FATHER BY NEWSPAPER AD: THE IMPACT OF *IN RE* THE ADOPTION OF A MINOR CHILD ON THE DEFINITION OF FATHERHOOD

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I. INTRODUCTION

"Under the ice I see fire, and warn you to beware lest it prove a volcano."[1]

The definition of fatherhood in the United States has become unclear. It has become politicized, and both law and society are unsure what it currently means.[2] In the past, fatherhood was the method of attaching children to fathers, in order to care for the children.[3] Today, as alternatives to the traditional nuclear family appear, family law is not always equipped to deal with new familial situations. One example is the rights of the unknown father when the mother wants to give the child up for adoption. The question is: when does the father of an illegitimate child have the right to know that the child is being placed for adoption? The United States Supreme Court and a now overturned and amended law in Florida had very different definitions of a father's rights in this situation. Their determinations of a father's rights turned on whether the man must demonstrate his commitment to being a parent or whether the sexual activity that results in pregnancy is enough. This paper will argue that the Supreme Court and the Florida legislature in 2001 had different definitions of fatherhood. It will also discuss the reasons why future legislatures or political leaders considering this issue should reject the Florida legislature's 2001 definition.

The rights and responsibilities of an unwed father have changed dramatically over the past 300 years. The United States Supreme Court,

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[1] Louisa May Alcott, Behind a Mask, *in* Alternative Alcott 97, 152 (Elaine Showalter ed., 1988).

[2] Robert L. Griswold, Fatherhood in America 269 (1993).

[3] Richard Collier, Masculinity, Law, and the Family 184 (1995).

beginning with Stanley v. Illinois, found that some unwed fathers were entitled to notice when their children were placed for adoption.[4] The Supreme Court requires "biology plus," whereby the father has to demonstrate some commitment to parenting. In subsequent cases, the Court has attempted to define what a demonstration of commitment to parenting means. Currently, this includes registering with a state's putative father registry.[5]

In 2001, the Florida state legislature made changes to its adoption law. I will argue that this definition can be described as "biology only." The law required notice to the other parent of a petition to terminate parental rights prior to an adoption proceeding. For fathers who were unknown or whose locations were unknown, service by publication of the proceeding was required before the fathers' rights could be terminated. The required publication was notice in the newspaper, including the name and description of the mother, the name and date of birth of the child, a description of the person reasonably believed to be the father, and the location of where the mother believed conception occurred.[6] A suit brought in Florida state court sought a declaratory statement that the requirement of notice by publication infringed on the mother's right to privacy. The judge found that the mother's right to privacy was invaded by the requirements only in cases of rape resulting in pregnancy.[7] However, a higher Florida court overturned this ruling, finding that in all instances the law invaded a mother's right to privacy.[8] Finally, the Florida legislature amended the defunct law, creating a putative father registry as a replacement.[9]

This paper will discuss the law the Florida legislature adopted in 2001 and examine its definition of fatherhood as compared to the definition attempted by the Supreme Court and the consequences of each. Part II presents *In re* The Adoption of a Minor Child at the trial and appellate levels, Florida's definition of the illegitimate father, and the establishment of Florida's putative father registry. Part III presents the historical development of the illegitimate father in the United States. With this background in place, Part IV presents the Supreme Court's definition of the

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[4] Stanley v. Illinois, 405 U.S. 645 (1972).

[5] Lehr v. Robertson, 463 U.S. 248 (1983).

[6] Fla. Stat. ch. 63.087(6) (2001) (repealed 2003); Fla. Stat. ch. 63.088(5) (2001) (repealed 2003).

[7] *In re* The Adoption of a Minor Child, at 20 (Fla. Cir. Ct. July 24, 2002) (unpublished order granting in part and denying in part the motion to declare Florida Statute chapters 63.087 and 63.088 (2001) unconstitutional) (docket number redacted) (on file with author).

[8] G.P. v. Florida, 842 So. 2d 1059 (Fla. Dist. Ct. App. 2003).

[9] Committee Substitute for House Bill 835, Fla. 105th Reg. Sess., 2003 Fla. Laws ch. 58, § 11.

illegitimate father. Part V examines the differences between the two definitions and the consequences of each. Part VI presents a brief discussion of the Father's Rights Movement and the role it may have played in the Florida law. Part VII presents the potential insidious reasons for the adoption of the Florida law. Finally, the conclusion addresses why we should be concerned about the Florida definition and additional issues to consider in connection to this paper.

II. *IN RE* THE ADOPTION OF A MINOR CHILD

The Florida Adoption Act was amended in 2001 to require the court to determine in a separate proceeding whether a minor is legally available for adoption. A minor is legally available for adoption when his/her parents' parental rights have been terminated.[10] A petition entitled "In the Matter of the Termination of Parental Rights for the Proposed Adoption of a Minor Child" must be filed, and a written consent to adoption, affidavit of non-paternity, or affidavit of diligent search for each person whose consent is required for the adoption must have been attached.[11] Consent is normally required from the biological mother and the biological father.[12] Requiring the consent, affidavit of non-paternity, or affidavit of diligent search for

[10] Fla. Stat. ch. 63.087(1) (2001) (repealed 2003).

[11] Fla. Stat. ch. 63.087(6)(e) (2001) (repealed 2003).

[12] Fla. Stat. ch. 63.062 (2001) (amended 2003):

> (a) The mother of the minor; (b) The father of the minor, if: 1. The minor was conceived or born while the father was married to the mother; 2. The minor is his child by adoption; or 3. The minor has been established by court proceeding to be his child. (c) If there is no father as set forth in paragraph (b), any man established to be the father of the child by scientific tests that are generally acceptable within the scientific community to show a probability of paternity. (d) If there is no father as set for in paragraph (b) or paragraph (c), any man who the mother has reason to believe may be the father of the minor and who: 1. Has acknowledged in writing, signed in the presence of a competent witness, that he is the father of a minor and has filed such acknowledgment with the Office of Vital Statistics of the Department of Health; 2. Has provided, or has attempted to provide, the child or the mother during her pregnancy with support in a repetitive, customary manner; or 3. Has been identified by the birth mother as a person she has reason to believe may be the father of the minor . . . (e) Any person who is a party in any pending proceeding in which paternity, custody, or termination of parental rights regarding the minor is at issue. (f) Any father who has provided, or has attempted to provide, the child or the mother during her pregnancy with support in a repetitive, customary manner, if consent has been obtained under paragraph (a) and subparagraph (b)1. (g) The minor, if more than 12 years of age, unless the court in the best interest of the minor dispenses with the minor's consent.

such persons allowed the court to ensure that all legally interested parties were notified of the petition for the termination of parental rights.[13]

Chapter 63.088(5) of the Florida Code provided for constructive notice when a legally interested person or their location was unknown. This notice was required through publication for four weeks in a newspaper in the required counties of the state.[14] The constructive notice must include

> [A] physical description including, but not limited to, age, race, hair and eye color, and approximate height and weight of the minor's mother and of any person the mother reasonably believes may be the father; the minor's date of birth; and any date and city; including the county and state in which the city is located, in which conception may have occurred.[15]

