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# ***Lehr v. Robertson: A Constricted View of the Rights of Putative Fathers***

## I. Introduction

Historically, adoption laws did not require that notice and an opportunity to be heard be given a putative father<sup>1</sup> before termination of his parental rights.<sup>2</sup> In 1972, the Supreme Court, in *Stanley v. Illinois*,<sup>3</sup> altered the traditional view by requiring notice and a hearing for a putative father involved in a custody proceeding.<sup>4</sup> The philosophy of *Stanley* has since been extended to protect the right to notice and hearing of putative fathers in adoption proceedings.<sup>5</sup> In a series of decisions<sup>6</sup> concluding with *Lehr v. Robertson*,<sup>7</sup> the Supreme Court has clarified the extent and type of notice sufficient to meet the constitutional requirements of *Stanley*.<sup>8</sup>

In *Lehr*, the Supreme Court upheld the constitutionality of a New York statutory scheme<sup>9</sup> for notification which listed seven

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1. A putative father is "[t]he alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979).

2. See Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries are Defined*, 19 J. FAM. L. 445, 445 (1981).

3. 405 U.S. 645 (1972).

4. *Id.* at 658. For a discussion of the ramifications of *Stanley*, see Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10 (1975); Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115 (1973-1974) [hereinafter cited as Comment, *Problems in Implementation*]; Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972) [hereinafter cited as Comment, *Emerging Protection*].

5. Bodenheimer, *supra* note 4, at 54-55.

6. *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

7. 103 S. Ct. 2985 (1983).

8. See generally Bodenheimer, *supra* note 4; Note, *Putative Fathers: Unwed, But No Longer Unprotected*, 8 HOFSTRA L. REV. 425 (1980); Comment, *Problems in Implementation*, *supra* note 4.

9. N.Y. DOM. REL. LAW § 111-a(2)(a) to -a(2)(g) (McKinney 1982) states that the following persons must receive notice:

(a) any person adjudicated by a court in this state to be the father of the child; (b) any person adjudicated by a court of another state or territory of the United

categories of putative fathers who must receive notice prior to termination of parental rights.<sup>10</sup> The Court weighed the need to protect the interest of a putative father in his child against the state's objective of facilitating the adoption of illegitimate children and concluded that the notification procedure offered by section 111-a of the New York Domestic Relations Law<sup>11</sup> adequately protected an informed and interested putative father.<sup>12</sup>

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States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the Social Services Law; (c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the Social Services Law; (d) any person who is recorded on the child's birth certificate as the child's father; (e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father; (f) any person who has been identified as the child's father by the mother in written, sworn statement; (g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the Social Services Law.

*Id.* Amendment of the statute added the following category:

(h) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law.

N.Y. DOM. REL. LAW § 111-a(2)(h) (McKinney Supp. 1983).

N.Y. SOC. SERV. LAW § 372-c (McKinney 1983) (1983 version of the statute is similar to the version in effect at the time of the *Lehr* decision) established the putative father's registry that was at issue in *Lehr*:

1. The department shall establish a putative father registry which shall record the names and addresses of . . . (b) any person who has filed with the registry before or after the birth of a child out-of-wedlock, a notice of intent to claim paternity of the child . . . . 2. A person filing a notice of intent to claim paternity of a child or an acknowledgement of paternity shall include therein his current address and shall notify the registry of any change of address pursuant to procedures prescribed by regulations of the department. 3. A person who has filed a notice of intent to claim paternity may at any time revoke a notice of intent to claim paternity previously filed therewith and, upon receipt of such notification by the registry, the revoked notice of intent to claim paternity shall be deemed a nullity nunc pro tunc. 4. An unrevoked notice of intent to claim paternity of a child may be introduced in evidence by any party, other than the person who filed such notice, in any proceeding in which such fact may be relevant. 5. The department shall, upon request, provide the names and addresses of persons listed with the registry to any court or authorized agency, and such information shall not be divulged to any other person, except upon order of a court for good cause shown.

*Id.*

10. *Lehr*, 103 S. Ct. at 2994-96.

11. N.Y. DOM. REL. LAW § 111-a (McKinney 1982).

12. *Lehr*, 103 S. Ct. at 2995.

Part II of this note examines the development of a putative father's constitutional rights. Part III presents the opinion in *Lehr* and Part IV analyzes it. Part V concludes that the constitutional guarantees of notice and hearing afforded a putative father are not absolute, but are based on the strength of his relationship with his child. Although the categories created by section 111-a generally include most putative fathers interested in their children's welfare, the court failed to exercise its discretionary powers of notification in *Lehr's* case.

## II. Background

Prior to 1972, a putative father had limited due process protection of his liberty interest in the welfare or custody of his child.<sup>13</sup> Traditionally, custody of the child remained with the mother, and her consent alone sufficed to terminate all parental rights and free the child for adoption.<sup>14</sup> Scattered cases recognized certain rights of a putative father.<sup>15</sup>

In *Stanley v. Illinois*,<sup>16</sup> the Supreme Court altered this traditional view of a putative father's rights and interest in his child.<sup>17</sup> Under an Illinois statutory scheme,<sup>18</sup> the death of the mother of an illegitimate child made that child a ward of the state even if the putative father was alive and interested in retaining custody.<sup>19</sup> The Court held that due process required that

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13. See Comment, *Problems in Implementation*, *supra* note 4, at 116-18; see generally Comment, *Emerging Protection*, *supra* note 4.

