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ARTICLES

LEGAL PATERNITY (AND OTHER PARENTHOOD) AFTER *LEHR* AND *MICHAEL H.*

Jeffrey A. Parness and Zachary Townsend***

I. INTRODUCTION

ACTUAL genetic ties do not always establish, or even help to establish, legal paternity, that is, male parental rights and/or duties under law as of the time of birth, for children born of consensual sex. Paternity status is typically governed by state law and is often dependent upon the marital status of the mothers or the non-sex acts of men preconception, prebirth, or shortly after birth. For example, husbands of mothers are usually deemed parents under law at birth, often because genetic ties are presumed. Such marital presumptions typically arise where marriages predate conception, although some also operate when the marriage postdates birth. These presumptions can even operate when the marriage has effectively, though not legally, ended before conception. It is not unusual for a husband to be the presumed legal parent of a child born as a result of sex with his wife when the husband in fact had nothing to do with conception (though a presumption is less typical if the child was born via artificial insemination). Thus, for nonmarital children born to certain married women, legal paternity designations are often not founded on actual genetic ties. The public policy at work here is arguably sensible, as intact marriages will frequently be preserved by disallowing adulterous genetic fathers the opportunity to intrude. Settled, and often loving, family relations continue even after the discovery (often years after birth) of the lack of a husband's genetic ties. Marital paternity presumptions make sense, as they are easily applied and promote the governmental interests of having two parents for children born because of sex. Yet these presumptions adversely impact genetic fathers.

Similarly, actual male genetic ties may not lead to legal paternity when children are born to unmarried women because of sex. Again preconception, prebirth, or at birth conduct may be important. The 1983 United States Supreme Court decision *Lehr v. Robertson* recognizes that American states can require

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natural fathers,¹ at least in the adoption setting, to do more than prove genetic ties in order to acquire parental opportunities involving their nonmarital children.² When such fathers perform sufficiently beyond simply proving genetic ties, they acquire “substantial” federal constitutional child-rearing interests so that any proposed adoption requires their consent.³ When such fathers do not do enough, *Lehr* allows states to deny them legal parentage.⁴ While the U.S. Constitution under *Lehr* forbids states from omitting too many natural fathers from governmental protection of parental interests,⁵ *Lehr* does not forbid a state, at least within adoption, from imbuing a man with no genetic ties with legal paternity for a nonmarital child born of sex. Within adoption, and elsewhere, states often recognize a nongenetic father’s child-rearing interests in nonmarital children, such as holding children out as their own. Many American states, in fact, say that genetic ties alone are an insufficient basis for legal paternity. Indeed, some states require much more.

The U.S. Supreme Court has said little since *Lehr* about male parentage for nonmarital children born of sex to unmarried mothers, in or outside of adoption. It has, however, spoken on legal paternity for children of married mothers whose husbands are not the genetic fathers—a different form of nonmarital children.⁶ In the 1989 case *Michael H. v. Gerald D.*, the Court recognized that states could create an irrebuttable presumption of genetic ties in the husband for a child born during a marriage if the marriage remains intact for some time after birth and if the married couple chooses to raise the child.⁷ However, many states choose not to employ irrebuttable presumptions, potentially giving adulterous natural fathers *Lehr* interests.

After a review of the *Lehr* and *Michael H.* decisions, this article next considers whether the *Lehr* guidelines have been properly followed in and outside of adoption, including safe haven, and custody and visitation settings. We also review American paternity laws affecting child support, torts, and inheritance, where male child-rearing is not always at issue. Along the way, this article explores the possible expansion of *Lehr*’s child-rearing opportunity interests, in children born of sex, to those uninvolved in the sex. As part of this

1. We employ natural fathers, genetic fathers and biological fathers synonymously—with each usually contemplating births resulting from consensual sex. Similarly, natural, genetic and biological mothers typically are female parents whose children are born of their own sexual conduct.

2. *Lehr v. Robertson*, 463 U.S. 248, 248 (1983).

3. *See id.* at 257-58 (Federal constitutional childrearing rights are grounded in the liberty interests protected by the Due Process Clauses.).

4. *Id.* at 262.

5. *Id.* at 263-64 (If a statutory adoption scheme was “likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate.”). *See also* Jeffrey A. Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 WAYNE L. REV. 641, 649 (2008) [hereinafter Parness, *Out of Control Paternity Schemes*] (criticizing under *Lehr* many state adoption (and safe haven and paternity acknowledgment) schemes).

6. These children are, at times, called “quasi-marital.” *Nevitt v. Bonomo*, 53 So. 3d 1078, 1084 n.3 (Fla. Dist. Ct. App. 2010).

7. *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989).

exploration, we posit that *Lehr* has often been misread, in and outside of adoption, thus denying many natural fathers their federal constitutional opportunity interests in rearing their children. We conclude that *Lehr* rights should be expanded to biological fathers outside adoption and to certain nongenetic parents, both women and men. We further conclude that the policy analyses in *Lehr* and *Michael H.* should sometimes be considered in cases involving no federal constitutional interests.

II. THE *LEHR* DECISION

In *Lehr*, the U.S. Supreme Court ruled that most genetic fathers are eligible for federal constitutional child-rearing interests in adoption proceedings involving their nonmarital children born of sex.⁸ These interests are secured when the men take advantage of their paternity opportunities by timely establishing “significant custodial, personal or financial” relationships with their genetic offspring.⁹ Unfortunately, neither *Lehr* nor later U.S. Supreme Court precedents fully describe how or when these paternity interests may be successfully executed. As a result, there are now significant interstate differences, subjecting many men not only to uncertainties, but also to procedural pitfalls constituting “the sheerest formalism.”¹⁰ Thus, courts read *Lehr* to allow states to deny genetic fathers parental child-rearing interests, even when their failures in establishing parent-child relationships were caused by “ignorance” of “grudging and crabbed” legal doctrines.¹¹ *Lehr* has even been read to permit such denials when mothers concealed the “whereabouts” of children from the genetic fathers.¹²

A detailed examination of *Lehr* demonstrates how the Supreme Court has permitted states to establish legal disconnects between genetic ties and legal paternity in adoptions. In *Lehr*, the story of Jessica Martz’s birth to an unmarried couple, Lorraine and Jonathan, is “far different” depending upon the storyteller.¹³ In *Lehr*, the six-Justice majority relied on Lorraine’s story, while the three dissenters chiefly heard Jonathan’s.¹⁴

The majority, through Justice Stevens, focused on Jessica, Lorraine and Richard, who had married Lorraine eight months after Jessica’s birth.¹⁵ The case originated when Richard filed a petition to adopt Jessica shortly after her second birthday.¹⁶ Jonathan contested the adoption, arguing that he was entitled to, but

8. See generally *Lehr*, 463 U.S. 248. There is no indication in *Lehr* (or later Supreme Court decisions) that such interests arise for genetic fathers of children born of nonconsensual sex. See *id.* Lower courts differ on such interests for men engaged in certain forms of statutory rape. See, e.g., *Pena v. Mattox*, 84 F.3d 894, 900 (7th Cir. 1996).

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

10. *Id.* at 273-75 (White, J., dissenting).

11. *Id.* at 274-75 (White, J., dissenting).

12. *Lehr v. Robertson*, 463 U.S. 248, 269 (1983).

13. *Id.* at 270.

14. See *id.*

15. *Id.* at 248.

16. *Id.*

not given, advance notice of (and a chance to be heard at) the adoption proceeding.¹⁷ New York law entitled a genetic father of a child born to an unmarried woman to notice (assuming he had not abandoned the child)¹⁸ only if he had his name listed on "the putative father registry"; if he had been earlier adjudicated the father; if he was either "identified as the father on the child's birth certificate" or "identified as the father by the mother in a sworn written statement"; if he had married the mother before the child was six months old; or if he had lived "openly" with the child and the child's mother while holding himself out as the child's father.¹⁹ Though conceding he did not meet any of these criteria, Jonathan urged that "special circumstances gave him a constitutional right to notice and a hearing before Jessica was adopted" by Richard.²⁰ The special circumstances included a "visitation and paternity petition" filed by Jonathan a month after the adoption proceeding began, but more than a month before Jonathan learned of the adoption petition.²¹ Four days after learning of the pending adoption, Jonathan sought a stay so that his paternity case could proceed.²² The adoption court judge responded to Jonathan's request by telephone, explaining that an adoption order had been signed earlier that same day.²³ While the judge was aware of Jonathan's pending paternity petition,²⁴ and Lorraine and Richard had known of the paternity petition for roughly two weeks,²⁵ the adoption court judge concluded that no notice to Jonathan was required because, as Jonathan conceded, none of the statutory criteria had been met.²⁶

Two New York appellate courts sustained the adoption. The New York high court affirmed largely because it found that the lack of notice to Jonathan

17. *Id.*

18. *Id.* at 266-68 ("[Where] one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights."). See, e.g., *In re Adoption of Jessica XX*, 434 N.Y.S.2d 772, 774 (N.Y. App. Div. 1980) (holding that the New York adoption statute's differential treatment regarding notice to fathers and mothers did not offend equal protection); *In re Martz*, 423 N.Y.S.2d 378, 381 (N.Y. Fam. Ct. 1979).

19. See *Lehr*, 463 U.S. at 251. See also *Racine v. Nelson*, 2011 Ark. 50, at *16 (citing ARK. CODE § 9-9-207(a)(11), requiring that, to receive an adoption notice, a listing on the Putative Father Registry must be accompanied by the establishment of a significant custodial, personal or financial parent-child relationship).

20. *Lehr*, 463 U.S. at 252.

21. *Id.*

22. *Lehr v. Robertson*, 463 U.S. 248, 252 (1983).

23. *Id.* at 253.

24. *Id.* See also *In re Adoption of Jessica XX*, 430 N.E.2d 896, 898 (N.Y. 1981). The family court judge of Ulster County knew of Jonathan's pending paternity petition, because the same "Family Court Judge in Ulster County signed an order to show cause returnable March 12, 1979 (the return date in the ... proceeding) bringing on the mother's application to change the venue of the paternity proceeding from Westchester to Ulster County." *Id.*

25. *Lehr*, 463 U.S. at 252.

26. *Id.* at 253.

made no difference,²⁷ saying that a notice of an adoption proceeding is intended to afford a genetic father the chance “to provide the [adoption] court with evidence concerning the best interest of the child.”²⁸ Here, the New York court concluded that Jonathan had “made no tender indicating any ability to provide any particular or special information relevant to Jessica’s best interest.”²⁹ Of course, if Jonathan was a father (or perhaps even a potential father) under law, Jessica normally could not be adopted over Jonathan’s objection simply because it was in Jessica’s best interest to live elsewhere.³⁰ Parental rights (and interests) are not lost simply because others would better rear the child.

The issues before the U.S. Supreme Court included “whether the New York statutes are unconstitutional because they inadequately protect the natural relationship between parent and child” or because they draw “an impermissible distinction between the rights of the mother and the rights of the father.”³¹ On this relationship, a majority of the Court distinguished between an unwed genetic father who had formed a “significant custodial, personal, or financial relationship” with his child, thereby acquiring “substantial” federal constitutional child-rearing interests, and an unwed genetic father who had not yet formed such a relationship, who possessed a less weighty federal constitutional interest in forming such a relationship, at least while the mother was not married to another.³² The *Lehr* Court found that Jonathan had formed no such relationship with Jessica and, in fact, had not sought “to establish a legal tie until after she was two years old.”³³

The Court then assessed whether New York had “adequately protected” Jonathan’s opportunity to form a parent-child relationship with Jessica,³⁴ finding it adequate.³⁵ The Court deemed sufficient the New York statutory conditions, observing that “the right to receive notice was completely within” Jonathan’s control—he simply needed to mail a postcard to the putative father registry.³⁶ Jonathan’s ignorance of this requirement was no defense.³⁷ The Court rejected Jonathan’s plea that his case was “special” because both the adoption court and

27. See generally *id.* The New York high court did acknowledge “that it might have been prudent to give notice” to Jonathan. *Id.* at 244.

28. *Id.* at 254.

29. *Id.*

30. *Id.* at 266 (“The legislation at issue in this case ... guarantees to certain people the right to veto an adoption and the right to prior notice of any adoption proceeding.”).

31. *Id.* at 255 n.10. The *Lehr* majority also indicated that “the question presented is whether New York has sufficiently protected an unmarried father’s inchoate relationship” in a manner consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 248.

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

33. *Id.* at 262.

34. *Id.* at 262-63.

35. *Id.* at 265 (“Since the New York statutes adequately protected appellant’s inchoate interest in establishing a relationship with Jessica, we found no merit in the claim that his constitutional rights were offended.”).

36. *Id.* at 248.

37. *Id.* at 264 (“[I]gnorance of the law cannot be a sufficient reason for criticizing the law itself.”).

the mother knew of his pending paternity petition before the adoption order was entered.³⁸ The Court noted that requiring strict compliance with the statutory criteria served the public interest in facilitating adoptions of young children expeditiously³⁹ and that such a requirement was fair here because Jonathan was "presumptively capable of asserting and protecting" his own rights.⁴⁰ Like the courts below, the U.S. Supreme Court suggested that Jonathan was at least partly at fault for failing to intervene in Richard Robertson's adoption petition,⁴¹ effectively reasoning that Jonathan could not sleep on his parental opportunity rights after having slept with Lorraine.

Regarding the distinction that New York lawmakers drew between maternal and paternal interests, the Court recognized the need for the distinction to serve a conceivable "legitimate governmental objective."⁴² New York adoption procedures distinguished between women and men who were genetic parents by allowing all genetic mothers, but not all genetic fathers, "the right to veto an adoption and the right to prior notice of any adoption proceeding."⁴³ These gender distinctions were said to serve the objectives of promoting the best interests of the children and of securing prompt and final adoptions of "illegitimate" (nonmarital or out-of-wedlock) children by allowing veto and participation rights only to those genetic parents who had established "custodial, personal, or financial" relationships with their children.⁴⁴ Genetic moms, but not dads, always initially had such established relationships.⁴⁵ The Court found that New York law sufficiently recognized genetic fathers who participated in child-rearing, noting that the statutory scheme did not likely "omit many responsible

38. The *Lehr* Court did not address whether a different outcome was warranted if Richard Robertson knew about Jonathan's pending paternity action. See generally *In re Martz*, 423 N.Y.S.2d 378 (N.Y. Fam. Ct. 1979). Lorraine was served with notice of Jonathan's action. *Id.* at 384. Further, Lorraine and Richard were both represented by the same counsel, from the state trial court to the U.S. Supreme Court. See *id.* at 382. Nonetheless, the trial court found that there was no proof that Richard had actual notice of Jonathan's petition for paternity and that "[a]ny basis for the imputation of the wife's knowledge to the husband has to rest upon the marital relationship alone which is wholly insufficient." *Id.* at 384. Accordingly, the trial court dismissed Jonathan's motion to vacate Jessica's adoption, because "the only significant inquiry" was whether Richard had actual knowledge of Jonathan's pending paternity petition. *Id.*

39. *Lehr*, 463 U.S. at 265.

