaining that while aware of Lehr's interest in the child, the judge in the adoption case "did not believe he was required to give notice").

96. *See id.* at 251 n.5.

97. *See id.* at 255.

98. *Id.* at 261.

99. *Id.*

100. *Id.* at 262.

101. *Id.*

102. Not only was Lehr's name not on the birth certificate, but also his name did not appear in the putative father registry or in a paternity action until over two years after Jessica's birth. Further, Lehr had never lived openly with Jessica and her mother and he never offered to marry Jessica's mother. *See id.*

equal protection[103] and due process[104] interests would arise. Here, evidently, the time for Lehr to step forth to parenthood had passed by the time he filed a paternity action, and thus the Court sustained the adoption.

7. Michael H. v. Gerald D.

In *Michael H. v. Gerald D.*,[105] four members of the U.S. Supreme Court found that an extant marital relationship can trump biological ties coupled with an established parent-child relationship. In an "extraordinary" setting,[106] Carole D. and Gerald D. were found to have married in 1976 and to have established a home in California where they resided as husband and wife.[107] However, in 1978 Carole began an adulterous affair with Michael H. In May 1981, Carole bore a child, Victoria D.[108] Gerald was listed as the father on Victoria's birth certificate and had "always held Victoria out to the world as his daughter."[109] In October 1981, Gerald moved to New York City to pursue business interests, but Carole chose to remain in California.[110] Shortly after Victoria was born, Carole told Michael that she believed he might be the father.[111] In October 1981, with Gerald having moved to New York, Carole, Michael, and Victoria submitted to blood tests, which showed a high probability that Michael was the natural father.[112] During the next several years, Carole and Victoria spent time separately with Gerald, Michael, and another man, Scott K.[113] Carole and Gerald reconciled in June 1984. She then moved to New York, where they settled, later having two children born into the marriage.[114]

Michael, after Carole rebuffed him in his attempt to visit Victoria, sought to establish paternity and visitation rights in California in November 1982.[115] A California statute stated, however, "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the

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at 251-52.

103. *See id.* at 267, 268 n.27 (Lehr was not "similarly situated" with regard to his relationship to his natural offspring as were unwed natural mothers and the unwed natural fathers who met one of the conditions for notice under the statutory scheme).

104. *See id.* at 261 (*Lehr* was like *Quilloin* and unlike *Stanley* and *Caban* regarding "developed parent-child relationship").

105. 491 U.S. 110 (1989) (Scalia, J.) (Justices Rehnquist joined in full, and Justices Kennedy and O'Connor joined in all respects except for a footnote on the exploration of societal tradition).

106. *Id.* at 113.

107. *See id.*

108. *See id.*

109. *Id.* at 113-14. In January 1982, in St. Thomas, Michael "held Victoria out as his child," as he did between August 1983 and March 1984, when he lived at times in Carole's apartment in Los Angeles. *Id.* at 114.

110. *See id.*

111. *See id.*

112. *See id.* The test revealed a 98.07% probability that Michael was Victoria's father.

113. *See id.*

114. *See id.* at 115.

115. *See id.*

marriage."[116] Michael challenged the statute after Gerald employed it upon his intervention in October 1984,[117] arguing due process difficulties.[118]

A plurality opinion authored by Justice Scalia[119] relied heavily on tradition in rejecting Michael's interpretations of the *Stanley*, *Quilloin*, *Caban*, and *Lehr* cases. It found that those cases "rest . . . upon the historic respect — indeed, sanctity would not be too strong a term — traditionally accorded to the relationships that develop within the unitary family."[120] The Court deemed the presumption of the legitimacy of a child a "fundamental principle of the common law" that could only be rebutted by "proof that a husband was incapable of procreation or had had no access to his wife during the relevant period."[121] Justice Scalia "found nothing . . . in the older cases addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."[122] Furthermore, in order for Michael to obtain parental rights, Scalia said he must show "not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them."[123] Scalia observed that "to provide protection to an adulterous natural father is to deny protection to a marital father."[124] In rejecting Michael's claim, Scalia found that

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116. *Id.* (quoting Cal. Evid. Code Ann. § 621(a) (West Supp.1989)) This presumption may be rebutted by blood tests prompted by a motion within two years of the child's birth pursued either by the husband or, if the natural father has acknowledged paternity by affidavit, by the wife. *See id.* (citing Cal. Evid. Code Ann. §§ 621(c), (d) (West Supp. 1989)).

117. Evidently, Gerald did not intervene earlier as his relationship with Carole was not solidified until June 1984. For example, in August 1983, Carole moved out on Gerald in New York and back to California where she became "involved once again with Michael." *Id.* at 114.

118. *See id.* at 116 (alleging violation of procedural and substantive due process rights). The Court did not reach Michael's equal protection claim, noting that it "was neither raised nor passed upon below." *Id.* at 116-17. Victoria also raised equal protection and due process concerns with the statute. *See id.* at 116 (J., Scalia, plurality opinion) (seeking to preserve her relationship with both Gerald and Michael).

119. Chief Justice Rehnquist joined in the Scalia opinion. *See id.* at 110. Justices O'Connor and Kennedy joined in the opinion except for its seeming preclusion of a "mode of historical analysis" for due process liberty interests at something other than "the most specific level" of generality available. *Id.* at 132.

120. *Id.* at 123.

121. *Id.* at 124 (citations omitted).

122. *Id.* at 125.

123. *Id.* at 126. Justice Scalia further stated:

> Thus, it is ultimately irrelevant, even for purposes of determining current social attitudes towards the alleged substantive right Michael asserts, that the present law in a number of States appears to allow the natural father — including the natural father who has not established a relationship with the child — the theoretical power to rebut the marital presumption. What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.

Id. at 127 (citation omitted).

124. *Id.* at 130.

where a "natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage . . . it is not unconstitutional for the State to give categorical preference to the latter."[125]

Other Justices rejected this reasoning. Two Justices seemingly left open questions involving the "mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause."[126] Justice Stevens said that he "would not foreclose" the possibility "that a natural father might even have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabitating with, another man at the time of the child's conception and birth."[127] Though four Justices[128] seemingly recognized Michael's federal constitutional interests in visitation with Victoria,[129] prompting the need for some kind of procedural due process hearing, Stevens evidently did not join them because he found resolution of the constitutional issue unnecessary because Michael had already been accorded under state law "a fair opportunity" to show that Victoria's "interests would be served by granting him visitation rights."[130]

B. Extending the Precedents: Criminals Stepping Up to Parenthood

The High Court precedents on the parental prerogatives of unwed natural fathers are quite challenging, particularly where the natural mothers are themselves married to others during pregnancy and birth. The Court has not well described the constitutionally compelled guidelines on the opportunities that must be afforded unwed natural fathers to step forth to parental prerogatives. The state courts and legislatures have been left to determine which and how these men may seek to establish parental rights under law. Relevant state statutes often address assertions of parental prerogatives by unwed natural fathers in differing settings, including adoption, visitation, and paternity. Such statutes can be hard to read, as evidenced by the disagreement in *Michael H.* about the dictates of the California statute. And,

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125. *Id.* at 129. A majority of the Supreme Court was unclear on whether or not Michael was entitled to federal constitutional parental prerogatives. While Justice White, joined by Justice Brennan, found Michael had "a liberty interest entitled to protection under the Due Process Clause of the Fourteenth Amendment," *id.* at 160, Justice Stevens, who concurred with Scalia in the judgment, said he "would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist," *id.* at 133. Justice Brennan, joined by Justices Marshall and Blackmun, declared there was "a constitutionally protected interest." *Id.* at 151; *cf.* Brian C. v. Ginger K., No. 6024911, 2000 WL 92218, at *1 (Cal. Ct. App. Jan. 28, 2000) (finding it unconstitutional to give categorical preference to husband where the marital union was not a marriage "in any meaningful sense" and where the unwed father had "developed a substantial parent-child relationship").

126. Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) (O'Connor, J., concurring) (asking whether general or more specific historical inquiry is appropriate).

127. *Id.* at 133 (Stevens, J., concurring) (relying on cases like *Stanley* and *Caban*).

128. *See id.* at 136 (Brennan, J., dissenting) (Justices Blackmun, Marshall, and White dissented with Justice Brennan)).

129. *See id.* at 143. Michael H. should "prevail today" on his assertion of substantial federal due process protection as he showed a full commitment to the responsibilities of parenthood as needed under *Stanley*, *Caban*, and *Lehr*.

130. *Id.* at 135 (Stevens, J., concurring) (reading the relevant state visitation statute as allowing Michael an opportunity to seek visitation).

state statutes can vary in their requirements from setting to setting for natural fathers who have themselves acted similarly. One important consideration under Supreme Court precedents that can justify variations in the treatment of unwed natural fathers is the marital status of the natural mother. Another important consideration, found in some lower court cases, involves whether a pregnancy resulted from criminally prohibited sexual intercourse.

A recent case decided by the Court of Appeals for the Seventh Circuit explored crimes resulting in births.[131] The case further demonstrates the challenges in ascertaining state public policy and in understanding federal constitutional law principles involving the extent and nature of parental rights afforded unwed natural fathers. Uncertainties continue regarding which natural fathers may seek parental prerogatives and how eligible natural fathers may successfully step up to parenthood. The case also provides some lessons on the adequacy of governmental safeguards of the parental rights of eligible unwed natural fathers who are thwarted by natural mothers and others from learning about paternity or grasping parenthood opportunities.

In *Pena v. Mattox*,[132] the court considered whether an adult man who had become a natural father through nonviolent, but criminal, sexual intercourse with a minor had a protected due process liberty interest in forming a relationship with the child.[133] In 1991, Ruben Pena, then nineteen and an Illinois resident, began dating Amanda Mattox, then fifteen and also an Illinois resident.[134] Soon Amanda became pregnant, prompting her parents to forbid her to see Ruben. However, Amanda disobeyed their orders.[135] On the night of December 8, 1992, Amanda complained to Ruben that she felt sick; Ruben urged Amanda to tell her parents.[136] He called her at home later to see how she was doing, but he could not reach her. No one at the house would give him any information about her.[137] He later looked for her unsuccessfully at several hospitals.[138] The following night, Edward Mattox, Amanda's father, called Ruben and arranged to meet him at a local restaurant.[139] Upon his arrival, Ruben was arrested on a complaint signed by Edward, for the felony of criminal sexual intercourse with a person at least thirteen years of age but under sixteen and at least five years younger.[140] Edward Mattox and Charles Bretz,

131. *See* Pena v. Mattox, 84 F.3d 894 (7th Cir. 1996).

132. *Id.*

133. For an additional case involving the issue of an adult man who became the father through nonviolent criminal conduct having a due process liberty interest in forming a relationship with the child, see *Shepherd v. Clemens*, 752 A.2d 533 (Del. 2000).

134. *See Pena*, 84 F.3d at 895.

135. *See id.*

136. *See id.*

137. *See id.* at 895-96.

138. *See id.* at 896.