14. See Bodenheimer, *supra* note 4, at 54.

15. See *In re Brennan*, 270 Minn. 455, 463-64, 134 N.W.2d 126, 132 (1965) (an unwed father interested in obtaining custody of his illegitimate child must receive notice and must be afforded an opportunity to be heard at legal proceedings concerning the child); *In re Zink*, 269 Minn. 535, 538-39, 132 N.W.2d 795, 797-98 (1964), and *In re Zink*, 264 Minn. 500, 507-08, 119 N.W.2d 731, 736 (1963) (both holding that a putative father who appears at an adoption proceeding is entitled to be heard, present evidence, and cross examine witnesses).

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

17. For a general survey of the impact of *Stanley* upon the rights of a putative father, see Bodenheimer, *supra* note 4; Weinhaus, *supra* note 2; Comment, *Problems in Implementation*, *supra* note 4; Comment, *Emerging Protection*, *supra* note 4.

18. ILL. REV. STAT. ch. 37, § 701-14, as cited in *Stanley*, 405 U.S. at 650. Under this statute, "parent" included unwed mothers, adoptive parents, or the father or mother of a legitimate child. Therefore, unwed fathers were not considered parents.

For the current codification of the definition of "parent," see ILL. ANN. STAT. ch. 4, § 9.1-1(E) (Smith-Hurd 1975).

19. *Stanley*, 405 U.S. at 646.

a putative father be afforded a fitness hearing before his children became wards of the state.<sup>20</sup> The Court reasoned that a putative father like Stanley who had raised and provided for his children had a recognizable liberty interest in his children deserving of constitutional protection.<sup>21</sup> The Court concluded that the Illinois statutory definition of "parent,"<sup>22</sup> which included only unwed mothers and legally married parents, violated the equal protection clause.<sup>23</sup> Stanley fell outside this definition by virtue of his status as an unwed father.<sup>24</sup> Since he was similarly situated to other natural parents by virtue of his interest in his children, he could not be denied equal protection of the laws because of the absence of a marriage contract between him and the mother of the children.<sup>25</sup> *Stanley* guaranteed a putative father interested in obtaining or retaining custody of his child the right to a fitness hearing.<sup>26</sup>

The immediate impact of *Stanley* was a revision of adoption statutes throughout the United States to include reference to a putative father's existence.<sup>27</sup> In response to *Stanley*, New York commissioned a study of the legal implications of a putative father's rights.<sup>28</sup> Revisions of section 111-a of the New York Domestic Relations Law created seven categories<sup>29</sup> of putative

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20. *Id.* at 658.

21. *See id.* at 656-58.

22. ILL. REV. STAT. ch. 37, § 701-14, cited in *Stanley*, 405 U.S. at 650. *See supra* note 18.

23. *Stanley*, 405 U.S. at 649.

24. *Id.*

25. *See id.* at 658.

26. *Id.*

27. *See, e.g.*, Bodenheimer, *supra* note 4, at 61 & n.267, 65-75 (changes in Oregon and California); Comment, *Problems in Implementation*, *supra* note 4, at 132-33 & n.92, 138-47 app. (change in Michigan and a survey of rights of a putative father in all fifty states); Comment, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 527-28 (change in Michigan) [hereinafter cited as Comment, *Strange Boundaries*]; cf. *Doe v. Department of Social Servs.*, 71 Misc. 2d 666, 337 N.Y.S.2d 102 (Sup. Ct. Dutchess County 1972) (reinterpreting New York law in light of *Stanley*).

28. *See* Governor's Memorandum on approving L. 1976, ch. 665, 1976 N.Y. Laws 2442-43. Recommendations of the Temporary State Commission on Child Welfare resulted in the recodification of N.Y. DOM. REL. LAW § 111-a, which was in dispute in *Lehr v. Robertson*, 103 S. Ct. 2985 (1983). *See, e.g.*, *In re Jessica*, 54 N.Y.2d 417, 428, 430 N.E.2d 896, 901, 446 N.Y.S.2d 20, 25 (1980) (citing the recommendations of the Temporary State Commission).

29. N.Y. DOM. REL. LAW § 111-a(2)(a) to -a(2)(g) (McKinney 1982); *see supra* note

fathers, based on the interest they display in their children, who automatically receive notification of legal actions involving their children.<sup>30</sup> Those who are not included in one of the seven categories have no right to notice and a hearing.<sup>31</sup> The right to be heard includes the right to present evidence on whether the actions contemplated for the child represent the child's best interests.<sup>32</sup>

In 1978, the Supreme Court restricted the scope of *Stanley* in *Quilloin v. Walcott*.<sup>33</sup> In *Quilloin*, a putative father, who had occasionally given his son presents, sporadically visited him, but never consistently supported the child, received notification of a pending adoption by the natural mother and her husband.<sup>34</sup> The putative father opposed the adoption, since it would terminate his visitation rights.<sup>35</sup> The Supreme Court held that the refusal to grant the putative father veto power over the proposed adoption did not represent a denial of due process.<sup>36</sup> The Court also rejected Quilloin's equal protection claim, stating that a distinction made in the adoption statute<sup>37</sup> between the legal rights of the mother and of the father rested on factors other than the sex of the parent.<sup>38</sup> The distinctions made by the Court in *Quilloin*, like those in *Stanley*, rested on the degree of interest the putative fathers had displayed in their children.<sup>39</sup>

A statute similar to the one upheld in *Quilloin* was struck

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30. *Id.*

31. *Id.*

32. The Domestic Relations Law provides in relevant part: "The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child." N.Y. DOM. REL. LAW § 111-a(3) (McKinney Supp. 1983).

