Michael H. v. Gerald D.: The Presumption of Paternity

Joan C. Sylvain

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
NOTES

MICHAEL H. v. GERALD D.: THE PRESCRIPTION
OF PATERNITY

Despite the availability of blood tests that can establish biological paternity with a high degree of certitude,¹ many states² continue to enforce statutes imposing limitations on rebuttal of the marital presumption.³ Those statutes are aimed at furthering policies derived from common law,⁴ and seek both to decrease the number of children declared "illegitimate" and to

¹. See Motulsky, Medical Genetics, 261 J. A.M.A. 2855, 2855 (1989) (stating that "[p]aternity determination — already much improved by use of HLA typing — can now be made virtually certain by using DNA markers"); Shaw, Paternity Determination; 1921 to 1983 and Beyond, 250 J. A.M.A. 2536, 2536-37 (1983). HLA typing is commonly used by putative fathers seeking to assert paternity. See, e.g., Michael H. v. Gerald D., 109 S. Ct. 2333, 2337 (1989) (blood tests could show with 98.07% probability that the appellant was the child's father).


³. The marital presumption is a rule of law stating that the issue of a married woman cohabiting with her husband, who is not impotent or sterile, is the product of their marriage. Michael H., 109 S. Ct. at 2340 (discussing California's conclusive marital presumption); see also CAL. EVID. CODE § 621(a); infra text accompanying notes 49-55.

⁴. See 109 S. Ct. at 2342 (citing H. NICHOLAS, ADULTURINE BASTARDY 1 (1836)).
preserve order within families. Increasingly, however, unwed fathers are challenging the constitutionality of these statutes.

Unwed fathers view the laws governing their paternal rights with uncertainty. In considering the unwed father's legal rights, no concrete rules or precedents exist. In four separate cases, the United States Supreme Court has decided whether an unwed father has a right to maintain a relationship with his children based on the unique facts of each case, leaving courts to speculate as to the definitive rules encompassing these situations. In the cases considered by the Supreme Court, one putative father lived in a nuclear family setting with his children for eighteen years, one putative father lived with and supported his children for only two years, and the other unwed fathers failed altogether to establish substantial relationships with their children. None of the fact patterns in these cases implicated the marital presumption issue. Thus, the Supreme Court did not consider the effect of the marital presumption on unwed fathers' rights until Michael H. v. Gerald D.

5. Id. at 2343 (citing M. Grossberg, Governing the Hearth 201 (1985); J. Schouler, Law of the Domestic Relations § 225, at 306-07 (3d ed. 1882)).

6. As used in this Note, an unwed father refers to a biological father who is not married to the child's mother. A putative father is the alleged father of an illegitimate child. Black's Law Dictionary 1113 (5th ed. 1979); see also Comment, The Child with Two Fathers: Updating the Wisdom of Solomon, 46 La. L. Rev. 1211, 1212 n.8 (1986). Note that an unwed father is not a putative father where his child is the result of a married woman's extramarital affair. In this instance, the child is presumed to be the legitimate issue of the mother and her husband. Id.


8. See Wadlington, Prologue, The Parent-Child Relationship and the Current Cycle of Family Law Reform, 45 Ohio St. L.J. 307, 307-09 (1984) (pointing out that hasty statutory changes in domestic relations laws as well as court decisions having impact in unanticipated areas have contributed to the present state of confusion surrounding unwed fathers' legal rights).


10. Stanley, 405 U.S. at 646.

11. Caban, 441 U.S. at 382.

12. Lehr, 463 U.S. at 252; Quilloin, 434 U.S. at 247, 251.

13. See Lehr, 463 U.S. at 250 (the mother was unmarried at the time of the child's birth); Caban, 441 U.S. at 382 (same); Quilloin, 434 U.S. at 247 (same); Stanley, 405 U.S. at 646 (same).

In *Michael H.*, the United States Supreme Court addressed the marital presumption issue in the context of considering the extent of an unwed father's right to maintain a relationship with his child. The Court confronted a unique fact pattern which triggered the presumption. As a result of an extramarital affair, Carole D. gave birth to Victoria D. Throughout the first three years of her life, Victoria D. lived with her mother. Three different men lived with her mother during this period. Victoria D. spent less than half of her first three years living with Gerald D., her mother's husband and Victoria's legal father, and approximately the same amount of time living with her biological father.

When Victoria D. was three years old, her legal parents reconciled, forming a permanent unitary family. Nevertheless, Michael H., the child's biological father, wished to maintain his relationship with Victoria D. Because Carole D. and Gerald D. would not allow the biological father to visit Victoria D., Michael H. attempted to establish his paternity and right to visitation by filing a filiation action, a means of establishing paternity of a child which is typically used to compel the father of a child born out of wedlock to contribute to the child's support. Pursuant to section 621 of the California Evidence Code, however, which incorporates the marital presumption, the California Superior Court did not permit Michael H. to prove his paternity of Victoria D., and denied Michael H.'s request for continued visitation privileges under section 4601 of the California Civil Code.

On appeal, Michael H. argued that application of section 621 of the California Evidence Code violated his procedural and substantive due process rights. Victoria D., through her guardian ad litem, also challenged the statute, asserting denial of her due process and equal protection rights.

15. *Id.* at 2337.
16. *Id.*
17. *Id.*
18. *Id.* Gerald is presumed by law to be Victoria's father even though he may not be her biological father. *Id.* at 2338.
19. *Id.* at 2337. Victoria D. also spent several months living with another man involved with her mother. *Id.*
20. *Id.* At the time of this suit, Victoria D. lived in New York with Gerald D. and Carole D. Gerald D., and Carole D. had two other children born after Victoria D. *Id.*
21. *Id.*
22. *Id.*
23. CAL. EVID. CODE § 621 (West Supp. 1990); see infra note 54.
24. 109 S. Ct. at 2338. Section 4601 allows a court to grant, in its discretion, "reasonable visitation rights ... to any ... person having an interest in the welfare of the child." CAL. CIV. CODE § 4601 (West 1983).
26. *Id.*
Relying on precedent holding that the conclusive marital presumption of section 621 precludes any triable issues of fact as to the paternity of a child born to a married couple, the California Court of Appeal affirmed the superior court’s decision. The California Supreme Court denied review of the case, and the United States Supreme Court noted probable jurisdiction to decide whether section 621 of the California Evidence Code denied unwed fathers or their children due process or equal protection under the Constitution.

The Supreme Court upheld the constitutionality of the statute in a plurality opinion written by Justice Scalia. The plurality refused to recognize a traditionally protected liberty interest in maintaining a relationship between a biological father and a child presumptively the daughter of another man. Rather, the Court deferred to the legislature to decide whether an unwed father could rebut the marital presumption. Concurring in all but one footnote of Justice Scalia’s opinion, Justice O’Connor refuted the plurality’s method of looking to the interest of an adulterous natural father, rather than the more general interest of parenthood, in determining whether our society traditionally has protected that interest.

In his concurring opinion, Justice Stevens disagreed with the plurality’s analysis of the California statute’s constitutionality. Justice Stevens did not reject the possibility of a constitutionally protected interest in the relationship between a natural father and his child, even where the child’s mother was married to another man when the child was born. Justice Stevens found, however, that because California law permitted Michael H. the opportunity to convince a trial judge that allowing visitation would be in Victoria D.’s best interests, the California statutes implicitly recognized a biological father’s liberty interest and worked to protect such an interest.

