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LOW-INCOME FATHERS, ADOPTION, AND THE BIOLOGY PLUS TEST FOR PATERNAL RIGHTS*

I. INTRODUCTION

Jonathan Lehr and his girlfriend of two years, Lorraine, were expecting a baby.¹ Lorraine told her friends, relatives, and the New York State Department of Social Services that Jonathan was the father.² When Lorraine gave birth, Jonathan visited her and baby Jessica in the hospital every day.³ Then, after their release from the hospital, Lorraine and Jessica disappeared.⁴ Jonathan searched for his daughter, but each time he found them Lorraine and Jessica moved again.⁵ When Jonathan found Jessica a year later with the aid of a detective agency, Lorraine refused to let him financially assist his daughter and threatened to have him arrested if he attempted to see her.⁶ Jonathan hired a lawyer and filed a paternity petition, only to learn that Lorraine and her new husband had already instituted adoption proceedings.⁷

When Jonathan requested that the court await the results of the paternity proceeding before ruling on Jessica's adoption, he discovered that, despite knowing of the pending paternity proceeding, the judge had already signed an adoption order.⁸ Although he identified himself as Jessica's father by instituting a paternity proceeding, Jonathan failed to file with the state putative father registry.⁹ Because of this fact, the United States Supreme Court, applying the "biology plus" theory of paternal rights, held

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1. *Lehr v. Robertson*, 463 U.S. 248, 250 (1983).
2. *Id.* at 269 (White, J., dissenting).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Lehr*, 463 U.S. at 269 (White, J., dissenting).
7. *Id.* at 252 (majority opinion).
8. *Id.* at 253.
9. *Id.* at 251.

that Jonathan was not entitled to notice of Jessica's adoption proceedings, and Jonathan lost all rights to his daughter.¹⁰

While *Lehr v. Robertson* is now a decades-old case in an area of law that changes rapidly, the case set a concerning foundation for determining the parental rights of a man who fathers children outside of marriage.¹¹ In *Lehr*, the Court did not deny that an unmarried father could have paternal rights. Constitutional protection of their parental rights extends to all parents, regardless of marital status.¹² The Ninth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment protect these rights.¹³ Court-imposed responsibilities such as child support payments extend to both married and unmarried parents as well,¹⁴ and those who fail to meet these responsibilities may be subject to civil or criminal penalties.¹⁵ These penalties may range from monetary fines to incarceration to involuntary termination of parental rights or, in the most extreme cases, a finding that no parental relationship ever existed.¹⁶

While the percentage of children born to unmarried parents has declined in recent years, well over one third of all children born in the United States in 2015 were born out of wedlock.¹⁷ Statistics show that significantly more African-American and

10. *Id.* at 251-56, 261-65.

11. *Lehr*, 463 U.S. at 275-76 (White, J., dissenting) (stating that the majority opinion "represents a grudging and crabbed approach to due process" that does not serve state interests, as it "may result in years of additional litigation and threaten the reopening of adoption proceedings and the vacation of the adoption").

12. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

13. *Id.* at 658; *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965); *see also Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *see generally Meyer v. Nebraska*, 262 U.S. 390 (1923).

14. *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (finding that a statute granting child support to marital children while denying that support to nonmarital children violated the Equal Protection Clause).

15. *See, e.g.*, D.C. CODE § 46-225.02 (2017) (instituting criminal penalties for failure to pay child support); LA. STAT. ANN. § 14:75 (2017) (punishing failure to pay child support with fines and imprisonment); OKLA. STAT. tit. 43 § 111.1 (2017) (treating failure to pay child support as civil contempt of court).

16. *See, e.g.*, D.C. CODE § 46-225.02 (2017) (instituting criminal penalties for failure to pay child support); LA. STAT. ANN. § 14:75 (2017) (punishing failure to pay child support with fines and imprisonment); MONT. CODE ANN. § 42-2-609 (2017) ("[T]he court may terminate the parental rights of a putative father . . . [when] a judicial determination is made . . . that the parent and child relationship does not exist."); OKLA. STAT. tit. 43 § 111.1 (2017) (treating failure to pay child support as civil contempt of court).

17. Joyce A. Martin et al., *Births: Final Data for 2015*, NAT'L VITAL STAT. REP., Jan. 5, 2017, at 8, https://www.cdc.gov/nchs/data/nvsr/nvsr66/nvsr66_01.pdf [<https://perma.cc/Y66Z-3ZML>].

Hispanic men than non-Hispanic white men father their first child in a non-marital relationship.¹⁸ Unmarried fathers, on average, are younger, less educated, and more likely to be unemployed than married fathers.¹⁹ Because of these factors, unmarried fathers are more vulnerable to ignorance of their legal rights and responsibilities and are less likely to have assistance of counsel in custody hearings than their middle-class, married counterparts.²⁰

This difference becomes particularly relevant in situations such as Lehr's, where the father knows of a child's existence, but, through no fault of his own, has no legally cognizable relationship with that child. Had Lehr been educated about his responsibilities and registered as a putative father (rather than filing a petition for adoption), he might have obtained custody of his daughter.²¹

This Comment purposes to explore ways in which the current "biology plus" test for determining existence of a paternal relationship disproportionately affects lower-income minority fathers who are unlikely to be fully aware of the legal hoops they must jump through to establish paternity. Part II of this Comment provides necessary background on both the history of fathers' rights and current child-rearing in the United States. Part III lays out the development of the biology plus test.²² Part IV examines,

18. NAT'L CTR. FOR HEALTH STATS., U.S. DEP'T OF HEALTH & HUMAN SERVS., DATA BRIEF NO. 204, THREE DECADES OF NONMARITAL FIRST BIRTHS AMONG FATHERS AGED 15-44 IN THE UNITED STATES 2 (2015), <http://www.cdc.gov/nchs/data/databriefs/db204.pdf> [<https://perma.cc/57SY-6ZQH>]; see also GRETCHEN LIVINGSTON, PEW RESEARCH CTR., THE RISE OF SINGLE FATHERS: A NINEFOLD INCREASE SINCE 1960, at 3 (2013), <http://assets.pewresearch.org/wp-content/uploads/sites/3/2013/07/single-fathers-07-2013.pdf> [<https://perma.cc/X7VS-3PY2>] ("[S]ingle fathers are typically less educated and less well-off than their married counterparts. They are also younger and less likely to be white.").

19. OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., FATHERS AND MARRIAGE 2-3 (2007), <https://library.fatherhood.gov/cwig/ws/library/docs/FATHERHD/Blob/59995.pdf?w=NATIVE%28%27TI+ph+is+%27%27N RFC+Quick+Statistics%3A+Fathers+and+Marriage%27%27+AND+AUTHORS+ph+like+%27%27National+Responsible+Fatherhood+Clearinghouse%27%27+AND+YEAR+%3D+2007%27%29&upp=0&rpp=25&order=native%28%27year%27Descend%27%29&r=1&m=1> [<https://perma.cc/9PRF-BEAZ>].