40. *Id.*

41. *Id.* at 253 n.6 (without trying to intervene in the adoption proceeding, Jonathan could not appeal the adoption order). See also *In re Adoption of Jessica XX*, 430 N.E. 2d 896, 901-02 n.7 (N.Y. 1981) ("[The father] could have made a prompt application to intervene in the adoption proceeding once notice of its pendency was brought to his attention."); *Martz*, 423 N.Y.S.2d at 383 ("[A]t no time prior to this motion did the putative father of the child attempt to intervene in the proceeding as he might have done.").

42. *Lehr v. Robertson* 463 U.S. 248, 265-67 (1983).

43. *Id.* at 266.

44. *Id.* at 267-68.

45. *Id.* at 266.

fathers”⁴⁶ and did not necessarily estop genetic fathers who failed to step up for reasons beyond their control.⁴⁷

In contrast to the majority, the *Lehr* dissenters focused on the story told by Jonathan, resulting in a very different approach to the adequacy of the protections afforded Jonathan’s “natural relationship” with Jessica.⁴⁸ According to Jonathan (whose account was never subject to an evidentiary hearing), Jonathan and Lorraine cohabited “for approximately [two] years until Jessica’s birth,” during which time the two were engaged to be married.⁴⁹ During that time, Lorraine acknowledged to friends and relatives that Jonathan was Jessica’s father.⁵⁰ Lorraine later reported that Jonathan was the father of Jessica to the New York State Department of Social Services when she sought public aid.⁵¹ Evidently (and unfortunately for Jonathan), there was no “sworn written statement” of this.⁵²

Jonathan “visited Lorraine and Jessica in the hospital every day during Lorraine’s confinement.”⁵³ Upon discharge from the birth hospital in November, 1976, through August, 1977, Lorraine largely concealed her whereabouts from Jonathan, though he was able to sporadically locate Lorraine and visit Jessica “to the extent” Lorraine was willing to permit it.⁵⁴ From August 1977 until August 1978, Jonathan was unable to locate Lorraine and Jessica, though he never ceased looking for them.⁵⁵ Jonathan did locate them again in August, 1978, “with the aid of a detective agency.”⁵⁶ It was then that he first learned of Lorraine’s marriage to Richard.⁵⁷ Jonathan offered financial assistance and a trust fund for Jessica, but Lorraine refused the offer.⁵⁸ Lorraine also rejected Jonathan’s request to visit Jessica, threatening Jonathan “with arrest unless he stayed

46. *Id.* at 263-64.

47. *Id.* at 264 (“[Jonathan’s] right to receive notice was completely within appellant’s control.”). Where state statutes omit “responsible fathers,” the fathers’ lack of statutory standing can be challenged under *Lehr*. See, e.g., *Venable v. Parker*, 706 S.E.2d 211, 214 (Ga. Ct. App. 2011) (Dillard, J., concurring) (“As I understand it, our decision leaves open for another day whether a putative biological father might, in certain circumstances, have standing to ask a court to compel genetic testing—before or contemporaneous with the filing of a motion challenging a judgment of paternity—based upon a constitutional right to familial relations with the child, notwithstanding the lack of any statutory authority for doing so.”).

48. *Lehr*, 463 U.S. at 268-69.

49. *Id.* Appellant’s Brief indicates that Lorraine and Robert were engaged when Jessica was in utero, but the Authors have found no recognition of their engagement in any of the *Lehr* opinions. Brief for the Appellant at 12, *Lehr v. Robertson*, 463 U.S. 248 (1983) (No. 81-1756), 1982 U.S. S. Ct. Briefs LEXIS 219, at *12.

50. *Lehr*, 463 U.S. at 269.

51. *Id.*

52. *Lehr v. Robertson*, 463 U.S. 248, 251-52 (1983).

53. *Id.* at 269.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

away.”⁵⁹ Thereupon, Jonathan retained counsel who wrote to Lorraine early in December, 1978, requesting visitation for Jonathan and threatening legal action.⁶⁰ This was closely followed by Richard’s adoption petition, filed on December 21, 1978,⁶¹ and Jonathan’s visitation and paternity petition, filed early in 1979.⁶²

With this “far different picture,”⁶³ the dissenters concluded “that but for the actions” of Lorraine, Jonathan accepted fatherhood and gained veto and participation rights in any adoption proceeding.⁶⁴ They looked to a 1980 statutory amendment in New York requiring that consent to adoption be obtained from a genetic father who was “prevented” from establishing a significant parent-child relationship by the genetic mother or another “having lawful custody of the child.”⁶⁵ They concluded that blood ties, together with interference with the inquiring genetic father who actually parented for some time, were sufficient to prompt adoption notice and participation rights for Jonathan.⁶⁶

The dissenters went further, suggesting adoption proceeding rights might even arise for genetic fathers without interference. They hinted that a “mere biological relationship” between a child born to an unwed mother and the genetic father might itself be enough to prompt “a protected interest” for the genetic father under federal constitutional law.⁶⁷

The dissenters also concluded that Jonathan’s paternity case was so comparable to the explicit statutory criteria prompting notice and veto rights that the judicial failure to recognize Jonathan’s effective compliance with the statute amounted to the “sheerest formalism,” serving no legitimate governmental interests either regarding the children’s best interests or in expeditious and final adoptions.⁶⁸ The dissent suggested that there are Equal Protection difficulties with statutory distinctions between genetic mothers and genetic fathers “who have made themselves known.”⁶⁹ That is, it may be improper to distinguish between fathers who have formally acknowledged paternity under some, but not other, governmental schemes, since all schemes generally serve the purpose of designating fathers at birth.⁷⁰ While Jonathan had not listed his name on the state’s putative father registry, his name was known to a state social service agency; he filed a paternity action before the adoption order; and his efforts to

59. *Id.*

60. *Id.*

61. *Id.*

62. *Lehr v. Robertson*, 463 U.S. 248, 252 (1983).

63. *Id.* at 270 (White, J., dissenting).

64. *Id.* at 271.

65. *Id.* at 271 n.3.

66. *Id.* at 271-73.

67. *Id.* at 271-72.

68. *Id.* at 275. Similarly, when the New York high court addressed Jonathan’s motion to vacate Jessica’s adoption, a dissenter explained that “[t]o say in the face of the actual knowledge of the judge that petitioner could have protected his rights by filing a notice of intent to claim paternity is to require the performance of a meaningless act.” *In re Adoption of Jessica XX*, 430 N.E.2d 896, 904 (Cooke, J., dissenting).

69. *Lehr*, 463 U.S. at 275 (White, J., dissenting).

70. *Id.*

locate his daughter might be deemed significant if there was ever a hearing.⁷¹ The dissent focused more on what Jonathan did to parent Jessica rather than on his failure to register his name with some faceless bureaucrat.⁷²

Finally, the three dissenters observed that states could better ensure participation by genetic fathers in adoption proceedings by requiring unwed genetic mothers “to divulge” the names of genetic fathers.⁷³ They remarked that states could even do so when it is the spouse of the genetic mother (like Richard Robertson) who seeks adoption, at least when the marriage followed the birth and the husband had no marital presumption.⁷⁴ The dissent noted that unwed mothers are already required to identify genetic fathers of children born of sex in comparable settings, as when public aid is sought by mothers on behalf of their children.⁷⁵ In fact, Lorraine had reported Jonathan as the genetic father to a state social services agency when she sought public aid.⁷⁶ Under federal public aid laws, Lorraine had a “good faith” cooperative duty to name the genetic father of the child for whom she sought assistance.⁷⁷ As with public aid, voluntary termination of parental rights and placement for adoption are governmental benefits that may require good faith maternal cooperation.⁷⁸

III. THE *MICHAEL H.* DECISION

Since *Lehr*, the U.S. Supreme Court has said little about the paternity opportunity interests of unwed genetic fathers of nonmarital children born of sex either within or outside of adoption. However, it has said that such interests need not be afforded unwed fathers in child custody/visitation settings when the children are born to women married to other men.⁷⁹

In *Michael H. v. Gerald D.*, four U.S. Supreme Court Justices found that an extant marital relationship, coupled with an established parent-child relationship, can trump biological ties.⁸⁰ In this “extraordinary” case,⁸¹ Carole D. and Gerald

71. *Id.* at 271, 274-75 (1983) (White, J., dissenting).

72. *See Lehr v. Robertson*, 463 U.S. 248, 269-76 (1983).

73. *Id.* at 273 n.5. *See, e.g.,* CONN. GEN. STAT. ANN. § 45A-715(b) (West 2011) (“[Adoption petitions] shall set forth with specificity ... the names, dates of birth and addresses of the parents of the child, if known, including the name of any putative father named by the mother.”).

74. *Lehr*, 463 U.S. at 273 n.5 (White, J., dissenting). A postbirth marriage to a nongenetic father can prompt what is or looks like a paternity presumption for the husband. At the time of Jessica’s proposed adoption, “persons entitled to notice” included certain persons “married to the child’s mother within six months subsequent to the birth of the child.” *See, e.g., id.* at 251 n.5 (citing N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977 & Supp. 1982-1983)).

75. *Lehr*, 463 U.S. at 269 n.2.

76. *Id.* at 269.

77. Lorraine was legally obligated “to cooperate in good faith with the State and social services official in establishing the paternity of a child born out of wedlock” in order to comply with the public aid eligibility requirements. N.Y. COMP. CODES R. & REGS. tit. 18, § 369.2 (2011).

78. *Lehr*, 463 U.S. at 273 n.5.

79. *See generally* *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

80. *Id.* Justice Scalia wrote the opinion of the Court, to which Justice Rehnquist joined in full, and Justices Kennedy and O’Connor joined in all respects except for a single footnote.

81. *Id.* at 113.

D. were married in 1976 and established a home in California, where they chiefly resided together as husband and wife.⁸² However, in 1978, Carole began an adulterous affair with Michael H.⁸³ In May 1981, Carole bore a child, Victoria D.⁸⁴ Gerald was listed as the father on Victoria's birth certificate and had "always held Victoria out to the world as his daughter,"⁸⁵ even though shortly after the birth, Carole told Michael "she believed he might be the father."⁸⁶

In October 1981, Gerald moved to New York City to pursue business interests⁸⁷ while Carole remained in California.⁸⁸ With Gerald in New York, Carole, Michael, and Victoria had blood tests performed in late October, 1981, which showed that Michael almost certainly was the natural father.⁸⁹ In January 1982, when Carole visited Michael in St. Thomas, Michael "held Victoria out as his child."⁹⁰ During the next months, Carole and Victoria lived for some time with Gerald in New York and separately with a third man, Scott, in California.⁹¹ Carole and Gerald reconciled in June of 1984.⁹² Carole then moved to New York to live with Gerald, where she had two more children born into the marriage.⁹³

After Gerald rebuffed his attempts to visit Victoria, in November 1982, Michael sought, via a California filiation case, to establish paternity and visitation rights.⁹⁴ California law, however, instructed that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."⁹⁵ This presumption was conclusive as to Michael, but not as to Carole or Gerald.⁹⁶ Via "blood tests," Gerald could challenge the presumption "not later than two years" from Victoria's "date of birth."⁹⁷ Via "blood tests," Carole could also challenge the presumption within two years of birth, but only "if the child's biological father has filed an affidavit with the court acknowledging paternity of the child."⁹⁸ Michael challenged the

82. *Id.* They only resided together in California from May 1976 to October 1981 "when one or the other was not out of the country on business." *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 113-14.

86. *Id.* at 114.

87. *Id.*

88. *Id.*

89. *Michael H. v. Gerald D.*, 491 U.S. 110, 114 (1989) (testing revealed a 98.07% probability that Michael was Victoria's genetic father).

90. *Id.*

91. *Id.*

92. *Id.* at 115.

93. *Id.*

94. *Id.* at 114.

95. *Id.* at 117 (quoting CAL. EVID. CODE § 621(a) (West Supp. 1989)).

96. *See id.* at 118.

97. *Id.* (quoting § 621(c)).

98. *Id.* (quoting § 621(d)).

statute on due-process grounds, arguing that the California statute created an illegal irrebuttable presumption.⁹⁹

In March 1983, the filiation court appointed a guardian to represent Victoria's interests.¹⁰⁰ The guardian asserted a cross-claim, arguing that if Victoria "had more than one psychological or de facto father, she was entitled to maintain her filial relationship, with all of the attendant rights, duties and obligations, with both."¹⁰¹

In May 1983, Carole moved for summary judgment in the filiation case.¹⁰² She had lived in New York with Gerald from March to July 1983. Yet in August 1983, Carole "returned to California, became involved once again with Michael, and instructed her attorneys" to withdraw her summary judgment request.¹⁰³ From August 1983 to April 1984, Carole and Victoria lived with Michael in Carole's apartment in Los Angeles.¹⁰⁴ During this time Michael "held Victoria out as his daughter."¹⁰⁵ In April 1984, "Carole and Michael signed a stipulation that Michael was Victoria's natural father."¹⁰⁶

Things changed again in May 1984, when "Carole left Michael" and "instructed her attorneys not to file the stipulation."¹⁰⁷ Also in May 1984, Michael and Victoria "sought visitation rights for Michael pendent lite."¹⁰⁸ Upon the recommendation of a court-appointed psychologist, the court thereafter ordered "sole custody" for Carole, with "limited visitation privileges" for Michael.¹⁰⁹ "In June 1984, Carole reconciled with Gerald, joining him in New

99. *Michael H. v. Gerald D.*, 491 U.S. 110, 116 (1989). The statute has since been amended, allowing some biological fathers to gain custody or visitation, notwithstanding a marital paternity presumption. CAL. FAM. CODE § 7541(a) (West 2011) ("Notwithstanding Section 7540 [defining marital presumption], if the court finds ... the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly."). See, e.g., *In re Jesusa V.*, 85 P.3d 2, 11, 14 (Cal. 2004) (holding both husband and biological father were "presumed" natural fathers under the Family Code and affirming custody order benefitting husband). Compare *Strauser v. Stahr*, 726 A.2d 1052, 1054-55 (Pa. 1999) (irrebuttable presumption of paternity in husband as long as, as here, marriage is intact, and married couple favor maintaining the presumption), with *In re Parentage of John M.*, 817 N.E.2d 500, 506, 511 (Ill. 2004) (notwithstanding marital presumption, alleged biological father could demand DNA testing; little judicial guidance on when a man, with a positive test, could obtain custody or visitation, with a nod toward General Assembly responsibility), and *J.A.S. v. Bushelman*, 342 S.W.3d 850, 852-53, 859 (Ky. 2011) (notwithstanding marital presumption, alleged genetic father can pursue a paternity case involving child born in 2008, even where marital couple have lived together and regularly engaged in sex since their marriage in 1999).

