

1987

# In Re: Baby Doe, Sylvester Eno-Idem v. John and Mary Doe : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 870476-CA

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IN THE UTAH COURT OF APPEALS

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IN RE: BABY DOE,	)	
SYLVESTER ENO-IDEM,	)	APPELLANT'S REPLY TO
	)	RESPONDENTS BRIEF ON
Appellant,	)	APPEAL
vs.	)	
JOHN AND MARY DOE,	)	Priority 7
	)	Case No: 870476-CA
Respondents,	)	

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APPELLANT'S REPLY TO RESPONDENTS BRIEF ON APPEAL

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Appealed from an Order of the Honorable  
Judge Ronald O. Hyde that no evidentiary hearing  
be held to reconsider the adoption of Baby Doe.

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COURT OF APPEALS

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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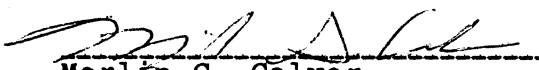
IN RE: BABY DOE, )  
SYLVESTER ENO-IDEM, ) APPELLANT'S REPLY TO  
Appellant, ) RESPONDENTS BRIEF ON  
APPEAL  
vs. )  
JOHN AND MARY DOE, ) Priority 7  
Respondents, ) Case No: 870476-CA

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Comes now the above named Appellant, Sylvester Eno-Idem and replies to the Respondent's Brief as follows:

Regarding Respondents arguments in Point I of his Brief, the Appellant would refer this Court to two current cases now pending before the United States Supreme Court. Edward McNamara v. County of San Diego Department of Social Services, No 87-5840; and Michael H. and Victoria D. v. Gerald D., Case No 87-756. Both of these cases are dealing with the questions of unwed fathers rights and due process of law. Enclosed herewith and made a part hereof are excerpts from said cases and Appellant respectfully submits that these two cases may be dispositive of the question of Baby Doe now before the Utah Supreme Court.

DATED: June 23, 1988

  
Merlin G. Calver  
Attorney for Appellant

87-746

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

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MICHAEL H.,  
*Appellant,*  
and

VICTORIA D., a minor by and through  
her Guardian *Ad Litem*, Leslie Shear,  
*Appellant,*

v.

GERALD D.,  
*Appellee.*

---

**On Appeal from the Supreme Court of California**

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**BRIEF FOR APPELLANT MICHAEL H.**

---

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## QUESTION PRESENTED

Subject to exceptions not applicable herein, § 621 of the California Evidence Code establishes a conclusive presumption of paternity in the husband of a mother whose child was born in wedlock. The question presented is whether § 621 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment when it operates to deny a hearing to a child's biological father and thereby to terminate his parental rights although he has demonstrated "a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'" *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

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## JURISDICTION

The judgment of the Supreme Court of California, denying appellants' petition for review, was filed on July 30, 1987. A notice of appeal to this Court was duly filed in the Court of Appeal, Second District, Division Three, of California, on October 28, 1987. This appeal was docketed in this Court on October 28, 1987, within 90 days of the judgment below.

This Court has jurisdiction under 28 U.S.C. § 1257. The provisions of 28 U.S.C. § 2403(b) may be applicable to this appeal.

Probable jurisdiction was noted on February 29, 1988.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of § 1 of the Fourteenth Amendment to the United States Constitution. This case also involves California Evidence Code § 621. These provisions are set forth at J.S. 2-4.

## STATEMENT OF THE CASE<sup>1</sup>

In 1978, Michael H. and Carole D. were neighbors in Playa del Rey, California. Carole had been married to Gerald D. since 1976. In the summer of 1978, Carole and Michael began an extramarital affair which continued until October 1980, when Gerald moved to New York and Carole left Los Angeles for a sojourn in Paris. A. 1, 43, 73-74.<sup>2</sup> Soon after Carole arrived in Paris, she called

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<sup>1</sup> Because the case was dismissed before any evidentiary hearing was permitted, and before Michael H. was allowed to introduce in court *any* evidence in support of his position, the record is necessarily limited to the undisputed facts noted in the court's opinion, by the affidavits of the parties and the report of the appointed expert.

<sup>2</sup> "A." refers to the record Appendix in this Court.

Michael, told him that she was pregnant with his child and that she intended to abort the fetus. Michael asked Carole to reconsider her decision, asking that she divorce Gerald, marry him and have the child. Subsequently Carole wrote Michael that she had had an abortion on October 31, 1980. In January of 1981, Carole called Michael to inform him that she had been pregnant with twins, that the abortion had terminated only one of the fetuses and that she was five months pregnant with the remaining fetus.<sup>3</sup> A. 75.

Following this, Gerald returned to Los Angeles and reunited with Carole. Victoria D. was born on May 11, 1981. Carole called Michael to inform him of the birth.

In September of 1981, Gerald and Carole separated again. A. 77. In the following month, Carole, Michael and Victoria went to a clinic at the University of California at Los Angeles for a Human Leukocyte Antigen (HLA) test to determine the child's biological paternity. The test showed a 98.07% probability that Michael was Victoria's biological father. A. 10, 77. From that point on, Michael has continually, with enormous persistence and at great personal expense, sought to establish and maintain his parental relationship with Victoria. He has fed and housed both Carole and Victoria and, indeed, has provided financial support to Carole and the child even when they were not living under his roof. His love and attention to Victoria has been constant and unswerving, and he has availed himself of every opportunity to provide her with warmth, comfort and parental involvement.

In January 1982, Carole and Victoria moved to St. Thomas to live with Michael. A. 44. They leased a house together; Carole signed the lease as "Carole Hirschen

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<sup>3</sup> Because Michael had a child by a previous marriage with a serious genetic disorder causing profound retardation, called Lawrence-Moon Beidel syndrome, he and Carole consulted the Genetic Clinic at the University of Southern California. A. 76.



son"; she held Michael out as Victoria's father, and the three lived together as a family unit. In March 1982, Carole took Victoria to Los Angeles for a visit, promising to return to Michael. A. 78. Instead, for approximately the following year, Carole lived with a new boyfriend, Scott K., and then returned again to Gerald. A. 44, 78.

In the fall of 1982, Michael came to Los Angeles to visit Victoria. Carole then attempted to restrict his visits with the child and, in November 1982, Michael filed the filiation suit that has led to this appeal. A. 78. On April 12, 1983, a guardian *ad litem* was appointed for Victoria.<sup>4</sup> J.S.S. 6.

In July 1983, Carole, having separated again from Gerald—who returned to New York—invited Michael to live with her and Victoria in Los Angeles. A. 79. The three resumed living together as a family in August 1983. Carole told her friends and family that Michael was Victoria's father and encouraged Victoria to call Michael "Daddy", a term the child used regularly. A. 79; J.S. B4. Michael supported Carole and Victoria and maintained a joint bank account with Carole. A. 79. During this period, Michael and Victoria developed a warm, close and loving parent-child relationship.

In March 1984, Michael and Carole agreed to a Stipulation intended to resolve the then-pending filiation suit. A. 83. As of that time, Gerald had never sought to intervene in the suit to take a position as to his paternity. The Stipulation, signed by Carole and Michael,<sup>5</sup> acknowledged Michael's paternity, obligated him for continuing financial support and made Victoria his sole heir. In the

<sup>4</sup> Throughout this litigation, the guardian *ad litem*, who has been independent of all the other adults in the case, has consistently taken the position that a *de facto* father-child relationship existed between Victoria and Michael which it was in Victoria's best interest to preserve. J.S. B6.