A motion brought in the circuit court of the 15th Judicial Circuit in Palm Beach County, Florida, sought declaratory relief regarding the constitutionality of Florida Statute chapters 63.087 and 63.088 (2001).[16] The "unwed mother" who brought this motion claimed that the publication requirement violated her right to privacy protected by the Fourteenth Amendment of the United States Constitution and Article I, Section 23 of the Florida Constitution.[17]

Six women brought cases to declare Florida Statute chapters 63.087 and 63.088 (2001) unconstitutional.[18] An order was issued on July 24, 2002, granting the motion in part and denying it in part.[19] Each woman sought to give a child up for adoption. The fact patterns of the six women (portions of which were redacted for privacy reasons) were as follows:

1. A child who was raped by an adult male (age twenty-seven). She was pregnant with his child. His name was known to the mother, but his location was unknown to both her and the police.[20]
2. A child who had sexual relations with several classmates. She became pregnant and wished to give the child up for adoption.[21]

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[13] Fla. Stat. ch. 63.087(6)(f)(1) (2001) (repealed 2003).

[14] Fla. Stat. ch. 49.011(10), 49.10(1) (2001) (amended 2003).

[15] Fla. Stat. ch. 63.088(5) (2001) (repealed 2003).

[16] *In re* The Adoption of a Minor Child, at 1 (Fla. Cir. Ct. July 24, 2002).

[17] *Id.*

[18] *Id.*

[19] *Id.* at 20.

[20] *Id.* at 2.

[21] *Id.*

3. A single woman in her late twenties. She was a former drug addict who had sexual relations with other drug users and did not know the identity or possible location of the father of her child.[22]
4. A single woman who had numerous sex partners.[23]
5. A single woman who alleged that she was slipped a "date rape" drug at a bar and was sexually assaulted by three unknown men.[24]
6. A single woman in her thirties with a substance abuse problem who had sexual relations with many drug dealers. She did not know the identity or location of the birth father.[25]

The judge found that there was a compelling state interest served by the statutes for all the situations described above, except for cases "involving birth arising from forced sexual battery."[26] The compelling state interest was providing notice to biological fathers so they could "exercise their rights and accept their responsibilities with respect to their biological children."[27] The two reasons for the interest were "strengthening and maintaining the bond between parent and child" and

> in those instances where the biological mother would need financial assistance from the state due to lack of support from the biological father, the notice provisions of the aforementioned statutes would reduce the financial burden on the state in each instance where a biological father comes forward and accepts his responsibility for the financial support of the child.[28]

The judge found a statutory conflict in requiring notice including personal information of the birth mother when she was a victim of a sexual offense, as there is a law in Florida prohibiting the printing and publishing of the name, address, or other identifying facts of such a victim.[29] The judge found no compelling state interest in requiring notification to a father when the minor's birth was the result of forcible rape.[30] There was a compelling state interest, however, in notifying the father in cases that did not involve

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[22] *Id.* at 2-3.

[23] *Id.* at 3.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 11.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 12.

[30] *Id.* at 17.

sexual battery and in cases of statutory rape that resulted in the child's birth. The next issue for the court to decide was whether the statute accomplished the State's interest by the least intrusive means possible.[31] The judge questioned the effectiveness of the statute, but found that "[w]ith no evidence that these statutes are ineffective or that the goals of the statutes could be accomplished with equal success through less intrusive means, the challenge to the constitutionality of these statutes as applied in cases that do not involve 'forced' sexual battery must fail."[32]

As the law stood in the 15th Judicial Circuit (Palm Beach County) of Florida, unknown or location unknown biological fathers had the right to "constructive notice" before their parental rights to their unknown children were relinquished. This constructive notice is the petition placed in the required newspapers. Immediately after the trial court decision plaintiffs' lawyer vowed to appeal,[33] and there were attempts to repeal the law.[34]

On April 23, 2003, the Florida Fourth District Court of Appeal overturned the trial court's decision.[35] The appellate decision is short and concise. It examined the right to privacy in the Florida Constitution[36] and found that it protects two interests: "the individual interest in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions."[37] More importantly, the court found that the adoption statute violated both interests to such an extent that analysis of the interests protected in prior case law was not necessary.[38] The court then applied a strict scrutiny standard of review to determine whether the statute had a compelling state interest and if it accomplished the intended result through the least intrusive means possible. The court found that the state had failed to show any interest of the state or the putative father that could outweigh the privacy rights of the mother or child.[39]

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[31] *Id.* at 19.

[32] *Id.*

[33] The lawyer who brought the lawsuit appealed the case to the Fourth District Court of Appeal. James R. Langford, "Scarlet Letter" Adoption Law Pushes More Women to Abortion, Fla. Today, Aug. 19, 2002, at 1.

[34] *Id.*

[35] G.P. v. Florida, 842 So.2d 1059 (Fla. Dist. Ct. App. 2003).

[36] Fla. Const. art. I, § 23.

[37] G.P., 842 So.2d at 1062.

[38] *Id.*

[39] *Id.* The State did not make an appearance in the appeal. Amicus briefs were filed by a variety of adoption agencies and foundations of the American Civil Liberties Union. *Id.* at 1060-61.

After this decision, the Florida legislature made drastic changes to its adoption statutes, encompassing a wide range of topics.[40] The amendments that are applicable to this discussion relate to the creation of a putative father registry. Unmarried biological fathers[41] are required to file a claim of paternity.[42] This claim includes "confirmation of his willingness and intent to support the child for whom paternity is claimed in accordance with state law."[43] The Office of Vital Statistics maintains the putative father registry. Due to privacy concerns, the registry is exempt from public disclosure.[44] Unmarried biological fathers whose identities and/or locations are unknown (and thus unable to be identified by the mother of the child) must comply with the following requirements to have the legal right to consent or object to the adoption of their children: when the child is younger than six months when given to the adoptive parents the father must 1) file a claim with the putative father registry and 2) after receiving notice of the petition to terminate his parental rights, sign an affidavit declaring his intention to care for the child or sign an affidavit of non-paternity and waive all rights to the child.[45]

The amended adoption statutes accepted a new version of an illegitimate father's parental rights and thus a new definition of the unwed father. This paper will now examine the ways in which the former law in Florida is an entirely different construction of father's rights than the construction the Supreme Court has developed. In addition, it will address the issues involved in adopting such a definition.

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[40] Committee Substitute for House Bill 835, Fla. 105th Reg. Sess., 2003 Fla. Laws ch. 58.

[41] Unmarried biological fathers are defined as "the child's biological father who is not married to the child's mother at the time of conception or birth of the child and who has not been declared by a court of competent jurisdiction to be the legal father of the child." *Id.* § 1.

[42] The form:

> shall be signed by the unmarried biological father and must include his name, address, date of birth, and physical description. In addition, the registrant shall provide, if known, the name, address, date of birth, and physical description of the mother; the date, place, and location of conception of the child; and the name, date, and place of birth of the child or estimated date of birth of the expected minor child, if known.

Id. § 11.