139. *See id.*

140. *See id.* Ruben was charged under 720 ILL COMP. STAT. ANN. 5/12-16(d) (West 1999). For a commentary on the rise in such prosecutions, see generally *Elizabeth Hollenberg, The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL'Y REV. 267 (1999).

the state prosecutor who triggered the arrest, knew that Ruben was less than five years older than Amanda.[141] Bail was set at $30,000, which Ruben could not make. As a result, Ruben spent two days in jail before the charge was reduced to criminal sexual abuse, a misdemeanor.[142] The reduction in the charge meant that bail could not then be set at more than $1000.[143] Ruben pleaded guilty to the reduced charge on the day the charge was reduced, and he was released with two years of court supervision.[144] As a condition of his release, Ruben was forbidden to have contact with Amanda or with any member of her immediate family until mid-April 1994.[145] Ruben then moved out of Illinois, "fearful that the defendants would 'continue to exert improper influence' over the law enforcement authorities of Illinois."[146]

On the night that Amanda became sick, about seven and a half months into the pregnancy, she had gone into labor.[147] Her parents took her to Indiana where the adoption statutes were read not to require that an unwed natural father consent to adoption if the mother was under sixteen at the time of conception.[148] Amanda, who was at least fifteen,[149] gave birth and her child was immediately placed for adoption in Indiana.[150]

Ruben commenced a federal civil action under 42 U.S.C. § 1983 in June 1994, claiming that the defendants, including Edward Mattox and Charles Bretz, conspired to deprive him of his federal constitutionally protected parental rights.[151] The complaint was dismissed for failure to state a claim[152] and the Seventh Circuit affirmed. The appeals court held that a natural father involved in criminal sexual

141. *See Pena*, 84 F.3d at 896. Mattox' and Bretz' knowledge (as well as all facts laid out in the opinion) were neither proven nor conceded; the allegations of the complaint were the only source of facts, and were accepted as true for the purposes of the appeal. *See id.* at 895.

142. *See id.* at 896; 720 ILL. COMP STAT. ANN. 5/12-15(c) (West 1999). Ruben's sister, when she learned of the arrest, called the Mattox home. The call was taken by Patricia Schneider, at the time an Illinois state judge who was Amanda's aunt and a named defendant. Schneider identified herself as a judge, warned the sister not to call again, and stated that Ruben's bail would be increased the next day, which it was to $45,000. *See Pena*, 84 F.3d at 896.

143. *See Pena*, 84 F.3d at 896.

144. *See id.*

145. *See id.*

146. *Id.* (quoting the complaint).

147. *See id.*

148. *See id.* (citing IND. CODE §§ 31-3-1-6(i)(2)(B)(ii) and 35-42-4-3(c) (West Supp. 2000) as well as Mullis v. Kinder, 568 N.E.2d 1087 (Ind. App. 1991) (reading the first statute excusing consent to adoption by a natural father where conception resulted from child molesting as demanding only a preponderance of evidence and needing no conviction, where the second statute defined the crime of child molesting)). In fact, these Indiana statutes would not excuse the consent of Ruben today in the adoption of Amanda's child, as they depend on child molesting, a crime now requiring the victim to be under 14 years old. *See* IND. CODE § 35-42-4-3(b) (West Supp. 2000).

149. *Pena*, 84 F.3d at 895 (noting that Ruben and Amanda began dating in 1991 when she was 15 years old).

150. *See id.* at 896.

151. *See id.*

152. *See id.* at 895 (reconsideration and amendments were also not allowed).

intercourse often does not have federal constitutional interests in any later child and that there were no relevant parental interests here.[153]

Chief Judge Richard Posner, writing for a unanimous court, found that Ruben had "no constitutionally protected interest in the offspring of his relationship"[154] and thus could not proceed on any conspiracy claim.[155] Posner assumed that under substantive due process, the federal constitution "forbids a state to deprive . . . natural fathers . . . of their children without good reasons for doing so."[156] He indicated that everyone involved in the case agreed that one good reason would be a pregnancy and birth resulting from a "violent rape."[157] He stated further, however: "It is not the brute biological fact of parentage, but the existence of an actual or potential relationship that society recognizes as worthy of respect and protection, that activates the constitutional claim."[158] The fact that Ruben became a father through an illegal, but nonviolent, act would not necessarily deny him the opportunity to establish a parent-child relationship and to secure parental rights under law.[159] Judge Posner noted that more than one in five American children are born out of wedlock and that their natural fathers are often fornicators or adulterers under state criminal laws.[160] However, he said that these sex crimes "are not taken seriously."[161] Therefore, "when the father, though a fornicator, has established a relationship with his child, the relationship receives the prima facie protection of the Constitution, much as if he were married to the mother."[162] And a father, though an adulterer, may receive similar protection, at least where a husband of the natural mother does not wish to raise the child as his own.[163] By comparison, Judge Posner reasoned that "fatherhood, consequent upon a criminal act that our society does take seriously" cannot constitute "an interest that the Constitution protects in the name of liberty."[164] Pregnancy was not deemed a mitigating circumstance of the sexual offense, but an aggravating one.[165] Posner reasoned that a "criminal should not be rewarded for having committed the aggravated form of the offense by receiving parental rights."[166]

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153. *See id.* at 894.

154. *Id.* at 899.

155. *See id.* at 902.

156. *Id.* at 899.

157. *Id.* at 900 ("The plaintiff's counsel conceded . . . that had Amanda's child been conceived as a result of a violent rape, the rapist would have acquired no constitutional right . . . to assert a parent's right."); *see also id.* at 898 (indicating Supreme Court dictum suggests a law separating all children from their parents at birth so that they may be raised by the state would violate substantive due process).

158. *Id.* (citation omitted).

159. *See id.* at 899.

160. *See id.*

161. *Id.*

162. *Id.*

163. *See id.* (citing Michael H. v. Gerald D., 491 U.S. 110 (1989)).

164. *Id.* at 900.

165. *See id.*

166. *Id.*

Judge Posner did acknowledge that some courts had recognized parental rights for male statutory rapists.[167] Yet, he found that in those cases the fathers had offered to support their children and had accepted paternal responsibilities "as well as seeking the benefits of the wrongdoing."[168] Ruben Pena made no such offer.[169] A statutory rapist, Posner wrote, "who has managed somehow to establish a relationship with his child" or who is being "dunned for child support," may have a legitimate claim to his parental rights.[170] By contrast, Posner declared that Ruben never attempted to forge such a relationship, though he acknowledged that Ruben should not be criticized for this failure as his child "already has . . . two parents."[171] Posner concluded that Ruben's interests were "not so compelling as to warrant our overriding the state's choice in the name of the Constitution."[172] In so concluding, he did not indicate how Ruben may have "managed somehow to establish a relationship with his child," except by noting that Ruben could have filed a prebirth declaration of paternity, though failing to recall how Amanda's delivery came about a month and a half early.[173]

Two state court cases cited by Judge Posner,[174] *In re Paternity Petition of LaCroix v. Deyo*[175] and *In re Craig "V,"*[176] provide some insight on how Posner might determine whether a natural father has sufficiently stepped up to parenthood. The cases seem to be at odds, however, with his failure to recognize parental rights for Ruben.

In *LaCroix*, a New York family court confronted a nineteen-year-old, unwed, natural father whose child was conceived as a result of criminal sexual misconduct involving a fifteen-year-old female.[177] The father sought a declaration of paternity

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167. *See id.* (citing *In re* Craig "V," 500 N.Y.S.2d 568 (N.Y. App. Div. 1986) and *In re* Paternity Petition of LaCroix v. Deyo, 437 N.Y.S.2d 517 (N.Y. Fam. Ct. 1981)). Judge Posner did not discuss laws allowing female sexual assailants to maintain their parental rights. *See, e.g.*, S.F. v. State, 695 So. 2d 1186 (Ala. Civ. App. 1996) (also finding male victim responsible for child support); County of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843 (Cal. Ct. App. 1996) (15-year-old boy seduced by 34-year-old woman has child support responsibilities); *In re* the Parentage of J.S., 550 N.E.2d 257 (Ill. App. Ct. 1990) (15-year-old boy ordered to pay child support and childbirth expenses); State *ex. rel.* Hermesmann v. Seyer, 847 P.2d 1273 (Kan. 1993) (13-year-old boy at time of conception, though possible victim of rape, is liable for child support).

168. *Pena*, 84 F.3d at 900.

169. *See id.* Of course, Ruben seemingly was significantly deterred from stepping up to parenthood early in his child's life as the child was born out-of-state after the mother was "spirited" away without Ruben's knowledge and as he was "fearful" of the Illinois officials who had already exerted "improper influence" over him. *Id.* at 896.

170. *Id.* at 901. *But see* 750 ILL. COMP. STAT. ANN. 50/12.1(j) (West 1999) (putative father as a result of "criminal sexual assault or abuse" not notified when child placed for adoption even though father registered on putative father registry).

171. *Pena*, 84 F.3d at 901.

172. *Id.*

173. *Id.* at 898 (failing to explain why it should have been apparent to Ruben that such a declaration was important to him).

174. *See id.* at 900.

175. 437 N.Y.S.2d 517 (N.Y. Fam. Ct. 1981).

176. 500 N.Y.S.2d 568 (N.Y. App. Div. 1986).

177. *See LaCroix*, 437 N.Y.S.2d at 517. LaCroix was 19 years old at the time of conception and

after the child's mother died when the child was seven years old.[178] The court was troubled by the "moral dilemma" raised and questioned whether the maxim that no person should benefit from a crime should apply.[179] It noted (perhaps too conclusively) that the rights of a natural father of a child born out of wedlock had been given full recognition by the U.S. Supreme Court[180] and that any "legal distinction which may have formerly existed between the rights of the married and unmarried parent and between the legitimate and illegitimate child have been all but obliterated."[181] In the field of custody, the *LaCroix* court continued: "'Amorality, immorality, sexual deviation and what we conveniently consider aberrant sexual practices do not ipso facto constitute unfitness for custody."[182] The court asked:

> If the father of an illegitimate child has rights to that child which must be recognized by the courts . . . if the adoption of his out of wedlock child cannot be accomplished without his consent . . . and he is entitled to notice of legal proceedings affecting a child . . . if a married woman is not barred by her adultery . . . from maintaining a paternity suit and presumably would not be barred from maintaining such a suit to establish the paternity of a child conceived as the result of either a bigamous or an incestuous relationship . . . and neither amorality, immorality of deviate sexual conduct, or adultery . . . automatically disqualifies a parent from seeking or retaining the custody of a minor child, why should sexual misconduct between children in which only the male participant is guilty of a crime bar . . . a putative father from maintaining a proceeding to establish his status to seek the custody of a child born of that relationship . . . ?[183]

The court allowed LaCroix to pursue his petition for custody.[184]

A New York Supreme Court followed *LaCroix* in *Craig "V."*[185] There, the respondent was less than seventeen years old at the time of conception and birth of the child, and the petitioner, who sought acknowledgment of paternity, was over twenty-one, which made the petitioner guilty of statutory rape.[186] The court declined to follow the maxim involving the benefits of crime and chose instead to follow *LaCroix*.[187] While the crime would be considered in terms of the child's

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the child's mother was 15, thereby making LaCroix, by his own verified statement, guilty of sexual misconduct, a misdemeanor in New York. *See id.*

178. *See id.* at 519.