33. 434 U.S. 246 (1978).

34. *See id.* at 249-51.

35. *Id.* at 250.

36. *Id.* at 256.

37. GA. CODE § 74-403(3) (1975), *cited in Quilloin*, 434 U.S. at 248. Under this section, the consent of the mother of an illegitimate child sufficed to free the child for adoption unless the father had legitimated the child according to the provisions of GA. CODE § 74-103 (1975). *Quilloin*, 434 U.S. at 248 n.3.

38. *See Quilloin*, 434 U.S. at 256.

39. *See, e.g.,* Weinhaus, *supra* note 2, at 453; 29 EMORY L.J. 833, 842 (1980); Note, *supra* note 8, at 431; Comment, *Illegitimacy and the Rights of Unwed Fathers in Adoption Proceedings After Quilloin v. Walcott*, 12 J. MAR. J. PRAC. & PROC. 383, 392 (1979).

down in *Caban v. Mohammed*<sup>40</sup> where the Court was faced with a challenge by a father who had assumed a nurturing role similar to that of the mother.<sup>41</sup> The New York statute<sup>42</sup> permitted the mother alone to block the father's adoption petition.<sup>43</sup> The Court held that this distinction, based purely on gender, violated the equal protection clause of the fourteenth amendment.<sup>44</sup>

The majority did not address Caban's claim<sup>45</sup> that his substantive due process rights had been ignored since section 111-a did not require a finding of parental unfitness before parental rights could be terminated.<sup>46</sup> Caban's basic *Stanley* rights to notice and hearing were protected, since he had an opportunity to be heard at his children's adoption proceedings.<sup>47</sup>

The decision in *Caban* is narrow, holding only that the right to block an adoption cannot be accorded to one class of parents purely on the basis of gender.<sup>48</sup> A statute which bases the veto power purely on gender without taking into account the strength of the parental relationship violates equal protection.<sup>49</sup> Caban had a substantial relationship with his children.<sup>50</sup> The concern of the majority in *Caban* was for just this type of putative father. The Court reasoned that although the right to block an adoption does not automatically vest in a putative father, the father of an older child who has developed a substantial rela-

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40. 441 U.S. 380 (1979).

41. *Id.* at 389.

42. N.Y. DOM. REL. LAW § 111 (McKinney 1977) (in effect at the time of the *Caban* decision). A child could not be freed for adoption without the consent of the parents of a legitimate child or the mother of an illegitimate child. These basic consent provisions were still in effect when *Lehr* was decided. *Lehr* never touched the consent issue since the father was never even notified of the proceeding.

43. *Caban*, 441 U.S. at 386-87.

44. *Id.* at 394. The gender based distinction did not "bear a substantial relationship to the State's asserted interest." *Id.* (footnote omitted).

45. Note, *supra* note 8, at 435.

46. *Id.* at 385. For portion of statute relevant to this discussion, see *supra* note 9. Caban based his substantive due process claim on the Court's holding in *Quilloin* which "recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents." *Id.* at 385 (citing *Quilloin*, 434 U.S. 246 (1978)).

47. *Caban*, 441 U.S. at 384.

48. *Id.* at 394.

49. *Id.* at 389.

50. *Id.*

tionship with that child should be accorded such a right.<sup>51</sup> On the other hand, a parent who had not legitimated his child or developed a significant relationship does not possess this right.<sup>52</sup> The Court emphasized that the rights accorded to Caban arose from the fact that his children were older.<sup>53</sup> In a footnote, the Court suggested that a different type of statutory scheme could be structured to deal with the adoption of newborns as opposed to older children who had ties to their fathers.<sup>54</sup>

The dissent by Justice Stevens<sup>55</sup> was concerned with the possible retroactive application of the *Caban* holding.<sup>56</sup> Untold millions of adoption decrees have been entered without notice to putative fathers.<sup>57</sup> Retroactively applying *Caban* would force the reopening of these adoption decrees which might cause disruption of long standing family units.<sup>58</sup> The majority never touched the retroactivity issue.

*Caban* and *Quilloin* dealt with the veto power of a putative father over a proposed adoption. By use of such a power, a putative father could prevent the legitimation of his child into an existing family unit. Since the court is always concerned with the best interests of the child,<sup>59</sup> this right to a veto power is not easily retained. *Lehr v. Robertson*,<sup>60</sup> however, dealt with a constitutional right more basic than the veto power. *Lehr*, unlike *Caban* and *Quilloin*, was not afforded notice and an opportunity to be heard.<sup>61</sup> Thus, while *Caban* and *Quilloin* were all present at legal proceedings involving their children and were able to present evidence,<sup>62</sup> *Lehr* was never afforded this opportunity.<sup>63</sup>

51. *Id.* at 392.

52. *See id.*

53. *Id.*

54. *Id.* at 392 n.11.