20. See, e.g., Theresa Amato, Opinion, *Put Lawyers Where They're Needed*, N.Y. TIMES, June 17, 2015, at A25 ("Throughout the country, millions of low-income people have no access to free or affordable lawyers, even for life-altering civil matters like child-custody disputes . . ."); Harry Reasoner, *Finding New Ways to Give Access to Justice to Those Who Cannot Afford Lawyers*, 79 TEX. B.J. 366, 366 (2016) ("Texas legal aid organizations can help only 10 percent of low-income Texans.").

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

22. The biology plus test is one of the most widely-used tests for determining parental rights. Other tests include a theory based solely on biological connection (now disfavored

in some detail, three ways in which the biology plus test disproportionately harms low-income fathers of color. Part V discusses the implications of these issues and promotes continued refinement of the biology plus test in order to alleviate its negative effects.

II. BACKGROUND

As with all areas of law, the societal conception of paternal rights has evolved throughout history as cultural values and structures have shifted. This evolution continues in contemporary society, due in part to rapid changes in the demographic of the modern family.

A. Historical Background

Historically, fathers held significant rights over their children. Ancient Roman fathers had unequivocal paternal rights to custody of their children.²³ Roman law utilized a proprietary theory of paternal rights—in other words, it did not contemplate the interests of the child in determining those rights, because it considered children property.²⁴ The law automatically assumed a husband to be the father of his wife’s children, unless he “was sterile, impotent, or had no access to his wife during the period when conception occurred.”²⁵ An unmarried man who fathered a child with a married woman had no recognized right to that child.²⁶

and generally used only in surrogacy situations), a “constructionist” view based on an implied contract between society and the parent, an “intention” theory, and the best interests of the child test (used mainly in divorce or foster care cases). See, e.g., Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 222-27 (2012). Because this Comment deals with the rights of often-unintentional biological fathers, these other tests fall outside its scope. In addition, this Comment focuses solely on the biology plus test’s impact on low-income unmarried fathers in adoption cases. Situations in which a man seeks to rebut the marital presumption, as in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), are outside the scope of this analysis.

23. Danaya C. Wright, *De Manneville v. De Manneville: Rethinking the Birth of Custody Law Under Patriarchy*, 17 L. & HIST. REV. 247, 263 (1999) (stating that Roman fathers had, arguably, “the most extreme example of parental rights existing in a civilized and complex legal system. . .”).

24. Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 223 (2002).

25. Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL’Y 29, 47 (2003).

26. *Id.*

The marital presumption, based in a desire for social stability rather than genetic precision,²⁷ extended throughout the Middle Ages and embedded itself into English common law.²⁸ A child born outside of marriage belonged, legally, to no one,²⁹ unless the biological father chose to legitimize him.³⁰ Neither the biological mother nor the child could establish paternity on their own.³¹ Thus, for much of Western history, a putative father could legally recognize, but had no legal obligation to, a nonmarital child.³² This allowed men to legitimize or ignore any nonmarital children as they saw fit, with few, if any, repercussions.³³ On the other hand, it placed the onus of support for nonmarital children solely on the mother.³⁴

This state of affairs slowly began to change. In 1973, the United States Supreme Court recognized a child's right to receive support from his or her father, regardless of the parents' marital status.³⁵ Rather than *filius nullius*, a baby born out of wedlock became a child of two parents, each of whom had responsibilities toward that child.³⁶

Additionally, a shift occurred in courts' mindsets regarding disputes over parental rights, beginning with the Maryland High Court of Chancery's 1830 decision *Helms v. Franciscus*.³⁷ In *Helms*, the court created an exception to the traditional presumption of paternal custody after divorce, stating,

[Although] in general, no Court can take from [a father] the custody and control of [his children] . . . even a Court of common law will not go so far as to . . . snatch [an infant]

27. Anderlik & Rothstein, *supra* note 24, at 222.

28. See 1 WILLIAM BLACKSTONE, COMMENTARIES *446, *454-55.

29. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 253 (1995) ("An illegitimate child was '*filius nullius*'—she had no legal relationship to anyone.").

30. Anderlik & Rothstein, *supra* note 24, at 223.

31. E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 10 (1992).

32. *Id.* ("[B]oth ancient and medieval civilizations protected the putative father to the detriment of the mother and child by refusing to force the father to recognize his true biological relationship to those children born out-of-wedlock.").

33. *See id.*

34. *See id.*

35. *See generally* Gomez v. Perez, 409 U.S. 535 (1973).

36. *See* Roberts, *supra* note 29, at 253.

37. 2 Bland 519, 535-36 (Md. 1830).

from the bosom of an affectionate mother, and place it in the coarse hands of the father.³⁸

This signaled the beginning of a movement toward greater recognition of maternal rights and a corresponding decrease in a father's rights toward his child.³⁹

It is worth noting that the tendency to award custody to fathers extended only to those married to the child's mother.⁴⁰ Unmarried fathers experienced hostility and a general neglect of their rights by both the judicial and legislative branches of government.⁴¹ Many believed a putative father's unmarried status automatically made him unfit to care for a child, while others assumed constitutional protections designed to safeguard parental rights did not apply to a father not married to his child's mother.⁴²

The United States Supreme Court extended constitutional protection to the rights of unwed fathers in 1972.⁴³ While the Court continues to uphold these constitutional rights, it predicates them on something more than merely a biological connection,⁴⁴ a theory commonly called the "biology plus" test⁴⁵ and discussed in detail in Part III of this Comment.⁴⁶ However, the marital presumption still applies by statute in many states,⁴⁷ and has been

38. *Id.*

39. Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 435 (1976).

40. Amy S. Haney, Comment, *The Constitutional Rights of Unwed Fathers in Georgia*: In re Baby Girl Eason, 5 GA. ST. U. L. REV. 591, 591 (1989) ("Prior to 1972 an unwed father's rights were virtually nonexistent.").

41. *See id.*

42. *See, e.g., In re Stanley*, 256 N.E.2d 814, 815 (Ill. 1970), *rev'd sub nom. Stanley v. Illinois*, 405 U.S. 645 (1972).

43. *Stanley*, 405 U.S. at 658 (rejecting as unconstitutional the state's presumption that unmarried fathers—but not unmarried mothers—were unfit parents).

44. Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 650-63 (1993); *see generally* *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978). However, unlike parental rights, parental obligations—most notably child support payments—may develop based solely on biology. *See* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 7-9 (2004).

45. Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 975 (1992).

46. *See infra* Part III.