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

101. *Id.*

102. *Id.*

103. *Id.* at 109.

104. *Id.*

105. *Id.* at 114.

106. *Id.* at 109-10.

107. *Id.* at 115.

108. *Id.*

109. *Michael H. v. Gerald D.*, 491 U.S. 110, 115 (1989).

York where they [lived] with Victoria and two other children since born into the marriage," at least until the U.S. Supreme Court decision in June 1989.¹¹⁰

In October 1984, Gerald, who had intervened in Michael's case, moved for summary judgment.¹¹¹ Finding the statutory criteria requiring cohabitation and lack of impotency or sterility met, in January 1985, the motion was granted.¹¹² A request for continued visitation for Michael was denied.¹¹³

The plurality opinion authored by Justice Scalia relied heavily on tradition in rejecting Michael's claim.¹¹⁴ In an express recognition of constitutionally protected paternity opportunity interests, Justice Scalia quoted *Lehr*, writing "that 'the significance of the biological connection is that it offers the natural father an opportunity that no other male possess to develop a relationship with his offspring,' and we assumed that the Constitution might require some protection of the opportunity."¹¹⁵ The opinion also found, however, that precedents, including *Lehr*,¹¹⁶ "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."¹¹⁷ The "unitary family" refers to the "family unit accorded traditional respect in our society" and is typified "by the marital family, but also includes the household of unmarried parents and their children."¹¹⁸ Respect for family integrity can be best served by an irrebuttable presumption of natural ties in a husband, as it promotes the preservation of the family unit.¹¹⁹

Justice Scalia was unclear about who constituted a unitary family.¹²⁰ After mentioning "the marital family" and "the household of unmarried parents and their children," he noted "[p]erhaps the concept [of the unitary family] can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships—and will thus cease to have any constitutional significance—if it is stretched so far."¹²¹ Scalia characterized the presumption of

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 115-16 (quoting CAL. CIV. CODE § 4601 (West Supp. 1989)).

114. *Id.* at 124 ("The legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of society.").

115. *Id.* at 128-29 (quoting *Lehr v. Robertson*, 463 U.S. 248, 262-65 (1983)).

116. The opinion expressly recognized the paternity opportunity interest in *Lehr*. *Id.* Beside *Lehr*, persuasive precedents included *Stanley v. Illinois*, 405 U.S. 645 (1972), *Quilloin v. Walcott*, 434 U.S. 246 (1978), and *Caban v. Mohammed*, 441 U.S. 380 (1979). *Michael H.* at 123.

117. *Id.*

118. *Id.* at 123 n.3.

119. See *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (holding that "the conclusive presumption not only expresses the State's substantive policy but also furthers it, excluding inquiries into the child's paternity that would be destructive of family integrity and privacy"). Justice Scalia did not comment on when such a family must exist. See, e.g., *Nevitt v. Bonomo*, 53 So. 3d 1078, 1079 (Fla. Dist. Ct. App. 2010) (statutory family must be intact at time of birth).

120. See, e.g., Anthony Miller, *The Case for the Genetic Parent: Stanley, Quilloin, Caban, Lehr, and Michael H. Revisited*, 53 LOY. L. REV. 395, 440 (2007) ("Justice Scalia's 'unitary family' test does not resolve the issue of who falls within the definition of such a family.").

121. *Michael H.*, 491 U.S. at 123 n.3.

the legitimacy of a child born into a marriage as a “fundamental principle of the common law”¹²² 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.”¹²³ Justice Scalia did not similarly recognize any common-law characterizations regarding “the household of unmarried parents and their children.”¹²⁴

In “consulting the most specific tradition available,”¹²⁵ 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.”¹²⁶ For Michael to obtain parental rights, Justice Scalia wrote that 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.”¹²⁷ In rejecting Michael’s claim, Scalia found that 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.”¹²⁸ The *Michael H.* plurality

122. *Id.* at 124 (citing H. NICHOLAS, ADULTURINE BASTARDY 1 (1836)).

123. *Id.*

124. *Id.* at 123.

125. *Id.* at 128 n.6.

126. *Id.* at 125.

127. *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 appear 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 (internal citations omitted). Since *Lehr*, there is some precedent for allowing the unwed natural father of a marital child to gain parental rights, though there is “an extant marital union that wishes to embrace the child.” See, e.g., *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294, 309 (Cal. Ct. App. 2000) (holding it unconstitutional to give categorical preference to the mother’s husband in circumstances where “it cannot be reasonably contended that” the mother and husband “were substantively a ‘marital union’ at the point of” the child’s birth and the first year of the child’s life, or when the mother and husband are married in name only); *Callender v. Skiles*, 591 N.W.2d 182, 191-92 (Iowa 1999) (holding unconstitutional a statute that limited the standing of certain putative fathers because “due process rights of the putative father must prevail” over the state’s interest of preserving the “family unity”); *Felix O. v. Janette M.*, No. P-02420/04, 2010 WL 5563887, at *13-14 (N.Y. Fam. Ct. Dec. 20, 2010) (ordering DNA tests and holding equitable estoppel operates against married mother who allowed unwed natural father to parent).

128. *Michael H.*, 491 U.S. at 129. A majority of the Supreme Court Justices were 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 (White, J., dissenting), Justice Stevens, who concurred with Justice Scalia in the judgment, said he “would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might

said that states are free to give categorical preference to mothers' husbands over biological fathers,¹²⁹ reasoning that "to provide protection to an adulterous natural father is to deny protection to a marital father."¹³⁰ The extent to which a husband's paternity opportunity interest can entitle him to protection over a mother's objection remains unclear. While the plurality called the opportunity of a mother's husband "similarly unique" to the opportunity interest of the natural father, it did not explain how this "similarly unique" opportunity relates to the family unit.¹³¹ Nor did the plurality elaborate on family units "accorded traditional respect," including households of "unmarried parents and their children."¹³²

Thus Justice Scalia recognized that legal and nonlegal ties with the mother can be allowed by states to negatively impact the parental opportunities of the unwed natural father. Scalia did say that in "some circumstances the actual relationship between father and child may suffice to create in the unwed father paternal interest comparable to those of the married father."¹³³ He recognized that a categorical preference for the husband may be rejected by a state, as when the marital couple does not wish to raise the child as its own.¹³⁴ Justice Scalia concluded that "the absence of a legal tie with the mother" for the unwed natural father, and a tie between her and another (i.e., via marriage), can, under state law, "appropriately place a limit on whatever substantive constitutional claims might otherwise exist[]" for the unwed natural father.¹³⁵

Other Justices rejected the Scalia reasoning. In a special concurrence, 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

exist." *Id.* at 133 (Stevens, J., concurring). Justice Brennan, joined by Justices Marshall and Blackmun, declared there was "a constitutionally protected interest." *Id.* at 151 (Brennan, J., dissenting).

129. It is unclear whether any U.S. state adoption law requires a conclusive, irrebuttable presumption of paternity. *See* *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989).

130. *Id.* at 130.

131. *Id.* at 129.

132. *Id.* at 123 n.3. The lack of clarity regarding nonmarital "family units" in *Michael H.* has left state courts to their own devices. *See, e.g.,* *C.C. v. A.B.*, 550 N.E.2d 365, 373 (Mass. 1990) (holding the biological father of a child born to an extant marital family can proceed with a paternity action, because if "the putative father can demonstrate that he has enjoyed a substantial relationship with the child, then his interest warrants protection and the interest in protecting a family ... is greatly decreased."); *Jack v. Jack*, 796 S.W.2d 543, 549 (Tex. App. 1990) (citing *Michael H.* in holding, "[W]e do not recognize that a man alleging to be the father of a child born into a marriage has a constitutionally protected interest which would enable him to challenge the presumption that the wife's husband is the father of the child."). *See also* *Georgina G. v. Terry M.*, 516 N.W.2d 678, 686 (Wis. 1994) (noting natural mother and her child "form a 'unitary family'" under *Michael H.*).

133. *Michael H.*, 491 U.S. at 129 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stevens, J., dissenting)).

134. *Id.* at 130.

135. *Id.* at 129 (quoting *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983)).

the time of the child's conception and birth."¹³⁶ While four other Justices¹³⁷ recognized Michael's federal constitutional interests in visitation with Victoria,¹³⁸ which would prompt the need for some kind of hearing, Justice Stevens did not join them, finding the resolution of the constitutional issue involving Michael's parent-child interest to be unnecessary since 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."¹³⁹ Justice Stevens seconded the plurality when he noted that if the California Evidence Code did effectively bar Michael from acquiring a judicial paternity determination, that bar was of no constitutional import if no legal rights were affected.¹⁴⁰ Incidentally, Justice Stevens's pronouncement that the federal Constitution poses no obligation upon states to determine paternity unless some legal right would be affected (and that the legal right could simply involve a hearing on whether a child's interest would be served by a paternity determination) was unmentioned in his majority opinion in *Lehr*.¹⁴¹

In *Michael H.*, Justice Stevens quoted the plurality, declaring "[i]t is no conceivable denial of constitutional right for a State to decline to declare facts unless some legal consequence hinges upon the requested declaration."¹⁴² He did not elaborate on what may constitute a "legal consequence." However, Justice Scalia did, saying, "[W]e cannot grasp the concept of a 'right to a hearing' on the part of a person who claims no substantive entitlement that the hearing will assertedly vindicate."¹⁴³ Scalia added that if Michael was to "obtain a declaration

136. *Id.* at 133 (Stevens, J., concurring) (relying on cases like *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Caban*, 441 U.S. at 380).

137. *Id.* at 136 (Brennan, J., dissenting). Justices Blackmun, Marshall, and White joined the dissent.

138. *Id.* at 143. Michael 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*.

139. *Michael H. v. Gerald D.*, 491 U.S. 110, 135 (1989) (Stevens, J., concurring) (reading the relevant state visitation statute as allowing Michael an opportunity to seek visitation).

140. *Id.* at 132-33.

141. See generally *id.* at 132-36. As such, Stevens's concurrence in *Michael H.* seems less protective of a father's status of paternity than his opinion in *Lehr*. See *Lehr*, 463 U.S. at 262 (holding that a biological connection alone "offers the natural father an opportunity that no other male possesses").

142. *Michael H.*, 491 U.S. at 126. Justice Stevens did not elaborate on what would constitute a "legal consequence"; however, a strict reading of the *Lehr* Court's majority opinion arguably suggests that some legal consequence can or does hinge on a judicial declaration of natural fatherhood. See *Lehr*, 463 U.S. at 262 (holding that a biological connection alone "offers the natural father an opportunity that no other male possesses"). By this reading of *Lehr*, the plurality opinion of *Michael H.* displaces or limits the paternal opportunity interest afforded to biological fathers, at least where children are conceived due to adultery and then born into an extant marital family.

143. *Michael H.*, 491 U.S. at 127 n.5. Justice Scalia stated, "What Michael asserts here is a right to have himself declared the natural father *and thereby to obtain parental prerogatives*," suggesting that Michael's petition for visitation was inseverable from Michael's petition for paternity. *Id.* at 126.

as to who was the natural father, that would not advance Michael's claim[.]" as such a declaration would not necessarily entitle him custody or visitation.¹⁴⁴

Thus for some, a judicial declaration of who was Victoria's natural father would not necessarily imbue in Michael any possible child-rearing interest. Yet a declaration of who was the natural father of Victoria might advance other interests with "some legal consequence" for Michael, including possible custody or visitation in the event of Carole's and Gerald's death.¹⁴⁵ As well, wrongful death or inheritance interests might arise for Michael upon Victoria's death. Possible legal consequences that would likely be unwelcomed by Michael might include child-support duties should Carole and Gerald pass, or should Gerald's paternity be disestablished. However, Justices Scalia and Stevens were the only Justices to employ the "legal consequence" reasoning.¹⁴⁶

Other Justices commented on the plurality's historical emphasis. Justices O'Connor and Kennedy left open the question of Justice Scalia's "mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment[.]" indicating that it may be "somewhat inconsistent with our past decisions in this area."¹⁴⁷ Justice Brennan criticized the plurality's approach to tradition, saying "[a]pparently oblivious to the fact that this concept can be as malleable and elusive as 'liberty' itself, the plurality pretends that tradition places a discernible border around the Constitution."¹⁴⁸ Justice Brennan argued that the plurality failed to follow the command of precedent but instead "reinvent[ed] the wheel" by inquiring anew as to whether a parent-child relationship is one that society traditionally respects.¹⁴⁹ To Brennan, the plurality's claim, that authoritative cases, such as *Lehr*, intended to protect the "unitary family," was a distortion of precedent.¹⁵⁰ Brennan argued that according to the plurality, a unitary family cannot exist unless the mother is married and the parents and children are living together.¹⁵¹ Brennan suggested that although the *Lehr* Court denied Jonathan the opportunity to rear his

144. *Id.* at 126-27.

145. *Id.* at 126. A biological father with no prior custody or visitation rights, in some instances, should be able to gain such rights upon, for example, the death of the natural mother and her husband, especially if parental rights were never terminated and a child's best interests would be served. *See, e.g., H.S. v. N.S.*, 93 Cal. Rptr. 3d 470, 479 (Cal. Ct. App. 2009) ("[A] parent who loses legal and/or physical custody in a family law custody proceeding is not foreclosed from regaining custody based on changed circumstances.").

146. *See generally Michael H.*, 491 U.S. 110.

147. *Id.* at 132 (O'Connor, J., concurring).

148. *Id.* at 137 (Brennan, J., dissenting).

149. *Michael H. v. Gerald D.*, 491 U.S. 110, 142 (1989) (Brennan, J., dissenting).

150. *Id.* at 143.