55. *Id.* at 401 (Stevens, J., dissenting). There was an additional dissent written by Justice Stewart. *Id.* at 394 (Stewart, J., dissenting).

56. *Id.* at 415-16 (Stevens, J., dissenting). *But see* notes 136-37 and accompanying text.

57. *Caban*, 441 U.S. at 415 (Stevens, J., dissenting).

58. *Id.* (Stevens, J., dissenting).

59. *Lehr v. Robertson*, 103 S. Ct. 2985, 2991 (1983).

60. *Id.*

61. *Id.* at 2987.

62. The surrogate court consolidated Caban's adoption petition and the petition initiated by the mother into a single hearing. *Caban*, 441 U.S. at 383.

The superior court consolidated Quilloin's writ of habeas corpus, petition for legiti-

### III. *Lehr v. Robertson*

#### A. *The Facts and Lower Court Opinions*

Jonathan Lehr and Lorraine Robertson had lived together for approximately two years before their daughter was born.<sup>64</sup> Lehr visited Lorraine in the hospital after the child was born.<sup>65</sup> During the next several years, however, he provided no financial or emotional support.<sup>66</sup>

On January 30, 1979, Lehr filed a paternity petition in Westchester Family Court.<sup>67</sup> He had not been notified that the natural mother and her husband had filed an adoption petition on December 21, 1978, in Ulster County Family Court.<sup>68</sup> The mother informed the Ulster County court of the pending paternity action.<sup>69</sup> She also requested that venue for the paternity petition be changed to Ulster County.<sup>70</sup> Since Lehr fell outside the seven categories of putative fathers who automatically receive notification of pending legal actions involving their children,<sup>71</sup> the change of venue request was his first indication that his daughter was the subject of an adoption petition.<sup>72</sup>

mation, and objection to the adoption with the adoption petition initiated by the mother and stepfather into a single hearing. *Quilloin*, 434 U.S. at 250-51.

Failure to receive notice was not the basis of Stanley's claim. Stanley objected to the presumption that as an unwed father his parental rights could be terminated without a preliminary finding of unfitness. *Stanley*, 405 U.S. at 646.

63. *Lehr*, 103 S. Ct. at 2990. The Court stated that the primary purpose of notification under § 111-a was to enable a person served to provide evidence on the best interests of the child. *Id.*

64. *In re Jessica*, 54 N.Y.2d 417, 422, 430 N.E.2d 896, 897, 446 N.Y.S.2d 20, 21 (1981), *aff'g* 77 A.D.2d 381, 434 N.Y.S.2d 772 (3d Dep't 1980), *aff'g* 102 Misc. 2d 102, 423 N.Y.S.2d 378 (Fam. Ct. Ulster County 1979), *aff'd sub nom. Lehr v. Robertson*, 103 S. Ct. 2985 (1983).

65. Brief for Appellant, *Lehr v. Robertson*, 103 S. Ct. 2985 (1983) (available on LEXIS, Genfed library, Briefs file). The parties disputed whether Lehr attempted to visit the daughter, Jessica, and was denied this privilege. *Id.*; Brief for Appellees, *Lehr v. Robertson*, 103 S. Ct. 2985 (1983) (available on LEXIS, Genfed library, Briefs file).

66. *Lehr*, 103 S. Ct. at 2988.

67. *Id.*

68. *In re Jessica*, 102 Misc. 2d 102, 104, 423 N.Y.S.2d 378, 380 (Fam. Ct. Ulster County 1979).

69. *Id.* at 105, 423 N.Y.S.2d at 381.

70. *Id.* at 106, 423 N.Y.S.2d at 381.

71. N.Y. DOM. REL. LAW § 111(a)(2)(a) to -(a)(2)(g) (McKinney 1982); *see supra* note 9.

72. *Lehr*, 103 S. Ct. at 2989.

On March 7, 1979, prior to the return date for the change of venue motion, the judge signed the adoption decree, refusing a request for an adjournment.<sup>73</sup> The judge also ruled that it was within the trial court's discretion to withhold formal notification before the finalization of the adoption decree from the father.<sup>74</sup>

Six weeks later, the Supreme Court held in *Caban v. Mohammed*<sup>75</sup> that section 111-a of the New York Domestic Relations Law,<sup>76</sup> requiring pre-adoptive consent of the mother and not of the father of an illegitimate child, violated the equal protection clause of the fourteenth amendment.<sup>77</sup> Upon refusal of the trial court to vacate the adoption order, the putative father appealed to the appellate division, seeking a retroactive application of *Caban*.<sup>78</sup> The appellate division denied the relief requested and affirmed the trial court's ruling.<sup>79</sup> The dissent, however, reasoned that since the trial judge knew the father's identity, it was an abuse of discretion not to notify him before the issuance of the final decree.<sup>80</sup>

The New York Court of Appeals affirmed both the constitutionality of the notice provisions of section 111-a<sup>81</sup> and the trial judge's exercise of discretion in withholding formal notification before the finalization of the adoption decree from the father.<sup>82</sup> The court observed that the notice statute was specifically designed to meet the due process requirements of *Stanley v. Illinois*.<sup>83</sup>

The dissent reasoned that the purpose of the statutory scheme is to reduce the possibility of the entrance of adoption

73. *In re Jessica*, 102 Misc. 2d at 106, 423 N.Y.S.2d at 381. The judge had all the necessary social service reports on hand before signing the adoption papers. *Id.* at 105, 423 N.Y.S.2d at 380.