30. Michael H., 109 S. Ct. at 2341. The Court was divided with five Justices concurring in the judgment and four Justices dissenting. Justice Scalia delivered the opinion of the Court in which Chief Justice Rehnquist joined. Justice O’Connor, joined by Justice Kennedy, filed an opinion concurring in part, and Justice Stevens filed an opinion concurring in the judgment. Justice Brennan filed a dissenting opinion, joined by Justices Marshall and Blackmun, and Justice White filed a dissenting opinion, joined by Justice Brennan.
31. Id.; see infra text accompanying notes 168-69, 185-89, 231-32.
32. Id. at 2345.
33. Id. at 2346-47 (O’Connor, J., concurring).
34. Id. at 2347 (Stevens, J., concurring).
35. Id.
Thus, Justice Stevens concluded that the California statutes operated in conformity with the due process clause of the fourteenth amendment.\textsuperscript{36}

In his dissent, Justice Brennan criticized the plurality for depending too heavily on a rigid interpretation of "tradition."\textsuperscript{37} Justice Brennan maintained that the plurality's objective definition of tradition consisted of entries in "dusty volumes on American history"\textsuperscript{38} and was incomplete. Further, Justice Brennan argued that, even if the plurality could accurately identify the content of specific operable traditions, in this case tradition was irrelevant and should not be the cornerstone of the plurality's analysis.\textsuperscript{39} Therefore, the dissent would have limited the role of tradition, recognizing that experience shapes constitutional concepts.\textsuperscript{40} In a separate dissent, Justice White intimated that sociological changes made reliance on history and past traditions irrelevant to the case.\textsuperscript{41} Thus, Justice White asserted that Michael H. established a liberty interest mandating constitutional protection by developing a substantial relationship with Victoria D.\textsuperscript{42}

This Note analyzes the development of the Court's guidelines for determining whether an unwed father can claim a constitutionally protected interest in maintaining a relationship with his child. The Note first presents the legislative and judicial development of the presumption of paternity, tracing the evolution of the substantial relationship test and the best interests standard implemented by the Court. This Note then discusses the influence of the peculiar facts of prior cases in applying these guidelines. Further, this Note addresses the United States Supreme Court's decision in \textit{Michael H. v. Gerald D.}, focusing on the contrasting views presented in the case. Ultimately, this Note concludes that the \textit{Michael H.} plurality failed to adhere to previously established guidelines for determining the extent of an unwed father's parental rights. In the absence of definitive boundaries, the Court should provide an unwed father with the opportunity to demonstrate that he established, or earnestly attempted to establish, a substantial relationship with his child before adopting a bright line rule that the best interests of a

\textsuperscript{36} \textit{Id.} at 2348-49.

\textsuperscript{37} \textit{Id.} at 2349 (Brennan, J., dissenting). Justice Brennan argued that "this concept can be as malleable and as elusive as 'liberty' itself [and thus tradition cannot place] a discernible border around the Constitution." \textit{Id.}

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} \textit{Id.} at 2350.

\textsuperscript{41} \textit{Id.} at 2362 (White, J., dissenting). Justice White saw "no reason to debate...ancient policy concerns behind bastardy laws," asserting that "[i]t is hardly rare in this world of divorce and remarriage for a child to live with the 'father' to whom her mother is married, and still have a relationship with her biological father." \textit{Id.}

\textsuperscript{42} \textit{Id.} at 2361.
child are served by discontinuing contact between the child and the unwed father.

I. THE CONCLUSIVE PRESUMPTION OF PATERNITY: A SUBSTANTIVE RULE OF LAW

In response to the need for new legislation eliminating the legal differentiation between “legitimate” and “illegitimate” children, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Parentage Act. The Act attempts to promote the goal of “equalizing the substantive legal position of the illegitimate child with that of the legitimate child” by seeking to identify a parent against whom the child may assert his legal rights. In situations where external circumstances, such as marriage, implicate a particular man as a child’s father, the Uniform Parentage Act incorporates the presumption of paternity. The presumption of paternity, while saving the state’s resources, can effectively ignore the parental claims asserted by a natural father who is not recognized by the statute.

The Uniform Parentage Act bases its presumptions of parenthood on state laws. Section 4 of the Act catalogs circumstances triggering the presumption of paternity. The presumption under section 4 “may be rebutted in an appropriate action only by clear and convincing evidence.” California, which was among the first states to adopt the Act, maintains a conclusive

44. Id. at 289 (prefatory note).
45. Id. By identifying a parent against whom to demand support, the State relieves itself of a fiscal burden in many cases where single parents turn to government assistance programs for child support. Id.
46. UNIF. PARENTAGE ACT § 4.
48. Id. at 657-58.
49. UNIF. PARENTAGE ACT, 9B U.L.A. at 289 (prefatory note).
50. UNIF. PARENTAGE ACT § 4. Circumstances which trigger the presumption include: Marriage between the presumed father and the mother at the time of the child’s birth; or, if the marriage has terminated, termination of the marriage no more than 300 days prior to the child’s birth; or, if the parents are unmarried at the time of the child’s birth, the marriage or attempted marriage of the presumed father and the mother after the child’s birth and the father’s acknowledgement of paternity. Id. The presumed father can also trigger the marital presumption by receiving the child into his home and openly holding out the child as his own, or by filing an acknowledgement of his paternity undisputed by the mother. Id. Only one father, however, may trigger the marital presumption. Therefore, a biological father who openly holds out a child as his own does not benefit from the marital presumption if the child’s mother is married to another man at the time of the child’s birth.
51. Id. § 4(b).
presumption of legitimacy for children born into a marriage. Section 621 of the California Evidence Code, which codifies the marital presumption, remains effective as an additional condition activating the presumption of paternity under California law.

Although the California marital presumption statute dates back to 1872, before the advent of blood tests that could determine parenthood with a high degree of accuracy, section 621 of the Evidence Code remains good law with few substantive changes. The conclusive presumption of the California statute affords the unwed father no opportunity to challenge the accuracy of the legal determination that a mother's husband is the father of her child. Therefore, unless the mother or her husband seeks to rebut the marital presumption, notice of motion for blood tests

(a) Except as provided in subdivision (b), 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.

(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

(e) The provisions of subdivision (b) shall not apply to any case coming within the provisions of Section 7005 of the Civil Code or to any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure.

Id.

55. Compare Unif. Parentage Act § 4 with Cal. Civ. Code § 7004 (California adds the phrase “if he meets the conditions as set forth in Section 621 of the Evidence Code” to the list of conditions activating the presumption of paternity).


57. See supra note 1.

tal presumption, an unwed father cannot claim paternity, and cannot obtain any parental rights with respect to his natural child.

II. JUDICIAL DETERMINATION OF PATERNITY: THE SUBSTANTIAL RELATIONSHIP TEST

A. Development of a Substantial Relationship

The Supreme Court fails to recognize as constitutionally protected the biological relationship between an unwed father and his child. Rather, when determining the scope of the unwed father's parental rights, the biological connection merely serves as a starting point. The Court considers the factors which tend to show a commitment to the biological connection more important than the biological connection itself. Therefore, the Court will consider factors such as financial support, emotional attachment, personal contact, and participation in rearing, which, when taken in combination with the biological connection, will contribute to the interest in a substantial relationship recognized by the Supreme Court.