47. *See, e.g.,* ALA. CODE § 26-17-204 (2017); CAL. FAM. CODE § 7540 (West 2017); DEL. CODE ANN. tit. 13, § 8-204 (2017); LA. CIV. CODE ANN. art. 195 (2017); ME. STAT. tit. 19, § 1881 (2017); UTAH CODE ANN. § 30-1-17.2 (West 2017); WASH. REV. CODE §

upheld as constitutional by the Supreme Court, even when the biological father has developed and maintained a relationship with his child.⁴⁸

B. Marriage and Child-Rearing Data

Understanding the rights of unmarried fathers is especially important today in light of recent demographic trends involving marriage.⁴⁹ Currently, 20% of American adults over age 25 have never been married,⁵⁰ and those who do marry do so at older ages than in previous decades.⁵¹ A groom's average age at first marriage increased from 23 in 1960 to 29 in 2012.⁵² Individuals without post-secondary education marry, on average, earlier than individuals with a college degree or higher.⁵³ However, men with no post-secondary education are less likely than their counterparts with post-graduate degrees to marry at all.⁵⁴ As a general rule, people with higher levels of education are more likely to get married and to stay married.⁵⁵

However, the lack of a marriage license does not mean an individual is necessarily "single."⁵⁶ Almost a quarter of

26.26.116 (West 2017); WIS. STAT. § 891.41 (West 2017); WYO. STAT. ANN. § 14-2-504 (West 2017).

48. See *Michael H. v. Gerald D.*, 491 U.S. 110, 128-30 (1989) (upholding denial of paternal rights under state statute to biological father when the "mother is, at the time of the child's conception and birth, married to, and cohabitating with, another man, both of whom wish to raise the child as the offspring of their union").

49. See generally KIM PARKER ET AL., PEW RESEARCH CTR., RECORD SHARE OF AMERICANS HAVE NEVER MARRIED AS VALUES, ECONOMICS, AND GENDER PATTERNS CHANGE (2014).

50. *Id.* at 4.

51. CASEY E. COPEN ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L HEALTH STATS. REP. NO. 49, FIRST MARRIAGES IN THE UNITED STATES: DATA FROM THE 2006-2010 NATIONAL SURVEY OF FAMILY GROWTH I (2012), <https://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf> [<https://perma.cc/DQM9-3TKZ>].

52. PARKER ET AL., *supra* note 49, at 4-5. Over the same time period, women's average ages at first marriage increased from 20 to 27. *Id.*

53. Wendy Wang, *The Link Between a College Education and a Lasting Marriage*, PEW RESEARCH CTR. (Dec. 4, 2015), <http://www.pewresearch.org/fact-tank/2015/12/04/education-and-marriage/> [<https://perma.cc/6AR7-YZX8>].

54. PARKER ET AL., *supra* note 49, at 9.

55. Alison Aughinbaugh et al., *Marriage and Divorce: Patterns by Gender, Race, and Educational Attainment*, MONTHLY LAB. REV., Oct. 2013, at 12-14, <https://www.bls.gov/opub/mlr/2013/article/pdf/marriage-and-divorce-patterns-by-gender-race-and-educational-attainment.pdf> [<https://perma.cc/MD2G-QNEC>].

56. See PARKER ET AL., *supra* note 49, at 16.

unmarried young adults cohabitate.⁵⁷ Those with no college education are more likely to cohabitate, and their cohabitations are less likely to result in marriage.⁵⁸ Multiple factors contribute to this decline in marriage rates, including economic pressures,⁵⁹ changing social values,⁶⁰ and a growing societal acceptance of non-marital cohabitation.⁶¹

Individuals who have non-marital children are less likely to marry early, and their marriages are less likely to last.⁶² As the marriage rate declines, the number of non-marital children born each year tends, unsurprisingly, to increase.⁶³ Around 40% of children—or 1.6 million babies⁶⁴—born every year in the United States are born outside of marriage.⁶⁵ While this represents a decrease in the non-marital birth rate since 2009,⁶⁶ it is still high compared to the 28% recorded in 1990.⁶⁷ Seventy percent of African-American, 66% of Native American, and 53% of Hispanic mothers bore their children outside of wedlock in 2015, compared to 29.2% of non-Hispanic white and 16% of Asian or Pacific Islander mothers.⁶⁸

Correspondingly, married fathers are more likely to be white than single fathers.⁶⁹ According to a 2015 study conducted by the Centers for Disease Control and Prevention (CDC), from 2000 to

57. *Id.*

58. See CASEY E. COPEN ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L HEALTH STATS. REP. NO. 64, FIRST PREMARITAL COHABITATION IN THE UNITED STATES: 2006-2010 NATIONAL SURVEY OF FAMILY GROWTH 3, 5 (2013), <https://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf> [<https://perma.cc/UL9A-UVLQ>]. One of the most common reasons for cohabitation instead of marriage is lack of financial preparedness. PARKER ET AL., *supra* note 49, at 19.

59. PARKER ET AL., *supra* note 49, at 7.

60. JILL DAUGHERTY & CASEY COPEN, U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L HEALTH STATS. REP. NO. 92, TRENDS IN ATTITUDES ABOUT MARRIAGE, CHILDBEARING, AND SEXUAL BEHAVIOR: UNITED STATES, 2002, 2006-2010, AND 2011-2013, at 3-5 (2016), <https://www.cdc.gov/nchs/data/nhsr/nhsr092.pdf> [<https://perma.cc/25WN-5BEK>]; see also LIVINGSTON, *supra* note 18, at 3.

61. DAUGHERTY & COPEN, *supra* note 60, at 4.

62. COPEN ET AL., *supra* note 51, at 6-8.

63. *Marriage in America: The Fraying Knot*, ECONOMIST (Jan. 12, 2013), <http://www.economist.com/news/united-states/21569433-americas-marriage-rate-falling-and-its-out-wedlock-birth-rate-soaring-fraying> [<http://perma.cc/3T3K-Q3RN>].

64. Martin et al., *supra* note 17, at 46.

65. *Id.* at 8.

66. *Id.*

67. GRETCHEN LIVINGSTON & D'VERA COHN, PEW RESEARCH CTR. THE NEW DEMOGRAPHY OF AMERICAN MOTHERHOOD 1 (2010).

68. Martin et al., *supra* note 17, at 46.

69. LIVINGSTON, *supra* note 18, at 2.

2009 36% of men fathered their first child outside of marriage.⁷⁰ While 39% of out-of-wedlock first children during this time had non-Hispanic white fathers, these men also made up an overwhelming majority of the population at the time.⁷¹ Thus, the number of non-marital first births to white fathers, while a high percentage of the total number of births, is statistically far lower than the prevalence of white men in the population at large would indicate.⁷² Conversely, 33% of non-marital first births occurred to Hispanic fathers, and 21% to African-American fathers,⁷³ despite these ethnic groups constituting 16% and 12% of the population, respectively.⁷⁴ Sixty-six percent of African-American fathers had a non-marital first birth, compared to 54% of Hispanic fathers and 24% of non-Hispanic white fathers.⁷⁵ Thus, compared to the population at large, unmarried fathers are far more likely to be men of color.⁷⁶

Women with lower levels of education are more likely to become pregnant early in a cohabitating relationship than those with a college education.⁷⁷ Thus, women without college degrees are more likely to have nonmarital children than those with college degrees.⁷⁸ While there are few statistical studies on the education levels of putative fathers, men tend to marry women of similar educational attainment.⁷⁹ As less-educated individuals are less likely to transition from cohabitation to marriage, they are more likely to give birth to non-marital children.⁸⁰ Because education levels and marital status correlate with income, these individuals are more likely to fall into lower income strata.⁸¹

70. NAT'L CTR. FOR HEALTH STATS., *supra* note 18, at 1.

71. *Id.* at 4. 72% of the American population identified as non-Hispanic white in the 2010 census. KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 (2011), <https://www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-02.pdf> [<https://perma.cc/NY9N-EPVF>].