<sup>5</sup> Carole later instructed her attorney not to file the Stipulation in court. J.S. B4.

following month Carole decided to end her relationship with Michael. A. 83.

Following Carole's decision to leave Michael, both Victoria's guardian *ad litem* and Michael sought *pendente lite* visitation between Michael and Victoria. The Superior Court appointed a psychologist to evaluate the parties and submit a recommendation. J.S.S. 11. The expert administered a battery of psychological tests. Michael, Carole, Victoria and Gerald, spent hours interviewing each of them and observing their interaction and submitted a 20-page report. A. 41. The report, in essence, concluded that the child was positively attached to all three parental figures, "*principally and equally*" (emphasis in original) to Michael and Carole. A. 48. The report recognized the importance to the child that Michael remain a part of her family because "[the evaluators] perceived Michael H. as the single adult in Victoria D.'s life most committed to caring for her needs on a long-term basis." A. 51. The report also commented on the beneficial nature to Victoria of a relationship with Michael, noting that "it would be unnecessarily hurtful to deprive her of his affection and intellectual stimulation." A. 52. It further addressed the "strong positive mutual attachment" between Michael and the child and Victoria's attitude of "warmth and comfort" toward him. A. 63. Following the submission of the report, the parties entered into a stipulated resolution of the *pendente lite* visitation issue which was entered as an order on October 13, 1984. J.S. B5.

#### PROCEEDINGS BELOW

On November 18, 1982, Michael H. initiated this action in California Superior Court against Gerald D., Carole D. and Victoria D. to declare his paternity of Victoria. As noted *supra*, the trial court appointed a guardian *ad litem*/attorney to represent the interests of Victoria and the guardian *ad litem* thereupon filed a cross-complaint.

plaint against Michael H., Gerald D. and Carole D. seeking a declaration of a legal or *de facto* parent-child relationship between Victoria D. and Michael H.

Following the submission of the report of the court-appointed psychologist and a stipulation among the parties to a visitation schedule, Gerald D. filed a Motion for Summary Judgment predicated on the absolute bar imposed by the conclusive presumption of section 621 of the California Evidence Code. Appellants opposed the motion on the ground that section 621 was unconstitutional as repugnant to the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. On January 28, 1985, the trial court granted the motion for summary judgment, dismissing Michael H.'s Petition for Declaration of Paternity and the guardian *ad litem*'s request for declaration of a parent-child relationship without an evidentiary hearing on any issue.

The due process and equal protection challenges were made again on appeal to the Court of Appeal of the State of California, Second District, Division Three. The constitutional claims were squarely decided by that court in affirming the Judgment of the Superior Court. J.S. B14-B18.

A Petition for Hearing was thereafter timely filed with the Supreme Court of California reiterating appellants' constitutional claims. The California Supreme Court denied appellant's petition for review on July 30, 1987.

#### SUMMARY OF ARGUMENT

I. This Court has in four cases considered the extent to which a natural father's biological relationship with his child is entitled to protection under the Due Process Clause, even if the child is not the product of a marital union. *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248

(1983). The basic principle enunciated by the Court is that if an unwed father has demonstrated a full commitment to his paternity by accepting its burdens, has developed a relationship with his child, and has cared for the child in the manner expected of a parent—by assuming financial, personal or custodial responsibilities—the Constitution recognizes that he has a “liberty” interest in his relationship to his child. *Lehr*, 463 U.S. at 260-262; *Caban*, 441 U.S. at 389, n.7; *Quilloin*, 434 U.S. at 255; *Stanley*, 405 U.S. at 651-652.

In this case, Appellant Michael H. has amply demonstrated a full parental commitment to his child and has thereby “developed [a] parent-child relationship [as] was implicated in *Stanley*, and *Caban*.” See *Lehr*, 463 U.S. at 621. Accordingly, he should be deemed to have a fundamental “liberty” interest entitling him to protection under the Due Process Clause of the Fourteenth Amendment and deserving of respect in determining his rights under the Equal Protection Clause.

II.A. Section 621 of the California Evidence Code declares that “the issue of a wife cohabiting with her husband \* \* \* is conclusively presumed to be a child of the marriage.” The only exceptions provided for therein are where the husband is impotent or sterile, and where the husband (alone), or the wife, together with the father, petition for a blood test to establish paternity within two years of the birth of the child.

In a case such as this, where a putative biological father who is not the mother's husband has established a parental relationship in the ways contemplated by *Lehr* and its antecedents, the statute extinguishes that father's liberty interests, not on the merits after a full hearing and careful consideration of all the interests affected, but by the legal fiction of conclusive presumption. It thereby denies such a father “due process of law—using that term in its primary sense of an opportunity to be heard, and to defend [his] substantive rights”. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930)

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(Brandeis, J.). A corollary of this constitutional requirement is "that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). Accordingly, in *Stanley v. Illinois*, *supra*, this Court held that a father had been deprived of his liberty interest "in children he has sired and raised" (405 U.S. at 651) without due process by Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children, whereby the state took custody of the children on the death of the mother without providing any hearing on the father's parental fitness. The fact conclusively presumed by § 621 is no more "necessarily or universally true" (*Vlandis*, 412 U.S. at 452) than the presumptions which were struck down in *Stanley* and *Vlandis*; nor, given present-day technology, is the state without "reasonable alternative means" (*id.*) for determining the identity of the actual father. Thus, by denying the biological father his liberty interest and "companionship, care, custody, and management" of his child (*Stanley*, 405 U.S. at 651) without a hearing, § 621 unconstitutionally deprives him of due process of law. See also *Lassiter v. Department of Social Service*, 452 U.S. 18 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Armstrong v. Manzo*, 380 U.S. 545 (1965) (each of which decides that a parent may not be divested of his or her rights as such without a hearing).

B. The court below sought to support the constitutionality of § 621 and its application in this case on the basis that the "conclusive presumption is actually a substantive rule of law \* \* \*." J.S. B11, citing *Kusior v. Silver*, 55 Cal.2d 603, 619, 7 Cal.Rptr. 129, 140, 354 P.2d 657, 668 (1960). On this view, the Court balanced appellant's right to a hearing against the state interests which were said to be served by § 621. This was fundamental error. In *Logan v. Zimmerman Brush Co.*, 452 U.S. 422 (1982), the Court reiterated that "it has become

a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property [or liberty] interest". (*Id.* at 433, quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-571, n.8 (1972) (emphasis in *Roth*)). Under the Due Process Clause, that right is not subject to being balanced away. "On the other hand," said the Court, "the timing and nature of the required hearing 'will depend on appropriate accommodation of the competing interests involved'." 455 U.S. at 434, quoting *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

Without a hearing, it cannot be determined whether the state interest which § 621 assertedly serves would in fact be adversely affected by recognizing the father's paternity and his parental rights. For example, the state's interest "in the integrity of the family unit," J.S. B11, B15-B16, is in fact furthered only if a stable family consisting of the child, the mother and *the husband* exists in fact. Its existence may not be *presumed*, since it is far from universally true that such a family is stable where the mother has had a child with a man other than the husband, and the biological father has assumed and exercised responsibility for the care of the child sufficient to establish a liberty interest in his relationship with the child. So too, there must be a hearing to ascertain whether the liberty interest and the state interest can be accommodated, for example, by recognizing the true father's paternity and according him visitational rights. Likewise, without a hearing a court cannot know whether the state's unquestionable interest in the welfare of the child would be advanced or hindered by terminating its relationship with its father. Nevertheless, as construed below, § 621 categorically overrides the father's liberty interest in his relationship with his child without regard to what a hearing would show as to whether these assertedly countervailing state interests are truly implicated, and if so, how these interests and that of the father can best be effectuated.