151. *Id.* (arguing that "[t]hrough it pays lipservice to the idea that marriage is not the crucial fact in denying constitutional protection to the relationship between Michael and Victoria, the plurality cannot mean what it says") (internal citations omitted). *But see Rubano v. DiCenzo*, 759 A.2d 959, 974 (R.I. 2000) (relying on the *Michael H.* plurality's articulation that the marital family "also includes the household of unmarried parents and their children" to support its holding that a child/nonbiological mother relationship can trump a child/biological mother relationship in a matter involving visitation where the child was born to a same-sex domestic partnership) (emphasis added) (citing *Michael H.*, 410 U.S. at 123 n.3).

biological child on grounds independent of family preservation, “the putative father’s demands [in *Lehr*] would have disrupted a ‘unitary family’ as the plurality defines it[.]”¹⁵²

A premise underlying Brennan’s criticisms is that the plurality erred in applying substantive due process instead of procedural due process.¹⁵³ The plurality was said to conflate “the question whether a liberty interest exists with the question what procedures may be used to terminate or curtail it.”¹⁵⁴ Brennan said the plurality “argues that a challenge to a conclusive presumption must rest on substantive rather than procedural due process.”¹⁵⁵ He opined, “This is simply not so.”¹⁵⁶

Since *Michael H.*, the U.S. Supreme Court has not addressed permissible state marital presumptions.¹⁵⁷ While under California law at the time of *Michael H.*, either Carole or Gerald could have challenged the marital presumption within two years of Victoria’s birth (though Carole would have needed Michael’s cooperation), the high court has not said what—if any—federal constitutional guidelines operate if either spouse/parent challenged the presumption over an objection by the other spouse/parent.¹⁵⁸ It has also not said whether a law allowing challenges only within 30 days of birth, or for as long as 18 years after birth, would be valid.¹⁵⁹ It has not said whether any time period for challenge by the husband/presumed father can be tolled for reasons like maternal deceit or lack of knowledge.¹⁶⁰ The Court has also not indicated whether Michael could have challenged the presumption under the *Lehr* decision if Carole and Gerald had wished to raise Victoria as co-parents after a separation, if not a divorce, shortly after Victoria’s birth,¹⁶¹ as they did, in fact, separate in October 1981 (when Gerald left the California marital home for New York without Carole or Victoria).¹⁶²

152. *Michael H.*, 491 U.S. at 144 (Brennan, J., dissenting).

153. *Id.* at 153.

154. *Id.* at 145. In dissent, Justice White articulated a similar criticism. *Id.* at 160 (White, J., dissenting) (“[T]he facts of this case satisfy the *Lehr* criteria, which focused on the relationship between father and child, not on the relationship between father and mother.”).

155. *Id.* at 153.

156. *Id.*

157. A Westlaw search of “state marital presumptions” reveals no Supreme Court cases addressing the issue since *Michael H.*

158. See generally *Michael H.*, 491 U.S. 110.

159. See generally *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

160. *Id.* at 143.

161. *Id.*

162. *Id.* at 114. The U.S. Supreme Court has also remained silent when states create two paternity presumptions favoring two different men at or around birth for a single child, or how such dual presumptions should be resolved in support or custody litigation. For cases where a choice between the men must be made, see, e.g., *In re Jesusa V.*, 85 P.3d 2, 6 (Cal. 2004) (two presumed fathers in a custody dispute, one married and one unmarried to the mother); *Kevin Q. v. Lauren W.*, 95 Cal. Rptr. 3d 477, 479 (Cal. Ct. App. 2009) (two presumed fathers, one married and one unmarried to the mother); *GDK v. State*, 92 P.3d 834, 835 (Wyo. 2004) (same); *In re Kiana A.*, 113 Cal. Rptr. 2d 669, 673 (Cal. Ct. App. 2001) (two presumed fathers, neither married to the mother at a time relevant to a paternity presumption); and *State v. EKB*, 35 P.3d 1224, 1226-27 (Wyo. 2001)

The U.S. Supreme Court has also provided no guidance on what would be permissible state law regarding legal paternity had Carole's journey ended differently. For example, it did not indicate whether California law could have allowed Gerald to be stripped of his parental rights by Carole and Scott, assuming Scott was willing to assume fatherhood under law.¹⁶³ Could Carole, Scott, and Victoria ever constitute a household of unmarried parents and child? Could Scott prevail where Michael, the biological father, acknowledges genetic ties, but then immediately seeks voluntary termination of any interests?

Further, given the parent-child relationship between Michael and Victoria, could the state law ever allow Michael to resurrect his *Lehr* opportunity interest if Carole and Gerald separated or divorced?¹⁶⁴ If so, would Carole's assent be needed? Similarly, upon separation or divorce, are there circumstances under which Gerald's new love, Marilyn, could attain *Lehr* interests? Recall that the New York adoption law operative in *Lehr* bestowed notice rights on men who married the mothers before the child was six months old, as well as men who lived "openly" with the children and mothers while holding themselves out as the fathers.¹⁶⁵ Could women use such paternity statutes to urge equality demands?¹⁶⁶ There are obviously many questions that were left open by the Court.

IV. THE IMPLICATIONS OF *LEHR* FOR ADOPTIONS

Since *Lehr* and *Michael H.*, the U.S. Supreme Court has affirmed *Lehr* by rejecting an equal protection challenge to federal laws differentiating between the maternity and paternity standards for establishing the natural parents of children born of sex. In *Nguyen v. INS* in 2001, the Court upheld different modes of proving maternity and paternity in order to secure U.S. citizenship for a child born outside the country.¹⁶⁷ Otherwise, the U.S. Supreme Court has been silent on the paternity opportunity interests for unwed natural fathers of children born of sex to both unwed and wed mothers.¹⁶⁸ As a result, state adoption laws on

(two men with marital paternity presumption, though neither wished to rear the child: one was married to the mother at the time of conception; the other was married to the mother when she was in her second trimester). For cases recognizing "dual paternity," see *Smith v. Cole*, 553 So.2d 847 (La. 1989), and *T.D. v. M.M.M.*, 730 So. 2d 873 (La. 1999).

163. See *Michael H.*, 491 U.S. at 110.

164. See, e.g., *In re S.D.*, 906 N.Y.S.2d 896, 898-99 (N.Y. Fam. Ct. 2010) (reinstating biological father's parental rights when no adoption followed).

165. *Lehr v. Robertson*, 463 U.S. 248, 251 (1983).

166. See, e.g., *Kristine H. v. Lisa R.*, 16 Cal. Rptr. 3d 123, 125 (Cal. Ct. App. 2004) (paternity statute used to find parenthood in woman who did not give birth), *aff'd on other grounds*, 117 P.3d 690 (Cal. 2005); *Amy G. v. M.W.*, 47 Cal. Rptr. 3d 297, 309-10 (Cal. Ct. App. 2006) (rejecting paternity statute claim by one woman (wife of child's father) as there was already a mother and father); *Rubano v. Dicenzo*, 759 A.2d 959, 971 (R.I. 2000) (two women partners "involved with paternity" under the Rhode Island statute).

167. *Nguyen v. INS*, 533 U.S. 53, 71 (2001). Many state laws differentiate between natural mothers and fathers of children born of sex. Thus, in some states only fathers can consent prebirth to adoptions of their later born children. See, e.g., DEL. CODE ANN. tit. 13, § 1106 (West 2010); NEV. REV. STAT. ANN. § 127.070 (West 2010); N.C. GEN. STAT. ANN. § 48-3-604 (West 2010).

168. *Nguyen*, 533 U.S. at 58.

legal paternity of unwed fathers vary considerably.¹⁶⁹ The constitutional interests of men and women not genetically tied to potentially adopted children whom they have actually parented also remain uncertain.¹⁷⁰ The varied state law guidelines involve such doctrines as psychological parenthood,¹⁷¹ virtual parenthood,¹⁷² de facto parenthood,¹⁷³ parenthood or no parenthood by estoppel,¹⁷⁴ *in loco parentis*,¹⁷⁵ and contractual parenthood.¹⁷⁶

After *Lehr*, in adoption settings some unwed genetic fathers have a real “opportunity for a meaningful relationship” with their children, while many others have little, if any opportunity.¹⁷⁷ Unwed fathers often need to assert parental opportunities rather quickly under largely uncertain state law in order to thwart adoptions of their biological offspring.¹⁷⁸ Unwed mothers generally have no obligation to inform prospective fathers of pregnancies or of the post-birth whereabouts of offspring, even when the fathers are interested in parenting.¹⁷⁹ Mothers also may have no duty to inform the fathers of adoption proceedings after the mothers learn that the fathers are interested in parenthood.¹⁸⁰ As well, unwed fathers might be foreclosed from pursuing legal paternity in adoption cases if they fail to comply with technical statutory requirements, such as

169. There are occasional federal statutes unifying all state practices. *See, e.g.*, 50 U.S.C. § 522 (2006). The Servicemember’s Civil Relief Act (SCRA) tolls the civil suit limitations period against those in military service. *See also In re Adoption of W.C.*, 938 N.E.2d 1052, 1055 (Ohio Ct. App. 2010). SCRA applies to adoption cases under state law, so its tolling provisions must be used in considering whether genetic father’s consent to adoption was required.

170. Nor has the Supreme Court “had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship.” *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989).

171. *See, e.g., Rubano*, 759 A.2d at 974.

172. *See, e.g., In re a Paternity Proceeding*, 906 N.Y.S.2d 865, 865 (N.Y. Fam. Ct. 2010).

173. *See, e.g., In re Shanaira C.*, 1 A.3d 5, 19 (Conn. 2010) (intervention by child’s father’s girlfriend in a custody case because she cared for the child for two years).

174. *See, e.g., Debra H. v. Janice R.*, 930 N.E.2d 184, 189 (N.Y. 2010) (holding former same-sex partner of mother, with civil union status, can estop mother from denying former partner’s parental relationship); *In re Juanita A. v. Mark*, 930 N.E.2d 214, 215 (N.Y. 2010) (holding biological father can assert equitable estoppel defense in paternity action by mother “where another father figure is present in the child’s life”); *Wanda M. v. Lawrence T.*, 915 N.Y.S.2d 610, 611 (N.Y. App. Div. 2011) (noting estoppel operates to designate a man as a father because he held himself out as the father).

175. *See, e.g., K.D. v. E.S.H.*, 990 A.2d 57 (Pa. Super. Ct. 2009).

176. *See, e.g., Boseman v. Jarrell*, 704 S.E.2d 494, 503 (N.C. 2010) (natural parent who surrenders custody to nonparent can lose childrearing right; child custody then determined by child’s best interests); *Price v. Howard*, 484 S.E.2d 528, 530 (N.C. 1997) (same). *But see In re T.J.S.*, 16 A.3d 386, 388, 391 (N.J. Super. Ct. App. Div. 2011) (holding absent adoption, wife is not legal mother of husband’s biological child born to a gestational carrier though wife and husband “arranged for the in vitro fertilization”).

177. *Nguyen v. INS*, 533 U.S. 53, 65 (2001).

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

179. *See, e.g., ARIZ. REV. STAT. ANN. § 8-106.01(F)* (2010) (stating sex with the mother “is deemed to be notice to the putative father of the pregnancy”). *See generally Shari Motro, The Price of Pleasure*, 104 NW. U. L. REV. 917, 958 (2010) (existing laws give “men almost no entitlement to be informed of conception”).

180. *Lehr*, 463 U.S. at 266.

registering with the putative father registry, even if they undertook similar, or perhaps more significant, acts such as providing pre-birth support, holding the children out in the community as their own while parenting, or suing for custody.¹⁸¹ Form can prevail over substance. The "sheerest formalism" can negate legal paternity for an unwed genetic father early in a child's life.¹⁸²

Further, *Lehr* suggests that an unwed genetic father like Jonathan may be afforded very little time to seize his constitutional opportunity to assume fatherhood before an adoption proceeds. While the facts of *Lehr* included a period of years between birth and the attempt to assert the unwed genetic father's rights, the New York statute would have foreclosed Jonathan's right to any notice or chance to be heard in Jessica's adoption even if the adoption was pursued days after Jessica's birth,¹⁸³ and even though Jonathan had visited Lorraine in the hospital and likely was recognized as the father by Lorraine during her pregnancy. Under the prevailing New York statute,¹⁸⁴ his name was not listed on the putative father registry. Further, his "cohabiting" with Lorraine during her pregnancy would likely not be the same as living "openly" later with Lorraine and Jessica, conduct which Jonathan obviously could not undertake on his own.¹⁸⁵

Lehr not only demonstrates barriers to paternity for certain genetic fathers whose offspring are subject to adoption, but also how certain non-genetic fathers can achieve paternity status in adoptions for children born to unwed mothers. The New York statute in *Lehr* would have recognized legal paternity, during the adoption, for the man living "openly" with Lorraine and her child and holding himself out in the community as the "child's father."¹⁸⁶ Therefore, a man like Scott, the third man involved with Carole in *Michael H.*, can hold himself out as a father even though he is not the genetic father, actual or presumed.¹⁸⁷ For all practical purposes, there can be a de facto adoption by a nongenetic father invited into the mother's family by her without any governmental oversight, and thus without an inquiry into the child's best interests or parental fitness. How would *Lehr* have been decided if Lorraine and Richard established a home together a few days after Jessica's birth and had never married? If Lorraine later wished to place Jessica for adoption, after she and Richard separated, Richard seemingly would be entitled to notice. Jonathan, though, would not be entitled to notice regardless of the fact that he continued to search for Jessica with a private detective and his whereabouts were perhaps known by Lorraine.

Over twenty five years have passed since *Lehr*. The "sheerest formalism" and maternal choice continue to thwart many genetic fathers seeking legal fatherhood in adoptions. Unwed fathers still lose their children due to their ignorance of putative-father-registry laws and to applications of adoption laws

181. *Id.*

182. *Id.* at 274-75.

183. *Id.* at 250-52.

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

185. *Lehr*, 463 U.S. at 250-52.

186. N.Y. DOM. REL. LAW § 111(a).

187. See *Michael H. v. Gerald D.*, 491 U.S. 110, 114 (1989); *Lehr*, 463 U.S. at 250-52.

familiar to very few, even attorneys practicing family law. A few cases and statutes illustrate these issues.