72. *See id.*

73. NAT'L CTR. FOR HEALTH STATS., *supra* note 18, at 4.

74. HUMES ET AL., *supra* note 71, at 4.

75. NAT'L CTR. FOR HEALTH STATS., *supra* note 18, at 2.

76. *See id.*

77. COPEN ET AL., *supra* note 58, at 6.

78. *See id.*

79. Richard V. Reeves, Opinion, *Sex, Race, Education and the Marriage Gap*, NEWSWEEK (Apr. 15, 2015), <http://www.newsweek.com/sex-race-education-and-marriage-gap-322591> [<https://perma.cc/95MA-R9RB>].

80. *Id.*; *see also* COPEN ET AL., *supra* note 58, at 6.

81. Aughinbaugh et al., *supra* note 55, at 3.

Significantly, studies have shown that marital status and a high income level often perpetuate one another,⁸² meaning that marriage can often be an indicator of economic prosperity.⁸³ This is partially because the highly-educated are more likely to marry, and generally marry each other, resulting in two individuals with above-average earning capacity consolidating their economic gains into one household.⁸⁴ Because college graduates are overwhelmingly white,⁸⁵ and because Americans tend to marry within their own ethnicities,⁸⁶ this forces unmarried parents of color to the lower levels of the economic strata.⁸⁷

III. THE BIOLOGY PLUS TEST

The biology plus test, one of the most common standards for parental rights in the American legal system, requires that an unmarried father demonstrate his paternity through some affirmative indicator outside of a biological relationship.⁸⁸ In other words, an unmarried biological father must take on the “responsibilities of parenthood” before he receives parental rights.⁸⁹ He may do so by marrying the biological mother, financially supporting the child, developing an emotional bond with the child, or otherwise “acting like a *husband*, as well as like a father.”⁹⁰

Generally, the biology plus test relies on statutory obligations, rather than subjective opinions, in determining whether a putative father has established a relationship with his biological child. State statutes, often based on the Uniform Parentage Act,⁹¹ list specific ways in which a man may establish

82. *Id.*

83. *See id.*

84. Reeves, *supra* note 79.

85. THOMAS SNYDER ET AL., NAT’L CTR. FOR EDUC. STATISTICS, NCES 2016-014, DIGEST OF EDUCATION STATISTICS 2015, at 635 tbl.322.20 (2016).

86. *See* WENDY WANG ET AL., PEW RESEARCH CTR., THE RISE OF INTERMARRIAGE 5 (2012), [http:// assets.pewresearch.org/ wp-content/ uploads/ sites/ 3/ 2012/02/SDT-Intermarriage-II.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/3/2012/02/SDT-Intermarriage-II.pdf) [<https://perma.cc/3YPW-5429>].

87. Reeves, *supra* note 79.

88. Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER, SOC. POL’Y & L. 387, 404-05 (2012).

89. *Id.* at 404; *see also* Dolgin, *supra* note 44, at 671 (stating that fatherhood depends on social relationships with the child and the mother as well as biology).

90. Murray, *supra* note 88, at 405.

91. Portions of the Uniform Parentage Act have been adopted by multiple states. UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM’N 2002), [http:// www](http://www).

paternity.⁹² These include marriage to the mother,⁹³ acknowledgment of the child as his own,⁹⁴ adoption,⁹⁵ adjudication of paternity,⁹⁶ and, where available, filing with the state putative father registry.⁹⁷

A jurisdiction relying on the biology plus test supposedly acts in an objective manner, as, when a putative father contests an adoption proceeding, attempting to assert his rights to a child, the court can simply look at the applicable statute and determine whether the father has fulfilled the necessary obligations.⁹⁸ If the father has had no contact with the child, provided no financial support, and did not enter his name in the putative father registry, the court will most likely conclude that he has no paternal relationship with that child.⁹⁹ Thus, the court can safely terminate his parental rights and allow the child's adoption.

A. Judicial Development

The Supreme Court's development of the biology plus test began in 1972, when the Court decided *Stanley v. Illinois*.¹⁰⁰ The plaintiff, Peter Stanley, lost custody of his two minor children under a state law that placed nonmarital children in state custody at their mother's death.¹⁰¹ The law required a finding of parental unfitness before terminating the rights of married fathers or

uniformlaws.org/ shared/ docs/ parentage/ upa_ final_ 2002.pdf [https://perma.cc/2JSZ-TZZN]; see also, e.g., Uniform Parentage Act, TEX. FAM. CODE §§ 160.001 to 160.763 (West 2017); Uniform Parentage Act, WASH. REV. CODE §§ 26.26.011 to 26.26.914 (2017).

92. See *infra* notes 137-41 and accompanying text.

93. OR. REV. STAT. § 109.070(4)(a) (2017).

94. ARK. CODE ANN. § 9-10-120 (2015); see also TENN. CODE ANN. § 68-3-302 (2017) (authorizing unmarried fathers to voluntarily complete forms acknowledging paternity of their newborns).

95. GA. CODE ANN. § 19-7-22(a)(2)(A) (2017).

96. CONN. GEN. STAT. § 46b-172a (2017).

97. FLA. STAT. § 63.054 (2017).

98. See *supra* notes 92-97 and accompanying text.

99. See generally, e.g., *Lehr v. Robertson*, 463 U.S. 248 (1983).

100. 405 U.S. 645 (1972).

101. *Id.* at 646. While Peter and Joan Stanley lived together off and on for eighteen years, they were not married at the time of Joan's death. *Id.* The statutes in question included as parents only "the father and mother of a legitimate child . . . the natural mother of an illegitimate child, and . . . any adoptive parent." *In re Stanley*, 256 N.E.2d 814, 815 (Ill. 1970), *rev'd sub nom. Stanley*, 405 U.S. 645.

unmarried mothers, but not those of unmarried fathers.¹⁰² Peter Stanley challenged the custody declaration on the grounds that termination of his parental rights without determination of his parental fitness violated the Equal Protection Clause.¹⁰³

The Supreme Court held that refusing parental rights to a father based solely on his marital status violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹⁰⁴ Rather, the Court stated that, by caring for his children, and thus fulfilling the traditional role of a father for eighteen years, Peter had established a paternal relationship subject to constitutional protections.¹⁰⁵ Because the state court terminated Peter Stanley's rights based solely on his marital status, despite his active role in his children's lives, the Supreme Court found its ruling unconstitutional.¹⁰⁶

Six years later, in *Quilloin v. Walcott*, the Supreme Court again took up a case regarding an unmarried father's parental rights.¹⁰⁷ Leon Quilloin, who had fathered a child with Ardell Walcott eleven years prior, sought to prevent Ardell's new husband, Randall, from adopting that child.¹⁰⁸ Although state law at the time required the consent of both biological parents to the adoption of a marital child, only the mother had to consent to the adoption of a nonmarital child unless the father legitimized that child.¹⁰⁹ The Court found that Leon had no constitutionally-protected parental interest.¹¹⁰

In *Quilloin*, as in *Stanley*, the Court based its reasoning on the father's conduct toward the child. It reasoned that a father does not automatically have a right to his biological child merely because that child exists, but must actively seek to establish a relationship in order to obtain paternal rights.¹¹¹ Because Leon Quilloin never had nor sought custody of his child, never

102. *In re Stanley*, 256 N.E.2d at 815, *rev'd sub nom. Stanley*, 405 U.S. 645.