74. *Id.* at 111, 423 N.Y.S.2d at 384.

75. 441 U.S. 380 (1979).

76. N.Y. DOM. REL. LAW § 111 (McKinney 1977) (current version at N.Y. DOM. REL. LAW § 111 (McKinney 1982 & Supp. 1983)); *see supra* note 42.

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

78. *In re Jessica*, 77 A.D.2d 381, 434 N.Y.S.2d 772 (3d Dep't 1980).

79. *Id.* at 383, 434 N.Y.S.2d at 774.

80. *Id.* at 385, 434 N.Y.S.2d at 775 (Mikoll, J., dissenting).

81. N.Y. DOM. REL. LAW § 111-a(2)(a) to -a(2)(g) (McKinney 1982); *see supra* note 9.

82. *In re Jessica*, 54 N.Y.2d at 421, 430 N.E.2d at 897, 444 N.Y.S.2d at 21.

83. *Id.* at 428, 430 N.E.2d at 900-01, 446 N.Y.S.2d at 25 (citing the implications of *Stanley v. Illinois*, 405 U.S. 645 (1972)).

decrees without adequate constitutional notice to putative fathers.<sup>84</sup> Although Lehr fell outside the statutory categories of fathers who must receive notice,<sup>85</sup> as a known father he should have received notice under section 111(3),<sup>86</sup> which specifically gives the trial court discretionary notification powers.<sup>87</sup> The dissent found that it was an abuse of this discretion not to notify Lehr.<sup>88</sup>

## B. *The Supreme Court*

### 1. *Majority*

In *Lehr v. Robertson*,<sup>89</sup> the Supreme Court rejected plaintiff's due process and equal protection challenges. The Court held that New York's statutory notification scheme<sup>90</sup> adequately protected the liberty interest of a putative father who developed a substantial relationship with his child.<sup>91</sup>

Accepting the facts as certified, the Court held that the right to notice and an opportunity to be heard at an adoption proceeding is not a fundamental right which automatically vests in a putative father.<sup>92</sup> A biological link represents only the first step in the maintenance of a parent-child relationship,<sup>93</sup> which must be nurtured in order to grow into a liberty interest. Ac-

84. *In re Jessica*, 54 N.Y.2d at 432-33, 430 N.E.2d at 903, 446 N.Y.S.2d at 27 (Cooke, C.J., dissenting).

85. *Id.* at 433, 430 N.E.2d at 903, 446 N.Y.S.2d at 27 (Cooke, C.J., dissenting).

86. The Domestic Relations Law provided:

Notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

N.Y. DOM. REL. LAW § 111(3) (McKinney 1977) (current version at N.Y. DOM. REL. LAW § 111(3) (McKinney Supp. 1983)).

87. *In re Jessica*, 54 N.Y.2d at 433 n.1, 430 N.E.2d at 903 n.1, 446 N.Y.S.2d at 28 n.1 (Cooke, C.J., dissenting).

88. *Id.* at 436, 430 N.E.2d at 905, 446 N.Y.S.2d at 29 (Cooke, C.J., dissenting).

89. 103 S. Ct. at 2995-97.

90. N.Y. DOM. REL. LAW § 111-a(2)(a) to -a(2)(g) (McKinney 1982); see *supra* note 9.

91. *Lehr*, 103 S. Ct. at 2995.

92. *Id.* at 2987.

93. *Id.* at 2993.

ording to the Court, a liberty interest worth protecting is one which the individual himself values and attempts to preserve.<sup>94</sup> Since Lehr never developed a significant relationship with his daughter during the first two years of her life, his interest in parenting never developed into the type of interest worthy of constitutional protection.<sup>95</sup>

The New York statutory scheme places the responsibility for protecting a liberty interest in an illegitimate child with the putative father. By either filing a notice of intent<sup>96</sup> or registering with the putative father registry,<sup>97</sup> a father such as Lehr automatically becomes entitled to receive notice and to be heard at any proceeding involving his child. The Court held that the scheme swept broadly enough to include those fathers desirous of protecting their liberty interests.<sup>98</sup>

The majority dismissed Lehr's equal protection claim, noting that mothers and fathers who assume similar nurturing roles encounter equal treatment under the law.<sup>99</sup> The mother in *Lehr* assumed complete parental responsibility for the child, while the father provided neither financial nor emotional support.<sup>100</sup> The different roles assumed by each parent permitted the state to assign different legal privileges to each class without violating the Constitution.<sup>101</sup>

## 2. Dissent

The dissent reasoned that the statutory scheme did not protect a father in Lehr's position.<sup>102</sup> Lehr claimed that Lorraine Robertson refused to allow him to visit Jessica and often hid her whereabouts from him, thus making it impossible for him to protect his liberty interest by developing a substantial relationship with the child.<sup>103</sup>

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94. *Id.* at 2993-94.

95. *Id.* at 2994.

96. N.Y. DOM. REL. LAW § 111-a(2)(c) (McKinney 1982); *see supra* note 9.

97. N.Y. DOM. REL. LAW § 111-a(2)(b) (McKinney 1982); *see supra* note 9.

98. *Lehr*, 103 S. Ct. at 2995.

99. *Id.* at 2996-97.