A. Illustrative Adoption Cases

In May 2010, the Utah Supreme Court decided *In re Adoption of T.B.*¹⁸⁸ T.J.M., a juvenile, lost his daughter, T.B., to an adoption by the parents of A.B., also a juvenile and the natural mother of T.B.¹⁸⁹ The child was conceived during a sexual relationship between T.J.M. and A.B.¹⁹⁰

Before birth, T.J.M. sought to parent T.B. As the court noted:

The putative father was aware of the pregnancy and made attempts to obtain receipts from the natural mother and her parents so that he could assist with prenatal medical expenses. He also requested that the natural mother sign a release allowing him access to T.B.'s medical information so that he could monitor T.B.'s progress during the pregnancy. The natural mother and her parents refused these requests.¹⁹¹

After T.B.'s birth on February 7, 2007, T.J.M. continued to pursue parenthood. As noted by the court:

On the day T.B. was born, the natural mother, despite having promised the putative father that she would coordinate with him to allow him to be present at T.B.'s birth, registered in a different hospital than originally planned as a "silent patient." The putative father was nevertheless able to locate the room and visited T.B. and the natural mother on the day T.B. was born. T.B.'s maternal grandparents, who were present in the hospital room during the putative father's visit, disapproved of his association with T.B., and T.B.'s maternal grandfather offered the putative father a "\$120,000 walking ticket" if he would depart from T.B.'s life. The putative father characterizes this as an offer to pay him off; the grandfather claims he was merely calling his attention to the expenses he could avoid by not raising T.B.¹⁹²

T.J.M. declined the maternal grandfather's offer.¹⁹³

T.J.M. continued to have contact with T.B., spending "parent-time with [her] for three to five hours, two times a week, usually at his parents' home."¹⁹⁴ He also had family pictures taken and held a baby shower. T.J.M. or his parents would sometimes take T.B. to daycare and later coordinated daycare with A.B.'s parents.¹⁹⁵ T.J.M. "also purchased child care supplies so that when he was with T.B. he, or his parents, would be able to care for her needs."¹⁹⁶

188. *In re Adoption of T.B.*, 232 P.3d 1026, 1026 (Utah 2010).

189. *Id.* at 1028.

190. *Id.* at 1027-28.

191. *Id.*

192. *Id.* at 1028.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

Nevertheless, T.J.M. lost his daughter to the adoption by the maternal grandparents.¹⁹⁷ “Shortly after T.B.’s birth, and unbeknownst to [T.J.M.], [A.B.] and her parents initiated adoption proceedings.”¹⁹⁸ “The natural mother’s parents ... filed a petition to adopt T.B. on February 23, 2007—sixteen days after T.B. was born.”¹⁹⁹ “On April 2, 2007, the natural mother consented to the adoption and relinquished her parental rights.”²⁰⁰

“On June 20, 2007, [A.B.]’s parents informed [T.J.M.] that they were in the process of adopting T.B. and that the adoption would extinguish his parental rights.”²⁰¹ “Approximately one month later, on July 18, 2007, [T.J.M.] filed a Verified Petition for Order of Paternity, Custody and Child Support . . . , naming [A.B.] as a defendant.”²⁰² “After July 29, 2007, just over a week following [T.J.M.]’s filing of his paternity action, [A.B.] and her parents refused to allow [T.J.M.] to have any further contact with T.B. The adoption decree was entered on August 16, 2007.”²⁰³

As with Jonathan Lehr, T.J.M. lost his child because he failed to follow the statutory requirements regarding putative father registration that trigger a right to notice and participation in an adoption. Under *Lehr*, T.J.M. was found (in a 3-2 decision) not to have developed a “substantial” or “enduring” parent-child relationship, especially as he never exercised “*actual or legal custody*.”²⁰⁴ The dissent, while acknowledging there had been no registration, found that “short of strict compliance with our statutory mandates, it is difficult to imagine what additional measures the father could have undertaken to secure a constitutionally protected parent-child bond with his daughter.”²⁰⁵

Interestingly, T.B. was just over six months old when she was adopted via a proceeding commenced when she was 16 days old.²⁰⁶ Had the maternal grandparents proceeded later, T.J.M. might have prevailed.²⁰⁷ The Utah Adoption Act provides that, for a child placed with adoptive parents more than six months after birth, consent of an unmarried biological father is required if the father “developed a substantial relationship with the child,” presumably before placement.²⁰⁸ Furthermore, that provision is inapplicable where the father “was prevented” from such development by “the person ... having lawful custody.”²⁰⁹ By contrast, when a child is under six months when placed with adoptive parents, “consent of an unmarried biological father is not required unless, prior to the time

197. *Id.*

198. *In re the Adoption of T.B.*, 232 P.3d 1026, 1028 (Utah 2010).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 1035.

205. *Id.* at 1040 (Nehring, J., dissenting).

206. *Id.* at 1028.

207. UTAH CODE ANN. § 78B-6-121(1)(a) (West 2010).

208. *Id.* § 78B-6-121(1)(a)(i).

209. *Id.* § 78B-6-121(2)(a).

the mother executes her consent for adoption,” the father initiates a paternity case, files an affidavit with a court promising to pay child support, and files a notice in a state registry as to the paternity case.²¹⁰ So, with no putative father registry filing, a father like T.J.M., whose child is placed for adoption early in life, must act very, very quickly. A mother can execute a consent to adoption shortly after birth.²¹¹ When an older child (over six months) is placed for adoption, a father like T.J.M. has had at least six months to develop a “substantial” and “enduring” parent-child relationship and can even seek visitation/custody with no such preexisting relationship if he was “prevented” from parenting.²¹² Here, the age of the child/infant placed for adoption determines the extent to, and manner in, which a *Lehr* interest is vested in an unwed natural father.

The T.B. case is quite similar to two 2010 Ohio Supreme Court cases in which the outcomes were very different. In *In re Adoption of G.V.*, the alleged biological father, Benjamin, timely registered with the Ohio Putative Father Registry as to any child born of his consensual sex.²¹³ G.V., his child from such sex, was born on October 29, 2007 and placed shortly after birth with Christy and Jason Vaughn, who filed an adoption petition on January 16, 2008.²¹⁴ Benjamin filed an action to establish paternity in the juvenile court on December 28, 2007.²¹⁵ The probate court stayed the adoption proceeding pending the juvenile court’s determination of paternity.²¹⁶ Ultimately, the Ohio juvenile court named Benjamin the father on March 17, 2009.²¹⁷

Pursuant to Ohio statutes, an adoption can proceed without the consent of a father or a putative father who “without justifiable cause” fails to provide “more than de minimis contact” or support for a period of at least one year immediately preceding either the filing of the petition for adoption or the placement of the minor in the home of the petitioner seeking to adopt.²¹⁸ According to the appellate court, a father’s one year period to demonstrate communication or support (lest he forfeit his right to veto an adoption) did not begin until one year after his paternity has been established.²¹⁹ The appeals court affirmed the trial court, declaring that parentage issues pending in juvenile courts at the time of the adoption petition effectively bar probate courts from proceeding with

210. *Id.* § 78B-6-121(3).

211. *Id.*

212. UTAH CODE ANN. § 78B-6-121(1), (2) (West 2010); *In re Adoption of T.B.*, 232 P.3d 1026, 1035 (Utah 2010).

213. *In re Adoption of G.V.*, 933 N.E.2d 245, 246 (Ohio 2010).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. OHIO REV. CODE ANN. § 3107.07(A) (West 2010).

219. *In re G.V.*, 933 N.E.2d at 246-47.

adoptions.²²⁰ The Ohio Supreme court affirmed, preserving Benjamin's paternal opportunity interest.²²¹

The "sheerest formalism" might be said to distinguish Benjamin from T.J.M. and Jonathan, as Benjamin was the only one to file with the putative father registry.²²² However, the Ohio Supreme Court indicated that this was not crucial in a companion case, *In re Adoption of P.A.C.*²²³

In *P.A.C.*, Gary was the biological father of P.A.C., who was born in July of 2005.²²⁴ At the time, the mother, Susan, was married to Jeremy.²²⁵ In fact, Jeremy was listed as the father on P.A.C.'s birth certificate.²²⁶ In August 2005, a DNA test showed Gary to be the biological father.²²⁷ Susan was divorced from Jeremy in November 2005 and married Kevin on April 13, 2007.²²⁸ On April 20, 2007, Kevin filed a petition to adopt P.A.C.²²⁹ As in *G.V.*, the Ohio high court held that staying the adoption proceeding was appropriate pending a determination of Gary's paternity.²³⁰ Gary, as did Benjamin, filed a parentage action before the filing of any adoption petition.²³¹ But unlike Benjamin, Gary did not register with the Ohio putative father registry.²³² Nonetheless, the Ohio Supreme Court preserved Gary's paternity opportunity interest.²³³

So, genetic ties do not always yield paternity under law even when a child is born to an unmarried woman (or girl) as a result of consensual sex and even when the child otherwise has no father under law at birth. This is troubling because, in the United States, public policy clearly desires that fathers be designated at birth for nearly all children.²³⁴ Positive paternity tests do not always prompt legal paternity, sometimes due to the "sheerest formalism" or the prevention of child-parent contacts. Children, at times, can be denied fathers at birth where the children's best interests are never considered. By not allowing a Jonathan Lehr or a T.J.M. to participate in an adoption, it will not be known

220. *In re G.V.*, 2009-Ohio-6338, 2009 WL 4447562, at *1 (Ohio Ct. App. 2009).

221. *In re G.V.*, 933 N.E.2d at 246.

222. See *Lehr v. Robertson*, 463 U.S. 248, 275 (1983).

223. See *In re Adoption of P.A.C.*, 933 N.E.2d 236, 238 (Ohio 2010).

224. *Id.* at 236.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 237.

229. *Id.*

230. *Id.*

231. *Id.* at 236-37.

232. *Id.* at 237.

233. *In re Adoption of P.A.C.*, 933 N.E.2d 236, 236 (Ohio 2010). See also *Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 192 (Fla. 2007) (holding paternity case filing on day child was born prompts standing for genetic father in an adoption proceeding though there was no use of the putative father registry).

234. Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59, 60 (2006) [hereinafter Parness, *Federal Paternity Laws*].

whether a Jessica or a T.B. would likely have benefitted from a relationship with her genetic father.

B. Illustrative Adoption Statutes

The Utah and Ohio cases suggest significant interstate and intrastate variations in judicial decisions regarding state adoption laws.²³⁵ There are also differences in the state statutes,²³⁶ such as an Indiana statute declaring that a pending paternity suit does not relieve a putative father of the duty to file with the putative father registry.²³⁷ There are other important differences, such as adoption laws requiring mothers to disclose the identities of the putative fathers before they may place their children for adoption. For example, in Connecticut, adoption petitions “shall set forth with specificity ... the names, dates of birth and addresses of the parents of the child, if known, including the name of any putative father named by the mother.”²³⁸ Delaware law, on the other hand, allows a mother to opt out of identifying possible father(s); doing so, however, allows some biological fathers later opportunities to contest adoptions.²³⁹

By contrast, in Alabama, mothers need not disclose the identities of the fathers.²⁴⁰ In Arizona, “the fact that the putative father had sexual intercourse

235. See, e.g., *In re Adoption of T.B.*, 232 P.3d 1026, 1031 (Utah 2010). Utah’s adoption scheme varies depending on age of the child placed for adoption under UTAH CODE ANN. section 78B-6-121(1).

236. Significant statutory differences in state adoption laws do not necessarily implicate *Lehr*, including when parental rights may be ended, even if mothers and fathers are treated differently. See, e.g., DEL. CODE ANN. tit. 13, § 1106 (West 2011) (“A mother whose consent to the termination of parental rights is required may execute a consent only after the child is born. Consent by the father or presumed father may be executed either before or after the child is born.”); NEV. REV. STAT. ANN. § 127.070 (West 2011) (“All ... consents to adoption executed ... by the mother before the birth of a child or within 72 hours after the birth ... are invalid A ... consent to adoption may be executed by the father before the birth ... if the father is not married to the mother.”); N.C. GEN. STAT. ANN. § 48-3-604 (West 2011) (A man can consent to adoption before or after birth, while a mother can consent “at any time after the child is born but not sooner.”). These differences are reasonable. As only women experience pregnancies, only their “relationships” with their future children are sufficiently “enduring” (per *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)). Only women are subject to physical and emotional change due to pregnancy. Genetic fathers are less likely to experience changed relations with future offspring, as their physical relationships do not change. Within a single state there also can be statutory differences between different types of adoption, like stepparent and non-stepparent. See, e.g., KAN. STAT. ANN. §§ 59-2136(d), (h) (West 2011).

237. IND. CODE ANN. § 31-19-5-6 (West 2011).

238. CONN. GEN. STAT. ANN. § 45A-715(b) (West 2011).

239. DEL. CODE ANN. tit. 13, § 1107(A)(e) (West 2011).

240. ALA. CODE § 26-10A-7 (2011) (Adoption law neither requires nor encourages the mother to disclose the identity of the father: “[t]he putative father if made known by the mother or is otherwise made known to the court provided he complies with Section 26-10C-1 and he responds within 30 days to the notice he receives under Section 26-10A-17(a)(10).”). See also IDAHO CODE ANN. § 16-1501(A)(4) (West 2011) (“[A]n unmarried mother has a right to privacy with regard to her pregnancy and adoption plan, and therefore has no legal obligation to disclose the identity of an unmarried biological father prior to or during an adoption proceeding, and has no obligation to volunteer information to the court with respect to the father.”).

with the mother is deemed to be notice to the putative father of the pregnancy” and of possible adoption proceedings.²⁴¹ In Florida, a biological father, by engaging “in a sexual relationship with a woman, is ... on notice that a pregnancy and an adoption proceeding regarding that child may occur.”²⁴²

Some American state adoption laws can necessitate significant investigations into the identities and whereabouts of putative fathers before adoptions. In Vermont, a court will make “every reasonable effort” to identify the unknown biological father.²⁴³ In Arkansas, a court “shall appoint an attorney ad litem who shall make a reasonable effort to locate and serve notice upon” an individual in an adoption case who is entitled to notice but has not yet been located.²⁴⁴ In some states, searching for the putative father is the duty of the party who petitions for adoption, typically either the mother or the state. In Connecticut, when the whereabouts of a putative father is unknown, “the petitioner shall diligently search for any such parent or putative father ... [and] shall file an affidavit with the [adoption] petition indicating the efforts used to locate the parent or putative father.”²⁴⁵ A petitioner who seeks an adoption in Texas must exercise “due diligence” to identify the father.²⁴⁶

No such investigation is necessary in Indiana.²⁴⁷ There, a father who has not registered with the state putative father registry within 30 days of the child’s birth, or before an earlier filing of either a petition to adopt or to terminate a parent-child relationship between child and mother, is not entitled to notice unless the mother discloses the name or address of the putative father to the attorney or the agency arranging the adoption.²⁴⁸ The “filing of a paternity action by a putative father does not relieve the putative father from the: (1) obligation of registering; or (2) consequences of failing to register” with the putative father registry.²⁴⁹ Nor does a rebuttable presumption of paternity, created by a father who “receives the child into the man’s home” and “openly holds the child out as the man’s biological child,” relieve the putative father from the obligation of registering or the consequences of failing to register with the Indiana putative father registry.²⁵⁰ Finally, in Indiana a “putative father’s failure to register not only waives his right to notice of the adoption but also irrevocably implies his consent.”²⁵¹ A putative father who thus implies consent “may not challenge the adoption or establish paternity.”²⁵² Even fathers in Indiana who are entitled to notice, because they registered as putative fathers, forfeit their rights to veto

241. ARIZ. REV. STAT. ANN. § 8-106.01(F) (2011).

242. FLA. STAT. ANN. § 63.088 (1) (West 2011).

243. VT. STAT. ANN. tit. 15A, § 3-404(a) (West 2011).

244. ARK. CODE ANN. § 9-9-212(a)(5)(A) (West 2011).

245. CONN. GEN. STAT. ANN. § 45A-715(c) (West 2011).

246. TEX. FAM. CODE ANN. § 161.002(f) (West 2011).

247. IND. CODE ANN. § 31-19-4-6 (West 2011).

248. *Id.*

249. *Id.* § 31-19-5-6.