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

104. *Id.* at 657-58 (“[The state] insists on presuming rather than proving Stanley’s unfitness solely because it is more convenient to presume than to prove. Under 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.”).

105. *Id.* at 646, 654-56, 658.

106. *Id.*; *see also Dolgin*, *supra* note 44, at 650-51.

107. 434 U.S. 246 (1978).

108. *Id.* at 247.

109. *Id.* at 248-49.

110. *Id.* at 247, 252-53.

111. *Id.* at 255.

legitimized the child (despite having eleven years to do so), and received full notice and a hearing prior to the adoption, the Court held that he had failed to establish the requisite paternal relationship.¹¹² In other words, though Leon had developed some relationship with his child, it was not a significant enough relationship to satisfy the Court.¹¹³

The Supreme Court took up the issue of unmarried fathers' rights again the next year.¹¹⁴ The plaintiff in *Caban v. Mohammed*, Abdiel Caban, sought to prevent the stepparent adoption of his two biological children.¹¹⁵ Abdiel and the children's mother, Maria Mohammed, lived together for five years, during which both parents contributed to the children's financial support.¹¹⁶ Maria then married another man, but Abdiel continued to see his children weekly.¹¹⁷ Eventually, both Maria and Abdiel, along with their new spouses, petitioned for adoption.¹¹⁸ Following a state statute, which required only the consent of the mother to adoption of a nonmarital child,¹¹⁹ a New York Surrogate granted Maria's petition and terminated Abdiel's parental rights.¹²⁰

The Court echoed its decision in *Stanley* by declaring the state law unconstitutional on the grounds that it "treat[ed] unmarried parents differently according to their sex."¹²¹ Writing for the majority, Justice Powell stated that, while Abdiel's new wife could not adopt his children without Maria's consent, Abdiel could only block Maria's husband from adopting his children if he proved such an adoption was not in the children's best interest.¹²²

112. *Quilloin*, 434 U.S. at 255-56.

113. *Id.*

114. *Caban v. Mohammed*, 441 U.S. 380 (1979).

115. *Id.* at 381-82.

116. *Id.* at 382.

117. *Id.*

118. *Id.* at 383.

119. The law in question, Section 111 of the New York Domestic Relations Code, stated: "[C]onsent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother, whether adult or infant, of a child born out of wedlock. . . ." *Caban*, 441 U.S. at 385.

120. *Id.* at 383-84.

121. *Id.* at 388.

122. *Id.* at 388.

As part of the children's best interest, the Court looked at the relationship between Abdiel and his children.¹²³ Applying the biology plus test, it found that Abdiel had clearly established a parental relationship with his children because his name appeared on their birth certificates as their father, and because he had provided financial support to, and lived with, the children as their father for five years.¹²⁴ Having established a parental relationship, Abdiel obtained the corresponding rights.¹²⁵ Thus, based on Abdiel's actions, rather than the biological connection between him and his children, the Supreme Court found he had a constitutional interest in continuing his paternal relationship.¹²⁶ The Court reversed the grant of Maria's adoption petition.¹²⁷

Four years later, the Supreme Court's decision in *Lehr v. Robertson* reaffirmed that, in the Court's mind, a father's rights are not predicated solely on biology.¹²⁸ While Jonathan Lehr attempted to locate his daughter, provided emotional support to her mother, Lorraine, throughout the pregnancy, and offered financial support that Lorraine rejected,¹²⁹ the Court held that these actions alone did not establish a parental relationship.¹³⁰ Rather, the Court stated that Jonathan "never established a substantial relationship with his daughter" because he failed to marry Lorraine or live with Baby Jessica—two traditional, conduct-based markers of paternity.¹³¹ In addition, the Court for the first time considered the role of putative father registries, stating that, despite Jonathan's failure to file with the New York registry, the very existence of the registry provided adequate protection to his rights.¹³²

123. *Id.* at 389.

124. *Caban*, 441 U.S. at 382, 389.

125. *Id.* at 389-93.

126. *Id.* at 394 ("The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers.").

127. *Id.*

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

129. *See id.* at 269-70 (White, J. dissenting).

130. *Id.* at 251-56.

131. *Id.* at 251-52, 267.

132. *Id.* at 250-55, 263-64.

B. States' Responses

Following the Court's decision in *Stanley*, in 1973 the Uniform Law Commission drafted the Uniform Parentage Act (UPA).¹³³ The UPA, designed to recognize unmarried fathers' rights and stop differentiation between marital and nonmarital fathers, integrated the biology plus test as a key tenet.¹³⁴ Specifically, the UPA focused on paternal acknowledgement, stating that a man who lives with his child and "openly holds out the child as his natural child" has established a paternal relationship with that child.¹³⁵

Often looking to the UPA for guidance, states began adopting the biology plus test through legislation.¹³⁶ State statutes generally require an unmarried biological mother's consent to the adoption of her child, but only require the biological father's consent if he meets certain guidelines.¹³⁷ Significantly, these statutes often ignore the father's subjective intent toward the child in favor of how that intent manifests through the father's conduct.¹³⁸ Such manifestations include financial support, visitation, official acknowledgement of paternity, or a significant relationship with the child's mother.¹³⁹

Enrollment in a putative father registry is one common method of ensuring a father meets the statutory requirements of the biology plus test. Such registries are encouraged in the

133. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1195 (2016).

134. *Id.*

135. *Id.* (quoting UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973)).

136. See, e.g., Kevin T. Lytle, Note, *Rock-a-bye Baby: When Determining How and Where the Cradle Should Fall, Nebraska "Blows It"—An Examination of Unwed Fathers' Rights Regarding Their Children and Nebraska's Infringement of Those Rights*, 74 NEB. L. REV. 180, 205 (1995) ("Scared into action by the implications of the United States Supreme Court's decision in *Stanley*, in September of 1974, a committee of attorneys and adoption agency representatives began work on a legislative bill that would revise the Nebraska adoption statutes. At the time of the *Stanley* decision, the Nebraska adoption statutes provided no rights for an unwed father.").

137. See, e.g., ARIZ. REV. STAT. ANN. § 8-106 (2017); ARK. CODE ANN. § 9-9-206 (2015); FLA. STAT. § 63.062(2) (2017); GA. CODE ANN. § 19-8-12(b) (2017); S.C. CODE ANN. § 63-9-310(A)(4)–(5) (2017).

138. See, e.g., S.C. CODE ANN. § 63-9-310(A)(4) (2017) ("The subjective intent of the father . . . does not preclude a determination that the father failed to maintain substantial and continuous or repeated contact with the child.").