100. *Id.* at 2996.

101. *Id.* at 2996-97.

102. *Id.* at 3000-01 (White, J., dissenting).

103. *Id.* at 2997 (White, J., dissenting).

After *Lehr* initiated his case, New York added a section<sup>104</sup> to its Domestic Relations Law to prevent maternal obstructionism from depriving a father of the opportunity to develop a relationship with his child.<sup>105</sup> The dissent noted that the new provision states that a father can not be deprived of his right to consent to an adoption, if he was prevented from seeing the child by the custodial parent or agency.<sup>106</sup> These consent provisions are a product of the *Caban* decision.<sup>107</sup> Since only the father with a developed relationship retains a veto power over an adoption, the state is obligated to protect a father's right to maintain such a relationship.<sup>108</sup>

The dissent viewed the rights of putative fathers in absolute terms.<sup>109</sup> Therefore, a statutory scheme based on the strength of parental ties can determine only the type of hearing afforded a father and not whether such a hearing will be given at all.<sup>110</sup> The liberty interest is fundamental, requiring substantial due process protection.<sup>111</sup> Without considering the equal protection claim, the dissent reasoned that the denial of due process was a sufficient constitutional basis to overrule the state court holding.<sup>112</sup>

#### IV. Analysis

In cases involving putative fathers, the Supreme Court balances two sometimes competing interests: the liberty interest of the putative father in maintaining a relationship with his child and the state's interest in promoting the adoption of illegitimate children.<sup>113</sup> The constitutional requirements which force the state to inform a putative father of the pending adoption of his child and provide him with an opportunity to present evidence

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104. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney Supp. 1983).

105. *Id.* The consent of a known and interested putative father must be obtained before a child is surrendered for adoption. The mother or other authorized custodian may not prevent the father from establishing a relationship with his child. *Id.*; see *Lehr*, 103 S. Ct. at 2998 n.3 (White, J., dissenting).

106. *Lehr*, 103 S. Ct. at 2998 n.3 (White, J., dissenting).

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

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

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

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

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

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

113. See, e.g., *Lehr v. Robertson*, 103 S. Ct. 2985, 2991-93, 2995 (1983).

at the adoption proceeding may delay the adoption process.<sup>114</sup> Statistics indicate that early placement of children in adoptive homes minimizes adjustment difficulties for both adoptive parents and children.<sup>115</sup> Since many putative fathers are unknown, states have attempted to create statutory schemes<sup>116</sup> which protect the interested father while not unduly delaying the adoption process.<sup>117</sup>

Given the Court's philosophy on adoption,<sup>118</sup> the majority in *Lehr v. Robertson*,<sup>119</sup> weighed the interests at stake and found that the state's interest in adoption was more compelling than the protection of Lehr's liberty interest. It is clear from the majority's holding that a putative father's rights are tentative at best. The fact that the Court recognized these rights at all<sup>120</sup> stems from the importance it places on the maintenance of family ties.<sup>121</sup> The precedent of *Stanley v. Illinois*<sup>122</sup> added a dimension to the Court's recognition of the importance of family ties within the traditional family unit.<sup>123</sup> *Stanley* demonstrated that important family relationships can exist outside the traditional family unit and that the liberty interest of an involved putative father deserves due process protection.<sup>124</sup>

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114. See Comment, *Strange Boundaries*, *supra* note 27, at 531.

115. *Id.* at 523.

116. See *supra* note 27. The Uniform Parentage Act specifies that the identity of a putative father should be ascertained if possible before termination of parental rights. If reasonable efforts do not provide any notion of his identity or he shows no interest in his child, his rights may be terminated without his presence. The Act presents a six month grace period in which the father may identify himself, claim lack of notice, and also request custody. UNIF. PARENTAGE ACT § 24(e), 9A U.L.A. 616 (1973).

117. See Comment, *Strange Boundaries*, *supra* note 27, at 526.

118. The Supreme Court does not often review a case involving family court issues since these matters have been traditionally regulated by the states. When the Court does review state statutes as in *Lehr*, it begins with a recognition of the realities of the possible family situations open to an illegitimate child. The Court is pro-adoption since adoption is viewed as being in the best interests of the child: placement in a stable home environment without the stigma of illegitimacy. The pro-adoption slant is especially strong in cases in which the prospective adoptive parents are the mother and stepfather. See *Lehr*, 103 S. Ct. at 2991.

119. 103 S. Ct. at 2995.

120. See *id.* at 2993.

121. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

122. 405 U.S. 645 (1972).

123. See *Lehr*, 103 S. Ct. at 2992.

124. 405 U.S. 645 (1972).