## ARGUMENT

III. Appellant was also denied his rights under the Equal Protection Clause by the operation of § 621. Because § 621 denies appellant and other fathers similarly situated a hearing in which they can establish their paternity and their parental rights, it is indistinguishable from the statute which was held in *Stanley v. Illinois* to be "inescapably contrary to the Equal Protection Clause", 405 U.S. at 658. Moreover, like the statute which was struck down in *Caban v. Mohammed* on equal protection grounds, § 621 unjustifiably discriminates between biological parents. Under its terms, the right of a biological mother to remain a parent is *never* open to question without access to a full panoply of due process protections, whereas a biological father may be deprived of parental rights without any determinations as to his fitness or otherwise.

Section 621 cannot survive scrutiny under the standard of *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978): "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." For, by depriving the father of his liberty interest without a hearing, § 621 cuts off at the threshold all inquiry as to whether that harsh result is realistically necessary to effectuate *any* important state interest.

### I. Appellant's Demonstrated Parental Commitment His Child Establishes a "Liberty" Interest Entitled Constitutional Protections

In determining whether a person's rights to due process under the Fourteenth Amendment have been infringed upon, the first inquiry is whether the interest infringed upon is of the sort which is entitled to constitutional protection. "[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Smith v. Organization of Foster Families*, 431 U.S. 816, 841 (1977) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-571 (1972) (emphasis in original)).

This Court has in four cases considered the extent to which a natural father's biological relationship with his child is entitled to protection under the Due Process Clause, even if the child is not the product of a marital union. *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 247 (1983). *Lehr* distilled the teachings of the earlier decisions to set forth the following test:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child," *Caban*, 441 U.S., at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." *Id.*, at 389, n.7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the in-

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dividuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972)). [463 U.S. at 261.]

The test is practical and rooted in the realities—the burdens and the joys—of the parent-child relationship.<sup>6</sup> The Court explained:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie. [*Id.* at 262 (footnote omitted).]

In fact, the basic principle enunciated by the Court is that if an unwed father has demonstrated a full commitment to his paternity by accepting its burdens, has developed a relationship with his child, has cared for the child in the manner expected of a parent—by assuming financial, personal or custodial responsibilities—the Constitution recognizes that he has a "liberty" interest in his relationship to his child. *Lehr*, 463 U.S. at 260-262; *Caban*, 441 U.S. at 389 & n.7; *Quilloin*, 434 U.S. at 255; *Stanley*, 405 U.S. at 651-652.<sup>7</sup>

<sup>6</sup> The Court's thesis is reminiscent of Samuel Clemens' observation: "A baby is an inestimable blessing and bother." Letter to Annie Webster, September 1, 1876.

<sup>7</sup> See also *Rivera v. Minnich*, — U.S. —, — n.7, 107 S.Ct. 3001, 3004 n.7 (1987) (quoting *Lehr*, 463 U.S. at 261).

In this case there is a "developed parent-child relationship [as] was implicated in *Stanley* and *Caban*." See *Lehr*, 463 U.S. at 261.<sup>8</sup> Appellant Michael H. has amply demonstrated a full parental commitment to his child. Michael H. (a) filed a timely petition for declaration of paternity 18 months after the birth of the child as soon as it became clear that the mother did not intend to acknowledge his paternity and might otherwise interfere with his relationship with Victoria; (b) was the *de facto* father of the child in a family unit during the periods Carole D. lived with him; (c) contributed financially to the child and mother on a regular and ongoing basis; (d) agreed to acknowledge the child as his son; and (e) developed a warm and supportive parental relationship with his offspring both during the time he acted as *de facto* father and during his regular periods of visitation.<sup>9</sup>

The report of a court-appointed expert, moreover, demonstrates that Michael H. and his daughter had an actual relationship as warm, as tender, as supportive and as important to the child's development as any other parental relationship to which Victoria was exposed. Indeed, that report stressed the importance of extending

<sup>8</sup> In *Stanley* the Court stated: "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." 405 U.S. at 651.

<sup>9</sup> This case, therefore, differs from the mere "potential relationship involved in *Quilloin*." See *Lehr*, 463 U.S. at 261. There, the natural father waited 11 years before filing a petition for legitimation, and "never exercised actual or legal custody over his child and \* \* \* never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." 434 U.S. at 256. Appellant's situation is also unlike that in *Lehr*, where the natural father failed to establish "any significant custodial, personal, or financial relationship" with his child, 463 U.S. at 262, and the majority concluded that the State had "adequately protected his opportunity to form such a relationship." *Id.* at 260.

formal parental recognition to Michael H. because it was in the *child's* best interest to maintain her relationship with "the single adult \* \* \* most committed to caring for her needs on a long-term basis." J.S. B5; A. 51.

Accordingly, under this Court's precedents, Michael H. should be deemed to have a fundamental "liberty" interest entitling him to constitutional protection under the Due Process Clause of the Fourteenth Amendment.

## II. The California Statute Violates the Due Process Clause Because It Deprives Petitioner of His Liberty Interest Without a Hearing

A. Appellant Michael H. has been denied the opportunity to establish that he is the biological father of Victoria and to vindicate his liberty interest as a biological father who has "demonstrate[d] a full commitment to the responsibilities of parenthood," *Lehr, supra*, 463 U.S. at 621, by operation of § 621 of the California Evidence Code. In terms, § 621 declares that "the issue of a wife cohabiting with her husband \* \* \* is conclusively presumed to be a child of the marriage." In a case such as this, where a putative biological father, who is not the mother's husband, has established a parental relationship in the ways contemplated by *Stanley, Quilloin, Caban* and *Lehr*, the statute extinguishes that putative biological father's liberty interests, not on the merits after a full hearing and careful consideration of all the interests implicated, but by the legal fiction of conclusive presumption.

The foregoing presumption is, however, subject to certain exceptions. The first is that the conclusive presumption is not applicable where the husband is "impotent or sterile." *Id.* Additionally, pursuant to amendments adopted in 1980 and 1981,<sup>10</sup> the conclusive presumption is

not applicable, and the husband's paternity may be challenged by blood-test evidence (§ 621(b)) in two circumstances—by the husband (§ 621(c)); and by the mother if the child's biological father has filed an affidavit with the court acknowledging paternity of the child (§ 621(d)).<sup>11</sup> Thus, the husband may raise the question of paternity alone, but neither the mother nor the biological father may do so except jointly.