139. ARK. CODE ANN. § 9-9-206 (2015); FLA. STAT. § 63.062(2) (2017); S.C. CODE ANN. § 63-9-310(A)(4)–(5) (2017).

UPA¹⁴⁰ and currently exist in at least half of the states.¹⁴¹ A man may proactively file with a putative father registry regarding any woman with whom he has had a physical relationship, whether or not he knows she is pregnant.¹⁴² If he does so, he is then entitled to receive notice of any proceedings within that state that may jeopardize his paternal rights.¹⁴³ Putative father registries offer a way around unilateral deception by the mother and also serve to provide courts with a means to reach the father in the event of an adoption proceeding.¹⁴⁴ For these reasons, putative father registries are an excellent resource for unmarried fathers who, through no fault of their own, have not been able to establish a relationship with their child or otherwise fulfill statutory requirements.

IV. THREE CRITIQUES OF THE BIOLOGY PLUS CONDUCT TEST

In theory, the biology plus test is an effective way of determining paternal rights. Not only does it provide a clear standard for courts in determining when they may legally terminate paternal rights, but it promotes faster adoption of young children who might otherwise spend months, or years, in parental limbo.¹⁴⁵ If the biological father is not in the child's life and has not filed with a putative father registry, the court may more easily terminate his parental rights and enter an adoption decree.¹⁴⁶ This not only provides the children in question with stability, but

140. UNIF. PARENTAGE ACT § 401-02 (UNIF. LAW COMM'N 2002).

141. These states are Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Wisconsin, and Wyoming. KAN. STAT. ANN. § 23-36,201(a)(7) (2017); WIS. STAT. § 48.025 (2017); CHILD WELFARE INFO. GATEWAY, THE RIGHTS OF UNMARRIED FATHERS 2 (2014), <https://www.childwelfare.gov/pubPDFs/putative.pdf> [<https://perma.cc/BF6W-EEMH>].

142. See Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1039 (2002).

143. See CHILD WELFARE INFO. GATEWAY, *supra* note 141, at 2.

144. Most putative father registries require at least the father's name and current address. See, e.g., ALA. CODE § 26-10C-1 (2017); ARK. CODE ANN. § 20-18-702 (2014); CONN. GEN. STAT. § 46b-172a (2017).

145. See Diane S. Kaplan, *The Baby Richard Amendments and the Law of Unintended Consequences*, CHILD. LEGAL RTS. J., Winter 2002, at 2-12.

146. See *id.*

promotes judicial efficiency. However, theory is often much different than practice, and such is sometimes the case in this area.

The biology plus test is not perfect. It can, in fact, lead to arguably unjust results. The test emphasizes judicial efficiency over paternal rights.¹⁴⁷ Judicial efficiency is certainly important, especially in cases regarding the guardianship and living arrangements of young, impressionable children. Parental rights, however, are protected by the Constitution and should not be sacrificed in the name of efficiency.¹⁴⁸ This Comment will address three particular problems with the biology plus test as applied to low-income, unmarried fathers: lack of notice, reliance on putative father registries, and lack of uniformity between the various states.¹⁴⁹

A. Lack of Notice

One criticism of the biology plus test is the lack of notice it provides unmarried fathers regarding their rights and responsibilities. While it is certainly true that “ignorance of the law is no excuse,”¹⁵⁰ it is also true that parenthood is a fundamental constitutional right.¹⁵¹ In contrast to adoptive parents, the majority of whom are well above the poverty level,¹⁵²

147. See UNIF. PARENTAGE ACT, art. 4, cmt. (UNIF. LAW COMM’N 2002) (advocating the biology plus test as a means of promoting faster adoptions).

148. See generally *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).

149. A detailed analysis of the constitutional issues raised by the biology plus test’s application to low-income fathers of color is outside the scope of this Comment. It is worth noting, however, that such issues do exist. Because parental rights are protected by the Constitution, any government action that curtails these rights potentially raises constitutional issues. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”). This particular application of the biology plus test raises Equal Protection and Due Process Clause issues. (While the Supreme Court has rejected claims that the biology plus theory violates the Equal Protection Clause based on gender, despite its overt differentiation on the basis of sex, the fact that the test’s application disadvantages men of color raises race-based Equal Protection issues. See generally, *e.g.*, *Lehr v. Robertson*, 463 U.S. 248 (1983).)

150. UNIF. PARENTAGE ACT, art. 4 cmt. (UNIF. LAW COMM’N 2002).

151. *Meyer v. Nebraska*, 262 U.S. 390, 399-403 (1923).

152. JO JONES, NAT’L CTR. FOR HEALTH STATS., *ADOPTION EXPERIENCES OF WOMEN AND MEN AND DEMAND FOR CHILDREN TO ADOPT BY WOMEN 18-44 YEARS OF AGE IN THE UNITED STATES*, 2002, at 11-12, 23 (2008), https://www.cdc.gov/nchs/data/series/sr_23/sr23_027.pdf [<https://perma.cc/M6BC-4GX8>].

a majority of unmarried fathers are low-income.¹⁵³ Since income level correlates with education, these men are less likely to know where to find information about their legal responsibilities—if, indeed, they realize they have such responsibilities at all.¹⁵⁴ Low-income putative fathers are also unlikely to possess resources necessary to engage legal representation or conduct an exhaustive investigation of their rights.¹⁵⁵

B. Putative Father Registries

Putative father registries are state-established databases that allow a man who has had a physical relationship with a woman to place his name on file as a potential father of any children that woman may bear. The registries may serve to alleviate some of the weaknesses in the biology plus test. There are, however, significant weaknesses in the registries themselves. First, the registries are only effective if fathers file with them and, unfortunately, many unmarried men simply do not know the registries exist. For instance, between 1989 and 2016, Arkansas' registry recorded only 2,110 filings.¹⁵⁶ In 2004, only forty-seven putative fathers registered in Florida, while 90,000 non-marital children were born in the state that same year.¹⁵⁷ Virginia's registry, established in 2007, had sixty-four filings in its first year compared with 38,000 out-of-wedlock births statewide.¹⁵⁸

Because most unmarried fathers come from lower socioeconomic strata, it stands to reason that the majority of those

153. In a Princeton and Columbia University study of 3,700 unmarried parents of children born between 1998 and 2000, only 21.5 % of the fathers earned more than \$25,000 per year. Marcia Carlson et al., *Unmarried but Not Absent: Fathers' Involvement with Children After a Nonmarital Birth* 30 tbl.1 (Ctr. for Research on Child Wellbeing, Working Paper No. 05-07-FF, 2005).

154. *Employment Projections: Unemployment Rates and Earnings by Educational Attainment*, U.S. BUREAU LAB. STATS. (Oct. 24, 2017), https://www.bls.gov/emp/ep_table_001.htm [<https://perma.cc/N6EF-E3TD>].