179. *See id.* at 521. The rule cited by Elwyn states: "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity or to acquire property by his own crime." Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889).

180. *See LaCroix*, 437 N.Y.S.2d at 521 (citing *Stanley* and *Caban*).

181. *Id.* at 522.

182. *Id.* (quoting *In re* Feldman v. Feldman, 358 N.Y.S.2d 507, 508 (N.Y. App. Div. 1974)).

183. *Id.* at 522-23 (citations omitted).

184. *See id.* at 523.

185. 500 N.Y.S.2d 568 (N.Y. App. Div. 1986).

186. *See id.*

187. *See id.* at 569.

best interest at any custody hearing, the court held that the "commission of the crime of statutory rape does not preclude petitioner's right to maintain the paternity and custody proceedings."[188] The court found it significant that the petitioner was "not seeking merely to benefit from his wrongdoing but, more importantly, to assume the duties and responsibilities of supporting the child."[189]

In *LaCroix*, the unwed father sufficiently stepped forward so as to gain a "trial on due notice"[190] of his paternity action "to have himself declared to be the father of the child so that he may have standing to seek the child's custody."[191] Though the child was seven, the paternity action was deemed timely because "a proceeding may be brought by a putative father at any time prior to the child's eighteenth birthday."[192] The *LaCroix* court did not mention the nature of the natural father's relationship with his child prior to the mother's death, which was followed by the paternity action less than two months later.[193]

In *Craig "V,"* the natural father was deemed to have "standing" under a state statute to seek custody or visitation where his civil action seeking a declaration of paternity was filed no more than 10 days after his son's birth and where he "filed a written acknowledgment of his paternity with the Putative Father Registry of the State Department of Social Services" within about a month of the child's birth.[194]

While referencing *LaCroix* and *Craig "V,"* wherein "criminals" were permitted to step up to fatherhood, Judge Posner did not sufficiently explain why Ruben Pena was such a different criminal. The relevant facts and misdemeanors in *Pena* and *LaCroix* were quite similar. And, can Ruben truly be faulted for not forging early on a parent-child relationship since Amanda was secreted away to Indiana prior to her child's birth? It seems unreasonable to fault Ruben for taking the threats of criminal charges seriously or for failing to seek to upset the adoption of his biological child over a year after the placement occurred. Thus, why was Ruben's loss of the chance for fatherhood so unimportant? As Judge Posner himself said, "society recognizes as worthy of respect and protection" the "potential relationship" between a natural father and his child.[195] Is not the loss of the opportunity to step up, to actualize "the potential relationship," a loss of federal constitutional dimension?[196] When people are improperly precluded from exercising their free

188. *Id.* at 570; *see also, e.g.*, Christian Child Placement Service v. Vestal, 962 P.2d 1261, 1266 (N.M. Ct. App. 1998) (reading *Craig "V"* as dependent upon the New York statutory language, not federal substantive due process).

189. *Craig "V,"* 500 N.Y.S.2d at 569.

190. *LaCroix*, 437 N.Y.S.2d at 517, 523.

191. *Id.*

192. *Id.* at 517.

193. *See id.* at 518.

194. *Craig "V,"* 500 N.Y.S.2d at 568 (the child was born on February 18 or 19, 1985; the paternity petition was filed on February 28, 1985; and, the acknowledgment was filed in March 1985).

195. Pena v. Mattox, 84 F.3d 894, 899 (7th Cir. 1996).

196. *See, e.g.*, David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 769 (1999).

> Thus, despite the availability of a plausible and theoretically sound alternative understanding of the Supreme Court's cases on the subject, the clear consensus among state courts

speech rights at all, are there not constitutional claims even though no one has yet spoken?[197]

Judge Posner failed to explain why Ruben Pena stood outside the precedents on the parental prerogatives of unwed natural fathers. Why are adulterers more favored than young men just a few years older than their girlfriends? Judge Posner found the acts of such young men are taken more "seriously" than the acts of adulterers, who often not only break vows but attempt to hide their conduct from others, such as husbands, whose lives can be dramatically altered (as through presumed paternity as in *Michael H.*).[198]

Not surprisingly, Judge Posner also failed to speak to how eligible natural fathers need to step up to parental rights that are then subject to federal constitutional protection. Is stepping forth in a paternity suit before the child reaches the age of eighteen enough for most unwed natural fathers, as it seemingly was in *La Croix*? Further, Judge Posner did not explain how Ruben could have "managed somehow to establish a relationship with his child."[199] He did acknowledge that Ruben could have been granted parental rights under state law, but found no such laws that were helpful to him.[200]

Such supplementary laws on parental prerogatives are next examined, followed by an inquiry into the adequacy under Supreme Court precedents of existing state and federal laws on unwed natural fathers who might or do step up to parenthood.

C. Supplementary Federal and State Laws

While all American governments are bound to provide some opportunity for many, though not all, unwed natural fathers to step up to federal substantive due

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> is that an unwed father is constitutionally entitled to object to the adoption of his child, even in the absence of an established relationship with that child, if he has been thwarted by others in his good-faith efforts to establish such a bond.

Id.

197. *See, e.g.*, LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 (2d ed. 1988). Tribe wrote:

> Government can 'abridge' speech in either of two ways. *First*, government can aim at ideas or information, in the sense of singling out actions for government control or penalty either (a) because of the specific message or viewpoint such actions express, or (b) because of the effects produced by awareness of the information or ideas such actions impart . . . . *Second*, without aiming at ideas or information . . . government can constrict the flow of information and ideas while pursuing other goals, either (a) by limiting an activity through which information and ideas might be conveyed, or (b) by enforcing rules compliance with which might discourage the communication of ideas or information.

Id.

198. *See Pena*, 84 F.3d at 899-900. *But see* Doe v. Attorney W., 410 So. 2d 1312, 1317 (Miss. 1982) (natural father's adultery with teenage girl whose child's adoption the father belatedly challenged is taken quite seriously).

199. *Pena*, 84 F.3d at 901.

200. *See id.* at 902 ("[W]e think the state has discretion to decide whether it is better to encourage the kind of conduct in which the plaintiff engaged by giving him parental rights or discourage it by refusing to bestow legal protection on the relationship between father and child.").

process "parental prerogatives,"[201] American state lawmakers may provide expanded opportunities. They have, in fact, done so in certain settings, for certain fathers, and for certain children.[202] Chiefly, they have acted through state statues that do not expressly differentiate between the mandates established by federal constitutional law and by state public policies. On occasion, courts have recognized expanded opportunities under state constitutions.[203]

Additional laws operate, for example, in circumstances where the opportunity afforded unwed natural fathers to establish "parental prerogatives," though earlier lost, can be regained. Thus, where a child seeks to establish the paternity of an unwed natural father who has himself already lost the chance to step up to parenthood, the action by the child may restore for the natural father some "opportunity that no other male possesses to develop a relationship with his offspring."[204] Such a paternity action may follow, for example, a marriage dissolution case wherein another man has lost the parental prerogatives that had presumptively arisen under law.[205] As well, it may follow a parental rights termination proceeding wherein another man lost the parental prerogatives earlier achieved as through an adoption or the legal presumption of paternity. In the *Pena* case, Judge Posner suggested that a statutory rapist who, though eligible, had not earlier stepped up to parenthood might later have a legitimate claim to parental rights if called upon for child support,[206] though the nature of such rights was not explored.

Supplementary laws can also operate to extend the time in which an unwed natural father may step up to paternity beyond that allotted under federal substantive

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201. Michael H. v. Gerald D., 491 U.S. 110, 126-27 (1989).

202. For example, unwed natural fathers may be allowed under state law to step up to parenthood for a child born into an extant marriage after the marriage has dissolved and the legal presumption as to the husband's paternity has been rebutted. *See* Minnesota v. Thomas, 584 N.W.2d 421, 423-24 (Minn. Ct. App. 1998) (holding that paramour may be deemed adjudicated father of child born into a marriage now dissolved even though ex-husband will continue to have relationship as a parent with the child). Moreover, unwed natural fathers may be allowed under state law to challenge the legal presumption as to a husband's paternity of a child born into a marriage that continues. *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999).

203. *See, e.g., Callender*, 591 N.W.2d at 190; State *ex rel.* Allen v. Stone, 474 S.E.2d 554, 567 (W. Va. 1996).

204. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

205. One example, among others, is the remarkable case of *In re Smith*, No. 97CA2202, 1999 WL 976630, at *4-*5 (Colo. Ct. App. Feb. 3, 2000), where a husband not only rebuts presumption of paternity in his marriage dissolution case, but also gains an order for child support reimbursement from the unwed natural father said to have a continuing duty to support until the child's emancipation. States do vary in the standards required for overcoming paternity presumed as a result of marriage. *Compare* Harmon v. Harmon, No. 02A01-9709-CH-00212, 1998 WL 835563, at *2-*5 (Tenn. Ct. App. Dec. 3, 1998) (holding that blood tests can overcome presumption of legitimacy even where husband married natural mother knowing he may not be natural father, where he was named on birth certificate, where he treated the child as his own during the marriage) *with In re* Parentage of J.P.M., 962 P.2d 130, 134 (Wash. Ct. App. 1998) (holding that best interests of child standard governs ex-husband's petition to disestablish paternity).

206. *See* Pena v. Mattox, 84 F.3d 894, 901 (7th Cir. 1996). It is unclear whether the claim for parental rights then arises under federal constitutional substantive due process law.

due process. Seemingly, time could be extended where children have never had legal fathers, whether through birth records, paternity presumptions, adoptions, or otherwise. Here, a late-arriving natural father could be deemed better than no legal father. Thus, in *LaCroix*, the natural father was able to bring a paternity action when the child, born after criminal sexual misconduct, was seven years old.[207]

Finally, supplementary American laws can operate to extend parental rights opportunities to unwed natural fathers who were ineligible for legal parenthood under federal substantive due process. Here, permitting male parenthood rights is deemed better than allowing for no father recognized under any law. Judge Posner suggested in *Pena* that a statutory rapist ineligible to step up to parenthood under federal substantive due process may nevertheless have a claim to parental rights if called upon for child support.[208] Perhaps, as well, legal recognition of two fathers rather than one may be preferred.[209] More generally, and seemingly too broadly, the West Virginia high court has said this about its own state constitutional due process parenthood rights: "The instant a child is born, both unwed biological parents have a right to establish a parent-child relationship with their child."[210] As well, consider whether supplementary laws might permit an unwed natural father, as Michael H., to step up to parenthood once the extant marriage that foreclosed him earlier is dissolved.[211] Finally, consider whether supplementary laws might permit a statutory rapist, like Ruben Pena, to step up to parenthood.[212]

D. Possible Procedural Due Process Claims

Had a supplementary American law recognized parental rights opportunities for an unwed natural father like Ruben Pena,[213] Judge Posner hinted that federal

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207. *See LaCroix*, 437 N.Y.S.2d. at 517 ("[A] proceeding may be brought by a putative father at any time prior to the child's 18th birthday.").