[43] *Id.*

[44] *Id.* § 3.

[45] *Id.* § 12.

III. HISTORY OF THE ILLEGITIMATE FATHER

The term illegitimate means "not in accordance with the law."[46] Thus a child born out of wedlock is looked upon as having violated the norms of society.[47] According to Martha Zingo and Kevin Early, the term illegitimacy "stigmatizes the labeled children, making them the object of scorn and malice, and it devalues their worth as persons."[48] The rights of the illegitimate child, and the rights and responsibilities of the father and mother, have changed drastically through English and American legal history.

In English common law, an illegitimate child was considered "the loose thread in the social fabric."[49] The child was considered a *filius nullius*, a child of no one.[50] The parents had no responsibilities towards the child.[51] The thirteenth century Statute of Merton excluded illegitimate children from inheriting their father's property.[52] The definition of illegitimacy was connected to the marital status of the parents at the time of a child's birth.[53] In England, children who were born prior to the marriage of their parents could not become legitimate after the marriage, and only special acts of Parliament could legitimate the child.[54]

After the American Revolution, American judges did not want to punish children for the transgressions of their parents.[55] To improve the welfare of illegitimate children, American judges began to give custody of these children to their mothers.[56] Patrimony acts were enacted allowing criminal prosecutions of the father.[57] The purpose of paternity trials was to eliminate the need for the local taxpayers to support the mother and child.[58]

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[46] Martha T. Zingo & Kevin E. Early, Nameless Persons 15 (1994).

[47] *Id.*

[48] *Id.* at 3.

[49] Harry D. Krause, Illegitimacy: Law and Social Policy 1 (1971).

[50] *Id.* at 3.

[51] Michael Grossberg, Governing the Hearth 197 (1985).

[52] Collier, *supra* note 3, at 183.

[53] Krause, *supra* note 49, at 10-11.

[54] Grossberg, *supra* note 51, at 204-05.

[55] *Id.* at 199.

[56] *Id.* at 207.

[57] *Id.* at 215-18.

[58] *Id.* at 217.

Such trials determined paternity and, if paternity was proven, forced the father to support both the mother and child.[59]

The chief difference at common law between a father's responsibilities to his legitimate and his illegitimate children was inheritance. Illegitimate children could not inherit from their father.[60] A father's rights and responsibilities to an illegitimate child were practically non-existent. Unwed fathers were considered irrelevant to the adoption process.[61] The mother was the sole custodian of a child born out of wedlock.[62]

Legitimate children were considered the property of their father.[63] Men, as the dominant sex, were likely to be given custody of their children if the marriage to the children's mother ended.[64] In addition, many fathers were widowers raising children, as there was a high mortality rate associated with childbirth.[65]

Until the twentieth century, fathers of illegitimate children had very few responsibilities towards their children. Because illegitimate children were considered to be children of no one, the courts were not concerned with the rights of fathers to know when their illegitimate children were being placed for adoption. In the past thirty years, however, when women began placing illegitimate children for adoption and the fathers were not given notice of such proceedings, fathers argued that allowing adoption without the father's consent violated the Equal Protection Clause of the Constitution.[66] The United States Supreme Court needed to define the group of fathers that were entitled to know of adoption proceedings.

IV. THE SUPREME COURT'S ATTEMPT TO DEFINE FATHERHOOD

The Supreme Court does not have an exact definition of what it takes for a biological father to be granted the right to notice of adoption proceedings. One description of the constitutional requirement is "biology plus some further requirement."[67] More than biology is required. The issue

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[59] *Id.* at 215.

[60] Krause, *supra* note 49, at 5.

[61] Nancy E. Dowd, Redefining Fatherhood 121 (2000).

[62] *Id.* at 119.

[63] Geoffrey L. Greif, The Daddy Track and the Single Father 5 (1990).

[64] *Id.* at 4.

[65] *Id.*

[66] Tracy Cashman, When is a Biological Father Really a Dad?, 24 Pepp. L. Rev. 959, 971 (1997).

[67] Dowd, *supra* note 61, at 114.

that the Court faced and continues to face is what satisfies the further requirement. The Supreme Court has addressed the issue of an unmarried father's rights regarding his children in five major cases.[68] Each case added an additional nuance to the Court's attempt to define a father entitled to notice.

In Stanley v. Illinois, the plaintiff, Peter Stanley, was an unwed father of three children.[69] He lived with the mother of his children and with his children intermittently for eighteen years.[70] When the mother died, following the relevant Illinois statute, the children became wards of the state.[71] The State's rationale was that unwed fathers were presumed to be unfit to raise their children.[72] Stanley filed suit claiming that he had been deprived of equal protection under the Fourteenth Amendment because neither married fathers nor unwed mothers were presumed to be unfit to raise their children.[73] The Supreme Court found the State's presumption to be in violation of the Equal Protection Clause.[74]

Although the Court decided Stanley on an equal protection basis, it made an important statement regarding the fundamental rights of fathers. The Court declared, "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[75] In this case, the Court did not find the interest of protecting "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community"[76] a powerful enough countervailing interest to allow Illinois to skip neglect proceedings (normally how the state proves that someone is an unfit parent) and presume that unwed fathers are unfit.[77]

Stanley was the first time the Court acknowledged that unwed fathers have fundamental rights to their children. The issue after Stanley can be seen in footnote nine of the opinion:

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[68] Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

[69] 405 U.S. 645.

[70] *Id.* at 646.

[71] *Id.*

[72] *Id.* at 647.

[73] *Id.* at 646.

[74] *Id.* at 658.

[75] *Id.* at 651.

[76] *Id.* at 652.

[77] *Id.* at 649-50.

> We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption case.[78]

This footnote indicates that the Supreme Court did accept the stereotype of the unwed father as uninterested in his child.[79] One reading of this footnote is, however, that notice of the adoption proceedings is important to the unwed father, because after receiving proper notice he can decide whether or not he is interested enough to appear.[80] Therefore, the broadest interpretation of Stanley may be that an unwed father *must* receive notice of the termination of parental rights proceedings before the proceedings may be considered valid.[81]

State legislatures had two responses to Stanley. Some legislatures began "requiring" notice to unwed fathers; others did not require notification unless the father was known or identified by the mother, or had acknowledged the child.[82] The next three Supreme Court cases discussed are responses to the Court's opinion in Stanley.

In Quilloin v. Walcott, Quilloin was an unwed father whose child lived with the mother and the mother's new husband, Walcott.[83] Walcott and the mother wanted Walcott to adopt the child.[84] Quilloin claimed that a Georgia law that denied an unwed father the right to prevent the adoption of his illegitimate child was unconstitutional.[85] At no point during the eleven years prior to the adoption proceedings did Quilloin attempt to legitimate his child.[86]

The Supreme Court found that Quilloin's substantive rights were not violated by the "best interests of the child standard" in the Georgia law: "[w]e cannot say that the State was required to find anything more than that

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[78] *Id.* at 657.

[79] Dowd, *supra* note 61, at 99.