155. Amato, *supra* note 20.

156. Ellen Thalls, *State Registry Could Protect Unmarried Fathers' Rights*, 5NEWS ONLINE (Jan. 28, 2016, 8:06 PM), <http://5news.com/2016/01/28/state-registry-could-protect-unmarried-fathers-rights-2/> [<https://perma.cc/MB75-SCR2>]. This number includes “duplicate forms and children who are now over 18.” *Id.*

157. Timothy L. Arcaro, *No More Secret Adoptions: Providing Unwed Biological Fathers with Actual Notice of the Florida Putative Father Registry*, 37 CAP. U. L. REV. 449, 453 (2008).

158. Ashley Hottle, *Virginia's Putative Father Registry: Three Years Later*, FAM. L. NEWS (Va. State Bar Family Law Section, Richmond, Va.), Winter 2010, at 8-9, <http://www.vsb.org/docs/sections/family/winter2010.pdf> [<https://perma.cc/4ZMG-H44X>].

who fail to file with the registries are also low-income. While some registries, such as Florida's and South Carolina's, can be located with a simple internet search and have online registration,¹⁵⁹ others are difficult to locate and complicated to file with. Kansas has no information on its putative father registry on its official government websites. Rather, a father must locate the applicable section in the Department for Children and Families' 600-page Policy and Procedure manual, informing him that he must call the Office of Child Support Services, who will then take the ambiguous action of "direct[ing]" him to add his name to the registry.¹⁶⁰

This less-than-accessible state of affairs is likely one reason that, in the twenty-five years between 1994 and 2016, only five men filed with the Kansas registry.¹⁶¹ The combination of ignorance of the registries' existence and lack of resources to investigate, which are both common to most low-income fathers, makes it likely that such fathers comprise the majority of the men who have failed to file with the registries.¹⁶²

The drafters of the UPA originally recognized that the outcomes dictated by a registry can be less than ideal, stating that the registries work only in intrastate situations, are based on "unsupported claims," could be used by an unscrupulous potential father to extort the child's mother, and "provide a simple (albeit 'hard-nosed' and potentially unjust) solution when a father fails to register"¹⁶³ However, in 2002, the drafters changed their position and "accept[ed] the importance and utility of a parentage

159. *Putative Father Registry*, FLA. HEALTH, http://www.floridahealth.gov/certificates/certificates/birth/Putative_Father/index.html [https://perma.cc/98LP-C2_YL] (last visited Sept. 8, 2017); S.C. Dep't of Soc. Servs., *Responsible Father Registry*, SC.GOV, <https://ssl.sc.gov/DSSFatherRegistry/FatherReg/RegIndex.aspx> [https://perma.cc/L9NG-5DKL] (last visited Jan. 8, 2017).

160. KAN. DEP'T FOR CHILDREN & FAMILIES, PREVENTION & PROT. SERVS., POLICY AND PROCEDURE MANUAL 457 (Jan. 2018), http://www.dcf.ks.gov/services/PPS/Documents/PPM_Forms/Policy_and_Procedure_Manual.pdf [https://perma.cc/WH_9_5UYX] ("To add a father to the registry, please contact Child Services Support [sic] and they will direct you.").

161. Amanda Palumbo & Angie Ricono, *Independence Father Denied Custody After Loophole Adoption*, KCTV NEWS (Jan. 28, 2016, 10:14 PM), <http://www.kctv5.com/story/31050293/independence-father-denied-custody-after-loophole-adoption> [https://perma.cc/L2CH-BCFE].

162. In contrast, adoptive parents are more likely to know their rights and how to protect them, as they are better able to hire legal counsel. *Supra* note 20 and accompanying text.

163. UNIF. PARENTAGE ACT, art. 4 cmt. (UNIF. LAW COMM'N 2002).

registry.”¹⁶⁴ This change of heart stemmed not from a goal of preserving fathers’ rights, but one of providing faster and easier adoptions.¹⁶⁵ Specifically, the UPA’s drafters asserted a goal of providing quick and efficient adoption proceedings in cases involving infants younger than one year.¹⁶⁶

Because of their reduced access to legal resources and lower levels of education, low-income unmarried fathers are more likely to fall prey to the problems inherent in the biology plus test, including the putative father registries.¹⁶⁷ Thus, while its efficient nature makes it appealing to courts and potential adoptive parents, the biology plus test fails to preserve the rights of the most vulnerable members of one of the populations it should protect.

The putative father registries are a prime example of promoting efficiency at the expense of paternal rights. They allow courts to terminate paternal rights in situations where the biological father has both the means and a desire to parent his child.¹⁶⁸ Such actions disproportionately affect low-income fathers—and, by inference, fathers of color—at the enrichment of middle- and upper-class white families.¹⁶⁹

C. Lack of Uniformity Between States

Variations from state to state in the biology plus test’s requirements constitute a third weakness in the test. Because many states require strict compliance with their own statutes and do not give credit to actions that fathers have taken to protect their rights in other states, these variations can lead to undesirable situations. This is particularly true when it comes to the state putative father registries.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See supra* notes 150-66 and accompanying text.

168. *See, e.g.,* *Lehr v. Robertson*, 463 U.S. 248 (1983); *Manzanares v. Byington (In re Adoption of Baby B.)*, 308 P.3d 382 (Utah 2012). *O’Dea v. Olea*, 217 P.3d 704 (Utah 2009).

169. While minority populations are disproportionately represented in the unmarried father demographic, adoptive families are more likely than the general population to be white. *See* SHARON VANDIVERE ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., *ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS* 13 (2009). Thus, a test that prioritizes the interests of adoptive families over the interests of the biological father disproportionately disfavors minorities.

While low-income fathers are unlikely to realize the registries exist in the first place, those who do register in one state are likely to believe that doing so protects their rights in all states. However, because the registries are run by individual states, each with its own set of rules and deadlines, that initial registry only protects his rights within that initial state.¹⁷⁰ If Jack registers in State A as a putative father for Jill’s child, Jill merely has to move to State B and put the child up for adoption there in order to prevent Jack from receiving notice. Thus, even if a man enrolls his name in his state’s putative father registry, there is no guarantee that his rights will be protected.

Such a situation took place in *Manzanares v. Byington (In re Adoption of Baby B.)*,¹⁷¹ when Robert Manzanares’ ex-girlfriend, Carie Terry, left their home state of Colorado under false pretenses and gave birth to their daughter in Utah.¹⁷² Despite knowing that Robert wished to keep the child, and without informing him of her birth, Ms. Terry “executed a consent to adoption in Utah” relinquishing Baby B. to her brother and sister-in-law.¹⁷³ Even though Robert had complied with Colorado requirements, filed a paternity petition in Colorado, and consistently opposed putting his daughter up for adoption while expressing his desire to parent her, the Utah court still terminated his parental rights.¹⁷⁴ After an extensive legal battle lasting several years, Robert finally gained partial custody rights to his daughter, but the adoptive parents maintained physical custody.¹⁷⁵ It is worth noting that Robert’s fight for his parental

170. See, e.g., *infra* notes 171-76 and accompanying text.

171. 308 P.3d 382 (Utah 2012).

172. *Id.* at 386-87. Utah’s adoption laws did not require consent from an unmarried biological father who had not complied with strict statutory requirements unless he did not know the mother resided in Utah and fulfilled paternity requirements in the mother’s previous state of residence or the state of conception before the mother consented to adoption. See *id.* at 389-90.