Beginning with *Stanley*, the Court showed its willingness to extend due process protection to those putative fathers who demonstrate a familial relationship with their children. The majority in *Lehr*<sup>125</sup> held that in light of the plaintiff's undeveloped relationship with his child, he resembled the father in *Quilloin v. Walcott*<sup>126</sup> rather than the father in *Caban v. Mohammed*.<sup>127</sup> Quilloin never supported his child, never married the mother, nor showed an interest in the child's upbringing.<sup>128</sup> He objected to the termination of his parental rights, but never wished to assume custody of the child.<sup>129</sup> In a similar manner, Lehr remained a virtual stranger to his child during the first two years of her life.<sup>130</sup> In *Quilloin* and *Lehr*, the contemplated adoptions represented the legal recognition of an existing family unit.<sup>131</sup> The Court's rejection of Lehr's view of his due process rights reflects a desire to protect and foster existing family relationships.<sup>132</sup>

The Court in *Lehr* looked at the realities of the family situation. Allowing the father to participate in the proceeding would not change what the Court saw as the best result for the child: her legitimation into an existing family. The father in *Lehr*, like the father in *Quilloin*, never petitioned for custody of his child.<sup>133</sup> His original petition requested visitation rights only.<sup>134</sup> When he learned of the pending adoption, his attempt to be included in the process was not an attempt to obtain custody of his daughter, but rather a desire to be included in any proceeding involving his parental rights.<sup>135</sup>

Lehr suggested that his case required a retroactive applica-

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125. *Lehr*, 103 S. Ct. at 2996.

126. 434 U.S. 246 (1978).

127. 441 U.S. 380 (1979).

128. *Quilloin*, 434 U.S. at 256.

129. *Id.* at 247, 256.

130. *Lehr*, 103 S. Ct. at 2988.

131. Quilloin's son had lived with his mother and her husband for nine of his eleven years. *Quilloin*, 434 U.S. at 246. Lorraine Robertson married her husband when Jessica was nine months old. Brief for Appellees, *Lehr v. Robertson*, 103 S. Ct. 2985 (1983) (available on LEXIS, Genfed library, Briefs file).

132. See *Lehr*, 103 S. Ct. at 2995 n.22.

133. See *id.* at 2988-89.

134. *Id.*

135. See *id.* at 2989.

tion of the *Caban* holding.<sup>136</sup> The Court did not discuss retroactivity directly,<sup>137</sup> but suggested that the philosophy of the *Caban* holding would apply to Lehr if he had been in the same type of family situation as *Caban*.<sup>138</sup>

The majority in *Lehr* viewed the plaintiff as someone who had been afforded ample opportunity to protect his interests and had failed to do so.<sup>139</sup> Since he initiated a paternity petition and acquired representation by counsel by December, 1978,<sup>140</sup> he knew or should have known of the statutory scheme of section 111-a of the New York Domestic Relations Law<sup>141</sup> and could have complied with its requirements.<sup>142</sup> He could also have chosen to intervene in the adoption proceeding under section 401, 1012(a), or 1013 of the New York Rules of Civil Procedure,<sup>143</sup> but instead chose to collaterally attack the decree.<sup>144</sup> In the majority's view, then, Lehr found himself outside of the adoption process through his own negligence;<sup>145</sup> the Court was not required to protect the rights of those unwilling to assert their rights themselves.<sup>146</sup>

The due process analysis suggested by the Court identifies an important liberty interest to be protected.<sup>147</sup> The Court, however, qualified this liberty interest in the case of a putative father.<sup>148</sup> His liberty interest in his child is inchoate, it being his responsibility to protect that interest.<sup>149</sup> The Court is primarily concerned with the state's obligation to protect the putative fa-

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136. Brief for Appellant, *Lehr v. Robertson*, 103 S. Ct. 2985 (1983) (available on LEXIS, Genfed library, Briefs file).

137. *See Lehr*, 103 S. Ct. at 2996.

138. *Id.*

139. *Id.* at 2994-95.

140. Brief for Appellant, *Lehr v. Robertson*, 103 S. Ct. 2985 (1983) (available on LEXIS, Genfed library, Briefs file).

141. N.Y. DOM. REL. LAW § 111-a(2)(a) to -a(2)(g) (McKinney 1982); *see supra* note 9.

142. *Lehr*, 103 S. Ct. at 2995.

143. N.Y. CIV. PRAC. R. 401, 1012(a), 1013 (McKinney 1972 & 1976).

144. *In re Jessica*, 54 N.Y.2d 417, 430 n.7, 430 N.E.2d 896, 901 n.7, 446 N.Y.S.2d 20, 26 n.7 (1981).

145. *Lehr*, 103 S. Ct. at 2995.

146. *See id.*

147. *Id.* at 2990.

148. *Id.* at 2993.

149. *Id.*

ther's opportunity to develop a liberty interest.<sup>150</sup> It determined that the New York statutory scheme provides adequate protection for the father who wants to be included in his child's life.<sup>151</sup> The Court stated that the right to receive notice is within a father's discretion,<sup>152</sup> but failed to consider the situation of a putative father who does not know of the very existence of a child or who has failed to develop a relationship with the child because of maternal obstruction. In such cases, the father has no discretion to receive notice and his paternal rights may be terminated before he has the opportunity to develop a significant relationship with his child.

Furthermore, the Court did not consider the issue of whether the trial court had abused its discretion by failing to notify Lehr under a separate category of the notification scheme.<sup>153</sup> In line with the pro-adoptive stance of courts, the trial court may have decided to adhere to the letter of the statutory scheme rather than to exercise its discretion under section 111(3) of the New York Domestic Relations Law<sup>154</sup> to notify Lehr even though he fit into none of the seven statutory categories requiring notice. Since Lehr would have had no veto power over the adoption even if he had appeared, however, giving him a right to be heard would have protected his due process rights at little cost in time to the other parties to the action.