The precise parameters of the relationship between a biological father and a child vary with each case, and circumstantial differences necessarily affect the case's outcome. The degree of protection that the Court affords to an

59. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting); see also Lehr v. Robertson, 463 U.S. 248, 261 (1983) (stating that "the mere existence of a biological link does not merit equivalent constitutional protection"). Obviously, there are situations in which there exists a biological connection that does not, and should not, give rise to a constitutionally protected relationship. Examples are scenarios involving rape or artificial insemination. The Uniform Parentage Act addresses the issue of artificial insemination, providing that "[t]he donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." UNIF. PARENTAGE ACT § 5 (1973) (emphasis added); CAL. CIV. CODE § 7005(b) (West 1983) (California omits the word "married" preceding "woman"); see also CAL. EVID. CODE § 621 (West Supp. 1990) (excepting from the marital presumption "any case in which the wife, with the consent of the husband, conceived by means of a surgical procedure").

60. See, e.g., Lehr, 463 U.S. at 262.

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.

61. See id. at 261.

62. Id. at 258-62.

unwed father's relationship with his child varies with the weight of factors that the father can prove tending to show a commitment to the biological connection.\textsuperscript{64} The strongest indication of a substantially developed relationship is a nuclear family arrangement.\textsuperscript{65} A nuclear family encompasses each of the important aspects of a substantial relationship.\textsuperscript{66} For example, a nuclear family arrangement gives rise to continuous association between parent and child. This continuity of personal contact promotes emotional attachment and active participation, both personal and financial, in the child's development.\textsuperscript{67} Accordingly, the Supreme Court indicated in \textit{Stanley v. Illinois} an increased willingness to recognize a parental interest if the biological father can prove the presence of a nuclear family relationship.\textsuperscript{68}

In \textit{Stanley}, the unwed father lived with his children and their mother intermittently as a unitary family.\textsuperscript{69} Upon the death of their mother, the State of Illinois declared the children wards of the state pursuant to a state statute,\textsuperscript{70} and, without a hearing, placed them with court-appointed guardians.\textsuperscript{71} Illinois law prohibited the taking of children from married parents or unwed mothers, however, absent a showing that they were unfit parents.\textsuperscript{72} Consequently, Stanley argued that the statute deprived him of his fourteenth amendment due process and equal protection rights.\textsuperscript{73} Stanley contended that his private interest in maintaining a relationship with his children was a central element of his due process right.\textsuperscript{74}

Holding that an unwed father is entitled to a hearing on his fitness prior to having his children taken from him by the state,\textsuperscript{75} the Supreme Court recog-

\begin{footnotes}
\item[64] See \textit{Lehr}, 463 U.S. at 261-62 \& n.18.
\item[65] Members of a nuclear family include the father, the mother, and their children all sharing one home. \textit{Moore v. East Cleveland}, 431 U.S. 494, 500 (1977).
\item[66] See supra text accompanying note 62.
\item[67] \textit{Lehr}, 463 U.S. at 261-62.
\item[68] 405 U.S. 645, 651 (1972). Justice White, writing for the majority, noted, "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." \textit{Id.}
\item[69] \textit{Id.} at 646.
\item[70] \textit{See ILL. REV. STAT.} ch. 37, para. 702-5 (1972) (repealed 1988) (describing a dependent minor as "any minor under 18 years of age . . . who is without a parent, guardian or legal custodian"); \textit{ILL. REV. STAT.} ch. 37, para. 701-14 (1980) (repealed 1988) (stating that "[p]arents' means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent;" note that unwed fathers are not included in this definition).
\item[71] The state asserted "that unwed fathers are presumed unfit to raise their children and . . . it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children." 405 U.S. at 647.
\item[72] \textit{Id.} at 646.
\item[73] \textit{Id.}
\item[74] \textit{Id.} at 650-51.
\item[75] \textit{Id.} at 658.
\end{footnotes}
nized Stanley's relationship with his children as constituting a "family" despite Stanley's single status.\textsuperscript{76} According to the Court, the substantial relationship between the biological father and his children did not depend solely upon the natural parents' marital relationship. While the Court recognized the existence of a substantial relationship under the facts and circumstances of \textit{Stanley}, however, the Court failed to delineate explicit guidelines for determining the outcome of future cases.\textsuperscript{77}

In \textit{Caban v. Mohammed},\textsuperscript{78} the Court again considered the parameters of a substantial relationship in determining the rights of an unwed father. In \textit{Caban}, the unwed father lived with and contributed to the support of his children until they were ages two and four.\textsuperscript{79} Subsequently, the mother left Caban, taking the children and marrying another man.\textsuperscript{80} Nevertheless, after the separation, Caban continued to visit the children, and on one occasion attempted to retain custody of them.\textsuperscript{81}

When the children's mother and stepfather filed for adoption, Caban and his wife cross petitioned for adoption.\textsuperscript{82} The Supreme Court rejected application of a New York statute that allowed an unwed mother, but not an unwed father, to oppose the adoption of the child.\textsuperscript{83} Although the Court declined to reach the issue of whether natural fathers possess a "due process right . . . to maintain a parental relationship with their children absent a finding that they are unfit as parents,"\textsuperscript{84} the Court recognized Caban's relationship with his children as being "substantial."\textsuperscript{85} The Court, while not identifying discernible boundaries to the "substantial relationship" test,

\begin{itemize}
\item \textsuperscript{76} \textit{Id.} at 651. Justice White explained the result stating, "[n]or has the law refused to recognize those family relationships unlegitimized by a marriage ceremony." \textit{Id.}
\item \textsuperscript{77} See \textit{id.} at 652.
\item \textsuperscript{78} 441 U.S. 380 (1979).
\item \textsuperscript{79} \textit{Id.} at 382.
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.} at 382-83. Caban visited the children while they were staying with their maternal grandmother in Puerto Rico. Rather than returning the children to their grandmother after a few days as expected, Caban brought the children back to New York with him. After a failed attempt to retrieve the children with the help of a police officer, the children's mother instituted custody proceedings, and later, with her husband, filed for adoption of the children. \textit{Id.}
\item \textsuperscript{82} \textit{Id.} at 383. Under New York law, a child born out of wedlock may be adopted by his or her natural parent and stepparent. N.Y. DOM. REL. LAW § 110 (McKinney 1988).
\item \textsuperscript{83} 441 U.S. at 394. N.Y. DOM. REL. LAW § 111 stated that prior to adoption of a child born out of wedlock, consent is required from "the parents or surviving parent, whether adult or infant, of a child born in wedlock . . . [or] the mother, whether adult or infant, of a child born out of wedlock." 1976 N.Y. Laws 1405 (current version as amended at N.Y. DOM. REL. LAW § 111 (McKinney 1988)). Consent of the unwed father was not necessary.
\item \textsuperscript{84} \textit{Id.} at 385.
\item \textsuperscript{85} \textit{Id.} at 386-87. The Court concluded that the statute was invalid on the basis of Caban's equal protection claim. \textit{Id.} at 388, 394.
\end{itemize}
broadened the test’s applicability to circumstances where the biological father can show the former presence of a nuclear family relationship.

In *Quilloin v. Walcott*, the Court further exemplified the importance of the familial bond between unwed fathers and their illegitimate children. *Quilloin* involved a statute similar to the statute questioned in *Caban*. The Georgia statute required the written consent of both parents before approving the adoption of a child born in wedlock unless a parent abandoned the child, surrendered rights in the child, was adjudicated unfit, or could not be found. Conversely, the consent of the unwed father was unnecessary prior to adoption of an illegitimate child. In *Quilloin*, the unwed father argued that application of the Georgia statute denied the natural father of an illegitimate child the ability to prevent the mother’s husband from adopting the child.