[80] Jerome A. Barron, Notice of the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois, *in* Fathers, Husbands and Lovers 96 (Sanford N. Katz & Monroe L. Inker eds., 1979) (originally printed in 9 Fam. Q. 527-46).

[81] *Id.* at 97.

[82] *Id.* at 100.

[83] 434 U.S. 246 (1978).

[84] *Id.* at 247.

[85] *Id.* at 250

[86] *Id.* at 249.

the adoption, and denial of legitimization, were in the 'best interests of the child.'"[87] The Court appeared to base its decision on the fact that Quilloin never had and never sought legal custody or legitimization of the child, and that "the adoption in this case is to give full recognition to a family unit already in existence."[88] It appears from Quilloin that the Court was not willing to give an unwed father the same fundamental rights regarding his illegitimate child if he did not take an active step towards being a parent. Therefore, in Stanley and Quilloin, the Court recognized that unwed fathers may have fundamental rights regarding their children, but that without taking some active step towards parenthood, a state can infringe upon those fundamental rights without violating the Due Process Clause.

Caban v. Mohammad was an equal protection case in which the Supreme Court found that a New York adoption law that differentiated between unmarried mothers and unmarried fathers violated the Constitution.[89] The law allowed an unwed mother to block the adoption of her child by withholding her consent, but only allowed an unwed father to block adoption by showing that the best interests of the child would not permit the adoption.[90] The Supreme Court found this law to be an unconstitutional gender-based distinction but left open the possibility that *some* fathers would not be entitled to object to an adoption: "In those cases where the father has never come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."[91]

Lehr v. Robertson concerned the issue of whether an unmarried father had a right to notice of adoption proceedings regarding a daughter he had never supported and seen infrequently since birth.[92] Lehr claimed that under the Supreme Court's prior rulings in Stanley and Caban he had an absolute right to notice and an opportunity to be heard before the child could be adopted.[93] When Lehr was brought, New York had established a putative father registry, which Lehr had not joined, and he did not meet any of the other classes of people entitled to notice of adoption proceedings.[94]

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[87] *Id.* at 254.

[88] *Id.* at 255.

[89] 441 U.S. 380, 381-82 (1979).

[90] *Id.* at 386-87.

[91] *Id.* at 392.

[92] 463 U.S. 248, 249 (1983).

[93] *Id.*

[94] *Id.* at 251-52. The other classes are:

> [t]hose who have been adjudicated to be the father, those who have been identified as the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves

In its analysis, the Court first stated that the rights of parents are a counterpart of the responsibilities that they have assumed as parents.[95] The Court found that New York offered protection to fathers through the laws that govern formal marriage, and through the putative father registry if the parents did not wish to be married.[96] Finally, the Court stated, "a natural father who has played a substantial role in rearing his child has a greater claim to constitutional protection than a mere biological parent."[97]

In this case, the Supreme Court acknowledged a different way of demonstrating a "full commitment to the responsibilities of parenthood,"[98] such as registering with a state's putative father registry. It appears that had Lehr registered with the putative father registry, the notice he would have received from the registry concerning the adoption proceedings would have been sufficient protection of his due process rights. This is different from the other ways that the Court has looked at the father's parental commitment, such as pre- and post-birth conduct, and emotional and financial support.[99] But it is perhaps recognition by the Supreme Court that in many instances, especially when a relationship between the mother and father of a child has ended badly, registering with the putative father registry is the best commitment that a potential father can demonstrate.

Michael H. v. Gerard D. was a paternity and custody dispute; it did not involve the issue of adoption *per se*.[100] In deciding this case, however, the Supreme Court set some limits on the definition of fatherhood. Michael H. was the neighbor of Carole and Gerald D., a married couple.[101] Michael and Carole had an affair. Subsequently, Carole had a child, Victoria.[102] Gerald was listed as the father on the birth certificate and held Victoria out

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> out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old.

Id. at 251.

[95] *Id.* at 257.

[96] *Id.* at 263-64. "By mailing a postcard to the putative father registry, he would have guaranteed that he would receive notice of any proceedings to adopt Jessica." *Id.* at 264.

[97] *Id.* at 262 n.18.

[98] *Id.* at 261.

[99] Cashman, *supra* note 66, at 975.

[100] 491 U.S. 110 (1989).

[101] *Id.* at 113.

[102] *Id.*

to be his child.[103] However, Carole told Michael that he might be the father.[104]

In response, Michael filed a filiation action in a California court seeking to establish his paternity and right to visitation.[105] The court found that there was evidence to find that Carole and Gerald were living together at the time of Victoria's conception and birth, and that Gerald was not sterile or impotent.[106] The court granted summary judgment to Gerald, stating that under the California statute, there were no triable facts regarding Victoria's paternity.[107]

Michael challenged the constitutionality of the statute, claiming that the statute's presumption both "infringes upon the due process rights of a man who wishes to establish his paternity of a child born to the wife of another man, and . . . infringes upon the constitutional right of the child to maintain a relationship with her natural father."[108] The Supreme Court found that the presumption expressed the state's social policy that a husband is responsible for his wife's children, because removing the presumption would invade the family's integrity and privacy.[109] The Court found that the relationship between Michael and Victoria had not been protected by the historic practices of society.[110] Finally, the Court found that providing protection to Michael, presumably by removing the statutory presumption, would be to deny Gerald's ability to preserve his family.[111]

In this case, although blood tests showed a 98.07% probability that Michael was Victoria's genetic father, he was not granted the due process interest of having the opportunity to prove that he was Victoria's father.[112] Biology, even very conclusive biology, was not enough to overcome the marital presumption that the husband of a woman bearing a child is the father. Therefore, the Supreme Court placed a limitation on the definition of a father with due process interests by stating that the marital presumption will trump almost conclusive scientific proof.

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[103] *Id.*

[104] *Id.* at 104.

[105] *Id.* at 114.

[106] *Id.* at 115.

[107] *Id.* The California statute provided that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." Cal. Evid. Code § 621(a) (West. Supp. 1989) (repealed).

[108] Michael H. v. Gerald D., 491 U.S. 110, 113 (1989).

[109] *Id.* at 120.

[110] *Id.* at 124.

[111] *Id.* at 128-29.

[112] *Id.* at 114.

The underlying theme of the first four cases discussed in this section is that the father must take an affirmative step to demonstrate his commitment to being a parent in order to deserve protection equal to that afforded to a legitimate father. This demonstration possibly may consist of legitimizing the child, caring for the child or the mother of the child, or registering with a state's putative father registry. In both Caban and Quilloin, because the men had taken positive actions towards the child in some sense, they were entitled to equal protection under the law in adoption proceedings on par with either an unmarried mother or a married father. In Lehr, biology was not enough.[113] Perhaps some variation on providing economic support and/or regularly visiting the child would have been viewed by the court as the "plus" required. The Supreme Court then gave the putative father another possible positive action: filing with the state putative father registry.[114] In Michael H., however, the marital presumption that a child born to a married woman is the child of her husband was not found to violate the "true" father's due process rights in establishing paternity of his daughter. The statutory presumption can completely trump scientific evidence. The Court thought biology was neither enough nor conclusive. The Supreme Court's attempt to define the father who is entitled to legal notice of his child being placed for adoption is not conclusive, but what is certain is that more than biology is required. This analysis is very different from that of the Florida law that required only biology.