250. *Id.* § 31-14-7-2; § 31-19-5-6.

251. *In re Adoption of J.D.C.*, 751 N.E.2d 747, 750 (Ind. Ct. App. 2001).

252. *Id.*

adoptions if they do not respond to adoption notices within 30 days of service of process when the children are over a year old.²⁵³ Finally, a failure to register or take responsibility for parenthood is often not excused when caused by ignorance of pregnancy, or even deceit.²⁵⁴

V. THE IMPLICATIONS OF *LEHR* IN OTHER SETTINGS

While *Lehr* and *Michael H.* involved two different instances of nonmarital children in adoptions, their analysis of federal constitutional paternity opportunity interests have been or could be applied in other settings. There is likely no good reason why protected interests in forming “significant” parent-child relationships should only be afforded to certain natural fathers whose children are placed for adoption. As noted, American states generally have public policies favoring one legal father and one legal mother at birth for nonmarital children born of sex.²⁵⁵ Most nonmarital children, born in or outside of marriages, will never be placed for adoptions.²⁵⁶

So where else, beyond adoption, might assessments of “custodial, personal, or financial” relationships between nonmarital children and their genetic fathers, and perhaps others, be constitutionally necessary?²⁵⁷ What do state laws now say about the prerequisites for such relationships, whether or not compelled constitutionally?

These constitutional questions have relevance for such areas as safe haven, custody/visitation, child support, tort, and inheritance.²⁵⁸ The first three often involve child-rearing interests in nonmarital children, thus implicating *Lehr* and *Michael H.*²⁵⁹ In the latter two settings, typically only money is at issue.²⁶⁰

253. IND. CODE ANN. § 31-19-5-12 (West 2011). To be entitled to notice of an adoption, “a putative father must register with the state department of health under section 5 of this chapter not later than: (1) thirty (30) days after the child’s birth; or (2) the earlier of the date of the filing of a petition for the: (A) child’s adoption; or (B) termination of the parent-child relationship between the child and the child’s mother; whichever occurs later.” *Id.*

254. See, e.g., *In re Baby Boy K.*, 546 N.W.2d 86, 99-101 (S.D. 1996) (reviewing cases).

255. Parness, *Federal Paternity Laws*, *supra* note 234, at 60.

256. Robin F. Wilson & W.B. Wilcox, *Bringing up Baby: Adoption, Marriage and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 884 (2006).

257. In neither *Lehr* nor *Michael H.* did the court limit due-process parental opportunity interests to adoptions. See Parness, *Out of Control Paternity Schemes*, *supra* note 5, at 655 (applying *Lehr* to safe haven and paternity acknowledgment schemes).

258. Reunification services (where children have been removed by the state, but parental rights are not yet lost) are another setting in which assessments of relationships between non-genetic fathers and children are necessary. See, e.g., *In re Baby Girl T.*, No. F055571, 2009 WL 866855, at *1, *3 (Cal. Ct. App. Apr. 2, 2009); *In re Jerry P.*, 116 Cal. Rptr. 2d 123, 125 (Cal. Ct. App. 2002).

259. See generally *Wolfe v. Stevens*, 309 S.W.3d 209, 210 (Ark. Ct. App. 2009); *J.S.A. v. M.H.*, 863 N.E.2d 236, 239 (Ill. 2007); *Wener v. Wener*, 312 N.Y.S. 2d 815, 816 (N.Y. App. Div. 1970).

260. See, e.g., *In re Estate of Perez*, 330 N.Y.S.2d 881, 883 (N.Y. Sur. Ct. 1972).

In all settings, the guidelines on paternity opportunity interests, and other possible legal parentage, differ both intrastate and interstate.²⁶¹ Indeed, guidelines can differ within a single setting in a single state.²⁶² Recall that under the Utah adoption scheme in *T.B.*, the guidelines varied depending upon the age of the child placed for adoption.²⁶³ Similarly, there are variations interstate in safe haven or custody/visitation settings depending upon age.²⁶⁴ Assuming Lorraine never married Richard, should Jonathan still be denied any chance for visitation with or custody of Jessica simply because he failed to register his sex with Lorraine pre-birth, at birth, or shortly after birth?²⁶⁵ Should Jessica's age at the time when Lorraine seeks to abandon her with the state (via a safe haven law), or when Jonathan seeks visitation, be important?²⁶⁶

In examining varying male parentage issues outside of adoption, it is helpful to ask, assuming the paternity opportunity of a genetic father like Jonathan Lehr was not timely exercised, might such an interest be revived? For instance, had Lorraine and Richard divorced after the adoption petition was filed but not granted, with Richard withdrawing his request to adopt, might Jonathan then be entitled to a renewed chance to secure visitation? Or, might Jonathan then only to be entitled to parent if Lorraine sought child support?

A. *Safe Havens*

Under American state statutes, varying peoples (like mothers or parents) may anonymously abandon infants or very young children by placing them in safe havens controlled by public safety entities, such as police, fire, or hospital personnel.²⁶⁷ Foster care or adoptions are contemplated for these abandoned children.²⁶⁸ Abandonment is most frequent among young mothers, who often reveal no information about the circumstances of birth, or about biological or legally presumed fathers or other family members.²⁶⁹ Safe haven statutes clearly implicate federal constitutional male parental opportunity (if not child-rearing)

261. See generally *In re Adoption of T.B.*, 232 P.3d 1026, 1031 (Utah 2010). Compare N.M. STAT. ANN. § 24-22-3(B) (West 2011) (indicating a "hospital may ask the person leaving the infant for the name of the infant's biological father"), with FLA. STAT. ANN. § 63.0423(4) (West 2011) (indicating that the child placing agency shall not attempt to pursue, search for, or notify the parent, absent circumstances suggesting abuse or neglect).

262. *In re Adoption of T.B.*, 232 P.3d at 1031.

263. *Id.*

264. Compare N.M. STAT. ANN. § 24-22-3(B), with FLA. STAT. ANN. § 63.0423(4).

265. See generally *Lehr v. Robertson*, 463 U.S. 248, 249-50 (1983).

266. See, e.g., *Jerry C. v. April H.*, No. F059797, 2011 WL 439567, at *2 (Cal. Ct. App. Feb. 9, 2011) (Upon consideration of "child's age" and duration of parent-child relationship, a court may decide to deny a non-genetic father's an action to set aside a signed, voluntary acknowledgment of paternity.).

267. Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 754-55 (2006).

268. *Id.* at 758.

269. *Id.* at 789.

interests,²⁷⁰ disregarding the federal constitutional protections of the parentage interests of men in their genetic offspring born of consensual sex with unmarried women.²⁷¹ When infants are abandoned by their (likely) mothers,²⁷² typically those receiving the infants cannot ask for the mother's identification or about the circumstances of the birth.²⁷³ Would abandonments by their (likely) fathers, in states where either parent is authorized by law to abandon, be comparably treated, with no inquiries?

State safe haven statutes illustrate how paternity opportunity interests are foreclosed; that is, how statutory schemes likely "omit many responsible fathers."²⁷⁴ Unlike *Michael H.*, here, biological fathers often lose their child-rearing opportunities without any countervailing state interests in preserving unitary families.²⁷⁵

A West Virginia statute declares that a hospital taking possession of an abandoned child from a parent "may not require" the parent to identify himself or herself and shall "respect the person's desire to remain anonymous."²⁷⁶ A New Mexico statute appears sympathetic to potential lost fathers, but ultimately provides little help, stating, "A hospital may ask the person leaving the infant for the name of the infant's biological father or biological mother, the infant's name and the infant's medical history, but the person leaving the infant is not required to provide that information to the hospital."²⁷⁷ In Florida, safe haven procedures seemingly include requirements of diligent searches for, and notice to, interested men.²⁷⁸ They also allow potential lost fathers certain opportunities to void earlier parental rights terminations or adoptions where a court finds a person "knowingly gave false information that prevented the birth parent from timely making known his or her desire to assume parental responsibilities toward the minor or from exercising his or her parental rights."²⁷⁹ However, another Florida provision states that, except "when there is actual or suspected child abuse or neglect, any parent who leaves a newborn infant ... and expresses an intent to leave the newborn infant and not return, has the absolute right to remain

270. E.g., KY. REV. STAT. ANN. §§ 216B.190(3) (West 2011); W. VA. CODE ANN. § 49-6E-1 (West 2011).

271. See, e.g., KY. REV. STAT. ANN. §§ 216B.190(3); W. VA. CODE ANN. § 49-6E-1.

272. For a further exploration of maternal abandonments, see generally Sanger, *supra* note 267, at 754-55.

273. *Id.* at 755.

274. See *Lehr*, 463 U.S. at 263-64.

275. See *Lehr v. Robertson*, 463 U.S. 248, 263-64 (1983).

276. W. VA. CODE ANN. § 49-6E-1 (West 2011). See also ARIZ. REV. STAT. ANN. § 13-3623.01(D) (2011) (respecting mother's right to anonymity); KY. REV. STAT. ANN. §§ 216B.190(3), 405.075(2) (West 2011) (need to respect mother's "right to remain anonymous"); IDAHO CODE ANN. § 39-8203(3) (West 2011) (No inquiry is made into identity of parent; if parent is known, the information is to remain "confidential.").

277. N.M. STAT. ANN. § 24-22-3(B) (West 2011).

278. FLA. STAT. ANN. § 63.0423(4) (West 2011). See also *In re Doe*, 3 A.3d 657, 662 (N.J. Super. Ct. Ch. Div. 2010) (when a mother refuses to reveal, the state nevertheless must investigate if there is "other information").

279. FLA. STAT. ANN. § 63.0423(9)(a).

anonymous and to leave at any time and may not be pursued.”²⁸⁰ Thus, there are no real opportunities for diligent searches for genetic fathers. By contrast, when a mother places an older child for adoption in Florida, the proceeding to terminate all parental rights in anticipation of a later adoption requires judicial inquiry and, perhaps an adoption entity search, for the father.²⁸¹ Such a father includes a man married to the mother, a man who earlier acknowledged paternity, or a man who cohabitated with the mother at the time of conception.²⁸²

Too often safe haven laws foreclose genetic fathers from parenting their own children even though there are no unitary families worthy of state protection. The *Lehr* paternity opportunity interest is unfairly denied.

B. Custody/Visitation

Genetic fathers of children born because of sex with unmarried women who are not in unitary families typically may exercise their constitutional parental interests by seeking paternity or custody/visitation orders.²⁸³ In these situations, the parental interests are not as easily lost as they may be in adoptions, where genetic fathers can lose because of pre-birth or at-birth failure to act.²⁸⁴ In the absence of a unitary family, must states, per *Lehr*, recognize more time for genetic fathers to exercise their rights?²⁸⁵ As well, per *Lehr*, must states, at least post-viability, recognize some pre-birth opportunities for prospective fathers to establish “personal or financial” (if not “custodial”) relationships with their potential offspring?²⁸⁶ The U.S. Supreme Court has set minimal guidelines.²⁸⁷ State precedents vary.²⁸⁸

The recent Illinois case of *J.S.A. v. M.H.* involved a birth mother who opposed custody or visitation for their non-marital child’s genetic father, in part because he failed to register with the putative father registry.²⁸⁹ The genetic father initiated a paternity suit.²⁹⁰ Only then did the mother’s husband, who

280. *Id.* § 383.50(5).

281. *Id.* § 63.088(1)-(2).

282. *Id.* § 63.088(4)-(5).

283. See, e.g., *Ex parte G.C., Jr.*, 924 So. 2d 651, 653-54 (Ala. 2005); *Wolfe v. Stevens*, 309 S.W.3d 209, 210 (Ark. Ct. App. 2009).

284. See, e.g., *Wolfe*, 309 S.W.3d at 210 (noting laches did not bar alleged biological father from pursuing paternity as statute ARK. CODE ANN. § 9-10-102(b) (West 2011) allows paternity suits “at any time”). But see *Ex parte G.C., Jr.*, 924 So. 2d at 661 (Stuart, J., concurring) (finding a biological father can lose prima facie right to custody because of a failure to assume childrearing in a timely manner).

285. *Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983).

286. *Id.* A few states allow prospective fathers, with unwed prospective mothers, to file voluntary paternity acknowledgements which can later be used to place the men on birth certificates. See, e.g., TEX. FAM. CODE ANN. § 160.304(b) (West 2011); WYO. STAT. ANN. § 14.2-604(b) (2011).

287. *Lehr*, 463 U.S. at 265-68.

288. *Id.*

289. *J.S.A. v. M.H.*, 863 N.E.2d 236, 239-40 (Ill. 2007).

290. *Id.* at 240.

married post-birth, file for an adoption.²⁹¹ The court rejected the father's failure to register as a putative father as a ground for dismissing the paternity suit.²⁹²

The Iowa Court of Appeals examined a case involving a genetic father who pursued custody and visitation against a birth mother who continued to parent; the court was asked whether a father who attempts to assert parental rights five years after birth has intentionally relinquished a known right.²⁹³ In this case, the mother's deceit was arguably the cause of the genetic father's delay.²⁹⁴ The paternity and custody/visitation claims were actually considered in the mother's dissolution proceeding from her husband, the presumed father.²⁹⁵ Thus, a biological father may have more opportunity to assert parental rights where there is no adoption proceeding shortly after birth and where there is a dissolved unitary family.²⁹⁶ This is not surprising given the social policies enunciated in *Michael H.*²⁹⁷

C. Child Support

Questions about paternity opportunity interests also often surface in child support suits against men where there were no prior determinations of legal paternity.²⁹⁸ Support can be pursued by mothers, other guardians of the child, or governments (often seeking reimbursements for earlier child welfare payments).²⁹⁹ When support is sought, upon a determination of male parentage under law, based on genetic ties,³⁰⁰ do the pursued men always have child-rearing opportunities? If not, is the preclusion based on the father's failure to accept parenting responsibility, comparable to the failures of Jonathan Lehr or T.J.M.? Again, there are no U.S. Supreme Court standards,³⁰¹ and state practices vary.³⁰²

291. *Id.*

292. *Id.* at 247.