208. *See Pena*, 84 F.3d at 900.

209. *See, e.g.*, T.D. v. M.M.M., 730 So. 2d 873, 876 (La. 1999) (setting out policy factors supporting some recognition of "dual paternity"); *see also* CAL. FAM. CODE § 7004 (West 1994) (repealed 1994). This was the relevant statute in *Michael H.* that was altered so as to permit an unwed natural father who receives a child into his home and openly holds out the child as his natural child, to seek visitation where the best interests of the child are served, thus overcoming a paternity presumption favoring the husband. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989).

210. *In re* Jeffries, 512 S.E.2d 873, 879 (W. Va. 1998) (citing State *ex rel.* Allen v. Stone, 474 S.E.2d 554, 569 (W. Va. 1996) where the court recognized state due process rights for a putative unwed natural father, even where the natural mother was married to another); *see also Pena*, 84 F.3d at 901 (recognizing that in the parental rights arena, "judge-crafted exceptions to statutes are common and uncontroversial to avoid absurd results," leaving much then to "pragmatic" judgments on case-to-case bases). Similar to *Jeffries* is *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999) (holding that liberty interest in challenging paternity presumption arising out of marriage does not insure unwed father the right to maintain a relationship with his biological offspring).

211. *See, e.g.*, Fish v. Behers, 741 A.2d 721, 723-24 (Pa. 1999) (holding that upon marriage dissolution, where ex-husband cannot be ordered to pay child support, ex-wife cannot pursue paternity claim against her paramour/unwed natural father, in part due to child's best interests).

212. *See In re* Paternity of Baby Doe, 558 N.W.2d 897, 900 (Wis. Ct. App. 1996) (holding that where statute provides for no exception, putative natural father who allegedly sexually assaulted unwed natural mother may proceed in paternity action).

213. Judge Posner at one point seemingly (and unfortunately) determined that any such rights would

constitutional procedural due process claims might have arisen and been redressable in a 42 U.S.C. § 1983 lawsuit. Yet, given Ruben's allegations as to misconduct and his request for relief, no such claims were likely available to him.

Federal procedural due process claims, as do federal substantive due process claims, require allegations involving deprivations of "life, liberty or property" interests.[214] However, the interests relevant to many procedural due process claims differ from the interests usually at stake with substantive due process claims. Interests triggering procedural due process claims often involve creatures of state law that do not implicate fundamental federal constitutional rights.[215] Interests triggering many substantive due process claims are narrower and involve fundamental federal constitutional rights.[216]

A federal procedural due process claim often concerns "a species" of liberty or property that the constitution protects from "merely procedural infringements,"[217] thus encompassing an inquiry into the predeprivation or postdeprivation hearings attending losses of interests that are not more fundamentally protected. A federal substantive due process claim often concerns the strength and legitimacy of the rationale(s) for governmental action infringing upon a fundamental interest, regardless of "how elaborate"[218] any hearing procedures may be,[219] triggering the

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arise under Indiana law even though all of Ruben's relevant conduct occurred in Illinois. *See Pena*, 84 F.3d at 901 ("Indiana did not want Pena to impregnate an underage female and does not want to reward him for his having done so by bestowing the rights of a parent on him . . . ."). At another point he did recognize Ruben possibly could have sought a prebirth declaration of paternity under Illinois law, 750 ILL. COMP. STAT. ANN. 45/7(a) (West 1999). *See Pena*, 84 F.3d at 898.

214. For a review of the two forms of federal substantive due process claims as well as of federal procedural due process claims, see *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). *See also* Troxel v. Granville, 120 S. Ct. 2054, 2059-60 (2000) (recognizing both fair process and substantive components of due process guarantee when government interferes with parental care, custody, and control of children).

215. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (explaining that procedural due process interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits").

216. At times, nonfundamental interests do trigger substantive due process as well as equal protection claims where the complainants urge their losses were caused by the hands of government and bore no rational relationship to any legitimate governmental purpose, though the chances for success on such claims are usually quite small. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1, 11 (1988) (holding that due process is satisfied if a law infringing upon a nonfundamental interest has "a reasonable relation to a proper legislative purpose" and is "neither arbitrary nor discriminatory"); Dandridge v. Williams, 397 U.S. 471, 487 (1970) (holding that there is no equal protection denial as long as any classifications under law are "rationally based and free from invidious discrimination").

217. *Pena*, 84 F.3d at 897.

218. *Id.*

219. The difference is not always recognized. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 145 (1989) (Brennan, J., dissenting) (finding the plurality's analysis "conflates the question whether a liberty interest exists with the question what procedures may be used to terminate or curtail it"). Once separated, it is clear that procedural due process will require more process when government deprives a claimant of a fundamental right under substantive due process than when the deprivation involves "purely a procedural" right (i.e., a nonfundamental life, liberty or property interest). *See Pena*, 84 F.3d at 898 ("What is true is that the Supreme Court's decisions dealing with parental rights, . . . speak mainly the

need for the government to provide some very good or compelling reason for its acts.[220]

A supplementary federal or state law recognizing "a species" of liberty or property related to paternity and protected from "merely" federal procedural due process infringements typically creates an expectancy of parental rights or of potential parental rights upon the establishment of a certain condition or conditions.[221] These rights arise though they are not compelled by federal substantive due process, and their creation usually is dependent upon state constitutional, statutory, or common law. Where parental rights do not arise automatically upon a condition, potential parental interests can still come into play. Such interest can trigger at least requirements of notice and opportunity to be heard regarding a child's best interests.[222] Relevant conditions prompting automatic parental rights can include the mere demonstration of a biological link between a man and child;[223] the registration by a man on a putative father registry;[224] the inclusion

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language of procedural rather than of substantive due process. They emphasize the importance of the right not in order to show that it is more than procedural but rather to show that under the formula of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), it warrants a higher order of procedural protection." (citation omitted)).

220. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring) ("In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose . . . . The law must be shown 'necessary, and not merely rationally related to the accomplishment of a permissible state policy.'").

221. *See, e.g.*, Board of Pardons v. Allen, 482 U.S. 369, 376-77 (1987) (noting that expectancy by prisoner of release on parole arises from mandatory language of relevant statute, which suggests presumptively that parole will be granted upon requisite findings involving future obedience to law and reasonable probability of no detriment to the community); Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (explaining that state may create "protected liberty interest by placing substantive limitations on official discretion"); Hewitt v. Helms, 459 U.S. 460, 472 (1983) (noting that relevant statute had "explicitly mandatory language in connection with requiring specific substantive predicates"); *see also* Sandin v. Conner, 515 U.S. 472, 483 n.5, 484 (1995) (abandoning methodology of *Hewitt*, which relied upon whether statutory or regulatory language was mandatory or permissive, in assessing state-created liberty interests for prisoners, and placing emphasis now on state conduct which is "unexpected" or "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life"). *See generally* Sealy v. Giltner, 197 F.3d 578 (2d Cir. 1999) (applying *Sandin*).

222. For example, in *Lehr*, the unwed natural father would have been entitled to notice of the adoption proceeding had he been living with his child after birth, named on the birth certificate, or listed on the putative father registry. *See* Lehr v. Robertson, 463 U.S. 248, 253 (1983).

223. *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 192 (1999) (finding state due process rights for alleged unwed natural father in a paternity action setting where natural mother is married to another, as long as there was no earlier waiver of parental rights by unwed father); *see also* State *ex rel.* Allen v. Stone, 474 S.E.2d 554, 567 (W. Va. 1996) (state due process rights for unwed natural father in paternity action setting where natural mother is married to another as long as unwed father shows by clear and convincing evidence that he has developed a parent-child relationship and that the child will not be harmed if the paternity action proceeds).

224. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 50/12.1 (West 1993) (stating that by failing to timely register with Putative Father Registry, natural father surrenders any rights to notice and consent authority in adoption proceeding).

of a man's name on a birth certificate;[225] or, the voluntary acknowledgment of parentage.[226]

Had supplementary American laws recognized parental rights opportunities for unwed natural fathers like Ruben Pena, a federal procedural due process claim under *Parratt v. Taylor*[227] and its progeny would nevertheless have been unavailable to him. As the alleged governmental misconduct seemingly involved "a random and unauthorized abuse of process by state officers,"[228] no predeprivation hearing was possible. And as Ruben only sought "damages, not rights in the child,"[229] seemingly as to postdeprivation process rights "it might be thought that . . . state-law doctrines of fraudulent concealment, equitable estoppel, malicious prosecution and abuse of process provide all the process that is due."[230]

By contrast, a federal predeprivation procedural due process claim would likely be available to unwed natural fathers who, without adequate process, lost their state law opportunities to step up to parenthood because of a system founded on decisions "made at the policy making level of state or local government."[231] They would seek equitable relief designed to conform governmental policy on predeprivation activities to the federal constitutional dictates on adequate process.[232]

Had Ruben Pena actually stepped up to fatherhood before Amanda was whisked away to Indiana, as by filing a prebirth paternity action in an Illinois court or by providing significant financial and other support to Amanda in Illinois during her pregnancy,[233] a federal predeprivation procedural due process claim may have

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225. Jonathan Lehr would have been entitled to notice of the adoption proceeding had he been named on Jessica's birth certificate. *See Lehr*, 463 U.S. at 251 n.5.

226. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 45/6 (West 1993) (stating that acknowledgment has full force and effect of a judgment and can serve as the basis for a child support order).

227. 451 U.S. 527 (1981). A major elaboration of *Parratt* occurred in *Hudson v. Palmer*, 468 U.S. 517 (1984). *See also* Zinermon v. Burch, 494 U.S. 113, 131-32 (1990) (holding that *Parratt* applies to both property and liberty interest deprivations).

228. Pena v. Mattox, 84 F.3d 894, 902 (7th Cir. 1996) (referencing *Parratt*); *see also id.* at 897 (referencing *Parratt* and labeling the governmental defendants' conduct as "the unauthorized acts of subordinate state officials").

229. *Id.* at 896.

230. *Id.* at 902 (referencing *Parratt* and suggesting such doctrines would amount to "an adequate state judicial remedy").

231. *Id.* at 897 (referencing *Parratt*).

232. *See Parratt*, 451 U.S. at 538 (noting Supreme Court precedents require predeprivation hearings before governmental infringements on liberty or property interests, where the infringements were "authorized by an established state procedure" and hearings would "serve as a check on the possibility that a wrongful deprivation would occur").