V. "BIOLOGY PLUS" VERSUS BIOLOGY ONLY

The Supreme Court's definition of an unwed father who has due process/equal protection interests when his child is being placed for adoption is quite different from the Florida state legislature's definition in the 2001 changes to the adoption law.[115] In the context of the Florida law, paternity equaled fatherhood. The law required "notification" to every father, regardless of whether he had demonstrated a commitment to parenting or not.[116] Constructive notice was required when the only relationship known to have occurred between the two parents was that of sexual intercourse, such as what is known colloquially as a "one-night stand." The Florida notification statute had the consequence of stating that "biology only," the act of causing pregnancy, was enough. In contrast, the Supreme Court requires "biology plus" to consider a man a father. What are the consequences of each?

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[113] Dowd, *supra* note 61, at 102.

[114] Lehr v. Robertson, 463 U.S. 248, 250-51 (1983).

[115] *See supra* Section III, "History of the Illegitimate Father."

[116] For more on the requirement of notification, see *supra* discussion in Part IV.

A. "Biology Plus"

"Biology plus" requires an unwed father to demonstrate his commitment to parenting before he can receive the right to know that his child is being placed for adoption. Therefore, before an unwed father is considered a father, he must take some affirmative steps. After Stanley, most states enacted legislation conforming to the narrow interpretation of the case: notice to the unwed father is required only when he is known and identifiable by the mother or has acknowledged the child.[117] The legislation evidences the belief that biology gives the father an opportunity to develop a father-child relationship with his child, but that biology in and of itself is not indicative of that relationship.[118] Such legislation did not reinforce biological rights; rather, it set a stronger nurturing standard for an unwed father to meet.[119]

This definition has benefits for the cohesive family unit. Historically, the family protection argument has allowed for legal differences between married and unmarried fathers.[120] A married father does not have to demonstrate a commitment to parenting, the commitment is assumed as a result of marriage to the mother of his child. As seen in Michael H., the law can also overcome biological proof that an unwed father, and not the mother's husband, is genetically the child's father.[121] Hence, the law can and will overcome biology.[122] The argument is that it is in the best interest of the child to have a cohesive family unit, rather than have a father who is not married to the child's mother. If having cohesive family units is considered a goal of a well-ordered society, then "biology plus" definitions of fatherhood will encourage "little commonwealths."[123] Men who treat their wives' children as their own will be rewarded by the title of father and are thus given added protection in the form of a legal presumption of paternity.

The "biology plus" definition defines unwed mothers and unwed fathers who are entitled to notice regarding the termination of their parental rights differently. Obviously the mother, as the person placing the child up for adoption, knows of the proceedings. The father, however, without

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[117] Barron, *supra* note 80, at 109.

[118] Dowd, *supra* note 61, at 103.

[119] *Id.* at 124.

[120] Krause, *supra* note 49, at 74.

[121] Michael H. v. Gerald D., 491 U.S. 110, 110 (1989).

[122] Collier, *supra* note 3, at 184.

[123] William Gouge, *quoted in* John Demos, A Little Commonwealth, Family Life in Plymouth Colony x (1970), *quoted in* Grossberg, *supra* note 51, at 5.

demonstrating a commitment to parenting, does not. Supreme Court precedent supports the idea that mothers and fathers are not necessarily required to be treated equally. In Miller v. Albright, the Supreme Court found that governmental interests supported a distinction between citizen mothers and citizen fathers.[124] The case involved an immigration statute, which set different standards for an illegitimate child born outside the United States to establish United States citizenship. When a child is born to a citizen mother and an alien father, there is no time limitation within which the child must establish citizenship.[125] By contrast, when a child is born to a citizen father and an alien mother, the child must establish citizenship within twenty-one years (eighteen years for the particular plaintiff due to an amendment of the law) of the child's birth.[126] The father must take some affirmative step within that time period to establish fatherhood.[127]

Justice Stevens stated that the "biological differences between single men and single women provide a relevant basis for differing rules governing their ability to confer citizenship on children born in foreign lands."[128] The Court found that the event which established the relationship between a child and a citizen mother and a child and a citizen father were different.[129] The event for the citizen mother and child was birth, but the event for the citizen father and child was post-birth conduct.[130] This distinction is consistent with the Supreme Court's precedent regarding the differences between fathers and mothers in the adoption cases discussed above. The father is required to take some affirmative step to create a relationship with either the mother or child, while the relationship between the mother and child is presumed. In fact, Justice Stevens found support for the finding in Miller from Lehr v. Robertson, which required an affirmative act by an unwed father to establish a sufficient relationship with his child.[131]

A majority of the Supreme Court agreed and adopted this line of reasoning in Nguyen v. INS.[132] The Court considered the same immigration statute at issue in Miller, and found that Congress could establish different requirements for mothers and fathers, based on their responsibilities

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[124] The opinion was written by Justice Stevens and joined by Chief Justice Rehnquist. 523 U.S. 420, 423-24 (1998).

[125] *Id.* at 424.

[126] *Id.* at 426.

[127] *Id.* at 424.

[128] *Id.* at 445.

[129] *Id.* at 443.

[130] *Id.*

[131] *Id.* at 441.

[132] 533 U.S. 53 (2001).

towards the "potential citizen" at her/his birth.[133] The conclusion of Nguyen demonstrates the Court's reasoning best:

> To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.[134]

These two cases make it clear that a majority of the Supreme Court is willing to accept gender differences in *some* instances without finding a violation of the Equal Protection Clause. The Court has found in the context of the citizen mother and the citizen father that basic biological differences make it constitutional to treat such parents differently. The Supreme Court defines a father who is worthy of due process and/or equal protection interests as one who has demonstrated a commitment to being a father in more than a genetic sense. The Court insists on some "tangible proof" of a parent/child relationship between the unmarried father and child, but will infer the existence of a maternal relationship with the child from the act of childbirth.[135]

The Supreme Court's definition of a father who is entitled to notice of adoption proceedings may be better for the child being placed for adoption. Because the unknown father has played no role in the upbringing of the child, or in its support since birth, why should the law give the father the chance to withhold consent to the adoption? If society considers an illegitimate child harmed by the status of illegitimacy, why should the unknown father be able to delay the solution to such harm—the adoption and legitimization of the child?[136] Only a father who has provided support (financial, emotional, or otherwise) to the child and/or mother ought to have the due process or equal protection rights to intervene in an adoption proceeding.

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[133] *Id.* at 62.

[134] *Id.* at 73.

[135] Erin Chlopak, Mandatory Motherhood and Frustrated Fatherhood: the Supreme Court's Preservation of Gender Discrimination in American Citizenship Law, 51 Am. U. L. Rev. 967, 986 (2002).

[136] Krause, *supra* note 49, at 79.