293. *In re Briggs*, No. 07-0730, 746 N.W.2d 279, at *1 (Iowa Ct. App. Jan. 30, 2008). The Court's decision is referenced in a "Decision Without Published Opinions" table in the North Western Reporter.

294. *Id.* at *4.

295. *Id.* at *1.

296. *Id.* at *1, *4.

297. *Michael H. v. Gerald D.*, 491 U.S. 110, 120-30 (1989).

298. *See generally Wener v. Wener*, 312 N.Y.S.2d 815 (N.Y. App. Div. 1970).

299. *See, e.g., Still v. Hayman*, 794 N.E.2d 751, 753 (Ohio Ct. App. 2003).

300. At times male child support does not depend upon genetic ties. *See, e.g., Wener*, 312 N.Y.S.2d at 815 (holding that husband must support child he neither fathered nor adopted, where husband had agreed at one time to adopt and had treated the child as his own before a marital separation).

301. In *N.E. v. Hedges*, the court said:

[T]here are no judicial decisions recognizing a constitutional right of a man to terminate his duties of support under state law for a child that he has fathered, no matter how removed he may be emotionally from the child. Child support has long been a tax fathers have had to pay in Western civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between father and his offspring—even if unwanted and unacknowledged—remains constitutionally sufficient to support paternity tests and child support requirements. We do not have a system of government like ancient Sparta where

In many circumstances, men have no legal opportunity to rear the children they must support.³⁰³ Even when a biological father's child-rearing opportunities are wrongfully lost, he is typically not relieved of support obligations.³⁰⁴ However, equitable principles can limit paternal support duties if there were serious deprivations of desired custody/visitation rights.³⁰⁵

A 2003 Ohio case, *Still v. Hayman*, illustrates how very late requests for paternal child support are considered by courts even where the money may not directly benefit the children; when any real chance for exercising parental guidance by the father has long since passed; and when the father was long unaware of his own paternity.³⁰⁶ In *Still*, Melissa Hayman, then about 15, became pregnant after a one-time sexual encounter in 1984 with Clyde Still, Jr., then about 13.³⁰⁷ During the pregnancy, Clyde asked Melissa if he was the

male children are taken over early in their lives by the state for military service. The biological parents remain responsible for their welfare. One of the ways the state enforces this duty is through paternity laws. This responsibility is not growing weaker in our body politic ... but stronger

N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004).

302. See *Upfront Answers to Back Child Support Law in America*, CHILDSUPPORTLAWFIRMS.COM, <http://www.childsupportlawfirms.com/topics.cfm/back-child-support-law.html> (last visited Oct. 1, 2011).

303. In *In re Adoption of Baby A.*, the court said:

This case demonstrates that Florida has taken substantially different statutory approaches to the rights and responsibilities of biological fathers of children born to unmarried mothers depending upon the issue at stake. In cases of adoption, we wish to minimize unmarried biological fathers' rights. When the state seeks to declare a child dependent, the unmarried biological father's rights are guarded in the hopes the father will fulfill his parental obligations to the child. In cases of child support, especially when the state seeks reimbursement of welfare payments, we attempt to maximize the unmarried biological father's responsibilities. Whether Florida needs a unified policy for the rights of such biological fathers or whether varying policies can coexist is an interesting issue that is raised, but certainly not resolved, in this case.

In re Adoption of Baby A., 944 So. 2d 380, 395-96 n.21 (Fla. Dist. Ct. App. 2006). For a contrary authority, see generally *Ex parte M.D.C.*, 39 So. 3d 1117 (Ala. 2009). See also *In re Beck*, 793 N.W.2d 562, 567 (Mich. 2010) (holding that terminating parental rights does not end parental support obligations); *In re Marriage of Cohen*, 747 P.2d 363, 365 (Or. Ct. App. 1987) (simultaneously affirming the trial court's denial of father's right to visitation and the trial court's denial of father's request to reduce child support payments); *In re Ryan B.*, 686 S.E.2d 601, 609 (W. Va. 2009).

304. See, e.g., *Commonwealth ex rel. Zercher v. Bankert*, 405 A.2d 1266, 1269 (Pa. Super. Ct. 1979) ("Generally, matters of support are separate and independent from problems of visitation and custody, and ordinarily a support order must be paid regardless of whether the wife is wrongfully denying the father's right to visitation.").

305. See, e.g., *In re T.K.Y.*, 205 S.W.3d 343, 356-57 (Tenn. 2006) ("Because Mr. P. did not have the benefits or responsibilities flowing from an adjudication of parenthood, or the rights flowing from court-ordered visitation, his ability to form a paternal relationship was entirely dependent upon the willingness of Mr. and Mrs. Y to permit him to do so[;] ... [thus,] it would be inequitable to require Mr. P to pay retroactive support to Mrs. Y.").

306. *Still v. Hayman*, 794 N.E.2d 751, 753 (Ohio Ct. App. 2003).

307. *Id.*

father.³⁰⁸ Melissa responded that the father was a man she met in Arizona while on vacation.³⁰⁹ No one in Melissa's family, with whom Clyde was friendly, ever indicated that Clyde was the genetic father.³¹⁰ On March 3, 1985, Melissa bore Amber.³¹¹ In 1987, Melissa began receiving public assistance benefits for Amber through the local Department of Human Services.³¹² Prior to receiving benefits, Melissa was required to name Amber's father so that paternity and paternal child support duties (including reimbursement to the government for the aid it provided) might be established.³¹³ Melissa, knowing Clyde was the father, lied to the Department, saying Amber's father was Jeff Mills, about whom she had no information.³¹⁴ It is unclear what actions, if any, were taken to locate the fictitious Mills.³¹⁵

In August 2000, when Amber was 15, Amber told Clyde that he was her genetic father.³¹⁶ In October, 2000, Melissa informed a local Child Support Enforcement Agency (CSEA) that Clyde, not Jeff, was Amber's father.³¹⁷ Melissa told the agency that at the time she began receiving assistance, she did not want to get into trouble so she just picked a name for the father. Melissa also said that she had not previously disclosed the identity of Amber's father because Clyde had raped her.³¹⁸

Genetic testing showed in November 2000, a 99.98% chance that Clyde was Amber's biological father.³¹⁹ In December 2000, CSEA issued an administrative order establishing a parent-child relationship between Clyde and Amber, in large part to recover past support it had provided for Amber.³²⁰ Clyde filed a parentage complaint against Melissa, arguing a paternity order was barred by laches, as there was a failure to assert paternity for such an unreasonable time resulting in prejudice; CSEA intervened.³²¹

A hearing proceeded with testimony from Clyde and Donna Anderson, a CSEA investigator.³²² The trial court then ruled that laches barred the mother's attempt to establish paternity and to collect child support.³²³ Since CSEA's rights to recover from Clyde were derived from Melissa, the court also found laches barred CSEA.³²⁴ The trial court concluded: "Plaintiff, Clyde Still Jr., does not

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 753-54.

313. *Id.* at 754.

314. *Id.*

315. *Id.*

316. *Still v. Hayman*, 794 N.E.2d 751, 754 (Ohio Ct. App. 2003).

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

owe a duty of support for the child, Amber Hayman ... because he has materially been deprived of his parental right in raising his daughter and in having visitation and other contact with the child.”³²⁵

CSEA appealed.³²⁶ The appeals court first determined that laches generally should not apply against state entities like CSEA when it would be “contrary to an ascertainable public interest.”³²⁷ It declared “[T]he public should not suffer due to the inaction of public officials.”³²⁸ Yet, the court also found that at times laches might be appropriate, as when a state request for reimbursement is accompanied by state “delay and prejudice.”³²⁹

In “the case at hand,” the appeals court found a “strong public policy ... that it is in the child’s interest that a parent-child relationship be formed,” as well as a policy dictating that parents, not governments, assume responsibilities “for the health, maintenance, welfare and well-being” of their children.³³⁰ Because “a parent-child relationship could be established through court-ordered visitation” since Amber was still a minor, and thus because Clyde had “the ability to become involved” in Amber’s life, laches was “not applicable.”³³¹ The court found there was no “material prejudice” to Clyde because between “the ages of 15½ to 18, there is still an amount of rearing that must be done.”³³² Yet, because Clyde had no chance to parent until Amber was 15½, he was not ordered to “pay retroactive child support for a child he had no knowledge of.”³³³ The appeals court found this was not like a case “where a father chooses not to support his child, the mother waits years before seeking an enforcement order, and the father claims that the delay in asserting her right resulted in material prejudice.”³³⁴ Rather, it was deemed “more closely analogous” to a case where a father stops paying child support because the mother concealed the whereabouts of the child, thus making it impossible for him to enforce his visitation rights.³³⁵ Clyde’s child support obligations were sustained.³³⁶

The appeals court in *Still* reasoned that a duped dad could be assessed child support duties long after birth because there was still some child-rearing “that must be done,” and because the genetic father could then begin to parent, as through “court-ordered visitation.”³³⁷ There was no mention of what, if any,

325. *Id.* at 755.

326. *Still v. Hayman*, 794 N.E.2d 751, 753 (Ohio Ct. App. 2003).

327. *Id.* at 755.

328. *Id.*

329. *Id.*

330. *Id.* at 755-56.

331. *Id.* at 756.

332. *Id.* at 757.

333. *Id.*

334. *Id.* at 758.

335. *Id.* at 755.

336. *Still v. Hayman*, 794 N.E.2d 751, 755 (Ohio Ct. App. 2003).

337. *Id.* at 757. Federal Circuit Judge Richard Posner has suggested that even a statutory rapist who had earlier accepted parenting duties under *Lehr* might later have a claim to parental rights if obligated to provide child support. *Pena v. Mattox*, 84 F.3d 894, 901 (7th Cir. 1996).

fatherly parenting had been given Amber for any part of her 15 years.³³⁸ Furthermore, there was no guarantee that Clyde would secure a parenting opportunity, as Amber's best interest must be considered. Clyde's opportunity to parent Amber for even the short time she was still a minor would likely be barred if, in fact, Clyde raped Melissa.³³⁹

Unfortunately at times child support orders obligate men who never had a chance to accept parenting responsibility and to rear their genetic offspring to pay support. Child support orders should not always prompt opportunities for custody or visitation, but they should be preceded by some reasonable opportunity to accept parentage, at least for nonmarital children.

D. Torts and Inheritance

Legal parentage at the time of pregnancy or birth must also be determined when certain tort and/or inheritance recoveries are sought by fathers for fatal injuries suffered by their children prenatally or at birth.³⁴⁰ Although paternity is at issue in these instances, without the need to consider possible child-rearing interests, should legal paternity issues in tort and inheritance be determined like legal paternity issues in adoption? Should a *Lehr* analysis operate for male genetic fathers with no possible opportunity to parent their children, but who wish to pursue tort or inheritance recoveries for losses of potential or actual offspring?³⁴¹ Further, should those not genetically tied to a child, but who have actually parented, possess recovery rights, like the adoption notice rights possessed by those who hold themselves out as parents? Here, there could not be significant U.S. Supreme Court guidelines, as state laws typically govern these claims.³⁴² State laws vary on these issues, sometimes recognizing recovery rights for genetic fathers who could not rear their children under *Lehr* standards.³⁴³

338. *Still*, 794 N.E.2d at 753-58.

339. *See, e.g.*, KAN. STAT. ANN. § 59-2136(h)(1)(F) (West 2011) (stating that in adoption, male parental rights are terminated where "the birth of the child was the result of the rape of the mother").

340. *See, e.g.*, *In re Estate of Perez*, 330 N.Y.S.2d 881, 886 (N.Y. Sur. Ct. 1972) ("[B]y its very nature, wrongful death operates as a link to paternity only when the putative father during his lifetime is proved to have supported the child; without this no damage can be suffered in the wrongful death.").

341. *See, e.g.*, *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 10 (5th Cir. 1986) (noting *Lehr* did not support a liberty interest of parents to pursue wrongful death claims; despite the *Lehr* holding "that the 'intangible fibers that connect parent and child' are 'sufficiently vital to merit constitutional protection in appropriate cases ...' it would be inappropriate to extend recognition of an individual's liberty interest in his or her family or parental relationship to" a parent's claim for the wrongful death of a child).

342. *See, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (As *parens patriae*, a state may restrict parental control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.).

343. The result may be unconstitutional as well if the "unitary family" of *Michael H.* has independent federal constitutional interests in being free from arbitrary intrusions by nonmembers, including genetic fathers who lost their *Lehr* opportunity interests.

The 2004 New York case of *Caldwell v. Alliance Consulting* is illustrative, and troubling. In *Caldwell*, a son was born to Elsie and Leon Caldwell in February, 1971.³⁴⁴ The son died at the World Trade Center on September 11, 2001.³⁴⁵ Leon had earlier left Elsie and two sons behind in Philadelphia when he moved to New Jersey in September, 1972.³⁴⁶ Thereafter, Leon had contact with his deceased son on only two occasions.³⁴⁷ There was an overnight visit with Leon when his son was six³⁴⁸; and Leon saw his son, but did not speak, when they attended the funeral of Elsie's mother in January, 1984.³⁴⁹ Evidently, Leon rejected Elsie's suggestions that he spend more time with his sons.³⁵⁰ After Elsie obtained a court order for child support, Leon failed to pay.³⁵¹ Receiving public assistance, Elsie raised her two sons alone.³⁵² The son who died "was a college graduate with an ostensibly successful career."³⁵³

Because the deceased son was unmarried and had no dependents, Elsie filed a claim for a \$50,000 death benefit under New York Workers' Compensation Law.³⁵⁴ Upon his intervention, Leon was awarded \$25,000.³⁵⁵ The relevant statute declared that the decedent's death benefit "shall be paid to the deceased's surviving parents."³⁵⁶ Four of the five appellate court judges ruled that when a term such as "parent" does not have a controlling statutory definition, but is clear and unambiguous, it should be given its usual and commonly understood meaning.³⁵⁷ They looked to a legal dictionary, finding parent often means "the natural father or the natural mother."³⁵⁸ Since Leon's parental rights were never terminated, the four judges found Leon survived his deceased son under the Workers' Compensation Law.³⁵⁹ The judges did recognize that in other statutory settings, like probate and wrongful death, a parent who has abandoned his children is expressly disqualified by statutes as a surviving parent.³⁶⁰ The judges reasoned that in this instance, there was no intent to exclude Leon as a parent as

344. *Caldwell v. Alliance Consulting Grp., Inc.*, 775 N.Y.S.2d 92, 94 (N.Y. App. Div. 2004) (Lahtinen, J., dissenting).