In evaluating Lehr's equal protection claim, the Court applied the intermediate standard of review used in scrutinizing classifications based on gender.<sup>155</sup> When a classification scheme separates individuals by sex, it must promote a legitimate state interest in order to pass constitutional muster.<sup>156</sup> In *Lehr*, the Court identified several state interests deemed legitimate: facilitation of adoption, promotion of the best interests of the child, and protection of the rights of interested third parties.<sup>157</sup> The

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150. *Id.* at 2994.

151. *Id.* at 2995.

152. *Id.*

153. N.Y. DOM. REL. LAW § 111(3) (McKinney 1977); *see supra* note 86.

154. N.Y. DOM. REL. LAW § 111(3) (McKinney 1977); *see supra* note 86.

155. *See, e.g.,* *Craig v. Boren*, 429 U.S. 190, 204 (1976); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

156. *See Reed v. Reed*, 404 U.S. at 76.

157. *Lehr*, 103 S. Ct. at 2995.

Court held that the classification scheme is not based purely on gender, but on the different legal roles assumed by parties.<sup>158</sup> The Court found that the classification scheme serves to promote the identified state interests.<sup>159</sup> Litigants similarly situated receive equal protection of the laws while those such as Lehr, who have assumed different legal roles, legitimately fall outside of the system.<sup>160</sup>

While the majority in *Lehr* looked at the realities of the family situation, the dissent realized that recognizing the father's rights to notice and a hearing, while protecting his fundamental due process rights, would not change or delay the adoption process.<sup>161</sup> The putative father in *Lehr* never registered with the putative father registry.<sup>162</sup> The dissent reasoned, however, that his attempt to have his daughter legitimated through a paternity petition represented a similar effort.<sup>163</sup> The trial court knew of the putative father's existence following the change of venue motion initiated by the mother.<sup>164</sup> To deny his existence for failure to follow the letter of the statutory scheme amounted to empty formalism not in keeping with the nature of the interests at stake.<sup>165</sup> The dissent also suggested that the presumption that a father who does not file a notice of intent or register with the state loses his due process rights reflects the same type of presumption struck down in *Stanley*.<sup>166</sup> The trial court reasoned that delay in the adoption process was detrimental to the best interests of the child.<sup>167</sup> As the dissent pointed out, however, the trial court's haste to complete the adoption without notifying the father led to the appellate process through two New York courts and finally to the Supreme Court, resulting in a four year delay of the finalization of the adoption decree.<sup>168</sup>

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158. *Id.* at 2996.

159. *Id.*

160. *Id.*

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

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

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

164. *Id.* at 2989.

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

166. *Id.* at 3000 n.7 (White, J., dissenting).

167. *See id.* at 3001 (White, J., dissenting).

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

## V. Conclusion

When the Supreme Court first carved a special niche for putative fathers in *Stanley v. Illinois*,<sup>169</sup> states recodified the notice and consent provisions of their adoption statutes.<sup>170</sup> Many states require the consent of even unknown and unavailable fathers prior to terminating parental rights.<sup>171</sup> After the Court upheld the distinctions of Georgia's adoption statute in *Quilloin v. Walcott*,<sup>172</sup> states recognized that the rights accorded to the father in *Stanley* do not attach to all putative fathers, but depend instead on the relationship the father develops with his illegitimate child. In *Lehr v. Robertson*,<sup>173</sup> the Court again showed its willingness to make distinctions between putative fathers based on the depth of their relationships with their children. The message of *Lehr* is that states do not have to treat putative fathers as a single class with identical due process rights. Before a putative father has a liberty interest in his child, he must develop a substantial relationship with that child. Once such a relationship exists, a putative father's interest in his child receives full due process protection.

Given the competing interests at stake in adoption cases involving putative fathers, the courts must balance the liberty interest of the father against the best interests of the child. Statutory schemes must of necessity sweep as broadly as does section 111-a of the New York Domestic Relations Law<sup>174</sup> to include as many interested fathers as possible while not unduly delaying the adoption process by requiring notification of unknown or unavailable fathers. Most putative fathers who do not care to be involved in the adoption process fall outside the categories of the statute.

In *Lehr*, the trial court failed to exercise its discretionary notification powers. While *Lehr* was not technically within one of the seven categories of section 111-a(2),<sup>175</sup> the judge knew of

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169. 405 U.S. 645 (1972).

170. See *supra* note 27.

171. See Comment, *Strange Boundaries*, *supra* note 27, at 526 (examining Illinois, Florida, and Georgia statutes).

172. 434 U.S. 246 (1978).

173. 103 S. Ct. 2985 (1983).

174. N.Y. DOM. REL. LAW § 111-a (McKinney 1982).

175. N.Y. DOM. REL. LAW § 111-a(2)(a) to -a(2)(g) (McKinney 1982); see *supra* note

his existence and interest in his daughter's welfare.<sup>176</sup> The failure to utilize the discretionary notification power under section 111(3)<sup>177</sup> caused a four year delay in the adoption process. Better coordination between the statutory scheme and the discretionary notification power should assure that all interested putative fathers receive notification of pending adoptions.

*David S. Scher*

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176. *In re Jessica*, 54 N.Y.2d 417, 436, 430 N.E.2d 896, 905, 446 N.Y.S.2d 20, 29 (1981).

177. N.Y. DOM. REL. LAW § 111(3) (McKinney 1977); see *supra* note 86.