By denying him a hearing to establish and effectuate his liberty interest in his relationship with his daughter, California has denied to appellant "due process of law—using that term in its primary sense of an opportunity to be heard and to defend [his] substantive right." *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678 (1930) (Brandeis, J.). "Before a person is deprived of a interest, he must be afforded opportunity for some kind of a hearing \* \* \*," *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972), because "the right to be heard before being condemned to suffer grievous loss of any kind \* \* \* is a principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). In short, "[a] fundamental requirement of due process is 'the opportunity to be heard.'" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

One corollary of this constitutional principle is "that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Vlandis v. Kline*, 412 U.S. 441, 446 (1973). In *Vlandis*, the Court declared unconstitutional, under the Due Process Clause of the Fourteenth Amendment, a state statute mandating an

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<sup>11</sup> Such a challenge would be brought on by notice of motion for blood tests which must, under both (c) and (d), be raised not later than two years after the child's birth.

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<sup>10</sup> See *Estate of Cornelious*, 35 Cal.3d 461, 465, 198 Cal.Rptr. 543, 546, 674 P.2d 245, 248, appeal dismissed, 466 U.S. 967 (1984).

irrebuttable presumption of nonresidency for the purposes of qualifying for reduced tuition rates at a state university. The Court said:

[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. [412 U.S. at 452.]

*Vlandis* followed, among other precedents (see 412 U.S. at 446-447), *Stanley v. Illinois*, *supra*. In *Stanley*, after holding that a man has a liberty interest "in the children he has sired and raised," 405 U.S. at 651, this Court went on to decide that Stanley had been deprived of that interest without due process of law by Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children. Because of that presumption, the statute required the state, upon the death of the mother, to take custody of all children born of parents who were not married to each other, without providing any hearing on the father's parental fitness. The state sought to defend that presumption by the argument "that Stanley and all other unmarried fathers can reasonably be presumed to be unqualified to raise their children." *Id.* at 653. This Court disagreed:

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would

have been furthered by leaving custody in him. [40 U.S. at 654-655 (footnote omitted).]

The irrebuttable presumption established by § 621 of the California Evidence Code—that a child born to a married woman who is cohabiting with her husband is the child of the husband unless the latter is impotent or sterile—is no more "necessarily or universally true" as a factual matter, *Vlandis*, 412 U.S. at 452, than the presumptions which were struck down in *Stanley* and *Vlandis*.<sup>12</sup> Nor, given the present day technology of blood tests, is the state without "reasonable alternative means," *id.*, for determining the identity of the actual father.<sup>13</sup> Like the presumption in *Stanley*, the effect of the California statute is to deny the biological father his liberty interest in "the companionship, care, custody and management" of his child. *Stanley*, 405 U.S. at 651. Therefore, under this Court's precedents, it unconstitutionally deprives him of due process of law.

The conclusive presumption cases do not stand alone in requiring this conclusion. By refusing to provide the opportunity to establish legally the factual and emotional reality of parental interest,

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<sup>12</sup> See also *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644-646 (1974). In *Weinberger v. Salft*, 422 U.S. 749 (1975), the Court distinguished *Stanley* and *LaFleur* in sustaining the constitutionality of the nine-month-duration-of-relationship social security eligibility requirements for surviving wives and stepchildren of deceased wage earners. "Unlike the claims involved in *Stanley* and *LaFleur*," said the Court, "a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status." *Id.* at 771-772 (emphasis added).

<sup>13</sup> The situation was otherwise when California first codified the presumption in 1872 as a rule of expediency based, in part, on the impossibility of establishing an absolute determination of nonpaternity when parentage was disputed. See Comment, "California's Conclusive Presumption of Legitimacy: *Jackson v. Jackson* and Evidence Code Section 621", 19 Hastings L.J. 963, 964 (1968).



the State has sought not simply to infringe upon that interest, but to end it. If the State prevails, it will have worked a unique kind of deprivation. [citations omitted]. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one. [*Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981).]

In *Lassiter*, a divided Court held that the Due Process Clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The Court subsequently observed, however, that "it was 'not disputed [in *Lassiter*] that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause.'" *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (quoting 452 U.S. at 37 (Blackmun, J., dissenting), and citing the Court's opinion in *Lassiter* and the dissenting opinion of Justice Stevens). As the Court added in *Santosky*:

The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). [455 U.S. at 753.]

B. The court below did not attempt to support the constitutionality of § 621 or its application against Michael H. on the basis that the presumption it establishes is a reasonable approximation of factual reality. Rather, the court below stated that the "conclusive presumption

is actually a substantive rule of law \* \* \*." J.S. B11 (citing *Kusior v. Silver*, 54 Cal.2d 603, 619, 7 Cal.Rptr. 129, 140, 354 P.2d 657, 668 (1960)).<sup>14</sup> This characterization is in accord with the current view of the California Supreme Court. See e.g., *Michelle W. v. Ronald W.*, 39 Cal.3d 354, 216 Cal.Rptr. 748, 703 P.2d 88 (1985), appeal dismissed, 474 U.S. 1043 (1986).

Adhering to *Michelle W.*, the court below proceeded to determine whether Michael H.'s (and Victoria D.'s) due process claims were valid by purportedly balancing their interests against the state interests which § 621 is said to serve. In *Michelle W.*, the court had said:

We have held that the issue of whether section 621 adequately protects a putative father's interest "must be resolved by weighing the competing private and state interests." In *Board of Regents v. Roth* (1972) 408 U.S. 564, 570, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548, the high court explained that "a weighing process has long been a part of any determination of the form of hearing required in particular situations.

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<sup>14</sup> In *Kusior*, the Supreme Court of California rejected the contention that giving effect to the conclusive presumption of § 621 "is not consistent with constitutional principles in that there is no reasonable relationship between the presumption and the fact sought to be presumed in a case in which there is scientific evidence to the contrary." The court responded that

appellant does not suggest that the Legislature has no interest in or power to determine, as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child. There are significant reasons why the integrity of the family when husband and wife are living together as such should not be impugned. A conclusive presumption is in actuality a substantive rule of law and cannot be said to be unconstitutional unless it transcends such a power of the Legislature. [54 Cal.2d at 618-619, 7 Cal. Rptr. at 139-140, 354 P.2d at 667-668.]

*Kusior*, which was decided long before *Stanley v. Illinois*, was a suit by the mother to establish paternity in a man other than the person who was her husband at the time of conception.

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..." (Emphasis in original.) [39 Cal. 3d at 360, 216 Cal.Rptr. at 751, 703 P.2d at 91 (citation omitted).]

However, this Court's decision in *Roth* does not justify the use of a balancing test in determining the constitutionality of § 621 here. For, regardless of the California courts' characterization of § 621, the reality is that the court below *applied* the conclusive presumption precluding Michael from establishing that he is Victoria's father "to terminate their relationship." J.S. B14.<sup>15</sup> And where, as here, the issue is not the *form* of hearing but whether a person is entitled to be heard at all, a balancing test is not applicable; the only issue is whether or not a "liberty" or "property" interest is at stake. If so, *Roth* establishes (as we note at the outset of this part of our brief), that the Due Process Clause requires that a hearing be held.<sup>16</sup> This distinction was carefully articulated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982):

As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party

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<sup>15</sup> The court below acknowledged that in *Michelle W.* the California Supreme Court far from applying § 621 to *terminate* an existing father-child relationship "left open the validity of section 621 as applied to a situation where the state is preventing the *establishment* of a relationship between a putative father and child." J.S. B14 (emphasis added).