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. *Caldwell v. Alliance Consulting Grp., Inc.*, 775 N.Y.S.2d 92, 94 (N.Y. App. Div. 2004) (Lahtinen, J., dissenting).

355. *Id.*

356. *Id.*

357. *See id.* at 93.

358. *Id.* at 93-94.

359. *Id.*

360. *Id.* at 93.

there was no explicit provision to that effect in the Workers' Compensation Law.³⁶¹

The one dissenting judge not only looked to different dictionary descriptions, but also undertook a different statutory analysis.³⁶² The dissenter used the axiom that "the legislature is presumed to have intended to do justice, unless its language compels the opposite conclusion."³⁶³

The dissenter determined that justice required there be no award to "those who abandon their obligations to their children," a determination supported by the "public policy" expressly articulated in probate and other wrongful death settings, as well as by "common sense."³⁶⁴ Out of five judges, only one would deny Leon, the deadbeat dad, recovery.

Fortunately, the *Caldwell* approach has not been followed everywhere. In New Mexico in 2003, an appeals court barred wrongful death benefits for a genetic father who had abandoned his child over a decade before the child's death in 1986. In *Perry v. Williams*, the court noted that while the relevant statute did not expressly say that abandonment precludes recovery (as did the Probate Code), common law and public policy barred relief.³⁶⁵ The court also noted that the genetic father had "failed to cooperate in the necessary testing for a bone marrow transplant," though he was told that his son had cancer, that he was "one of three possible donors," and that the other two donors did not match.³⁶⁶

By contrast, the law in Kentucky has been articulated to say:

[A] parent may not recover proceeds of a child's estate, nor proceeds of a wrongful death proceeding, if he has willfully abandoned the child unless he resumed the care and maintenance of the child at least one year prior to his or her death, or was deprived of custody by court ... and substantially complied with Orders requiring contribution to the support of the child.³⁶⁷

In Kansas, a termination of parental rights in a child during an adoption ends "all the rights of birth parents to such a child, including their right to inherit from or through such child."³⁶⁸

Criteria to determine paternity in tort and inheritance settings vary by state, and are at times different from the paternity criteria followed for adoption.³⁶⁹

361. *Id.*

362. *Id.* at 95-96 (Lahtinen, J., dissenting).

363. *Id.* at 94-95 (Lahtinen, J., dissenting).

364. *Caldwell v. Alliance Consulting Grp., Inc.* 775 N.Y.S.2d 92, 95 (N.Y. App. Div. 2004) (Lahtinen, J., dissenting).

365. *Perry v. Williams*, 70 P.3d 1283, 1287 (N.M. Ct. App. 2003).

366. *Id.* at 1285.

367. *Calhoun v. Sellers*, No. 2008-CA-001311-DG, 2009 WL 3231506, at *2-3 (Ky. Ct. App. Oct. 9, 2009).

368. KAN. STAT. ANN. § 59-2136(i) (West 2011).

369. See, e.g., *Garza v. Maverick Mkt., Inc.*, 768 S.W.2d 273, 275 (Tex. 1989) ("[I]n a wrongful death action an illegitimate child need not be 'recognized' in accordance with other bodies of law not specifically applicable to the Wrongful Death Act.").

Some states even recognize paternity for the wrongful death of an unborn child.³⁷⁰

VI. PARENTAL OPPORTUNITY INTERESTS FOR THOSE NOT INVOLVED IN SEX?

Before concluding, we consider when a *Lehr* or *Michael H.* approach might include a parental opportunity interest, arising at birth, in nonmarital children born of sex, but for those who are not involved in the sex.³⁷¹ Constitutional interests might be recognized for one or both members of a heterosexual or homosexual relationship who parent the child. At birth or thereafter, these relationships may need to be marital-like, exhibiting "unitary family" characteristics.³⁷² Interests might also be extended to single people not involved in sex who parent children, perhaps including grandparents, other blood relatives, and maybe even nonrelatives.

Lehr illustrates how a parental interest might be recognized under state law, if not federal constitutional law, for one not involved in sex.³⁷³ The New York statute guiding Jessica's possible adoption by Richard recognized notice rights, *inter alia*, for a man who was listed on the putative father registry or who held himself out in the community as Jessica's father.³⁷⁴ In each setting there is no guarantee of genetic ties.³⁷⁵ Might such a non-genetic father ever have a federal

370. See, e.g., *Connor v. Monkem Co., Inc.*, 898 S.W.2d 89, 92 (Mo. 1995) (Missouri "legislature intended the courts to interpret 'person' within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her unborn child, even prior to viability.").

371. Those involved in procreative sex often wish to parent children who often wish or need their parenting to continue. It has been observed:

[F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. This attachment results from day-to-day attention to his needs for physical care, nourishment, comfort, affection and stimulation. Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

JOSEPH GOLDSTEIN, *BEYOND THE BEST INTERESTS OF THE CHILD* 17 (1979).

372. But see *In re T.J.S.*, 16 A.3d 386, 388 (N.J. Super. Ct. App. Div. 2011) (Absent adoption, wife is not the legal mother of husband's biological child though she helped arrange the in vitro fertilization with husband's aid.).

373. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) ("[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children." (quoting *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977))).

374. *Lehr*, 463 U.S. at 263.

375. The New York statute also recognized notice rights for a man "identified as the father on the child's birth certificate." While such an identification does not guarantee genetic ties, it at least requires a good faith belief of genetic ties. See Office of Temp. and Disability Assistance, New York State Dep't of Health, Form No. LDSS-4418, Acknowledgment of Paternity (rev. Aug. 1998) ("I hereby acknowledge that I am the biological father.").

constitutional interest in blocking an adoption or in being afforded custody/visitation? Could a state-law parental interest trigger a federal constitutional liberty interest where there otherwise would not be one?³⁷⁶

Lehr further illustrates how a parental interest at birth might be recognized in a non-genetic parent as a result of a natural mother's, rather than a man's, acts. The New York adoption statute in *Lehr* granted notice rights for a man "identified as the child's father by the mother in a written, sworn statement."³⁷⁷ As well, the statute recognized notice rights for a man who "married the child's mother within six months subsequent to the birth of the child."³⁷⁸ Here too there is no guarantee of genetic ties. Might such a man ever have constitutional interests in blocking an adoption or seeking custody/visitation?

Further, as *Michael H.* illustrates, some parental interests for children born of sex have been recognized for men who theoretically could have been, but were in fact not, involved in the relevant sex.³⁷⁹ Such interests may not always depend on the significant acts, or the continuing wishes, of mothers, such as in settings when only men can rebut marital presumptions.

Beyond such men like Gerald, who was able to (and did) father other children,³⁸⁰ might there be additional federal constitutional interests lurking in the birth of children born of sex? For example, what about an impotent man who was incorrectly, with maternal knowledge, "identified as the father by the mother in a sworn written statement," or who "married the mother before the child was six months old," or who held himself out in the community as the child's father,

376. In contrast to the paternity opportunity interests of unwed genetic fathers under *Lehr* and *Michael H.*, where state laws can vary widely, there is less variation in state laws governing the childrearing interests of those legally recognized as parents. While the U.S. Supreme Court decision in *Troxel v. Granville* in 2000 serves as a guide, there was no unanimous, or even majority, opinion. See generally *Troxel v. Granville*, 530 U.S. 57 (2000). However, all Justices affirmed the principle that every parent recognized under state law has a federal constitutional "liberty interest ... in the care, custody and control" of her or his child. *Id.* at 57, 64. For most Justices, such parental authority limits significantly governmental efforts to override decisions by parents regarding third-party visitation (or other contacts) with their children. *Id.* at 57. Thus, the *Troxel* court invalidated a state statute allowing "any person" who is not a parent to petition a court "for visitation rights" with a child "when visitation may serve the best interest of the child." *Id.* at 63. The statute had been employed by paternal grandparents who, after their son died, were informed by their granddaughter's mother that the mother wished grandparent visitation be changed from a "regular" basis to "one short visit per month." *Id.* at 60-61. The decision to allow visitation was now up to the mother alone.

Since *Troxel*, federal constitutional childrearing authority has not yet received a "precise definition" that was concededly omitted in *Troxel*. *Id.* at 96 (Kennedy, J., dissenting). Lower federal courts have exercised "considerable restraint," usually limiting their rulings to "the precise facts of particular cases." *Id.* at 95-96. Justice Scalia, who dissented in *Troxel*, lamented that the decision would likely someday usher in "a new regime of judicially prescribed, and federally prescribed, family law." *Id.* at 93 (Scalia, J., dissenting). To date, it has not.

377. N.Y. DOM. REL. LAW § 111-a(2)(f) (McKinney 2011).

378. *Id.* § 111-a(2)(g).

379. *Michael H. v. Gerald D.*, 491 U.S. 110, 128-30 (1989).

380. *Id.* at 115. After Carole bore Victoria, Carole had at least two more children with her husband Gerald. *Id.*

with at least some maternal support for at least some period of time?³⁸¹ Could federal constitutional child-rearing interests arise for such a man, whether in or outside of adoption, as long as he established a “significant custodial, personal, or financial” relationship with the child?

Further, what about a lesbian partner of a mother who, with maternal consent, was identified as a parent by the mother,³⁸² or who married the mother before the child was six months old, or who held herself out in the community as the child’s second parent?³⁸³ Should it matter if consensual sex led to birth? Should it matter whether the partner was involved with the mother prebirth? Increasingly, natural mothers who agree with their same sex partners to rear their children jointly cannot later object to dual legal parentage when the partnership (whether or not marital³⁸⁴) dissolves.

Finally, might any non-partners of mothers, like grandparents, ever attain federal constitutional child-rearing interests? With maternal consent, there are some grandparents who rear their grandchildren from childbirth, acting as parents, and sometimes declaring their parentage in the community.³⁸⁵ Could state laws validating such arrangements prompt federal constitutional interests? Could state laws denying such grandparents tort recovery rights be invalidated on *Lehr*, or equal protection, grounds?³⁸⁶

Major hurdles, as well as absolute roadblocks, await nongenetic parents pursuing federal constitutional parental interests, including the American

381. N.Y. DOM. REL. LAW § 111-a(2).

382. See generally *Davis v. Swan*, 697 S.E.2d 473 (N.C. Ct. App. 2010); *In re Mullen*, 2011-Ohio-3361, 2011 WL 2732258 (Ohio 2011) (Former lesbian partner lost bid for shared legal custody of child whose conception she planned with biological mother while the two women were living as a same sex couple.); *In re La Piana*, 2010-Ohio-3606, 2010 WL 3042394 (Ohio Ct. App. 2010).

383. See, e.g., *K.M. v. E.G.*, 117 P.3d 673, 678 (Cal. 2005) (no decision on whether same sex partner is a presumed parent because she received child into her home and held her out as her child); *Chatterjee v. King*, 253 P.3d 915, 918 (N.M. Ct. App. 2010).

384. See, e.g., *K.M.*, 117 P.3d at 682 (holding that one same sex partner’s claim “to be the twins’ mother because the twins were produced from the ova is equal to” the second partner’s “claim to be the twins’ mother because she gave birth to them”). Both mothers were legally tied to each other, due to a domestic partnership, *id.* at 675, which is significant because the *Michael H.* court held that the U.S. Constitution permits states to categorically prefer parents who have “a legal tie with the mother.” *Michael H.*, 491 U.S. at 129. The *K.M.* court considered it crucial that the couple “intended to produce a child that would be raised in their own home,” which speaks to the importance of the “unitary family” that the *Michael H.* court sought to preserve. *K.M.*, 117 P.3d at 679. The *K.M.* court also found that a statutory presumption, that a father is considered a legal parent when “he receives the child into his home and openly holds out the child as his natural child,” need not apply in same-sex settings where both parents are related to the child by blood. *Id.* at 682.

385. *Willis v. Louisville/Jefferson Cnty. Metro. Sewer Dist.*, No. 2009-CA-001874-MR, 2010 WL 4137492, at *3 (Ky. Ct. App. Oct. 22, 2010).

386. One such law operated in *Willis*, 2010 WL 4137492, at *3 (holding a grandmother who raised child from birth cannot sue for loss of consortium or negligent infliction of emotional distress; while law is “arbitrary,” it is not unconstitutional).

tradition of reserving most family relations matters for state lawmakers.³⁸⁷ At least where there is some maternal approval, arguably there is a “unitary family” under the *Michael H.* analysis by Justice Scalia, which is a “household of unmarried parents and their children.”³⁸⁸

So, federal constitutional parentage interests for those not involved in sex might arise for those involved in a “unitary family.” Recall that in *Michael H.*, the married parents, constituting a family, retained custody of a child born of sex outside the marriage because they agreed to raise the child (as their own?).³⁸⁹ In *Lehr*, could an agreement by Lorraine and Richard to raise Jessica, entered before marriage, have sufficed to confer upon Richard federal parentage interests? In *Michael H.*, could an agreement between Carole and Scott (neither the husband nor the genetic father) to raise Victoria, together with Scott’s actual parenting of Victoria, ever bestow upon Scott federal constitutional parentage interests? Should the length of time Scott actually parented, or the time when the agreement was entered, or the child’s age, matter? Some state parentage laws, as with adoption notices, make such distinctions.³⁹⁰ Generally, how might intended parentage in the absence of sex prompt federal constitutional child-rearing interests?

VII. CONCLUSION

Male genetic ties to children born of consensual sex can, but need not, prompt opportunities for “substantial” federal constitutional child-rearing interests, at least in adoption settings (and likely elsewhere). States can afford similar opportunities to men and women without genetic ties but in “unitary family” relationships. The major U.S. Supreme Court precedents, *Lehr* and *Michael H.*, do not directly address parental status at birth outside adoption. State legislators and judges struggle as a result.

State paternity laws vary intrastate (by context) and interstate (within the same context). Too often, as with safe haven and adoption notice statutes, states unconstitutionally deprive many responsible genetic fathers of their paternity opportunity interests under *Lehr*. State lawmakers and judges also fail to consider the constitutional import of, and the social policies underlying, *Lehr* and *Michael H.* in assessing legal parentage at birth for genetic parents outside of adoption (where substantial child-rearing interests may or may not be involved), as well as in settings involving nongenetic parents. The “significant custodial, personal, or financial relationship”³⁹¹ between natural father and child, as well as the preservation of “unitary” families, must be considered in many more legal parenthood settings in and beyond adoption.

387. See generally *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (finding that the regulation of domestic relations has historically been regarded as the “virtually exclusive province of the States”).

388. *Michael H.*, 491 U.S. at 123 n.3.

389. *Michael H. v. Gerald D.*, 491 U.S. 110, 130-31 (1989).

390. See, e.g., WASH. REV. CODE ANN. § 26.26.116 (West 2011).

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