173. *Id.* at 387.

174. See *id.* at 386-87.

175. Brooke Adams, *Father Wins Role in Life of Daughter Being Raised by Utah Couple*, SALT LAKE CITY TRIB. (Mar. 9, 2014, 9:53 PM), <http://archive.sltrib.com/story.php?ref=/sltrib/news/57648198-78/manzanares-utah-judge-case.html> .csp [https://perma.cc/WC73-CHYJ]. In a small victory for Robert Manzanares, the Colorado judge who issued the ruling at least denied the adoptive parents—the Byingtons—requested child support. *Id.* Utah has since passed a law requiring birth mothers who have not lived in the state at least ninety days to “file with the court, a declaration regarding each potential birth father” and to “search the putative father registry” of states where she conceived the baby or lived while pregnant. UTAH CODE ANN. § 78B-6-110.5(1) (West 2017). The mother

rights cost nearly \$250,000—an amount far beyond the reach of most unmarried fathers.¹⁷⁶

In addition, the lack of uniformity between states means that the biology plus test's requirements are not as objective as they may at first appear. The interstate statutory variations and nebulous obligations in those statutes—such as “fair and reasonable” financial support¹⁷⁷ or a “significant . . . relationship . . . with the [child]”¹⁷⁸—leave room for broad judicial interpretation. This is especially significant because adoptive households are more likely to be conventional, two-parent households, which are traditionally considered more stable.¹⁷⁹ In addition, the expense associated with adoption procedures results in most adoptive families placing well above the poverty line.¹⁸⁰ Because children raised in higher-income households receive both tangible and intangible benefits a lower-income family cannot provide, judges will often (consciously or unconsciously) favor more wealthy parties in a parental rights determination case.¹⁸¹ This, coupled with a shortage of newborns available for adoption,¹⁸² could potentially lead to wealthier individuals using the judicial system to strong-arm poor fathers into handing over their children.¹⁸³

V. MOVING AHEAD

must then inform an interested or unaware putative father that she plans to put the child up for adoption in Utah. UTAH CODE ANN. § 78B-6-110.5(3) (West 2017).

176. Robert Manzanares, *Illegal Adoption of Kaia: Donations to Legal Fund*, <http://illegaladoption.com/donations-to-legal-fund/> [https://perma.cc/E3U5-CF9D] (last visited Sept. 8, 2017).

177. S.C. CODE ANN. § 63-9-310(A)(4) (2017).

178. ARK. CODE ANN. § 9-9-206(a)(2)(F) (2015).

179. VANDIVERE, ET AL., *supra* note 169, at 17.

180. *Id.* at 9, 15. One adoption agency estimates the 2015-16 cost of a private, agency-assisted domestic newborn adoption at between \$34,000 and \$38,000. *How Much Does It Cost to Adopt a Child?*, AM. ADOPTIONS, http://www.americanadoptions.com/adopt/why_does_private_adoption_cost_so_much_money [https://perma.cc/YX39-HWRT] (last visited Jan 6, 2017).

181. These benefits are sometimes referred to as “cultural capital.” *See generally, e.g.*, Mads Meier Jaeger, *Equal Access by Unequal Outcomes: Cultural Capital and Educational Choice in a Meritocratic Society*, 87 SOC. FORCES 1943 (2009).

182. *Types of Adoptions*, NAT'L ADOPTION CTR., <http://www.adopt.org/types-adoptions> [https://perma.cc/8NLJ-67EN] (last visited Sept. 8, 2017).

183. *In re* Petition of Doe, 638 N.E.2d 181, 188 (Ill. 1994) (Heiple, J., writing in support of the denial of rehearing). “We must remember that the purpose of an adoption is to provide a home for a child, not a child for a home.” *Id.* at 190.

Although the biology plus test has its weaknesses, it remains a viable test because it allows judicial efficiency while still providing some measure of protection to unmarried fathers' rights. Until legislators or the Supreme Court develop a better test, lawmakers should continue to refine the existing test. A number of minor changes would alleviate some of the harms while still maintaining the benefits of the test.

A. Uniformity

Ideally, the test's requirements should be standardized. Current law requires unmarried fathers to comply with fifty sets of rules in order to protect their rights in all fifty states. Legislatures could both protect paternal rights and increase judicial efficiency by enacting a standard set of rules governing termination of paternal rights. While passage of a national law might be the most effective means of achieving this goal, legislating family law matters has typically been the province of the states. Since states should be free to craft their own laws, the goal should be uniformity among the states, rather than a federal paternal rights bill.

State laws should include several facets.¹⁸⁴ They should provide protection for unmarried fathers against fraud by birth mothers, as in the *Manzanares*' case. Such protections might include crediting out-of-state fathers for complying with the relevant laws in their home states. State laws should also provide—and many already do provide—actual notice requirements, ensuring that an unmarried father knows his child may be adopted.¹⁸⁵ In addition, in newborn adoption cases, states should allow a reasonable response period after the child's birth during which an unaware father may assert his rights.

B. Education

Some have lobbied for implementation of a national putative father registry.¹⁸⁶ While this would eliminate the interstate

184. Some states have already enacted laws providing these protections. *See, e.g., supra* note 175.

185. *Id.*

186. *See generally* Beck, *supra* note 142; *see also* UTAH CODE ANN. § 78B-6-121.5 (West 2017) (creating a "Compact for Interstate Sharing of Putative Father Registry Information").

adoption problem, it would still be subject to the other weaknesses posed by the existing registry system. In addition, Congress has traditionally left family law matters to the states, and deviating from this tradition would likely cause an uproar.

In order to eliminate the glaring lack-of-notice problem posed by putative father registries, states—or the federal government—should institute an informational campaign designed to raise awareness about the registries. This could take the form of anything from television advertisements to billboards to awareness marches, but might be most effective long-term if implemented as part of public school sexual education classes.

This proposal would certainly require both financial and human resources, which are often in short supply in the governmental realm. However, it would also provide education to those who do not have the knowledge or time to self-educate about their rights, and who are often unable to seek legal advice. Such education would likely lead to a greater number of putative fathers complying with the necessary requirements for establishing their rights, thus promoting judicial efficiency by reducing the number of cases requiring a judicial determination of whether the father adequately protected his rights.

VI. CONCLUSION

The current state of the paternal rights of unmarried fathers in the United States leaves much to be desired. Low-income fathers, disproportionately men of color, bear the brunt of this suboptimal state of affairs. While many states have procedures for establishing paternity, low-income fathers are unlikely to know of these procedures. Because of this, they are more likely than their middle- and upper-class counterparts to have their parental rights involuntarily terminated. In addition, these fathers' economic and marital status may give rise to unconscious prejudice against them when judges apply the subjective aspects of the biology plus test.

These issues are symptomatic of broader social issues—most notably the vestiges of institutionalized racism, and societal prejudice against nontraditional families. Only an understanding of how the test disadvantages the vulnerable individuals it should protect can produce a test better calculated to address the issues at hand.

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