The Supreme Court upheld the constitutionality of the Georgia statute as applied to the unwed father in *Quilloin*. To merit constitutional protection, the Court required a familial bond supported by a financial commitment or a shared household such as the one recognized in *Caban*. Because the unwed father in *Quilloin* “never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child,” the Court determined that the father had failed to establish a substantial relationship with the child.

**B. Difficulties in Establishing a Substantial Relationship**

In *Stanley*, *Caban*, and *Quilloin*, the Court alluded to what it considered the factors necessary to form a substantial relationship between a putative father and an illegitimate child. The Supreme Court required financial support or custodial attachment to secure the protection of the relationship

---

86. 434 U.S. 246 (1978).
87. *Id.* at 248. The statute provided that, prior to adoption, “[i]f the child be illegitimate, the consent of the mother alone shall suffice.” 1941 Ga. Laws 300, 301 (current version at GA. CODE ANN. § 19-8-3 (1982) (containing no special provisions for the adoption of illegitimate children)). *Cf. N.Y. DOM. REL. LAW § 111* (similarly requiring only the mother’s consent); see supra note 83 and accompanying text.
88. 1941 Ga. Laws 300 (current version at GA. CODE ANN. § 19-8-3 (1982)).
89. *Id.*
90. 434 U.S. at 255-56.
91. *Id.* at 256.
92. *Id.* at 251, 256. Where the unwed father did not live with or support the child, the Court relied on the “best interests” standard which considered the effect of a continued relationship on the child above the interest of the unwed father. *See id.* at 251, 255; *see also infra text* accompanying notes 122-29.
93. 434 U.S. at 256.
under the Constitution.\textsuperscript{94} Until \textit{Lehr v. Robertson},\textsuperscript{95} however, the Court had not addressed the possibility of the mother's intervention preventing the unwed father from establishing such a relationship.\textsuperscript{96}

In \textit{Lehr}, the unwed father lived with the child's mother before the child's birth.\textsuperscript{97} After the hospital discharged the mother and newborn from its care, the mother failed to return to the unwed father and would not disclose her whereabouts to him.\textsuperscript{98} In addition, the biological father did not receive advance notice of the child's adoption by the mother's new husband.\textsuperscript{99} Nevertheless, the Court failed to recognize the unwed father's parental rights, and upheld the adoption order.\textsuperscript{100}

Reaffirming its position requiring the demonstration of a substantial relationship between the unwed father and his child as a condition to constitutional protection, the Supreme Court in \textit{Lehr} ignored the biological father's protestations that he was prohibited from establishing such a relationship with his daughter.\textsuperscript{101} The Court's decision in \textit{Lehr} implied that the feasibility of the putative father's development a substantial relationship with his child was irrelevant to the consideration of his claim to parental rights.\textsuperscript{102}

\textbf{C. Challenges to the Substantial Relationship Test}

\textbf{1. The Unwed Father's Equal Protection Claim}

Unwed fathers commonly attack statutes limiting their parental rights on equal protection grounds.\textsuperscript{103} The success of an unwed father's equal protec-

\begin{footnotes}
\item[94] \textit{See supra} text accompanying notes 59-93.
\item[95] 463 U.S. 248 (1983).
\item[96] \textit{See id.} at 270-71 (White, J., dissenting).
\item[97] \textit{Id.} at 252 (majority opinion).
\item[98] \textit{Id.} at 269 (White, J., dissenting).
\item[99] \textit{Id.} at 250 (majority opinion).
\item[100] \textit{Id.} at 265-68.
\item[101] \textit{Id.} at 262. Justice White criticized the majority for omitting consideration of this aspect of the circumstances. \textit{Id.} at 271 (White, J., dissenting).
\item[102] \textit{Id.} at 250-51 (majority opinion). The Court drew attention away from the importance of \textit{Lehr}'s difficulty in establishing a relationship with his child, finding that the unwed father could have used other channels open to him to insure minimum due process protection. For example, by registering in the "putative father registry," he would have secured notice of any adoption proceedings. \textit{Id.} at 263-65; \textit{see also} N.Y. SOC. SERV. LAW § 372-c (McKinney 1988) (establishing a putative registry for unwed fathers to record notice of intent to claim a child born out-of-wedlock).
\end{footnotes}
tion claim hinges first on proof of biological paternity, and second on confirmation of a substantial relationship with the child. Given the opportunity to present medical evidence, an unwed father can accurately prove paternity. Unlike an unwed mother or a married parent, however, the unwed father must also convince the Court that he has developed a substantial relationship with his child.

Absent a showing of a substantial relationship, the Court does not consider the unwed father “similarly situated” with the mother because the mother maintains custodial responsibility for the child. The Court recognizes a distinction between the unwed father and the unwed mother on the basis of the mother’s additional responsibilities. Therefore, without a showing of a substantial relationship, the unwed father’s equal protection claim will fail. Similarly, an unwed father’s claim asserting denial of equal protection where a statute treats unwed fathers and married parents differently fails where the unwed father cannot show a substantial relationship. The Court distinguishes the interests of a married parent responsible for the support of a child from the interests of an unwed father who has not provided any support or assumed any responsibility for the rearing of the child.

---

105. See Lehr v. Robertson, 463 U.S. 248, 250, 269 (1983) (the mother prohibited the biological father from establishing a substantial relationship with his child); Caban, 441 U.S. 380, 386-87 (the biological father established a substantial relationship with his children by living with and supporting them until they were ages two and four); Quilloin, 434 U.S. at 256 (the biological father failed to establish a substantial relationship with his child through occasional visits); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (the biological father established a substantial relationship with his children by living with them in a nuclear family setting).

106. See supra note 1 and accompanying text.
107. See, e.g., Quilloin, 434 U.S. at 256 (distinguishing between parental rights of married and unwed fathers). Statutes operate to presume a parental relationship between a natural mother and child where the mother can prove that she gave birth to the child, and between a father and child where the father can prove that he was married to the mother at the time of the child’s birth. See, e.g., UNIF. PARENTAGE ACT §§ 3-4(a)(1) (1973). The statutes do not, however, require showing of a substantial relationship in these cases.
108. Compare Lehr, 463 U.S. at 267 (where the biological father had not participated in the rearing of his child) with Caban, 441 U.S. at 392-93 (where the biological father lived with his children for several years). “An unwed father who has not come forward and who has established no relationship with the child is plainly not in a situation similar to the mother’s.” Caban, 441 U.S. at 399 (Stewart, J., dissenting); see also Note, supra note 2, at 379-82 (discussing the gender-based classification of marital presumption statutes).
109. See, e.g., Lehr, 463 U.S. at 267-68. “If 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.” Id. (footnotes omitted).
110. See Quilloin, 434 U.S. at 255-56.
111. Id.
Consequently, a substantial relationship with the child is essential to an unwed father's equal protection claim.112