233. Ruben, under Judge Posner's analysis, may have had at least a federal procedural due process liberty interest regarding parental prerogatives. Indiana law provided no supplementary parental rights protections to Ruben. *See Pena*, 84 F.3d at 901 ("Indiana did not want Pena to impregnate an underage female and does not want to reward him for his having done so by bestowing the rights of a parent on him . . . ."). However, Illinois law may have been able to do so, as the most significant governmental interest in any paternal rights to be recognized for Amanda's child seemed to exist in Illinois. *See id.* at 898-99 (considering it an open question whether the Indiana courts would need to respect a prebirth Illinois paternity action filed by Ruben regarding Amanda's future child).

arisen regarding the Indiana policy, which is reflected in "an unusual law, dispensing with the requirement that the father consent to adoption, if . . . the mother was under 16 when the child was conceived."[234] Judge Posner suggested that federal constitutional procedural due process claims could redress, via equitable orders, systemic features leading to lost paternity opportunities.[235] Outside adoption, governmental policies on notice, participation, and/or consent can cause additional lost paternity opportunities, prompting other possible federal predeprivation procedural due process claims. Relevant proceedings can involve such matters as birth certificate, parental rights termination (without adoption), paternity, and marriage dissolution.[236]

Of course, for a single child there can be multiple governmental proceedings on the issue of paternity under law. Here, the predeprivation process, if any, due in a later proceeding may depend upon the results of some earlier related proceeding(s). Thus, Judge Posner recognized that an earlier judgment in an Illinois prebirth paternity case initiated by Ruben Pena could have influenced the assessment of processes required in the later Indiana adoption case.[237]

This article concludes by reviewing possible predeprivation and postdeprivation procedures for legal paternity determinations that may be required by federal constitutional procedural due process. Due process procedures would serve to deter unfortunate losses of paternity opportunities for eligible unwed natural fathers. Before addressing such procedures, however, the article first reviews briefly some open legal issues, including issues of federal substantive due process remaining

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234. *Id.* at 896 (citing title 31, sections 31-3-1-6(i)(2)(B)(ii), 35-42-4-3(c) of the Indiana Code and Mullis v. Kinder, 568 N.E.2d 1087 (Ind. Ct. App. 1991)). The *Mullis* court read the first statute excusing consent to adoption by a natural father where conception resulted from child molesting as demanding only a preponderance of evidence and needing no conviction, where the second statute defined the crime of child molesting. *See Mullis*, 568 N.E.2d at 1089-90. In fact, Indiana statutes today do not excuse the consent by Ruben to the adoption of Amanda's child as they now depend upon child molesting, a crime requiring the victim to be under 14 years old. *See* IND. CODE ANN. § 35-42-4-3 (Michie 1998).

235. *See Pena*, 84 F.3d at 897 (explaining that where procedural due process liberty interest is infringed because of a system created by a decision made at the policy-making level of state government, the infringement can only be sustained if the system requires "reasonable notice" and "an opportunity for a fair hearing"). Judge Posner did not address how the Indiana law, which he generally described as requiring "notice of a proposed adoption to be sent to the father," who then has 30 days to contest the adoption, may have been systematically disregarded so as to cause Ruben Pena not to receive the required notice. *Id.* at 898; *see, e.g.*, IND. CODE ANN. §§ 31-19-4-3, 31-19-4-4 (Michie 1997 & Supp. 2000). These Indiana laws seemingly require only notice by publication to a putative father who has not been named by the mother and who has not registered with the putative father registry. They do not demand that courts hearing adoption petitions in such cases make some reasonable inquiries as to the natural father's identity.

236. In adoption, birth certificate, and perhaps other proceedings causing unwarranted lost paternity yet involving chiefly nongovernmental actors (private adoption agencies or medical personnel), the requisite state action may still be found. *See, e.g.*, Swayne v. L.D.S. Social Servs., 670 F. Supp. 1537, 1542-44 (D. Utah 1987) (holding that private adoption agency and prospective adoptive parents are state actors when they follow the dictates of the state adoption statutes).

237. *See Pena*, 84 F.3d at 899 ("Had he gotten a judgment [in paternity] he could have taken it to an Indiana court, which, at least if the adoption had not yet become final, might — or might not — have been obliged to honor it . . . .").

after *Michael H.*, *Pena*, and other federal case precedents. These issues are important because they come into play in federal procedural due process cases challenging governmental systems used to foreclose fundamental, and other, parental rights.

III. Open Issues Involving the Parental Prerogatives of Unwed Natural Fathers

Significant issues involving the parental prerogatives of unwed natural fathers under law remain open, prompting uncertainties about instances of lost paternity that go unrecognized, unremedied, and/or undeterred. These issues involve both questions of who may step forward to paternity and how eligible natural fathers may successfully step up.

Some open issues involve the parameters of the fundamental liberty interests of unwed natural fathers in paternity under the federal constitutional substantive due process.[238] Other federal constitutional issues involve how American governments must adequately protect the federal and state law opportunities afforded unwed natural fathers to form parent-child relationships with their biological offspring that are encompassed within merely procedural due process liberty interests. In federal procedural due process settings, issues remain open not only because of the uncertainty of federal substantive due process precedents on fundamental liberty interests involving paternity,[239] but also because there exist incomplete state statutes on paternal rights whose true dimensions are hard to predict.[240] In addition, there exist continuing differences in relevant state laws protecting the parental prerogatives of unwed natural fathers beyond the protections afforded by federal substantive due process.[241] Where state laws extend parental prerogatives beyond the requirements of federal substantive due process, these rights should normally receive federal procedural due process protections where deprivations are contemplated or occur due to governmental action.

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238. Consider, for example, the uncertainties prompted by *Michael H.* regarding the "parental prerogatives" of adulterous natural fathers where there exist marital fathers in extant marriages.

239. The extent of federal substantive due process parental rights is even important in a procedural due process case where there is already a state-created parental right triggering a federal constitutional (liberty) interest, because a species of liberty protected from "merely procedural infringements" should command fewer process rights. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 756 (1982) (noting greater procedures needed when relevant federal individual constitutional interests "are both 'particularly important' and 'more substantial than mere loss of money'").

240. Consider, for example, Judge Posner's approach in *Pena* wherein he found "judge-crafted exceptions" to statutes on paternal rights are "common," but he failed to mention any possible concerns involving either separation of powers or lack of notice. *Pena*, 84 F.3d at 901-02.

241. Consider again, for example, *Pena*, wherein Judge Posner noted the uncertainties about prevailing state laws on the possible parental rights of child molesters and statutory rapists. *See id.* at 901-02 (finding that no "national consensus has formed around the proposition that a child conceived in crime belongs to the criminal"). The primacy, if not exclusivity, of state legislative rather than Congressional authority to determine the "parental prerogatives" of unwed natural fathers is seldom challenged. *See, e.g.*, *Ex parte* Burrus, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.").

Beyond the uncertainties of federal constitutional substantive due process, there exist under supplementary federal and state laws further open issues on the scope of parental rights afforded unwed natural fathers and on the adequacy of governmental safeguards of these rights. For example, there are questions involving the scope of parental rights protected under state constitutional provisions that are more explicit than the "life, liberty and property" interests protected under federal constitutional due process[242] and thus that seemingly need no penumbral or other such recognition.[243]

Before suggesting how American laws may better recognize, remedy, and deter instances of lost paternity, this article first surveys some of the open federal due process issues involving which unwed natural fathers are eligible to step forth to federal constitutional parental rights and how they may do so.

A. Who May Step Forward

After *Michael H.*, issues remain on the nature, if any, of federal substantive due process parental prerogatives for an unwed natural father "of a child conceived within, and born into, an extant marital union that wishes to embrace the child."[244] In *Michael H.*, four Justices seemed to indicate that they would never find parental rights, even where the unwed father managed somehow to establish a relationship with his child,[245] while five refused to foreclose the possibility,[246] even perhaps in settings where the unwed father had not yet established a parent-child relationship.[247]

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242. *See, e.g.*, ILL. CONST. art. I, § 6 ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, *invasions of privacy* or interceptions of communications by eavesdropping devices or other means.") (emphasis added); ILL. CONST. art. I, § 12 ("Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, *privacy*, property or reputation.") (emphasis added).

243. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . . Various guarantees create zones of privacy . . . . The present case, then, concerns a relationship [marriage] lying within the zone of privacy created by several fundamental constitutional guarantees.").

244. Michael H. v. Gerald D., 491 U.S. 110, 126 (1989) (Scalia, J., plurality opinion).

245. *See Pena*, 84 F.3d at 901.

246. *See id.* at 133 (Stevens, J., concurring) ("I therefore would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this."); *id.* at 142-43 (Brennan, J., dissenting) (stating that the question should be "whether the relationship under consideration is sufficiently substantial to qualify as a liberty interest under our prior cases"); *id.* at 160 (White, J., dissenting) ("He therefore has a liberty interest entitled to protection under the Due Process Clause."); *see also* Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294, 308-10 (Cal. Ct. App. 2000) (unconstitutional to give categorical preference to husband where marital union was not truly a marriage and the unwed natural father had developed a substantial parent-child relationship).

247. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 249 n.4 (1979), where Georgia law allowed an unwed natural father to veto an adoption as long as he simply obtained a court order declaring the child legitimate, where the petition need not make mention of any substantial parent-child relationship. *See also* State *ex rel.* Allen v. Stone, 474 S.E.2d 554, 566 (W. Va. 1996) (leaving for "another day" the decision on whether the unwed natural father need establish a substantial parent-child relationship where it was foreclosed by "the mother's repudiation").

After *Pena*, issues remain on the extent of federal substantive due process parental prerogatives afforded an unwed natural father whose child is born "consequent upon a criminal act."[248] Judge Posner suggests that the line be drawn between crimes that "our society does take seriously," like "violent rape,"[249] and "crimes like adultery or fornication that remain on the statute books, archaic and unenforced, as a residue of legislative inertia."[250] For an unwed natural father committing a crime lying between the extremes of violent rape and fornication, like the misdemeanor statutory rape committed by Ruben Pena, parental prerogatives may neither automatically arise nor fail. Rather, Judge Posner suggests they may develop if other events occur, such as the unwed natural father establishing a parent-child relationship or the attempt to dun an unwed natural father for child support.[251]

Also remaining open are issues on the nature, if any, of federal substantive due process parental prerogatives for an unwed natural father whose child is born through artificial insemination, in vitro fertilization, and the like.[252] Should biological linkage alone, in at least some of these settings, be sufficient? Where biology alone is not enough, what additional facts should trigger federally protected parental rights? And, where such federal due process rights do arise, how may they be waived?

Furthermore, issues remain open on the time for asserting the federal due process parental interests available to unwed natural fathers. Some unwed natural fathers eligible for federal substantive due process protections must assert parenthood in a timely fashion. Further, state law protections of parental prerogatives for unwed natural fathers, which can trigger federal procedural due process protections, also often demand certain timing. Recently, one state court found that it was not "harsh" for a putative father registry law to foreclose an unwed father's participation in an adoption proceeding if he failed to file a notice of intent to claim paternity within thirty days of the child's birth.[253] Timeliness standards may vary depending upon matters outside the control of the unwed natural father. Eligibility may be lost, for example, if an unwed father fails to step forward before the legal fatherhood of another man is first established or is sought to be established. Judge Posner suggested that had Ruben Pena not been "too

248. *Pena*, 84 F.3d at 900.

249. *Id.*

250. *Id.*

251. *See id.* at 901. Posner also notes that they may arise where the unwed natural father moved as swiftly as circumstances allowed to establish his willingness to assume parental responsibilities. *See id.*

252. *See, e.g.*, Marsha Garrison, *"Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage,"* 113 HARV. L. REV. 835 (2000) (asserting that cases of sexual and technological conception should be guided by similar rules).