<sup>16</sup> The sentence which the California Supreme Court quoted from *Roth* was the beginning of a comparison which reads in full as follows:

[A] weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake. See *Morrissey v. Brewer*, ante, p. 471, at 481. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property. [408 U.S. at 570-571 (emphasis in original, footnote omitted).]

the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that "*some form of hearing*" is required before the owner is finally deprived of a protected property interest. *Board of Regents v. Roth*, 408 U.S., at 570-571, n.8 (emphasis in original). And that is why the Court has stressed that, when a "statutory scheme makes liability an important factor in the State's determination . . . , the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing." *Bell v. Burson*, 402 U.S., at 541. To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. See *id.*, at 542.

On the other hand, the Court has acknowledged that the timing and nature of the required hearing "will depend on appropriate accommodation of the competing interests involved." [455 U.S. at 433-434 (footnotes omitted).]

Since it is established that Michael H. and other fathers similarly situated do have a liberty interest in their father-child relationship, their right to a hearing to vindicate that relationship cannot, consistently with the requirements of the Due Process Clause, be "balanced" away.

While stating that § 621 declares "a substantive rule of law," the court below did not specify what it considered that rule of law to be. When that rule is articulated, however, the sweeping breadth of § 621 as construed herein is immediately evident. That rule, simply put, is that *unwed fathers shall not be recognized as such, and shall not enjoy any of the rights of parenthood if the mother is married and cohabiting with her husband, unless the husband is impotent or sterile, or either the husband or the mother (joined by the father) chooses otherwise*. As the court below understood § 621

and applied it in this case, that provision overrides the father's interest even if he "has established an affectionate relationship with [the child] and has at times even contributed to her support." J.S. B16. The rule cuts off such a father's liberty interest in his relationship with his child without a hearing into the circumstances of the individual case. It therefore violates the father's rights under the Due Process Clause even if it is regarded solely as a rule of substantive law.

It is illuminating in this regard to compare the situations in *Roth* and *Logan* with the operation of § 621. Whereas the right to a hearing asserted in the earlier cases was based on "property" claims which were dependent on state law,<sup>17</sup> appellant's liberty interest is derived directly from the Constitution itself. Thus, the state could have adopted legislation which eliminated the property right at issue in *Logan*—a claim under the state's Fair Employment Practices Act; it would thereby have eliminated any due process right to a hearing on a claim of employment discrimination. 455 U.S. at 432-433. But the state may not simply eradicate a father's liberty interest in his relationship with his daughter; it likewise may not accomplish the functional equivalent by denying him a hearing to vindicate that interest.

The state's interest in "the integrity of the family unit," J.S. B11, B15-B16, does not validate § 621. As we have shown above, the question whether a person has a right to *some* form of hearing to protect the liberty interest is not subject to any balancing test. Moreover, even if it is viewed as a substantive regulation, § 621

<sup>17</sup> See *Logan*, 455 U.S. at 430-431; *Roth*, 408 U.S. at 576-578. In *Roth*, the Court held that the respondent teacher did not have a property right in his continued employment, and therefore concluded that he was not entitled to a hearing concerning his dismissal. Cf. *Perry v. Sindermann*, 408 U.S. 593, 596-603 (1972). *Roth* also concluded that no liberty interest of the teacher was affected.

may not constitutionally be applied to override a liberal interest without a "showing [of] a subordinating interest which is compelling." Cf. *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); *Carey v. Population Services International*, 431 U.S. 678, 685-686 (1977). Such a showing—indeed, even the minimal showing that the state interest in family stability would be furthered at all by depriving the father of any relationship with the child—depends on the existence of a stable family relationship between the mother and her husband. It is, to say the least, far from "necessarily or universally true in fact"<sup>18</sup> that the family relationship between a husband and his wife is stable where the mother has a child by another man, and that man, the father, has assumed and exercised responsibility for the care of the child and established a personal relationship with him or her. Therefore, the Constitution requires that the stability of the family be established in every case in which it is asserted as a reason for overriding the father's liberty interest.<sup>19</sup> And, too, there must be a hearing to determine whether the father's liberty interest and the state interest can be accommodated, for example, by recognizing the true father's paternity and according him visitational rights. Nevertheless, as construed below, § 621 categorically overrides the father's liberty interest in his relationship with his child without regard to what a hearing would show as to whether the assertedly countervailing state interest is truly implicated, and if so, how that interest and that of the father can best be effectuated.

In disposing of appellant's interests, the court below observed: "Gerald D. and Carole D. are now living together with Victoria D. and their new baby boy as

<sup>18</sup> *Vlandis v. Kline*, *supra*, 412 U.S. at 452.

<sup>19</sup> Of course, in those cases where the person who claims paternal rights has not established such a relationship with the child, he has without a constitutionally protected interest, and § 621 may have a constitutionally valid field of operation.

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family unit. The state's interest in maintaining that family is considerable." J.S. B16. Since federal constitutional rights are involved, that analysis is utterly inadequate. To begin with, the court implicitly assumed that the present relationship there described is the pertinent one for evaluating Michael H.'s rights, and that this relationship is stable. Neither of these assumptions can survive constitutional scrutiny.<sup>20</sup>

Moreover, the court does not find that the state's interest in "maintaining that family" would be adversely affected if Michael H. were to be accorded the benefits of fatherhood, or inquire whether the state's asserted interests and those of the appellant can, in some way, be accommodated. The Due Process Clause does not permit a court to destroy the father's interest in his relationship with his child without making such a determination, and requires that no such determination be made except after a hearing directed to that issue.

The court below further stated that because Carole D. and Gerald D., who have custody of Victoria D., oppose Michael H.'s action, "there are competing *private* interests" as to parental relationships with the child. J.S. B16-B17 (emphasis added). But these "private interests" cannot, by their mere assertion, override the father's constitutional interest in his relationship with his daughter. This is so even though Carole D. also has a liberty

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<sup>20</sup> Apparently because of the perceived requirements of § 621, the court ignored the abundant evidence—placed in the record before the trial court dismissed the case—which demonstrated the instability of the D.s' marriage. See Statement pp. 2-5, *supra*. Yet, the court below took note of and was influenced by the birth of a son to the D.s shortly before the hearing in that court, an event which was announced by the husband's attorney at oral argument.

We also submit that the Constitution does not permit a father in appellant's position to be divested of his interest in the child which he has fathered by the circumstance that the mother has produced another child with her husband while his parental rights are in litigation.

interest in *her* relationship with Victoria D. Due process requires that a resolution of these interests be made after a full hearing on all pertinent issues. See especially, *Armstrong v. Manzo*, *supra*, where the father's due process right to a hearing was vindicated despite the opposition of the child's mother, his former wife. See 380 U.S. at 546-548.

A further state interest which the court below identified as justifying § 621 is that its "rule protects the innocent child from the social stigma of illegitimacy," J.S. B11, and the court invoked that theory in rejecting Victoria D.'s due process claim. *Id.* at B18. We anticipate that Victoria's constitutional position will be fully presented in the brief of her guardian *ad litem*; but we comment briefly on that portion of the court's decision because, although the court did not expressly advert to the "stigma" rationale in deciding against Michael H., it appears to have affected the result as to him as well. The court relied on the "stigma" theory in determining that the application of § 621 would be in Victoria D.'s welfare, *id.* at B17-B18, and the court's view as to what was in Victoria's welfare was a factor in its decision against Michael H. as well. *Id.* at B17.