2. The Unwed Father's Due Process Claim

The Supreme Court identified the elements to be used in a due process analysis in Mathews v. Eldridge.113 The Court explained that an individual's private interest must be weighed against countervailing interests in determining the extent of process due.114 Applying this analysis in the context of an unwed father, in order to secure protection under the due process clause, a putative father must show not only a sense of parental responsibility by forming a substantial relationship with his child,115 but also that his interest in maintaining that relationship outweighs any competing interests.116 In particular, the Court considers the child's best interests,117 the interests of the marital family,118 and the state's interests when assessing the due process protection afforded to a father in preserving his personal contacts with a child.119 The Court has stated, however, that the protection provided to further the best interests of the child will outweigh an unwed father's due process protection where such interests conflict.120

a. The Best Interests of the Child Standard

Where putative fathers assert paternal rights, the Court considers the "best interests of the child" paramount.121 The difficulty for the Court

112. See Caban, 441 U.S. at 386-87 (the demonstration of a substantial relationship persuaded the Court to find in favor of the biological father); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (same).
113. 424 U.S. 319 (1976). The factors to be considered were:
[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
Id. at 335.
114. Id. at 334.
116. Id. at 258-60. The interest of a natural father in personal contacts with his child is deserving of "substantial protection under the Due Process Clause." Id. at 261.
117. See, e.g., id. at 257.
118. See, e.g., id. at 258.
119. See, e.g., id. at 266; see also infra text accompanying notes 137-45.
120. Lehr, 463 U.S. at 260-62 & n.16.
arises in defining a child's best interests and in deciding who determines them. 

In *Quilloin v. Walcott*, the Court utilized the "best interests of the child" standard. The mother neither married, nor lived with, the putative father. When the child was almost three years old, the mother married another man. When the husband filed a petition for adoption eight years later, the putative father objected. Affirming the adoption, the Court considered the trial court's findings that the putative father visited the child and gave the child occasional gifts, but failed to provide support for the child on a regular basis. Although the child expressed a desire to continue visiting his putative father, the mother alleged that the visits were having a "disruptive effect" on the child. Consequently, the Court denied further visitation rights to the putative father.

In evaluating the best interests of an illegitimate child, the Supreme Court consistently has used criteria that include the existence of a substantial relationship between the child and the putative father, and the possibility of competing relationships that would conflict with the continuation of the putative father-child association. The Court, however, has neither clearly defined these criteria nor identified the relative weight accorded to them. The *Quilloin* holding, while not settling the ongoing debate on defining best interests, provided some workable guidelines for future courts' determination of those interests.

---

122. 434 U.S. at 254.
123. Id.
124. Id. at 247.
125. Id.
126. Id.
127. See *supra* text accompanying note 94.
128. 434 U.S. at 251 & n.11. The mother and her husband had another child, and the mother testified that the putative father's contacts with his illegitimate child were disturbing for both children. Id. at 251 n.10.
129. Id. at 251, 256.
133. 434 U.S. at 254-56. Although courts have used the best interests standard in other cases involving assertions of paternal rights by putative fathers, they have shed little additional instructive light on how to apply the standard. See, e.g., *Lehr*, 463 U.S. at 266-67 (relying on, but not adding to, the *Quilloin* best interests standard); *Caban v. Mohammed*, 441 U.S. 380, 386-87 (1979) (requiring the unwed father to show that adoption by the mother's husband would not be in the child's best interests); *In re Lisa R.*, 13 Cal. 3d 636, 648-51, 532 P.2d 123, 131-33, 119 Cal. Rptr. 475, 483-85 (weighing private interests against state interests, but failing to shed additional light on the best interest standard), *cert. denied*, 421 U.S. 1014 (1975); *Vincent B. v. Joan R.*, 126 Cal. App. 3d 619, 627-28, 179 Cal. Rptr. 9, 13 (1981) (stating that
The Quilloin Court identified two elements as relevant in determining the best interests of a child. First, without providing a rationale, the Court sanctioned giving considerable weight to the mother's opinion. Second, the Quilloin Court maintained that being legitimized by adoption into an already existing family unit, particularly when all parties except the putative father desire the adoption, serves the best interests of an illegitimate child. The Court based this assertion on the putative father's irregular support of the child in contrast with the stable homelife the child's mother provided. Thus, the Court's assessment of the child's best interests focused on securing the most appropriate familial setting for raising the child, and permitted the mother's opinion to play a decisive role in that determination.

b. Other Interested Parties

While the Court considers the best interests of the child foremost, the Court accords due weight to interests of other parties in conflict with those of a putative father. Specifically, the Supreme Court acknowledges a state interest in facilitating the adoption of illegitimate children. Adoption of illegitimate children by responsible families often lifts the financial burden of child support from the state. Equally important, most states possess an interest in protecting "the moral, emotional, mental, and physical welfare" of a minor, and in protecting the best interests of the community. Typically, courts consider illegitimacy contrary to the states' interests, and thus courts favor adoption by a stepparent to legitimize a child over continuation of a natural father's visitation rights.

Likewise, courts have recognized that a child's mother has an interest in maintaining a stable environment for the child. Visits from the child's biological father may disrupt an established family unit. In addition, courts...
are aware that contacts between the illegitimate child and the putative father might cause animosity among other children in the family and possibly strain the relationship between the mother and her spouse. Consequently, uncoupling the private interests of the child's mother and the interests of the state appears difficult when determining the best interests of the child.

Although the Supreme Court acknowledges the right of an unwed father to continue a substantially developed relationship with his child if it furthers the child's best interests, the Court declines to recognize the relationship as requiring greater protection than the interests of other parties involved. When a child is born to a married woman, the marital presumption protects the interests of the married couple by presuming that the child is the product of that union. This presumption, however, operates to deny parental rights to the unwed father of a child born into another marital family. In *Michael H. v. Gerald D.*, an unwed father seeking parental rights over a child born into an existant marital union challenged the constitutionality of the marital presumption.

### III. *Michael H. v. Gerald D.: The Presumption of Legitimacy*

*Michael H. v. Gerald D.* presented the Supreme Court with a new dimension to the problem of determining the extent of an unwed father's paternal rights. The unwed father, Michael H., had an adulterous affair with Carole D. that continued intermittently for six years. Carole D. gave birth to a daughter, Victoria D., during the time of her involvement with Michael H., and blood tests confirmed with ninety-eight percent certainty that Michael H. fathered the child. Carole D. and Victoria D. periodically lived with Michael H. during the first three years of Victoria D.'s life, and Michael H. held the child out as his own. Nevertheless, when Carole D. reconciled with her husband, Gerald D., establishing a permanent home with him, she prevented Michael H. from maintaining a relationship with Victoria D. Although Michael H. filed a filiation action in the California

---

143. See supra note 128 and accompanying text.
144. See Comment, supra note 6, at 1226 (noting that visits from the unwed father can create tension between the child's mother and her husband).
145. See supra text accompanying notes 137-44.
147. See supra notes 46-48 and accompanying text.
148. 109 S. Ct. at 2336-37.
150. Id. at 2337.
151. Id.; see also supra note 1.
152. 109 S. Ct. at 2337.
153. Id. at 2337-38.
Superior Court and gained limited visitation privileges, Gerald D. intervened in the suit, citing section 621 of the California Evidence Code, and asked the court to dismiss Michael H.'s claim.

Section 621 of the California Evidence Code presumes that a woman's husband, if he is not impotent or sterile, is the father of her children. Only the mother's husband or, under limited circumstances, the mother of the child can rebut the marital presumption. Because an unwed father cannot rebut the presumption, it is difficult for him to maintain a relationship with his child. Therefore, to continue to associate with his children, an unwed father must gain visitation rights under section 4601 of the California Civil Code, which allows a court to grant, in its discretion, "reasonable visitation rights . . . to any . . . person having an interest in the welfare of the child." In Michael H., the California Superior Court granted Gerald D.'s motion, disallowing any further visitation between Michael H. and Victoria D.

