NEW YORK'S UNCONSTITUTIONAL TREATMENT OF UNWED FATHERS OF CHILDREN IN FOSTER CARE

CHRIS GOTTLIEB AND MARTIN GUGGENHEIM[∞]

ABSTRACT

Over the last 25 years, the United States has pursued a policy of terminating parent-child relationships at an unprecedented rate. Given the fundamental constitutional interests at stake and the child welfare system's shameful history of destroying low-income families of color, any mechanism that contributes to the break-up of families should be carefully scrutinized. This Article challenges one such mechanism, arguing that New York's practice of making unmarried men's parental rights to their children in foster care contingent on paying child support undermines the goals of child welfare policy and is unconstitutional. The practice of requiring monetary payments from unmarried fathers, but not from mothers or married fathers, is based on outdated stereotypes and is, as Justice Ruth Bader Ginsburg called an analogous instance of sex discrimination, "stunningly anachronistic."

The blatant sex discrimination of the rule on unwed fathers of children in foster care has been masked by the fact that it employs a rubric developed in a different context. The Supreme Court has addressed fathers' rights to prevent the adoption of their children only in the private adoption context, where the constitutional analysis has allowed sex-based discrimination when mothers and fathers' interests are at odds and they are differently situated. This Article explains how the constitutional interests at stake are very different in the public adoption context, in which it is the state, rather than another parent, that seeks to re-order family relationships.

New York has taken advantage of a statutory provision that allows the state to put foster children up for adoption over the objection of their unmarried fathers—without even a hearing on the father's fitness as a parent or the father's relationship with his child—solely because he failed to pay child support. This rule is an exception to the general requirement that children can only be adopted if their parents consent or if the parents' rights are terminated based on clear and convincing evidence. It is important to understand and end this violation of the Equal Protection Clause, and this analysis illustrates the broader need to consider

---

∞ Chris Gottlieb is Adjunct Professor of Clinical Law and Martin Guggenheim is Fiorello LaGuardia Professor of Clinical Law at New York University School of Law; they are Co-Directors of the NYU Family Defense Clinic. We would like to thank Jonathan Steinberg for unusually able research assistance and Heather Stoloff for helpful comments on an earlier draft. We would also like to express our appreciation to Amy Mulzer for suggestions on an earlier draft and, more importantly, for being the change in child welfare appellate practice.

the different interests at play when importing private family law principles, particularly constitutional analysis, into public family law.

I.
INTRODUCTION

New York law makes unmarried men's parental rights to their children in foster care contingent on paying child support. This approach is directly at odds with the state's child welfare policy goals. It is also unconstitutional.

The blatant sex discrimination of the rule for unwed fathers of children in foster care has been masked by the fact that it employs a rubric developed in a different context. The Supreme Court has addressed fathers' rights to prevent the adoption of their children only in the private adoption context, where adoption is sought by private parties. In contrast, public adoptions, which involve the adoption of children from foster care, result from state action. When the state is seeking to impose its power to re-order family relationships, the constitutional interests at stake are very different than those in play in the private adoption context, where the constitutional analysis has allowed sex-based distinctions in the rules governing parents' rights. Once the differences between state interests in public and private adoption law are identified, it becomes apparent that these differences

significantly affect equal protection analysis of the treatment of unwed fathers.[1] It also becomes clear that certain practices that have become accepted in child welfare cases cannot withstand equal protection scrutiny.

The United States today pursues adoption of children from foster care at an unprecedented rate.[2] The trend toward increasing adoptions of children in foster care was stimulated by the Adoption and Safe Families Act of 1997 (ASFA), which provides financial incentives to states for increasing their foster care adoptions and penalties for failing to move toward adoption when family reunification is not achieved on a strict timeframe.[3] In order for children to be adopted from foster care, either any living parents must surrender their parental rights or courts must enter orders terminating those rights over the parents'

1. It has often been noted that family law operates in two distinct universes, with remarkably different laws applied to privileged, wealthy families on the one hand and low-income families on the other. *See, e.g.*, Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 262 (1964). Many commentators have noted in particular the distinction between the field of traditional family law, which is principally concerned with private disputes among family members, and child welfare law, which is principally concerned with protecting children through involuntary intervention in family life by state agencies alleging parental unfitness. *See, e.g.*, *id.*; Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 118–19, 141–42 (2013); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 368 (2002). Some, including the authors here, have argued that differential treatment in the two realms should, at a minimum, raise questions about whether it is just to impose different rules and principles in public family law than in private family law and that there is often reason to suspect that the differences reflect racism and other indefensible inequities. *See, e.g.*, Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997*, 11 COLUM. J. RACE & L. 711, 726 (2021); Chris Gottlieb, *Improving* Res Ipsa Loquitur *Doctrine in Child Abuse Cases: A Step Toward Racial Justice*, 25 J. GENDER, RACE & JUST. 411 (forthcoming 2022). The point in the text is that it is also important to recognize that at times it is appropriate—required even—to assess legal interests differently when the state, rather than a private actor, pursues a legal position, and that therefore differing legal rules in the public and private realms sometimes are justified.