This definition may encourage unwed fathers to provide support during and after the mother's pregnancy. Although an "unwilling father's affection cannot be legislated,"[137] encouraging a father to take responsibility for the child may be in both the child's and the state's best interest, by eliminating the state's need to support the child. Such a definition would not require the unwed father's consent if he has been found to have legally "abandoned" the child by not providing support.[138] This may encourage unwed fathers to be more supportive of the mothers of their children. Although traditionally abandonment was focused on economic support, the Florida Supreme Court in 1995 expanded the notion to psychological and emotional support of the mother. For example, the Court held that in determining whether the father had abandoned the mother, courts "may consider the lack of emotional support and/or emotional abuse by the father of the mother during her pregnancy."[139] Such a definition of support would allow the father to demonstrate his commitment to parenting in more than financial terms, thus allowing all fathers, even those with limited financial resources, to demonstrate their support of the mothers.

One criticism of the "biology plus" definition is that it continues the assumption that unwed fathers are not interested in raising their children.[140] Despite the Supreme Court's tacit acceptance of such an argument in Stanley, the Court has found that there are biological reasons to account for the difference in treatment between unmarried fathers and unmarried mothers. Mothers have to be present for the birth of their children, while fathers do not. This definition also demonstrates a difference between the law's definition of marital fatherhood and unwed fatherhood. While an unwed father must take affirmative steps to show his commitment to parenting, a father who is married to the child's mother must do nothing more. Marital fatherhood will "shield the conduct of the father from analysis,"[141] but the court will have to analyze the conduct of the unmarried father to determine if he has acted enough like a father to be given the reward of his parental rights.

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[137] *Id.* at 95.

[138] Dowd, *supra* note 61, at 5.

[139] *In re* Adoption of Baby E.A.W., 658 So. 2d 961, 964 (Fla. 1995).

[140] Dowd, *supra* note 61, at 121.

[141] *Id.* at 103.

B. Biology Only[142]

One possible theory behind the Florida law is that all fathers, married or unwed, whether involved in the child's life or not, deserve notice of a proceeding terminating their parental rights.[143] Theoretically, such a system would allow every unwed father to decide whether he wanted to respond to the notification or not. If he truly was not interested in either adopting his child or appearing at proceedings he would simply default or not appear. Currently, paternity is established for only thirty percent of non-marital children.[144] Notice by publication creates the possibility for more fathers to acknowledge their children, which may be in the best interests of both the child and the state. The termination of parental rights is a separate proceeding from adoption. Children who do not have legal parents are placed in foster care. There are currently 45,000 children under state supervision in Florida.[145] There is potential for this law to allow fathers to accept financial responsibility for their child and perhaps to take custody of the child themselves. Providing notification to all fathers might result in a reduction in the number of children in foster care. Additionally, a biology only definition would reduce the use of gender stereotypes in law.[146]

However, this standard may discourage unwed fathers from taking responsibility for their actions. If a man knew that he could ignore the potential consequences of getting a woman pregnant and still be entitled to notice by publication regarding any potential child from the encounter, such a definition might create a disincentive to take any affirmative actions to determine whether he has fathered a child.

There are practical problems with this definition as well. It is extremely unlikely that notice by publication will reveal the identity of many natural fathers.[147] The Supreme Court noted the practical problems with notice by publication in Mullane v. Cent. Hanover Bank & Trust Co.:

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will

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[142] Even the title given this section of the paper is misleading. It is possible that a mother is not sure which of several "unknown" men is the father of her child.

[143] *See infra* Section VII, "'Scarlet Letter' Law."

[144] Dowd, *supra* note 61, at 4.

[145] Florida Department of Children & Families, Progress Report on Immediate Priorities for the Governor's Blue Ribbon Panel on Child Protection 4 (2002), http://www.state.fl.us/cf_web/blueribbon.pdf.

[146] *See infra* Section VI, "Fathers' Rights Movement."

[147] Barron, *supra* note 80, at 106.

> never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint.[148]

How many newspaper readers actually read the Legal Notices? Using notice by publication to notify potential fathers of their legal rights is extremely unlikely to notify many men. In order to be notified, a man would have to read the correct newspaper, read the legal notices in the paper, and recognize his description and/or the description of the woman. Laws cannot be analyzed in a vacuum. If the process is unlikely to work, the law is unlikely to produce its desired results.[149]

VI. FATHERS' RIGHTS MOVEMENT

In the 1960s, as feminists drew attention to the "second shift," all gender assumptions were being questioned.[150] This included the definition of fatherhood.[151] In the past, the idea that the man was the breadwinner of the family justified the fact that women were the primary caretakers of children.[152] The concept of parenthood changed; it was no longer simply the mother who could be a parent.[153] As such, a new definition of fatherhood included the idea that "liberated" fathers could share in the nurturing and caring of their children.[154] These fathers had been liberated from the traditional view of the father as only the breadwinner.

The liberation of the father prompted a backlash in the 1970s and 1980s. Critics from the right protested that the societal changes of the 1960s were destroying the traditional relationships in society.[155] Fathers began

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[148] 339 U.S. 306, 315 (1950).

[149] *But see* Section VII, "'Scarlet Letter' Law."

[150] Griswold, *supra* note 2, at 5. The term "second shift" refers to the concept that working women, after putting in a full day at work, spent significantly more time doing housework and caring for their children than their husbands. Arlie Hochschild, The Second Shift 3 (1989).

[151] Griswold, *supra* note 2, at 244-45.

[152] *Id.* at 3.

[153] *Id.* at 250.

[154] *Id.* at 245.

[155] *Id.* at 257. Conservative psychologist Harold Voth believed the father was the protector of the family—responsible for the "integrity and survival of the family." Harold M. Voth, The Castrated Family 4 (1977). Phyllis Schlafly argued against the Equal Rights Amendment (ERA) stating that "[t]he moral, social and legal evil of ERA is that it proclaims as a constitutional mandate that the husband no longer has the primary duty to support his

reasserting "paternal authority within families and reemphasizing men's obligation to support their dependents."[156] Thus began the Fathers' Rights Movement.

The goal of the Fathers' Rights Movement was to "overcome the decades-old assumption that mothers were the more capable parent and to insist that fathers be assured continued involvement in the lives of their children."[157] Men were angry at a family law system that they believed was "stacked against them."[158] By the mid-1980s there were over 200 Fathers' Rights groups in every state. By the end of the 1980s such groups helped to pass joint custody bills in more than thirty states.[159] Today there are books for fathers to help them win custody of their children[160] and Internet sites committed to the concept of Fathers' Rights.[161]

The Fathers' Rights Movement has raised many questions in regard to parents' rights vis-à-vis each other and to their child. Although there are only two people involved in a legal debate over adoption or custody or paternity, there are three people in the situation. Being a parent means being in a relationship with a child; it should not be treated as simply a relationship between a mother and father.[162] Critics of the Fathers' Rights Movement claim that men's legal control of their children outside of the marital context has increased while the day-to-day care of children has remained the responsibility of their mothers.[163] In addition, while fathers are commended for playing an increased role in the nurturing of their children, judges may criticize mothers who do less than all the nurturing or caring.[164]

Decisions of who will care for the child in the future depend on who has cared for the child in the past. This is a problematic standard in

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wife and children." Phyllis Schlafly, The Power of Christian Woman 83 (1981). Allen Hunter described the changes to society as "judicial activism and liberal, humanist social legislation [that] have threatened the traditional family by penetrating it with instrumental individualistic values and by creating a paternalistic state which takes over child-rearing from parents and subverts the market." Allen Hunter, Children in the Service of Conservatism: Parent Child Relations in the New Right's Pro-Family Rhetoric, 1, 10 (Summer 1989) (unpublished manuscript read at the Legal History of the Family Symposium, Madison, Wisconsin).