The presumption of legitimacy, which identified Gerald D. as Victoria's father under California law, precluded Michael H. from asserting his paternity and, consequently, his right to maintain a relationship with his child. Therefore, Michael H. attacked, on due process grounds, the California statute that endorsed the marital presumption. Specifically, Michael H. argued that section 621 prevented him from legally establishing a parental relationship with Victoria D., thereby depriving him of a constitutionally protected liberty interest. The California Court of Appeal upheld the constitutionality of the statute, and following the California Supreme Court's denial of discretionary review, the United States Supreme Court noted probable jurisdiction.

154. Id. at 2337.
155. Id. at 2337-38.
156. See supra note 54.
159. 109 S. Ct. at 2338.
160. CAL. EVID. CODE § 621.
161. 109 S. Ct. at 2338.
162. CAL. EVID. CODE § 621.
163. 109 S. Ct. at 2338. Victoria D. also challenged the constitutionality of the statute, claiming that a child has a right to continued contact with her natural father, and thus a right to rebut the marital presumption. Id.
165. Id. at 1007-10, 236 Cal. Rptr. at 817-19.
The United States Supreme Court, in a plurality decision written by Justice Scalia, upheld the constitutionality of the California statute.\textsuperscript{167} The plurality concluded that the Constitution traditionally affords no protection to the relationship between a natural father and his adulterously conceived offspring.\textsuperscript{168} Unable to point to previous cases or sources traditionally recognizing the right of a natural father to continue contact with his adulterously conceived offspring, Michael H. failed to show that he had a constitutionally protected liberty interest in maintaining a relationship with Victoria D.\textsuperscript{169}

A. The Plurality's and Concurrences' Rejection of Due Process Challenges to the Marital Presumption

1. Procedural Due Process

In dismissing the natural father's procedural due process claim,\textsuperscript{170} the plurality declared irrelevant Michael H.'s biological paternity under the California statute.\textsuperscript{171} The plurality asserted that California Evidence Code section 621 created a conclusive presumption that Victoria D. was the legitimate offspring of the union between her mother and her mother's husband and, therefore, the natural father lacked standing to claim any parental rights at all.\textsuperscript{172} The Court's reasoning, however, appeared directly contradictory to the Court's earlier holding in Stanley v. Illinois.\textsuperscript{173} In Stanley, the Court specifically addressed the issue of denying a hearing to a putative fa-

\textsuperscript{167} 109 S. Ct. at 2336-37.

\textsuperscript{168} Id. at 2344. The plurality repeatedly used the word "adulterous" when describing Michael H.’s position, thereby emphasizing the immorality of Michael H.’s past behavior throughout the opinion. Justice Brennan noted in his dissent that "no fewer than six times, the plurality refer[red] to Michael as the adulterous natural father." Id. at 2353 (Brennan, J., dissenting) (emphasis in original).

\textsuperscript{169} Id. at 2343-44 (plurality opinion). Justice Scalia identified Michael H.’s burden as establishing that "the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man . . . is so deeply embedded within our traditions as to be a fundamental right." Id. at 2343. Further, Justice Scalia stated that not only must Michael H. show 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 not traditionally denied them." Id. at 2344.

\textsuperscript{170} Victoria also posed a due process claim to maintain a relationship with her natural father. Id. at 2346. The Court dismissed this claim as deserving little merit, stating that traditionally the state has never recognized dual fatherhood as being beneficial for a child. Id. Victoria also presented an equal protection claim, but the Court rejected it as well, stating that Victoria was treated in the same manner as other legitimate children in being permitted to maintain a relationship with her legal father. Id. The Court further determined that allowing a child to rebut the marital presumption could "well disrupt an otherwise peaceful union." Id.

\textsuperscript{171} Id. at 2340 (citing CAL. EVID. CODE § 621 (West Supp. 1990)).

\textsuperscript{172} 109 S. Ct. at 2340-41 (plurality opinion).

\textsuperscript{173} 405 U.S. 645 (1972).
ther on the basis of a statutory presumption of unfitness as a parent, and declared the application of the statute that warranted such a result violative of due process. The plurality reconciled the apparent inconsistency in its judgment, contending that the Stanley decision was based on substantive, rather than procedural, due process.

Justice Stevens, in his concurrence, took issue with the plurality's disposition of the procedural due process claim. According to Justice Stevens, California Evidence Code section 621 did not work as a complete bar to Michael H.'s ability to continue his relationship with Victoria D. because section 4601 of the California Civil Code offered an alternative method. Section 4601 allows the court discretionary power to grant visitation rights to parties, other than parents, having an interest in the welfare of the child. Justice Stevens reasoned that section 4601 of the California Civil Code granted Michael H. the opportunity to be heard with regard to his interest in Victoria D.'s welfare, and thereby afforded him his procedural due process rights.

Justice Stevens argued that, by reading the California statutes as an absolute bar to a natural father's asserting visitation rights under section 621, the plurality misinterpreted the plain meaning of the provisions. Instead, Justice Stevens concluded that the statutes demand that the Court address the separate issue of whether to grant the unwed father visitation rights pursuant to section 4601. Using this approach, Justice Stevens asserted that Michael H.'s claim would fail on substantive, rather than procedural, due process grounds because it was not in the best interests of the child to allow visitation.

---

174. Id. at 647; see supra note 71.
175. 405 U.S. at 658. The Court criticized the statute because "[i]t insists on presuming rather than proving . . . solely because it is more convenient to presume than to prove." Id. The Court continued, "[u]nder the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." Id.
176. 109 S. Ct at 2340; cf. Stanley, 405 U.S. at 649-50, 656-58 (the Stanley Court, conspicuously omitting the word "substantive," required that, as a matter of due process, an unwed father be granted a hearing on his fitness as a parent before his children were taken away from him).
177. 109 S. Ct at 2347 (Stevens, J., concurring).
178. Id.
179. CAL. CIV. CODE § 4601 (West Supp. 1990). Section 4601 of the California Civil Code provides, in relevant part: "In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child." Id.
180. Id.
181. Id.
182. Id. at 2347-49 (Stevens, J., concurring).
183. Id. at 2347.
184. Id. at 2348-49.
2. Substantive Due Process

Justice Scalia's plurality opinion rejected Michael H.'s substantive due process claim on two grounds. First, the plurality opinion refused to recognize a constitutionally protected liberty interest in Michael H.'s relationship with Victoria D. According to Scalia, the relationship between an unwed father and his child, who was living in another marital family, did not warrant special protection "under the historic practices of our society." Maintaining that an asserted liberty interest must traditionally be recognized, Justice Scalia concluded that Michael H.'s claim of a constitutionally protected interest in continuing his relationship with Victoria D. must fail. Second, the plurality asserted that, even if the Court recognized such a liberty interest, the State's interest in terminating the adulterous father-child relationship would override the unwed father's liberty interest in continuing the relationship. Justice Scalia reasoned that the state possessed the discretionary power to give preference to the interest of the married couple in preserving the integrity of their nuclear family over the interest of the unwed father in continuing his relationship with his child.