253. *See* M.V.S. v. M.D., No. 2980595, 1999 WL 1100860 (Ala. Civ. App. Dec. 3, 1999); *see also* Friehe v. Schaad, 545 N.W.2d 740 (Neb. 1996) (holding that unwed father's consent to adoption needed only if father filed intent to claim paternity within five days of child's birth). *But see* Adoption of Haley A., 57 Cal. Rptr. 2d 361, 362 (Cal. Ct. App. 1996) (sustaining the statutory right of a natural mother to withdraw consent to adoption within six months of baby's placement).

intimidated,"[254] whatever federal procedural due process liberty interests in fatherhood he may have had, as under the Illinois statute allowing him to sue for a paternity declaration even before the child was born,[255] may have been lost if a paternity action had not been pursued before the Indiana court granted the adoption of his biological child.[256]

Related to timing are issues involving the tolling of any time requirements. Interestingly, while no finding was necessary on whether Ruben Pena even knew of a possible paternity action under Illinois law, actual knowledge by an eligible unwed natural father of his own possible paternity, of the means to step forward to parenthood, and of any timing requirements may be key at times to determine whether the chances for paternity have been lost due to time restrictions. In the *Quilloin* case, a unanimous Court was reluctant to hold that Leon's failure to petition for the legitimation of his biological offspring would result in the loss of any due process liberty interests to the parent because there was no evidence that Leon was aware of the legitimating procedure until after another man petitioned for adoption.[257] Other courts and legislatures have been willing to find losses of federal due process parental interests though similar knowledge was or may have been lacking.[258]

As well and related to timing, no finding in the *Pena* case was necessary on whether an eligible unwed natural father may ever lose the chance for a federal constitutional liberty interest in paternity solely due to prebirth abandonment, neglect, support failure, and the like of their unborn offspring or of future natural mothers.[259] Similarly, is the failure to file a prebirth paternity action, or to be

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254. *Pena*, 84 F.3d at 899.

255. *See id.* at 888-99 (referencing chapter 750, section 45/7(a) of the Illinois Compiled Statues).

256. *See id.* at 899 (expressing uncertainty as to whether the Indiana court would have been "obliged to honor" the Illinois paternity judgment before the adoption became final as the case law was "in disarray").

257. *See* Quilloin v. Walcott, 434 U.S. 246, 254 (1978).

258. *See, e.g., In re* Ariel H., 86 Cal. Rptr. 2d 125 (Cal. Ct. App. 1999) (holding 15-year-old unwed natural father to adult standards for stepping up to fatherhood); *In re* K.J.R., 687 N.E.2d 113, 125 (Ill. App. Ct. 1997) (deciding alleged unwed natural father lost his chance for parental rights for not utilizing Putative Father Registry within 30 days of child's birth, even though his failure was due to natural mother's misrepresentation, or for not registering within 10 days of learning of his paternity, even though he sought to intervene in the adoption case involving his child within 10 days after learning).

259. Some state statutes recognize (explicitly or via judicial construction) that prebirth conduct by itself can warrant the loss of parental prerogatives of some (unwed) natural fathers. *See, e.g.*, C.V. v. J.M.J., No. 2970889, 1999 WL 64951, at *7 n.1 (Ala. Civ. App. Feb. 12, 1999) (Crawley, J., dissenting) (listing explicit statutes and finding, contrary to the majority, that the Alabama statute at issue was not explicit and could not be construed to cover prebirth abandonment). If foreclosure of paternal rights due to prebirth conduct is ever possible, should it only occur where the man knew of the pregnancy and of his likely biological link, and where he was invited (or at least not barred) by the expectant natural mother to step up to possible fatherhood? *See, e.g., In re* Swanson, 2 S.W.3d 180, 188 (Tenn. 1999) (finding irrebuttable presumption of failure to provide child support due to four month period of nonsupport unconstitutional if intentional failure not shown).

Of course, maternal rights may be lost in some states even during pregnancy due to conduct demonstrating parental unfitness or neglect. *See, e.g., In re* Ruiz, 500 N.E.2d 935, 939 (Ohio C.P. 1986) (holding that child abuse finding may be predicated solely on mother's prenatal conduct involving heroin

named on a newborn's birth certificate, enough to prompt the loss of parental prerogatives even where prebirth financial support has been provided?[260]

Matters of timing also arise where parental rights earlier lacking or lost may later develop for or be regained by an unwed natural father. Judge Posner recognized that while some unwed natural fathers may initially have no federal due process interests in parenthood due to their criminal conduct, such interests may later arise if they are "being dunned for child support."[261] And when they arise, do they warrant federal substantive as well as procedural due process protections? Comparably, federal procedural due process interests may also be recognized for unwed natural fathers who had earlier lost their opportunities to step up to parenthood, but who are later sued for child support. Consider what would have happened if the natural mother of Darrell Quilloin ever divorced and then sought child support from Leon after the parental rights of her ex-husband, gained through adoption, were terminated. Under what circumstances might an unwed natural father's federal due process parental rights be regained?[262] When regained, are parental rights the same as the parental rights that arise at birth and are never lost?

B. How to Step Forward

Unwed natural fathers who are eligible for, but are not automatically accorded, federal substantive due process liberty interests in parenthood usually must step up in order to secure constitutional protection. Where an unwed father's biological relationship with his child must be coupled with some other affirmative acts, stepping up to parenthood seemingly can be undertaken in a variety of ways. Significant issues on the techniques remain open.

The U.S. Supreme Court has clearly said that an eligible unwed natural father can successfully secure federal substantive due process parental prerogatives by developing "an actual relationship" with the child in a timely fashion, indicating his "full commitment to the responsibilities of parenthood" by participating in "the

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use); Whitner v. State, 492 S.E.2d 777, 782 (S.C. 1997) (finding that prenatal drug use constituted criminal child neglect by pregnant woman). Yet, permanent termination of maternal rights usually is not fully grounded on prebirth conduct, but rather is accompanied by findings of continuing, post-birth inability to afford parental care. *See, e.g., In re* K.H.O., 736 A.2d 1246 (N.J. 1999).

260. *See, e.g.*, Jeffrey A. Parness, *Prospective Fathers and Their Unborn Children*, 13 U. ARK. LITTLE ROCK L.J. 165 (1991) (reviewing and critiquing such decision by Florida high court in *In re Adoption of Doe*, 543 So. 2d 741 (Fla. 1989)).

261. *Pena*, 84 F.3d at 901 ("A statutory rapist . . . who in default of adoption is being dunned for child support may have a claim to parental rights.").

262. *See, e.g.*, McNamara v. Thomas, 741 A.2d 778, 781 (Pa. Super. Ct. 1999) (holding that termination of natural mother does not regain parental rights upon death of adoptive parent, but that natural mother can pursue visitation under circumstances permitted third-parties). Incidentally, might parental rights be regained by Leon even if Darrell's adoptive father also maintained parental rights and duties under law (i.e., dual paternity)? *See, e.g.*, T.D. v. M.M.M., 730 So. 2d 873, 877 (La. 1999) (recognizing possibility of dual paternity of a single child shared between a presumptive father due to marriage and a biological father who legitimates). Yet, typically adoption by one man as a father cannot proceed unless the parental rights of the natural father never arose, were waived, or were terminated.

rearing of his child."[263] High Court precedents indicate that this usually means that the natural father has established a "significant custodial, personal, or financial relationship."[264] The Court has not often discussed minimal requirements for such relationships.[265] Thus, the Court has not addressed whether a custodial, personal, or financial relationship with the child, by itself, is sufficient. What if an unwed natural father has some form of custodial or personal relationship, but has provided little or no financial support though able? Alternatively, what if child support checks have been forwarded by an unwed natural father, but there has been little or no custodial or personal relationship?[266]

Nor has the High Court addressed whether necessary parent-child relationships may vary depending upon the contexts in which they are assessed. Certainly, the wealth of the unwed natural father will be relevant to a determination about a "financial relationship."[267] Yet, will the adequacy of custodial or personal relationships for federal substantive due process purposes be differently approached where the state seeks to terminate the parental rights of an unwed natural father (1) so that the child may be adopted by strangers to the child; (2) so that the child may be adopted by the husband of the natural mother who married shortly after giving birth to the child; or (3) so that the natural mother can be rid of the natural father and be left to raise her child on her own? In the first scenario, neither natural parent remains a custodian, but the strangers, as in the widely reported Baby Richard case,[268] may be in an extant marriage which has for some time included the child as a family member. In the second scenario, there is both one natural parent as custodian as well as "an extant marital union that wishes to embrace the child,"[269] if not a preexisting traditional "family unit"[270] including an adult male, an adult female, and a child. In the third scenario, there is a custodial natural parent whose family unit may include only a mother and child.[271] As well, will the adequacy of the relationships differ for federal substantive due process purposes where termination of parental rights is at issue rather than the nature of custodial arrangements? Even if under state laws the best

263. Lehr v. Robertson, 463 U.S. 248, 260-61 (1983).

264. *Id.* at 262.

265. One requirement discussed in lower courts is whether the requisite relationship may contain conditions beyond the control of the natural father. *See, e.g.*, Adoption of Kelsey S., 823 P.2d 1216, 1220 (Cal. 1992) (discussing whether requirements for presumed fatherhood could include receiving child "into his home" since father may be prevented from doing so by unwed natural mother, court order, or prospective adoptive couple).

266. *See In re* K.J.B., 959 P.2d 853, 859 (Kan. 1998) (holding natural father's consent to adoption by stepfather required under statute as he had provided social security disability benefits for his children though otherwise showing little or no affection, care, or interest).

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

268. *In re* Doe, 638 N.E.2d 181 (Ill. 1994).

269. Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) (Scalia, J., plurality opinion).

270. Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

271. *See* State *ex rel.* Allen v. Stone, 474 S.E.2d 554, 566 (W. Va. 1996) (leaving for "another day" to resolve issue of whether unwed natural father need establish a substantial parent-child relationship where it was foreclosed by "the mother's repudiation").

interests of the child standard may not be employed to terminate male parental rights altogether, may the standard be employed to deny custody and allow for only visitation of an otherwise fit and able parent who has stepped up to parenthood in some way?[272]

Where federal substantive due process liberty interests involving parental prerogatives are unavailable to unwed natural fathers, as with Ruben Pena, federal procedural due process liberty interests in parenthood can nevertheless arise for fathers where state laws afford them parental rights protections. Such interests receive the federal constitutional guarantees of "reasonable notice" and "an opportunity for a fair hearing" before they can be subject to governmental deprivation.[273] Where feasible, notice and hearing are required before any deprivation occurs; where a predeprivation proceeding is not feasible, notice and hearing can follow the deprivation, often encompassing "adequate avenues of redress."[274]

As in *Pena*, parties often confuse federal substantive and procedural due process liberty interests in parenthood.[275] In part, the confusion arises because there are few U.S. Supreme Court precedents involving paternity in the procedural due process realm, but there are several major decisions on substantive due process rights involving paternity. The two process interests, while each concerned with parenthood, operate quite differently. As Judge Posner noted in *Pena*, "[W]hen the deprivation of a constitutional right occurs through the unauthorized acts of subordinate state officials rather than through a decision made at the policy-making level of state or local government,"[276] in a civil rights case under 42 U.S.C. § 1983 the procedural due process claimant "must show that the state failed to provide adequate avenues of redress" in postdeprivation hearings[277] while a substantive due process claimant can recover even though there were other "state as well as federal judicial remedies."[278] Judge Posner also noted that U.S. Supreme Court precedents recognizing that predeprivation governmental hearings "dealing with parental decisions" warrant "a higher order of procedural protection" when federal substantive due process liberty interests rather than federal procedural due process liberty interests are present.[279]

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272. *See* Freshour v. West, 971 S.W.2d 263, 264-65 (Ark. 1998) (enforcing the statute so that custody was awarded to maternal grandmother rather than fit, natural father because it served the child's best interests; the natural father was provided "liberal visitation"); Charles v. Stehlik, 744 A.2d 1255, 1259 (Pa. 2000) (holding that biological father's custody rights do not "trump" child's best interests; awarding stepfather primary custody and biological father partial custody).