We submit that the purported state interest in protecting Victoria D. against "social stigma" is not tenable even as a makeweight to override the interests of either appellant herein. To begin with, the Court of Appeals rationale is contrary to the most recent apposite decision of the Supreme Court of California, which explicitly rejected an argument "that the 'stigma' of illegitimacy should be considered in determining the constitutionality of section 621." *Michelle W. v. Ronald W.*, 39 Cal.3d at 362 n.5, 216 Cal. Rptr. at 752 n.5, 703 P.2d at 92 n.4.

In any event, this rationale is wholly unsound. *Palmieri v. Sidoti*, 466 U.S. 429, 432 (1984), provides an apt analogy. There, the Court reversed a state court decision which had divested a natural mother of the custody of

her infant child because of her remarriage to a person of a different race. The state court had reasoned as follows:

*"This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come."* [466 U.S. at 431, this Court's emphasis.]

This Court forcefully rejected the notion that a child's welfare could be promoted by a court giving constitutional force and effect to private prejudices.

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. \* \* \*

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. [466 U.S. at 433 (footnote omitted).]

The Court of Appeal's "social stigma" rationale in this case is likewise indefensible because it gives effect to the private prejudice against illegitimate children. Cf. *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Levy v. Louisiana*, 391 U.S. 68 (1968). The *Palmore* precedent aside, it is almost incredible that the court below should have given appreciable weight to the "stigmatization" concern in determining that Victoria D.'s interests would be furthered by depriving her of the affectionate relationship which she and her father have developed.

The court's determination concerning Victoria D.'s welfare—and the consequent rejection of the appellants' due process claims—is constitutionally insupportable for a more fundamental reason. That determination was the product of the presumption under § 621 rather than a hearing addressed to all the circumstances affecting Victoria's welfare. It is, therefore, constitutionally invalid under the authority of *Stanley v. Illinois*, *supra*. What the Court held in *Stanley* is equally apposite here:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care [or other issue pertinent to the child's welfare], when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. [405 U.S. at 656-657.]

### III. The California Statute Violates the Equal Protection Clause Because It Invidiously Discriminates Against Biological Fathers

As the Court taught in *Stanley v. Illinois*, 405 U.S. at 651, "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)." Therefore, in determining whether § 621 of the California Evidence Code as construed and applied herein violates the Equal Protection command of the Fourteenth Amendment, the operative standard is that set forth in *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978): "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by suf-

ficiently important state interests and is closely tailored to effectuate only those interests.”

Analysis of § 621 under this standard begins by identifying the classification it creates, and the fundamental rights with whose exercise it interferes: California Evidence Code § 621 treats fathers of children whose mother is married to and cohabiting with another man (if he is not sterile or impotent) differently from other parents. By operation of the statute, such a father is denied a hearing at which he is given the opportunity to prove that he is in fact the biological father of the child, and at which he may vindicate his parental rights in his relationship with the child, and is thereby deprived of his legal status as father and of all parental rights.

In denying the father of a child a hearing in which he can assert and vindicate his parental interests, although he has exercised his parental responsibility to that child, § 621 is, as we have discussed earlier, indistinguishable from the statute which was struck down in *Stanley v. Illinois*. In *Stanley*, after his children were made wards of the state upon their mother’s death, the father was categorically denied a hearing on his fitness as a parent because, as an unwed father, he was conclusively presumed unfit under the Illinois statute. 405 U.S. at 649-650. This statutory conclusive presumption, operating to deny “a hearing to Stanley and others like him while granting it to other Illinois parents,” was held to be “inescapably contrary to the Equal Protection Clause.” *Id.* at 658. So too, § 621 denies appellant, Michael H., and other fathers similarly situated, a hearing in which they can establish their paternity and effectuate their parental rights.

Section 621 violates the Equal Protection Clause also because it constitutes gender-based discrimination like the statute which was struck down in *Caban v. Mohammed*. In *Caban*, § 111 of the New York Domestic

Relations Law required the consent of the mother to the adoption of a child born out of wedlock, but did not require the consent of the child’s father. 441 U.S. at 389. The Court ruled that § 111 was an unconstitutional discrimination because it treated unwed fathers and unwed mothers differently—by allowing the mother an absolute veto over the adoption of their children and by not giving that same protection to fathers who “may have a relationship \* \* \* fully comparable to that of the mother.” *Id.* at 389, 394. The effect of the statute was to discriminate unreasonably between the parents by making an undifferentiated distinction that bore no “substantial relationship to the State’s asserted interests.”

In this case, just as in *Caban*, § 621 unjustifiably discriminates between biological parents. Under its terms the right of a biological mother to remain a parent is never open to question without access to a full panoply of due process protections. On the other hand, a biological father is deprived of parental rights without any determination of his fitness and precluded from ever asserting parental rights notwithstanding his established relationship with the child.

Section 621 cannot be sustained on the theory that it is supported by sufficiently important state interests and is narrowly tailored to serve only these interests. *Id.* *Zablocki, supra*. Indeed, with respect to the objectives asserted by the court below, it is significantly both overinclusive and undersinclusive.

The state’s interest in preserving the stability of the family will be served by § 621 only if the family relationship between the husband and wife and the mother and child is in fact stable, because § 621 precludes any hearing which challenges the husband’s paternity and thereby cuts off at the threshold any inquiry into the stability of that family. Thus, § 621 can terminate a father’s rights without advancing any state interest in family stability. With respect to the state’s interest in the welfare of the child, § 621 is actually counterproductive because it forecloses a hearing at which the true welfare of the child

can be determined on the basis of all pertinent considerations—including, for example, whether the child's best interests would be "furthered by" preserving its relationship with its own father. Cf. *Stanley*, 405 U.S. at 654-655.<sup>21</sup>

Section 621 undermines the state's articulated goal in other circumstances as well. For example, if Carole D. had divorced Gerald D. after the child's birth, married Michael H. and raised the child with him, § 621 could prevent Michael H. from being adjudicated the child's father, even if he were the child's natural father as well as being the man in her family unit. Gerald would be considered the child's legal father and would be allowed to participate—in whatever fashion he might desire—in the Michael, Carole and Victoria family unit. That was the result in *Michelle W. v. Ronald W.*, *supra*.<sup>22</sup>

It is also apparent that § 621 is underinclusive by *permitting* the disruption of family stability. That provision authorizes the husband unilaterally, (or the mother, together with the unwed father), to raise the question of biological paternity. Such an action could be equally disruptive to family stability as an unwed father's individual request to be judicially declared a parent. So too,

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<sup>21</sup> For the reasons stated earlier, we submit that protecting a child against the "social stigma" of illegitimacy is not a state interest which can be asserted to override parental rights. We note, however, that while § 621 is effective to prevent a child from learning the identity of her true father through the means of a paternity hearing, it denies parental rights to all fathers *even if the child already knows that the man to whom her mother is married is not her father*. That is likely to be the result in most, if not all, situations where the real father has developed a relationship with the child which is sufficiently close to be a liberty interest under *Lehr* and its antecedents. See Part I, *supra*.

<sup>22</sup> In that case, the biological father had not established a relationship with his child prior to the litigation. See p. 20, n.15, *supra*. Under the interpretation of § 621 by the court below, however, that would make no difference.