While concurring in part, Justice O'Connor disagreed with one footnote of Justice Scalia's plurality opinion. In this footnote, Justice Scalia sketched a method of using historical traditions tailored to the most specific level for identifying an asserted right. Applying this methodology, the plurality concluded that the Court traditionally did not recognize a constitutionally protected parent-child relationship between a natural father and a child born into another marriage. Justice O'Connor noted that "[o]n occasion the

185. Id. at 2341-42 (plurality opinion).
186. Id. at 2342. In defining Michael H.'s rights, Justice Scalia advocated examining "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." Id. at 2344 n.6. In doing this, Justice Scalia rejected the possibility of recognizing Michael H.'s rights in the more general category of "parenthood." Id. Rather, Justice Scalia opted to categorize Michael H.'s rights as "the rights of the natural father of a child adulterously conceived." Id. Not surprisingly, Justice Scalia was then unable to find prior cases or historical precedent advocating constitutional protection of that right; it was this part of Justice Scalia's plurality opinion with which Justice O'Connor disagreed. Id. at 2346-47 (O'Connor, J., concurring); see infra text accompanying notes 190-93.
187. Id. at 2342.
188. Id. at 2345.
189. Id. Justice Scalia asserted that, although the unwed father may, under some circumstances, have a protected interest in maintaining a relationship with his child, "the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist." Id. (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979)).
190. 109 S. Ct. at 2346 (O'Connor, J., concurring).
191. Id. at 2344 n.6 (plurality opinion).
192. Id.
Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available," implying that this method of analysis is riddled with potential inconsistencies.

B. The Dissents' Endorsement of Michael H.'s Due Process Claims Against the Marital Presumption

1. Procedural Due Process

Dissenting, Justice Brennan criticized the plurality's disposition of Michael H.'s procedural due process claim. Justice Brennan argued that the court's refusal to grant an unwed father a hearing to prove paternity and to demonstrate the merits of his claim violates his procedural due process rights. Further, Justice Brennan criticized the plurality's method of analyzing the irrebuttable marital presumption issue. Specifically, Justice Brennan maintained that the plurality's method of analysis ignored the purpose of procedural due process. While the Scalia plurality opinion disposed of the procedural due process argument by relying solely on considerations of social policy, Justice Brennan emphasized that the object of due process is to allow a litigant an opportunity to prevail, not to ensure a specific outcome. Therefore, Justice Brennan asserted that, although the plurality chose to analyze the case in terms of substantive due process, the working of California Evidence Code section 621 denied Michael H. the opportunity for hearing on his claim of paternity, and therefore the Court should properly have analyzed the case under procedural due process.

2. Substantive Due Process

Justice Brennan criticized the plurality's disposition of Michael H.'s substantive due process claim, asserting that the plurality's method of defining

193. Id. at 2346 (O'Connor, J., concurring).
194. Id. at 2357-58 (Brennan, J., dissenting).
195. Justice Brennan stated that, in its analysis, "the plurality turn[ed] procedural due process upside down." Id. at 2354.
196. Id. at 2340-41 (plurality opinion).
197. Id. at 2354-55 (Brennan, J., dissenting).
198. Id. Justice Brennan pointed out that "[five] justices agree that the flaw inhering in a conclusive presumption that terminates a constitutionally protected interest without any hearing whatsoever is a procedural one." Id. at 2349 (emphasis in original). This argument is predicated on the existence of a constitutionally protected interest at the outset. This is precisely the reason that Justice Brennan advocated addressing the substantive due process claim before considering the procedural due process claim, criticizing the plurality's method of "invoking substantive due process before . . . consider[ing] the nature of the interest at stake." Id. at 2358 (emphasis in original).
the unwed father’s interest at its most specific level would have led to different results in prior cases.\(^{199}\) Justice Brennan noted, for example, that contraceptive use, by married or unmarried couples, was never a traditionally protected interest.\(^{200}\) Had the Court attempted to identify the interest in prior cases with such specificity, Justice Brennan concluded, these interests would have remained unprotected.\(^{201}\) Therefore, Justice Brennan rejected the plurality’s “misguided”\(^{202}\) approach, and advocated defining Michael H.’s interest on a less specific level, focusing on the parent-child relationship rather than the relationship between an unwed father and a child adulterously conceived.\(^{203}\)

Justice Brennan recommended reexamining the rationale behind the courts’ traditional refusal to recognize an interest in a parent-child relationship between an unwed father and his natural child, and suggested that a rule denying the asserted interest may have outlived its foundations.\(^{204}\) In particular, Justice Brennan advocated linking the biological connection between an unwed father and his child with the Court’s substantial relationship test to weigh against any counterclaims asserted by the state on behalf of the child’s mother or her husband seeking to terminate the unwed father-child relationship.\(^{205}\) Justice Brennan pointed to the unifying theme of prior cases, including \textit{Stanley v. Illinois}\(^{206}\) and \textit{Lehr v. Robertson},\(^{207}\) which advocated the use of the substantial relationship test, and noted that Michael H. met the criteria for establishing such a relationship with Victoria D.\(^{208}\) In this way, Justice Brennan concluded that the state could not have an interest

---

\(^{199}\) \textit{Id.} at 2350.

\(^{200}\) \textit{Id.} (citing \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972); \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965)).


\(^{202}\) \textit{Id.} at 2351 (Brennan, J., dissenting).

\(^{203}\) \textit{Id.} at 2350-51.

\(^{204}\) \textit{Id.} at 2351.

\(^{205}\) \textit{Id.} at 2352-54.

\(^{206}\) 405 U.S. 645 (1972).


\(^{208}\) 109 S. Ct. at 2352 (Brennan, J., dissenting).
so powerful that it justified terminating Michael H.’s interest in continuing his relationship with Victoria D. without so much as a hearing.209

Similarly, Justice White, in his dissent, advocated applying the interpretive substantial relationship approach used by the Court in previous cases to determine the extent of an unwed father’s rights.210 Justice White criticized the plurality’s approach, arguing that a substantial relationship between a natural father and his child merits constitutional protection regardless of the father’s marital status.211 Justice White favored examining the relationship between the natural father and the child rather than the relationship between the natural father and the mother.212 He noted that, due to divorce and remarriage, children commonly maintain a relationship with a biological parent while living with another parent; Justice White therefore rejected the plurality’s contention that discontinuing Michael H.’s relationship with Victoria D. would further Victoria D.’s best interests.213

Focusing on the substantial relationship test, Justice White concluded that Michael H. established a substantial relationship and was, as a result, entitled to maintain it.214 Justice White advocated combining the substantial relationship test with a decreased weighting of countervailing state interests to reflect more accurately society’s present concerns, as the best test for determining whether the unwed father has a protected interest in maintaining a relationship with his child.215 Justice White asserted that societal changes and technological advances in blood testing render protection of a child from the stigma of illegitimacy an outdated concern.216 Giving credence to the state’s interest in preserving the marital relationship between Gerald D. and Carole D., Justice White admitted that allowing outsiders to claim paternity of children born into a marriage could disturb the marital harmony.217 Justice White pointed out, however, that statutes preventing unwed fathers from obtaining parental rights in no way prevent unwed fathers from assert-

209. Id. at 2358.
210. Id. at 2360-61 (White, J., dissenting). Although Justice White disagreed with the majority’s requirement of a substantial relationship in Lehr, he determined that Michael H. had clearly satisfied that standard and thus had a protected liberty interest in his relationship with Victoria D. Id. at 2360-61 & n.1.
211. Id. at 2360.
212. Id. at 2361.
213. Id. at 2362.
214. Id. at 2361.
215. Id. at 2360-62.
216. Id. at 2362.
217. Id.
ing the claim of paternity, and thus an unwed father can easily disturb a couple's marital harmony in spite of these statutes.  