273. Pena v. Mattox, 84 F.3d 894, 897 (7th Cir. 1996) (listing these two interests as "the basic elements of due process in the procedural sense of the term").

274. *Id.*

275. *See id.* (explaining that defendants failed to appreciate that the principle involving the adequacy of postdeprivation remedies is relevant to "cases in which the deprivation is of a right that the due process clause secures only against the denial of procedural protection").

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 898.

IV. Procedural Due Process Safeguarding of Parenthood for Unwed Natural Fathers

Courts have infrequently addressed federal constitutional procedural due process protections safeguarding the opportunities of unwed natural fathers to step up to parenthood rights recognized under state laws, rather than under federal substantive due process.[280] Issues of adequate safeguarding can be raised regarding decisions "made at the policy making level of state or local government"[281] that infringe on the opportunities of eligible unwed natural fathers to step up to parenthood. Often, assessments of adequacy are made under a predeprivation hearing analysis. Safeguarding issues can also involve remedial schemes established by government to correct or compensate for earlier governmental infringements of "purely"[282] procedural federal due process liberty interests in parenthood as well as of fundamental federal due process parental prerogatives. Here, assessments are made under a postdeprivation hearing analysis.

In predeprivation settings, governmental policies reflected in a variety of state laws on paternal rights must be examined for whether they have "adequately protected" an unwed natural father's "opportunity to form"[283] a parental relationship with his biological offspring. Such laws may involve putative father registries, birth certificates, paternity actions, adoptions, and paternity presumptions arising from marriage. Once opportunities are recognized under state laws for certain unwed natural fathers to step up to parenthood, even though there may be no federal substantive due process parental right, their adequate protection must still be found under federal procedural due process standards.

In postdeprivation settings, again governmental policies on male parenthood reflected in a variety of state laws can be relevant. Such laws may involve remedial schemes allowing erroneous deprivations of paternal rights to be corrected or to be subject to compensation. These schemes may thus include both equitable and legal remedies against mothers and others who under color of law have caused losses of protected paternal rights.[284]

American governments should better safeguard parental prerogatives of unwed natural fathers in both predeprivation and postdeprivation settings. Real and

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280. In addition to adequate safeguards, states must also afford equal protection in their parental rights laws. Equality issues are not herein explored; however, case law indicates disparate treatment between men and women regarding parental rights. *See, e.g.*, C.M.S. v. Goforth, 606 N.E.2d 874 (Ind. Ct. App. 1993) (treating Indiana laws regarding prebirth consents to adoption differently for unwed natural mothers and fathers, given what happened to Ruben Pena).

281. *Pena*, 84 F.3d at 897 (referencing Parratt v. Taylor, 451 U.S. 527 (1981)).

282. *Id.*

283. Lehr v. Robertson, 463 U.S. 248, 262-63 (1983).

284. Remedies for purely private conduct, as by natural mothers alone, causing losses of recognized paternal rights are outside postdeprivation procedural due process analysis because they lack the requisite state action. *See, e.g.*, Stone v. Wall, 734 So. 2d 1038, 1047 (Fla. 1999) (recognizing cause of action for intentional interference with parent-child relationship by third party nonparent, wherein other state laws are reviewed, including those recognizing a similar cause against the other parent).

hypothesized facts involving the unwed natural fathers in the precedents can be employed to demonstrate current failures. The following inquiry particularly examines important birth certificate circumstances and laws in the precedents that were overlooked but seemingly were key to any procedural due process analyses. For many children born in the United States, the parenthood interests of unwed natural fathers will not arise in adoption, parental rights termination, marriage dissolution, or paternity case settings; they will often be implicated, if not considered, in birth certificate settings.

A. Predeprivation Claims

A predeprivation procedural due process claim would arise, for example, where a state adoption scheme through "established state procedure"[285] allowing for the termination of the parental rights of unwed natural fathers was "likely to omit" many responsible fathers who themselves otherwise had no "control" over their lack of participation.[286] Under *Lehr*, such a scheme seemingly would be "procedurally inadequate."[287] In *Pena*, Judge Posner seemingly recognized this when he said that Ruben Pena may have had the right to "reasonable notice" and "an opportunity for a fair hearing" in the Indiana adoption case[288] had he earlier been a "responsible" father, as by having filed an Illinois paternity action.[289]

A predeprivation procedural due process claim comparably would arise where "an established state procedure" for birth certification omits many unwed natural fathers who have stepped up, or who remain eligible to step up, to legal parenthood in settings where these fathers had no "control" over their omission but where their omissions can lead to losses of parental rights.[290] Consider the *Pena* case where, prior to the adoption proceeding in Indiana, presumably there was issued a birth certificate in Indiana.[291] Under Indiana law, the name of the natural father should have been noted on the certificate.[292] Had Ruben been named on the Indiana birth

285. Parratt v. Taylor, 451 U.S. 527, 541 (1981).

286. *Lehr*, 463 U.S. at 264. Where only a few such responsible fathers are omitted, postdeprivation claims may suffice. *See* Mathews v. Eldridge, 424 U.S. 319, 344 (1976) (risk of error inherent in process as applied to the generality of cases, not the rare exceptions).

287. *Lehr*, 463 U.S. at 264.

288. Pena v. Mattox, 84 F.3d 894, 897 (7th Cir. 1996).

289. *See id.* at 898-99. Posner did not comment on whether the Indiana scheme for notice by publication only to unwed natural fathers not named by the natural mothers, even where fathers may have pursued paternity in a state other than Indiana, would be constitutionally sufficient. *See id.* The Indiana notice scheme is outlined in title 31, section 19-4-3 of the Indiana code.

290. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 137 (1990) (describing a predeprivation procedural due process claim as involving a request for new systemic features designed to prevent foreseeable (knew or should have known) losses of protected interests).

291. *Compare Pena*, 84 F.3d at 896 (noting that upon being "spirited" off to Indiana on December 8, Amanda "gave birth" there), *with* IND. CODE ANN. § 16-37-2-2(c) (Michie 1993) (requiring a local health officer who does not receive a certificate of birth from a person in attendance at a live birth or from one of the parents, to "prepare a certificate . . . from information secured from any person who has knowledge of the birth").

292. *See* IND. CODE ANN. § 16-37-2-2 (Michie 1998) (stating that local health officer receives or prepares a birth certificate); *id.* § 16-37-2-9(a) (stating that permanent record of births made or

certificate, the Indiana law requiring that notice of a proposed adoption be sent to the father, briefly referenced by Judge Posner,[293] seemingly would have resulted in notice of the proposed adoption being sent to Ruben.[294] If Ruben and other unwed natural fathers are systematically excluded from birth certificates in Indiana due to consistent failures by Indiana officials to insure their inclusion though their names are required under law, and if, as a result, these fathers are not notified of adoption proceedings involving their natural children, such a scheme is "procedurally inadequate."[295] Exclusion does not arise due to random and unauthorized acts but, rather due to systemic features within the birth certification processes. The Indiana system could be improved through additional procedural safeguards that would reduce the risk of inappropriate omissions of the names of unwed natural fathers from birth certificates at little cost to the government and to the interests of the natural mothers.[296]

Further, a predeprivation procedural due process claim would apparently arise where an established state procedure for adoption omits many unwed natural fathers who have stepped up, or who remain eligible to step up, to legal parenthood in settings where these fathers had no control over their omission. Had Ruben Pena actually filed a prebirth paternity action in Illinois, thus stepping up to parenthood, would the Indiana adoption proceeding have provided him the "reasonable notice" and "opportunity for a fair hearing" expected by Judge Posner?[297] In Indiana today, assuming Ruben Pena was unnamed by Amanda Mattox or any others attending the birth of Ruben's child, notice to Ruben seemingly would have come via "publication" under the Indiana Trial Procedure Rules,[298] likely meaning

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maintained by local health officer includes name and birthplace of parents).

293. *See Pena*, 84 F.3d at 898.

294. *See* IND. CODE ANN. § 31-19-4-1 (Michie 1997) (requiring notice to putative father whose name and address is known); *id.* § 31-19-4-11(2) (not requiring notice for certain fathers whose consent to adoption is not required); *id.* § 31-19-9-8(a)(4-8) (not requiring consent to adoption by natural father where child was conceived as a result of "sexual misconduct with a minor" or "child molesting" under designated Indiana statutes). Ruben, of course, did not help to conceive his child in Indiana.

295. Lehr v. Robertson, 463 U.S. 248, 264 (1983).

296. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (explaining that factors in predeprivation procedural due process analyses include private interests affected, risks of erroneous deprivations, availability of additional safeguards, and the governmental interests). In Indiana today (though not wholly at the time of Amanda's delivery), a person attending a live birth who is responsible for filing the birth certificate must only advise an unwed natural mother, when there is not present a man reasonably appearing to be the biological father, of the availability of a paternity affidavit and the putative father registry under Indiana law. *See* IND. CODE ANN. § 16-37-2-2 (Michie Supp. 2000). The attendant must also "verbally explain" to her "the legal effects of an executed paternity affidavit." *Id.* § 16-37-2-2.1. Not only might such information also be helpful at times to expectant mothers as well as future fathers if it was conveyed earlier, as by those providing prenatal care, but also if it addressed at least in some way the differences that may arise where the absent biological father acted and continues to be outside of Indiana (as with Ruben Pena). *See also* 410 ILL. COMP. STAT. ANN. 535/12(5) (West Supp. 2000) (stating Illinois requirements on reasonable effort to obtain signature of natural father on birth certificate as well as information on birth certificate when child is born to unmarried woman or to married woman whose husband is not the biological father).

297. *Pena*, 84 F.3d at 897.