§ 621 specifically permits the natural father to bring issue either the sterility or the impotence of the husband. The resulting disruption is surely no less than if he were to assert his paternity without impugning the husband's potential to sire a child. It is also clear that the statutory exceptions were framed without regard to the interest of the children who would inevitably be affected by operation of § 621.<sup>23</sup>

Finally, the inclusions and exclusions on the face of § 621 take no account whatsoever of the fundamental difference between unwed fathers who have demonstrated a full commitment to the responsibilities of parenthood sufficient to vest them with a liberty interest, and other unwed fathers, who have developed no relationship with the child and exercised no responsibility whatsoever for the child. Rather, it classifies fathers only according to whether the mother is or is not married and cohabiting with her husband. Thus, a father like Michael H. is deprived of parental rights without any hearing, whereas nothing in § 621 prevents any man who has had a child with an unmarried woman from insisting on a hearing to establish his paternity and to assert his parental rights, even if he has previously taken no interest in the child. The statute which so arbitrarily deprives fathers of their liberty interest "is inescapably contrary to the Equal Protection Clause." Cf. *Stanley*, 405 U.S. at 658.

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<sup>23</sup> We note also, for whatever it may be worth, that each of the statutory exceptions disserves any interest which the state might assert in protecting the child against the "stigma" of illegitimacy.

X

No. 87-5840

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In The  
**Supreme Court of the United States**

October Term, 1987

—————o—————  
EDWARD McNAMARA,

*Appellant,*

v

COUNTY OF SAN DIEGO  
DEPARTMENT OF SOCIAL SERVICES,

*Appellee.*

—————o—————  
ON APPEAL FROM THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION ONE

—————o—————  
**JURISDICTIONAL STATEMENT**

—————o—————  
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**QUESTIONS PRESENTED****I**

IS IT A DENIAL OF EQUAL PROTECTION TO TERMINATE THE PARENTAL RIGHTS OF AN UNWED FATHER WHO PROMPTLY MANIFESTED A SIGNIFICANT PARENTAL INTEREST IN HIS CHILD AND WOULD BE A GOOD PARENT SOLELY BECAUSE IT IS IN THE BEST INTERESTS OF THE CHILD?

**II**

IS IT A DENIAL OF EQUAL PROTECTION TO TERMINATE THE PARENTAL RIGHTS OF AN UNWED FATHER WITHOUT A FINDING ADVERSE TO HIS PARENTING ABILITY WHEN (A) OTHER FATHERS MUST BE FOUND TO HAVE NO INTEREST IN OR ABILITY FOR PARENTING BEFORE THEY LOSE THEIR RIGHTS, AND (B) UNWED MOTHERS DO NOT LOSE THEIR RIGHTS UNDER SIMILAR CONDITIONS?



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## OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, which appears in the separate Appendix submitted herewith, p. 1a, was reported at 191 Cal.App.3d 786, but was ordered not to be published in the Official Reports by the California Supreme Court, p. 69a.

The opinion of the California Supreme Court, which applied as law of the case, appears in the Appendix, p. 36a, held that the "best interests of the child" test applied, and was constitutionally sound, and remanded the case for further proceedings. It was reported at 37 Cal.3d 65, as *In re Baby Girl M.*

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## GROUND FOR JURISDICTION

### 1

#### THE JUDGMENT APPEALED

Edward McNamara appeals from the final judgment of the Court of Appeal of the State of California, dated April 30, 1987, p. 1a. The judgment terminated all of his parental rights as to a child born out of wedlock, but as to which he had proved paternity and sought to raise as his own soon after birth, within the statutory time for seeking custody.

The California Supreme Court had previously ruled in the case, as law of the case, and the Court of Appeal declined to reconsider, that California's custody test of "best interests" of the child controlled paternity suit

claims by father's seeking to retain their parental rights. That test is that a parent is entitled to custody unless custody with the parent would be detrimental to the child. The court also ruled that the best interests/detriment to the child test is the constitutional equivalent of proving unfitness of the unwed father to have parental rights.

No appeal was filed previously because the judgment terminating parental rights was not final; it was subject to the unwed father, appellant, proving he was the best person to have custody so he could retain his rights.

A timely petition for review was denied July 30, 1987, and this appeal is being docketed within 90 days of that denial.

## 2

### STATUTORY BASIS FOR JURISDICTION

Jurisdiction for appeal is based on 28 U.S.C. § 1257(2).

The California Supreme Court and Court of Appeal ruled that California Civil Code, section 7017, subdivision (d), as applied, was not repugnant to the United States Constitution, Amendment XIV, as it did not deny appellant equal protection of the laws or due process of law.

Appeal jurisdiction lies where the state court has actually decided that a state statute as applied is not repugnant to the United States Constitution. *Charleston Fed. S. & L. Assn. v. Alderson*, 324 U.S. 182, 185-186 (1945); *Edwards v. Elliott*, 21 Wall. (88 U.S.) 532, 550-551 (1874); accord, *Allenberg Cotton Co. v. Pittman*, 419 U.S. 18, 22 (1974); *Poulos v. New Hampshire*, 345 U.S. 395, 403 (1953).

Alternatively, the court should treat the papers as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103, and grant the writ. (Rules 17.1 (b) (c); cf., *Kulko v. Superior Court*, 436 U.S. 84, 90, n. 4 (1978).

—o—

### CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent California statutes are in the Civil Code. Section 4600, Appendix, p. 70a, covers child custody in general and sections 7004, p. 70a, 7006, p. 71a, and 7017, p. 72a, are part of the Uniform Parentage Act.

—o—

### STATEMENT OF THE CASE

Edward's daughter, Katie, was born July 18, 1981. He and the mother had dated during the fall of 1980, but did not see each other after November. Edward did not know of the pregnancy nor of Katie's birth until after August 1, 1981. The mother told him after Katie had been placed in a foster home. The mother wanted Katie adopted by strangers, and she wanted Edward not to have any contact with his daughter.

Not knowing that Katie was to be relinquished for adoption, Edward explored possible placements. At first, because he had two sons with him, he suggested his daugh-

ter be placed with his friends. On August 10th, he learned the mother was giving Katie up for adoption. Fearful he would never see her again, he asked for custody.

The statute allowed him 30 days to seek custody and assert parentage [Cal. Civil Code, § 7017, subd. (d), p. 72a] He acted well within that time and promptly under the circumstances.

At the initial hearing in December of 1981, the trial court found that Edward was the biological father and a "good parent [who] can provide a good, loving home for the child." But the court found that the best interests of the child would be served by giving custody to the prospective adoptive parents who had cared for her a total of five months. It was felt she had "bonded" with them and could not form a relationship with her father.

The California Supreme Court reversed, holding that unwed fathers, who are not presumed fathers, Cal. Civil Code, § 7004, sub. (a), p. 70a, are entitled to the parental preference presumption, Cal. Civil Code, § 4600, p. 70a. Custody may not be awarded to a nonparent unless custody with a parent would be detrimental to the child. [p. 39a-42a] The court, however, remanded the case for further proceedings to determine if the passage of time had changed circumstances so that Edward was no longer entitled to custody. [p. 50a]

Further hearing was held in February of 1985. No evidence showed Edward other than a good and loving parent who can provide a good home. [p. 6a] All parental rights were terminated, however, because Katie had been with the prospective adoptive parents for over four years and removing her would be detrimental. The Court

of Appeal affirmed, finding that there was substantial evidence to support the finding of detriment to the child, the only issue left open by the California Supreme Court. [pp. 6a-7a]

*At all times, Edward has been a good and loving father who has manifested significant parental interest.*

Edward sought custody shortly after learning of Katie's birth. He has been found to be a good parent.