IV. THE UNITARY FAMILY TEST: A NEW JUDICIAL PATERNITY TEST

While the Court's decision in Michael H. v. Gerald D. extended the trend of deciding cases concerning biological fathers' rights on unique factual bases, the Court added a further dimension. While in previous cases the Court acknowledged the right of a biological father to continue a substantially developed relationship with his child, in this case the plurality declined to recognize the substantial relationship as a constitutionally protected right. The Court upheld a law that not only denies a biological father parental rights if he is not married to his children's mother, but also denies him the right to present medical proof that he is their biological father in order to obtain parental rights.

Prior to deciding Michael H., the Court, in Lehr v. Robertson, extensively discussed the scope of an unwed father's interest in maintaining a relationship with his child. In Lehr the Court underscored the difference between a mere biological connection and a developed commitment to personal contact between a natural father and his child. The Lehr Court, following the precedents set forth in Caban v. Mohammed, Quilloin v. Walcott, and Stanley v. Illinois, relied upon the substantial relationship test as a determinative factor in realizing the extent of protection afforded an unwed father claiming a right to maintain a relationship with his child. Yet, surprisingly, Justice Scalia's plurality opinion in Michael H. v. Gerald D., ceased to employ the substantial relationship test in a determinative way. Instead, the Court circumscribed the test's application by defining

218. Id. Presumably, the harmony in a marriage is already disturbed upon the occurrence of an extramarital affair. Id. The Court is in reality attempting to protect the appearance of marital harmony in such a case. Id.
219. Id. at 2345 (plurality opinion).
220. Id.
221. See supra note 1 and accompanying text.
223. Id. at 261-62.
227. 463 U.S. at 258-61.
228. 109 S. Ct. 2333, 2342 (1989). Justice Scalia stated:

establishing that a liberty interest is created by biological fatherhood plus an established parental relationship—factors that exist in the present case as well . . . distorts the rationale of [prior] cases. [Those cases] rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.
the interest previously protected as turning on the establishment of a "uni-
tary family" by the natural father, mother, and child. In doing so, the
plurality effectively redefined the "substantial relationship" test and thereby
created a "unitary family" test. While the Court went on to broaden its
definition of the unitary family to "household[s] of unmarried parents and
their children," the Court refused to extend this definition to include an
adulterous relationship.

By limiting the substantial relationship test to a unitary family test, the
plurality redefined the critical issue in Michael H. v. Gerald D. Rather than
asking to what extent the Constitution affords protection to an unwed fa-
ther's asserted rights in maintaining a relationship with his child, the Court
asked whether courts traditionally had interpreted the Constitution to pro-
tect the relationship between an adulterous natural father and his child.
With the issue defined as such, the Court, exercising judicial restraint, de-
clined to recognize the creation of this newly defined constitutional right,
arguing that previous case law addressing the right to protect the relation-
ship between an unwed father and his adulterously conceived child did not
recognize such a right.

Consistent with the Court's redefinition of the interest at stake, Justice
Scalia advocated analyzing "the most specific level at which a relevant tradi-
tion protecting, or denying protection to, the asserted right can be identi-
fied." Justice Scalia reconciled the Court's decision in Michael H. with
contrary Supreme Court decisions by specifying Michael H.'s right to main-
tain his relationship with Victoria D. in this narrowed, exacting fashion.
Rather than characterizing the relevant interest in terms of "parenthood,"
Justice Scalia insisted on adhering to a more specific level of characteriza-
tion, the "natural father's rights vis-a-vis a child whose mother is married to

Id. at 2342.

229. Id. at 2342 & n.3.

230. Id. n.3.

231. Id. at 2342.

232. Id. at 2343. The Supreme Court had never before confronted a case involving the
marital presumption. Lower courts, however, had struggled with the issue. See, e.g., Vincent
rights to an unwed father of a child born into a preexisting marriage), appeal dismissed, 459
an unwed father a right of action to prove his paternity of a child born into a marital family for
the purpose of gaining visitation rights); Raleigh v. Watkins, 97 Mich. App. 258, 264-65, 293
N.W.2d 789, 792 (1980) (granting visitation rights to the unwed father of a child born during
the marriage of the mother to another man).

233. 109 S. Ct. at 2344 n.6.

234. Id. at 2342-46.
another man." In doing so, Justice Scalia left the substantial relationship analysis intact, yet resolved the case against Michael H. in spite of Michael H.'s substantial relationship with Victoria D.

Admittedly, the integrity of the marital family should properly play an important role in determining the extent of an unwed father's parental rights. The Michael H. Court, however, allowed the California legislature to magnify that role, despite contrary scientific fact, by giving "categorical preference" to an existant marital family through the operation of the marital presumption. The justification behind marital presumption statutes has shifted because of the advent of reliable paternity testing, and now focuses on family integrity rather than the impossibility of proving paternity. The change in the rationale behind the law has resulted in a change in the Court's method of analyzing cases involving unwed fathers' parental rights, and this change leaves increasing numbers of unwed fathers questioning their legal status as parents.

V. CONCLUSION

The United States Supreme Court, in its Michael H. v. Gerald D. plurality decision, upheld a statute that was written by the California state legislature at a time when medical science was unable to determine paternity through blood testing. In doing so, the Court relied on traditional values of family harmony and domestic tranquility, while modifying the Court's previous approach to determining the extent of an unwed father's parental rights. Rather than extending the trend of utilizing the substantial relationship test, which examines the nature of the relationship between the unwed father and his child, and the best interests of the child standard, the plurality defined a new "unitary family" test, and reasoned that, based on the facts of the case, the plaintiff, an unwed father, did not fall into this category. Exercising judicial restraint, the plurality refused to recognize a protected interest in the

235. Id. at 2344 n.6.
236. Id. at 2345.
238. "Clearly, there is an expanding population of unwed men who wish to play a role in the upbringing of their children." UNIF. PUTATIVE AND UNKNOWN FATHERS ACT, 9B U.L.A. 22, 23 (Supp. 1990).
239. The National Conference of Commissioners on Uniform State Laws approved the Uniform Putative and Unknown Fathers Act in 1988 in an attempt to clarify some of the questions raised by courts and unwed fathers with regard to the extent of unwed fathers' parental rights. Because no states have yet adopted the Act, prediction of its impact on the legal status of unwed fathers would be premature. See id.
tightly defined relationship between an unwed father and his adulterously conceived child.

In examining the competing interests of the unwed father and the State, the Court emphasized the integrity of the family unit with respect to the married couple and the child, but ignored the integrity of the developed relationship with respect to the unmarried natural parent and the child. Rather than examining the right of the unwed biological father to maintain a relationship with his child based on past interaction, the Court focused myopically on the future implications of such a relationship. In its decision in *Michael H. v. Gerald D.*, the Court overlooked an opportunity to clarify the guidelines for identifying the protected interest in the relationship between an unwed father and his child adhered to in former cases. Because the Court has varied the method of analysis to fit the particular circumstances of each case, the law leaves unwed fathers with no definitive rules to predict the scope of their parental rights.

*Joan C. Sylvain*