298. IND. CODE ANN. § 31-19-4-3 (Michie 1997) (requiring publication when the "child was

formulaic printings[299] in a newspaper in the Indiana county where the adoption petition was filed,[300] where "no further efforts" to give notice were "necessary" regardless of whether Ruben "actually" received notice.[301] As with the birth certification procedure, here the omission of Ruben Pena from the adoption case due to lack of actual notice seemingly arises due to systemic features rather than random and unauthorized acts. Evidently, Judge Posner did not give much thought to the lack of notice to Ruben Pena in the adoption case as he found that Indiana at the relevant time had an "unusual law, dispensing with the requirement that the father consent to adoption, if . . . the mother was under 16 when the child was conceived."[302] Yet, Indiana law at that time also seemingly required notice to, if not consent by, the putative father to the adoption proceeding.[303] Judge Posner found that Ruben "was not informed of the adoption or even that the child had been born."[304] Notice about and an opportunity to participate in, if not veto, adoption proceedings seemingly constitute procedural rights that may have been systemically denied unwed natural fathers like Ruben Pena in Indiana. Apparently, the factual allegations as to the crimes of fathers, set forth by adopting couples, parents of girls like Amanda, and their lawyers who all desire the adoptions to proceed, are taken as true though the allegers themselves often have little or no personal knowledge of the asserted acts, though the fathers and their whereabouts are known.[305]

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conceived outside of Indiana").

299. *See id.* § 31-19-4-7 (Michie 1997) (referencing Trial Procedure Rule 4.13, which demands three publications).

300. *See* IND. R. TRIAL P. 4.13 (Michie 1997).

301. IND. CODE ANN. § 31-19-4-7 (Michie 1997).

302. *Pena*, 84 F.3d at 896 (citing what is now title 31, section 19-9-8(a)(4)(b) of the Indiana Code) (stating that father's consent is not required if child was conceived as a result of child molestation under title 35, section 42-4-3 of the Indiana code (as in place before Public Law 79-1994)). It is not entirely clear, even with Ruben's Illinois criminal conviction, that Ruben was guilty of child molesting as it was defined in Indiana in 1991-1992. Under Indiana law, child molesting involving a person over 16 and a child between 12 and 15 was not a crime where "the accused person reasonably believed that the child was sixteen (16) . . . or older at the time of the conduct." *See* IND. CODE ANN. § 35-42-4-3 (Michie 1998). Ruben was convicted in Illinois of sexually abusing a victim under the age of 17, under chapter 720, section 5/12-15(c) of the Illinois Compiled Statutes. However, a defense was available under chapter 720, section 5/12-17(b) of the Illinois Compiled Statutes, if Ruben believed the victim to be at least 17. Thus, Ruben's conduct in Illinois would not have violated the Indiana child molesting law referenced by Judge Posner if Ruben thought Amanda was 16 when he first had intercourse with Amanda, or if Amanda was 16 when she first had sexual intercourse with Ruben. This was a possibility because Amanda gave birth on December 8, 1992, about seven-and-a-half months into her pregnancy, and since Amanda evidently turned 16 in mid-April 1992, because Ruben was ordered in the Illinois criminal case to have no contact with Amanda until mid-April 1994 (when she would be 18, presumedly).

303. *See* IND. CODE ANN. § 31-19-4-3 (Michie 1997) (stating notice to putative father "shall" be served); *see also id.* § 31-19-2-6(5) (Michie Supp. 2000) (stating a petition for adoption "must specify . . . (5) The name and place of residence, if known to the petitioner . . . of (A) the parent or parents of the child"); *id.* § 31-9-2-100 (Michie Supp. 2000) (defining putative father).

304. *Pena*, 84 F.3d at 896.

305. *See* Christian Child Placement Serv. v. Vestal, 962 P.2d 1261, 1266 (N.M. Ct. App. 1998) (mentioning that before terminating parental rights of alleged rapist in an adoption case, petitioner must make "preliminary showing" that child was conceived as a result of rape).

The Indiana procedures are similar in important ways to the procedures recently found violative of due process in Oklahoma adoption cases. In Oklahoma, the high court recently found under *Lehr*[306] that consent to adoption was required of an unwed natural father who first learned of his child four months after birth when he was notified of a pending adoption. The trial court procedures were deemed inadequate because they had permitted the natural mother and the private adoption agency she employed to engage in "complicity" in denying the father's "right to notice of the distinct possibility that he had fathered a child."[307] The adoption agency had not "advised" the mother as "to the consequences of deceiving the natural father," had not inquired "into the facts surrounding her pregnancy," and had moved too slowly to inform the father once his identity became known.[308] In *Boyd W.*, the natural father was found deprived "of notice of the . . . birth of his child and thus the chance to grasp his parental opportunity interest in his child" as required by procedural due process.[309]

Thus, while rejecting the federal substantive due process claims of Ruben Pena against "Illinois officialdom in the persons of a judge and a prosecutor,"[310] Judge Posner's analysis strongly suggests that Ruben may have had predeprivation procedural due process claims arising from the adoption against Indiana officialdom in the persons of a local health officer and a judge.[311] Posner's analysis also suggests that there was satisfaction of Ruben's postdeprivation procedural due process claims against Illinois officials and their cohorts through a "state-law right"[312] in tort (whether involving parenthood itself or a fair process when potential parenthood rights arise in state proceedings).

B. Postdeprivation Claims

For Ruben Pena, any postdeprivation procedural due process claims involving the "random and unauthorized abuse of process by state officers"[313] from Illinois were said to be satisfied because Illinois "state law doctrines of fraudulent concealment, equitable estoppel, malicious prosecution, and abuse of process provide all the

306. *See In re* Baby Boy W., 988 P.2d 1270, 1272-74 (Okla. 1999) (finding that *Lehr* requires a state statute deeming an unwed natural father who has not exercised parental rights and duties toward a child to afford the father the chance to veto an adoption where the father proves "he had been specifically denied knowledge of the child or denied the opportunity to exercise parental rights").

307. *Id.*

308. *Id.*

309. *Id.*

310. Pena v. Mattox, 84 F.3d 894, 897 (7th Cir. 1996).

311. *See id.* ("What really defeated Ruben's effort to establish a parental right (besides Indiana law) was the fact that Amanda was taken out of the state . . . without his knowledge . . . ."); *see also* Kickapoo Tribe of Okla. v. Rader, 822 F.2d 1493, 1500 n.8 (10th Cir. 1987) (noting that diligent efforts to locate natural father are needed before publication is permitted in adoption proceeding, especially in settings where natural father has no available putative father registry vehicle); Appeal of H.R., 581 A.2d 1141, 1171 (D.C. 1990) (holding due diligence needed in attempts to locate natural father in adoption case).

312. *Pena*, 84 F.3d at 902.

313. *Id.*

process that is due."[314] In the *Pena* case setting, of course, these doctrines would have been applied where there were allegations of wilful misconduct by at least two Illinois officials[315] who were joined as defendants with Amanda's father, Edward Mattox, who himself was alleged under state law to have acted wilfully against Ruben by signing an unfounded criminal complaint against him.[316]

Any postdeprivation claims against Indiana officials, as well as against any private citizens such as Edward Mattox, for harms caused by misconduct during the Indiana birth certification or adoption proceedings were not addressed by Judge Posner. Such claims seem different, and more difficult, as there seemingly were no acts of wilful misconduct either by Indiana officials or by Edward Mattox[317] and as the Indiana officials apparently acted in authorized ways, creating the increased likelihood that official immunities would arise should the necessary losses of federal rights be demonstrated.[318]

Unlike the *Pena* case setting, postdeprivation money claims involving lost paternity most often will involve at least some alleged misconduct by natural mothers who act in less significant ways with state "officialdom." Emerging state law tort claims involving fraud, misrepresentation, and infliction of emotional distress seemingly will suffice under due process as did the tort claims found by Judge Posner for Ruben Pena in Illinois law. While there may be few such claims subjected to a postdeprivation procedural due process analysis because lost paternity is frequently accomplished by natural mothers without the requisite state action, claims for lost paternity can continue in the private tort realm where only the acts of natural mothers against natural fathers are at issue. To date, there is little indication that such tort claims have been much pursued by unwed natural fathers against natural mothers.[319]

There have recently emerged other types of claims that may also deter lost paternity. They involve remedies sought by men, usually fathers presumed due to marriage, against their former spouses after legal fatherhood is overcome and deceit,

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314. *Id.*

315. *See id.* at 896. In the case, Pena alleges that a state prosecutor authorized criminal charges and an arrest warrant he knew were unfounded and that a state judge talked to a second judge in order to secure an increase in Ruben's bail after his arrest. *See id.*

316. *See id.*

317. *See id.* at 896 (stating that Edward "spirited" Amanda off to Indiana because state laws there appeared to permit his grandchild's birth and adoption without notice to or involvement by Ruben); *see also* Egervary v. Rooney, 80 F. Supp. 2d 491, 498 (E.D. Pa. 2000) (holding private lawyers liable on procedural due process grounds on *Bivens* claims where they lied to federal judge, causing natural father to lose his child without notice and opportunity to be heard).

318. *See Pena*, 84 F.3d at 897 (suggesting that the traditional absolute immunities in Section 1983 cases afforded to state prosecutors and judges would be inapplicable where the prosecutor and judge each undertook acts "wholly unrelated" to their roles).

319. *But see* Smith v. Malouf, 722 So. 2d 490, 498 (Miss. 1998) (holding that unwed natural father who had stepped up to fatherhood stated claims for intentional infliction of emotional distress and conspiracy against unwed natural mother and her parents where child was conceived in Mississippi, born in Georgia, and placed for adoption in California with a Canadian couple); Kessel v. Leavitt, 511 S.E.2d 720, 824 (W. Va. 1998) (recognizing similar claims where child was conceived in West Virginia, born in California, and adopted in Canada).

misrepresentation, or the like by the natural mothers has been shown.[320] In these private tort claim settings, there will be a "prophylactic effect" on those who act to abort the parental prerogatives of unwed natural fathers.[321]

V. Conclusion

Federal constitutional due process protections of the parental prerogatives of unwed natural fathers remain unclear. U.S. Supreme Court precedents on substantive due process interests are helpful, but not fully illuminating. "Purely procedural" due process protections, usually dependent on state parental rights laws, have received much less High Court attention. In addition, they are often confused with federal substantive due process protections. Exemplary of the continuing confusion, though more helpful in spots than many precedents, is the Seventh Circuit decision in *Pena*, authored by Chief Judge Richard Posner. Its exploration can help to illuminate, to better differentiate between the varying due process protections, and to demonstrate in general, at least, how presentations of federal procedural due process claims may help deter the unwarranted abortions of male parental rights.

320. *See, e.g.*, G.A.W. v. D.M.W., 596 N.W.2d 284, 290 (Minn. Ct. App. 1999) (post-divorce interspousal tort against former wife for fraud, misrepresentation and infliction of emotional distress involving lies about paternity). Somewhat different is *Koelle v. Zwiren*, 672 N.E.2d 868, 871 (Ill. App. Ct. 1996) (explaining that an unwed man who was deceived by the natural mother into thinking for eight years that he was the natural father had a valid claim against the mother for fraud and intentional infliction of emotional distress). The *Zwiren* court also recognized that the man may be able to obtain visitation rights if such visits would be in the child's best interests. *See id.* at 873.

321. *See Kessel*, 511 S.E.2d at 824.