At the first hearing, there was no evidence even of detriment to the child if removed from the foster parents after five months. [p. 49a] The trial court found he was a good parent who could provide a loving home. [p. 37a]

That evidence did not change at the second hearing. [p. 6a] Indeed, the trial court encouraged the adoptive parents to make Edward part of Katie's life. [p. 5a] There is no way to enforce visitation after termination of parental rights, of course, and visitation pending appeal was denied. There has been no contact since shortly after birth.

Edward is not an unfit parent and promptly acted to assert his parental rights and assume his parental duties. Katie's birth.

*California applied a best interest test to terminate parental rights of an unwed father.*

Under California Civil Code, section 7017, subdivision (d), p. 72a, as applied by the California courts, the test for terminating parental rights of unwed fathers who are not presumed fathers, Cal. Civil Code, § 7004, p. 70a, is what is in the best interests of the child. [p. 39a]

That is the result. There is a parental preference which must be overcome by a showing it would be detrimental to the child to give custody to the parent. [pp. 48a-49a] The statute has been amended so that there no longer is even that parental preference for fathers not presumed fathers. It now is a straight best interest test. [p. 13a, n. 7] If custody with someone else would be better for the child, the father loses, as Edward did.

The courts rationalized this by saying that the U. S. Supreme Court has never ruled on the issue, having reserved the question. [pp. 45a-48a] "The Supreme Court has not directly considered a fact situation similar to ours, where a mother has relinquished a newborn child and refused the father any contact. Thus the court has not addressed whether the natural father's parental rights may be terminated by only a best interests standard, or if a further finding of detriment is required." [p. 47a]

The court refused to hold that a finding of unfitness is required or even that the same standards apply to Edward as apply to other fathers, presumed fathers, which includes every one the mother lets have contact. Cal. Civil Code, § 7004, p. 70a. Other parents must be found to have abandoned the child or otherwise demonstrate an inability or lack of interest in their child. Cf., Cal. Civil Code, § 232. The unwed mother's consent to adoption is always required. Cal. Civil Code, § 7017, subd. (d), p. 72a.

There is a significant difference, too, between loss of custody and termination of parental rights. Custody may be modified and visitation allowed. Cf., Cal. Civil Code, § 4600. [p. 70a] Even if the foster parents got custody be-

itation the trial court thought he should have and encouraged it. Possibly, he could get custody; if not now, later.

At least he would have a relationship—and still could—during childhood and beyond.

Now those sweet and memorable moments, those irreplaceable moments, that companionship, are gone forever.

A parent deprived of parental rights also loses substantial legal rights: the right to earnings during minority, the right to inherit, and the right to be supported in old age, if necessary.

The losses are significant and based solely on the best interest test.

The California Supreme Court ruled that a finding of detriment and best interests is the constitutional equivalent of a finding of unfitness; at least it will be until this Court directs otherwise. [p. 47a] That, of course, is logically absurd. One describes the father and the other factors beyond his control, having nothing to do with the father.

After remand, the Court of Appeal believed the constitutional issue was foreclosed by the California Supreme Court [p. 6a, n. 2-7a], and the California Supreme Court denied review. [p. 68a]

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## REASONS QUESTIONS PRESENTED ARE SUBSTANTIAL

### I. PARENTAL RIGHTS ARE SUBSTANTIAL AND CONSTITUTIONALLY PROTECTED

The right to parent one's children has been vindicated in a long line of cases. It is a fundamental right. *Prince*

*v. Massachusetts*, 321 U.S. 158, 166 (1944). The rights of natural parents have also been vindicated, even though the child is born out of wedlock. *Lehr v. Robertson*, 463 U.S. 248, 257-258 (1983); *Stanley v. Illinois*, 405 U.S. 645 (1972).

## II. THE ISSUE OF TERMINATING PARENTAL RIGHTS SOLELY IN THE BEST INTERESTS OF THE CHILD HAS BEEN RAISED AND RESERVED BY THIS COURT

As the California Supreme Court observed [p. 45a, n.8], in *Caban v. Mohammed*, 441 U.S. 380, 394, n.11 (1979), this Court noted that a newborn child was not involved. The same case also reserved whether a State is "barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit." *Id.*, at 394, n.16.

In *Santosky v. Kramer*, 455 U.S. 745, 760, n.10 (1982) however, this Court doubted that a parental right termination based on the best interests of the child could stand:

"The Family Court Judge in the present case expressly refused to terminate petitioner's rights on a 'non-statutory, no-fault basis.' App. 22-29. Nor is it clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness. See *Quilloin v. Walcott*, 434 U.S. 246, 255, 54 L. Ed 2d 511, 98 S. Ct 549 (1978) . . . "

Other state courts addressing the issue have held unconstitutional statutes permitting terminations without a showing of unfitness, abandonment, or substantial neglect. *In re J. P.*, 648 P.2d 1364, 1375[9] (Utah 1982); *In re Adoption of Baby Boy C.*, 644 P.2d 150 (Wash.App. 1982). Those are California's statutes—old and new versions—and they are invalid.

The question is squarely presented.

## III. A CAPABLE PARENT WHO MANIFESTS SUBSTANTIAL PARENTAL INTEREST IS ENTITLED TO RETAIN HIS PARENTAL RIGHTS

Edward acted promptly and did everything he could to retain his parental rights and get custody—he still is. The courts agree that he should have been given custody at the original hearing, five months after Katie's birth. [pp. 2a, 12a, 18a, 24a, 34a, 49a] It may not be appropriate to give him custody now, immediately, but that is no reason to end parental rights or forbid contact.

"When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he 'act[s] as a father toward his children.' "

*Lehr v. Robertson, supra*, 463 U.S., at 261.

In *Stanley v. Illinois*, 405 U.S. 645, 657 (1972) and *Santosky v. Kramer*, 455 U.S. 745, 760, n.10 (1982), this Court held that unwed fathers are entitled to a hearing to determine if they are capable parents who have manifested a significant parental interest.

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

ship and make uniquely valuable contributions to the child's development."

*Lehr v. Robertson*, *supra*, 463 U.S., at 262.

At the least, to terminate rights, there ought to be a finding there was no significant relationship *and* that the father was not prevented from forming such a relationship. See, White, J., dissenting, *Lehr v. Robertson*, *supra*, 463 U.S., at 271, n. 3.

Edward was prevented from any relationship by the mother and the state agency, the adoption department. He proved he is a capable parents and showed significant interest by seeking custody—total responsibility. Still, he lost *all* parental rights. His parental opportunity was denied despite carrying all his burdens of proof.

The issue is squarely raised.

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### CONCLUSION

Reserved and significant issues are squarely presented. The California Supreme Court refused to address them until this Court does so expressly, but the statute was held valid. The new statute is even more directly a "best interests" test. Probable jurisdiction should be noted.

Respectfully submitted,

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**CERTIFICATE OF MAILING**

I hereby certify that a true copy of the foregoing document was mailed on the 14 day of July, 1988 to the following:

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