[156] Griswold, *supra* note 2, at 257-58.

[157] *Id.* at 261.

[158] *Id.*

[159] *Id.*

[160] *See, e.g.*, Maurice R. Franks, Winning Custody (1983).

[161] *See, e.g.*, Fathers' Rights Inc., *at* http://www.fathersrightsinc.com; The Fathers Rights Foundation, *at* http://www.fathers-rights.org.

[162] Mary Lyndon Shanley, Making Babies, Making Families 75 (2001).

[163] Griswold, *supra* note 2, at 262.

[164] *Id.* at 264.

many instances, but extremely so in the situation where an unwed mother is seeking to place a newborn child for adoption. Can you treat the unwed father and the unwed mother as having the same legal rights? Treating the parents identically promotes a false gender-neutrality, but treating them differently encourages traditional gender stereotypes.[165] If courts treat the mother and father the same, they may overlook differences in the parents' involvement with the child. For example, in the context of the one-night stand, the courts would ignore the fact that the mother has cared for the child through the pregnancy and since birth, while the father's participation in the pregnancy was the sexual activity. Any logical legal system must acknowledge the different biological roles men and women play in the creation and birth of a child.[166]

What will happen in the future? This defunct adoption law in Florida is not a concept that will simply go away. The American people have seen too many sad cases in which children are torn away from their adoptive parents because of the objection of a biological father who was not given notice of the adoption proceedings.[167] This statute affects a very particular situation, but represents an underlying theory that an unwed father has the right to notice of all situations that affect his child. The Supreme Court has not decided whether an unwed father has the right to veto the adoption of his newborn child when he has not had an opportunity to demonstrate his commitment to parenting.[168] However, the fact that this law existed in Florida indicates that some portion of American society believes the Florida law to be the proper route to take.

VII. "SCARLET LETTER" LAW

"On the breast of her gown, in fine red cloth, surrounded with an elaborate embroidery and fantastic flourishes of gold thread, appeared the letter A."[169]

There is another interpretation of the Florida adoption law and *In re* The Adoption of a Minor Child that has nothing to do with the rights of an unwed father at all. The law was colloquially called the "Scarlet Letter" law in newspaper articles, a reference to the novel by Nathaniel Hawthorne in which the protagonist was required to wear a scarlet "A" as a symbol of her

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[165] Shanley, *supra* note 162, at 47.

[166] *Id.*

[167] *See, e.g.*, *In re* Doe, 638 N.E.2d 181 (Ill. 1994); *In re* B.G.C., 496 N.W.2d 239 (Iowa 1993).

[168] Shanley, *supra* note 162, at 55.

[169] Nathaniel Hawthorne, The Scarlet Letter, *in* Novels 163 (1983).

adultery.[170] These articles allege that the law would lead more unwed mothers to choose to have abortions rather than to carry the children to term and suffer the public humiliation of putting their sexual history in the newspaper.[171]

One of the law's sponsors stated that the purpose of the law was to create finality in the adoption process, and suggested that it would prevent fathers from trying to get their child from the new adoptive parents.[172] However, given the practical reality that very few fathers are likely to receive notice through publication, punishing "one-night stand" sexual activity might be one of the unspoken motivations behind the law. As laudable as the goal of securing finality in adoptions is, the idea that the law is meant as a punishment has to be seriously considered, especially when women have to publish portions of their sexual history in the paper.[173] There must be a balance between finalizing adoptions and protecting the privacy of the women in Florida.

Another way to analyze the passage of this law is in the context of the "bad mother." According to Mary Lyndon Shanley, "defenders of an unwed biological father's right to veto an adoption often contrast what they portray as his laudable desire to assume custody and to care for the child with the mother's uncaring decision not to raise the child herself."[174] Aside from punishing the unwed mother for having sex outside of marriage, are we also punishing the unwed mother for giving the child up for adoption? Most of the newborn children adopted today are illegitimate.[175] Was an unspoken goal of the Florida legislature to validate and reinforce the assumption that any mother giving her child up for adoption when she does not know who the father of the child is has chosen to do so for selfish reasons, and therefore must be punished by forcing her to publish her sexual history?

If the above characterization is true, the definitions of motherhood and fatherhood in the law are completely different. Mothers, who have carried the child for nine months and given birth, must raise the child, even if they do not feel that they are emotionally, financially, or physically able

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[170] Langford, *supra* note 33, at 1; Legislature Replaces Bad Adoption Law, Fort Pierce Trib., June 3, 2003, at A8; Jon Burstein, Court Halts Birth Mothers' Public Notices, Sun-Sentinel, Apr. 24, 2003, at 1A.

[171] Langford, *supra* note 33, at 1.

[172] Shelby Oppel, Senate Okays Adoption Changes, St. Petersburg Times, Mar. 23, 2001, at 1A.

[173] ACLU Asks Florida Court to Strike Tell-All-Adoption Law, ACLU of Florida (Oct. 30, 2002), *at* http://www.aclufl.org/body_adoptionlaw103002.html.

[174] Shanley, *supra* note 162, at 58.

[175] Karen C. Wehner, Daddy Wants Rights Too: A Perspective on Adoption Statutes, 31 Hous. L. Rev. 691, 692 (1994).

to do so, or risk being labeled the "selfish mother" who simply cannot be bothered. Fathers, however, are celebrated for theoretically wanting to veto the adoption of a child they have not had any responsibility for since the child's conception. Is society's new Hester Prynn the unwed mother? According to this Florida law, perhaps she is.

VIII. CONCLUSION

The definition of when an unwed father is entitled to parental rights has rapidly changed. Until the Supreme Court's decision in Stanley, the unwed father had no parental rights whatsoever. Stanley, however, may have reinforced the same stereotype that existed before the decision, that the unwed father is uninterested in his illegitimate child. The Supreme Court has since found that unwed mothers and unwed fathers can be treated differently based on biological differences. After Stanley, there appeared to be two options for state legislatures: 1) requiring notification only when the father was known and identifiable by the mother and/or had acknowledged the child, or 2) requiring notification in all instances.

The debate concerning when an unwed father is entitled to notice regarding the termination of parental rights occurred in state legislatures. Many adopted the Supreme Court's "biology plus" definition of unwed fatherhood, which requires demonstrating a commitment to parenting as a prerequisite for gaining the right to be notified of an adoption proceeding. State legislatures and the Supreme Court continue to debate what exactly demonstrating a commitment to parenting requires. A new part of that definition is the putative father registry. If the unwed father takes the affirmative step of registering with the state, he will be notified if the mother of his child wants to place the child up for adoption.[176]

The second option, notification in all instances where an unwed mother seeks to place a child for adoption, drastically changes the definition of an unwed father entitled to notice. The "biology only" option can only be accomplished through notice by publication in instances where the name and/or location of the unwed father is unknown. Requiring notification in all instances changes the definition to "biology only," which only looks to sexual activity that results in the pregnancy.

The easy answer to this dilemma is that the "biology only" definition is bad. There is potential for insidious goals behind the laws, such as punishing unwed mothers for having "one-night stands." Putative motivation aside, there appear to be serious issues regarding whether such laws invade the woman's right to privacy. There are also practical problems with requiring notification by publication. For instance, lawmakers and judges have no idea whether such notice works. There are simply too many

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[176] Rebeca Aizpuru, Protecting the Unwed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes, 18 Rev. Litig. 703, 705 (1999).

variables before the court could conclude that the unwed father saw the notice and chose not to intervene in parental termination proceedings: he might not have seen the notice, he did not recognize himself in the notice, etc.

The putative father registry may be the best answer to the issue of the unwed father whose identity or location is unknown. A man who is interested in receiving notice of any potential illegitimate children would have to take the step of registering if he was concerned about notice. Any unwed father who did not register with the state registry would not have taken that affirmative step of committing to parenting, would not have satisfied the definition, and, consequently, his parental rights would be terminated by the court. In addition, the putative father registry makes clear that the unwed father's purpose is to demonstrate interest in his child, not to reestablish a relationship with the mother.[177]

The scenario involving an unwed father whose name or location is unknown is probably a limited problem, but it is not an excuse for the law not to attempt to deal with the situation. The best answer may be the "biology plus" definition. This definition creates the incentive for an unwed father with an interest in what happens to his illegitimate child to determine whether or not he is a father. This at least is an improvement from a past incentive the law created to deal with illegitimate children, where to achieve parental rights the solution was to marry the mother.

No solution to this problem is perfect. The unwed mother has the ultimate advantage: she knows when the child is born and can decide whether or not to place the child for adoption. If she decides to raise the child alone, the unwed father may never know that he has fathered a child. But when she does decide to place the child for adoption, the "biology plus" definition of the unwed father who has the right to notice of the proceedings may be the best option.

The "biology plus" definition is what the Florida legislature finally has adopted, through a putative father registry. Unmarried biological fathers (whose identity and/or location are unknown) need to register in order to receive notice if the mother chooses to give the child up for adoption. The introduction to the amended Florida adoption statutes gives the following legislative intent:

> (B) An unmarried mother faced with the responsibility of making crucial decisions about the future of a newborn child is entitled to privacy, has the right to make timely and appropriate decisions regarding her future and the future of the child, and is entitled to assurance regarding her future and the future of the child, and is entitled to assurance regarding an adoptive placement. . . .

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[177] Shanley, *supra* note 162, at 69.

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> (E) An unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during the pregnancy and after the child's birth. . . .[178]

Essentially, the Florida legislature has adopted the Supreme Court's requirement that an unwed father is entitled to notice if he has demonstrated a commitment to parenting by registering with the putative father registry. In Florida, that is now the "plus" required.

Where does this discussion leave the unwed fathers at issue in *In re* The Adoption of a Minor Child? If Florida could have continued with the "biology only" definition, fathers in fact patterns numbers one and five would not receive notice by publication.[179] Using the "biology plus" analysis, none of the unwed fathers, leaving aside the issue of father number two, would have the right to receive notice.[180] Now, with the putative father registry, if the fathers in fact patterns numbers three, four, and six had registered and if the registry matched their registration with the particular child, those men would be entitled to notice.[181] Even if the fathers in fact patterns numbers one, two, and five had registered with the putative father registry, however, they would not be entitled to notice of the termination of their parental rights, because the pregnancies were the result of a crime.[182] This is a codification of the Court of Appeals ruling and, in my opinion, a correction of the trial court ruling that in all cases but forcible rape, the alleged father has the right to notification.

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[178] Committee Substitute for House Bill 835, Fla. 105th Reg. Sess., 2003 Fla. Laws ch. 58, § 1.

[179] *See supra* Section II, "*In re* The Adoption of a Minor Child." As a side note, fact pattern number two, on the facts provided in the brief, does not seem to belong in the litigation. Presumably, the young woman knows the boys with whom she had sexual relations. The assumption can be made that each of the boys, and their parents, can be notified of the pregnancy and DNA evidence could determine which boy is the father of the child. If the child does not know which classmates she had sexual relations with, fact pattern number two is also applicable.

[180] *Id.*

[181] A man who files with the putative father registry consents to DNA testing to determine whether he is the father of a child. Committee Substitute for House Bill 835, Fla. 105th Reg. Sess., 2003 Fla. Laws ch. 58, § 11. The mother, when petitioning for the termination of parental rights, must provide information relating to whom she thinks is the father of the child (if she knows) to the registry. *Id.*

[182] "[T]he notice and consent provisions of this chapter as they relate to the birth of a child or to legal fathers do not apply in cases in which the child is conceived as a result of a violation of the criminal laws of this state, including, but not limited to, sexual battery, lewd acts perpetrated upon a minor or incest." *Id.* § 15.

Finally, the fact that the Florida legislature made these changes to its adoption law, and that the Court of Appeals subsequently overturned it, leads to some interesting conclusions. On one hand, it was such an extreme law that the appellate judge did not even need to explain why it invaded a woman's right to privacy. However, the initial bill did become law. Is the state of Supreme Court jurisprudence in conflict with the ideals of the people of Florida, and perhaps of Americans? If so, adoption laws are not the only laws in danger of being altered. The American people must decide if the law should acknowledge the biological differences between mothers and fathers. Otherwise, Florida will not be the last state to be embroiled in such a controversy.

This law also demonstrates the dangers of trying to legislate sexual activity. Essentially, the "constructive notice" provisions penalized women for having one-night stands. Florida women who did not know who or where the father of their child was and who did not want to raise the child were faced with two options: 1) go forward with the constructive notice, or 2) have an abortion.[183] Whatever one's beliefs about abortion, our country should be able to agree that it is appropriate to enact laws that allow as many alternatives to abortion as possible. One such alternative is adoption, and laws that have a "chilling effect on adoption" should be avoided.[184]

The history of this law and the effect it may have had on the definition of fatherhood in the United States presents an additional concern. This entire controversy resulted from what can be described as changes to a state statute regarding legal requirements of notice in adoption proceedings. With that description, would anyone, other than family lawyers and judges, be interested in the law? These amendments are the ice from the quotation that started this paper. We have now seen the volcano.

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[183] The Palm Beach Post reported that Charlotte Danciu, the attorney who brought the original lawsuit, "had at least 15 women walk out of her office and have abortions rather than have their names published in the paper." Susan Spencer-Wendel, Moms Needn't List Partners to Pick Adoption, Palm Beach Post, Apr. 24, 2003, at 1A.

[184] *Id.*