2. There are growing, compelling calls in the academic literature and from activists in directly impacted communities to end the trend toward favoring involuntary adoption. *See, e.g.*, Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins, Kelis Houston, Joyce McMillan, Vonya Quarles, Lisa Sangoi, Erin Miles Cloud & Adina Marx-Arpadij, *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861 (2021) (discussing termination of parental rights from an abolition perspective); Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 13–22 (2015) (discussing the potential benefits of guardianship, and particularly kinship guardianship, over adoption); *see generally The Harm of the Adoption and Safe Families Act*, FAM. JUST. & INTEGRITY Q. (Fam. Just. & Integrity Works, Lakewood, N.J.), Winter 2022, https://publications.pubknow.com/view/752322160/2/ [https://perma.cc/7V3N-HCQW] (discussing the harms created by the Adoption and Safe Families Act and advocating for kinship guardianship over adoption).

3. Pub. L. No. 105-89, § 103(a)(3), 111 Stat. 2115, 2118 (1997) (codified at 42 U.S.C. § 675(5)(E)); § 201, 111 Stat. at 2122–25 (codified at 42 U.S.C. § 673b); *compare* U.S. DEP'T OF HEALTH & HUM. SERVS., AFCARS REPORT: FINAL ESTIMATES FOR FY 1998 THROUGH FY 2002 (12) (2006), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport12.pdf [https://perma.cc/ALD7-SHXK] (documenting approximately 37,000 adoptions from foster care in the United States in 1998) *with* U.S. DEP'T OF HEALTH & HUM. SERVS., AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020—NO. 27 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf [https://perma.cc/2V3S-U8WN] (documenting between approximately 54,000 and 66,000 adoptions annually from foster care between 2015 and 2019).

opposition. As New York has increased the number of foster children it puts up for adoption, the state has taken advantage of a statutory provision that allows the state to adopt out children in foster care over the objection of their unmarried fathers solely because they failed to pay child support.[4] This rule is an exception to the general requirement that parents must surrender their rights or have their rights terminated by courts before their children can be adopted. As we shall see below, men often only learn at the end of lengthy foster care cases that, though they are the biological parents and have been understood and treated as such by all parties involved in the cases, they do not count as "parents" for legal purposes. This is typically the first time these fathers are informed that failure to pay child support—which they were never ordered by courts or even asked to pay—is fatal to any claim of parental rights. No such rule is applied to mothers. This is not a subtle form of discrimination resulting from implicit bias. This is formal, explicit, sex discrimination in statute and case law long past the time the Supreme Court has held that such discrimination violates the Constitution.

In the private adoption realm, where mothers and fathers sometimes have competing interests in determining when their children can be adopted—because one may favor and one oppose an adoption—the case law has developed to address those competing interests. In analyzing such situations, the Supreme Court has established the constitutional parameters circumscribing when states may prefer one of those sets of interests to the other. In certain cases, mothers and fathers have been found to be sufficiently differently situated to justify treating them differently at times when doing so furthers the state's legitimate interests in benefitting children.

When foster children are freed for adoption through involuntary termination of parental rights, however, the competing interests that are litigated are those of the state against the interests of each of the parents. When a father and mother's interests are not at odds with each other, but rather at odds with the state's goal in the litigation, there is not the same justification for treating parents who are men differently from parents who are women. As we shall show, the way in which New York law treats men differently from women in this context cannot survive constitutional review. In these circumstances, there is no argument that empowering women over men serves the state's interest in benefitting the children involved. Yet New York treats fathers and mothers' rights and duties very differently when deciding whether their children may be adopted from foster care over their objection.

Despite clear Supreme Court prohibitions on laws based on gender-role stereotypes[5] and widespread agreement that the child welfare system should do

4. *See* N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2021).

5. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996); Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

more to involve fathers in the lives of their children,[6] child welfare agencies in New York State routinely rely on this discriminatory approach to cut fathers out of their children's lives.[7] Understanding why this happens so long after sex discrimination has been recognized to violate the Equal Protection Clause is important to ending this practice in New York. More broadly, we hope that this analysis will encourage child welfare practitioners to more regularly consider the different interests at play in private family law and public family law. We wish to demonstrate the danger in importing law, particularly constitutional analysis, from the private family law realm into public family law without considering the differing interests at stake.

Part I of this Article illustrates New York's current discrimination against unwed fathers of foster children with a case example. Part II provides an overview of the rights of parents, particularly of unwed fathers, as they have developed in the private adoption context. Part III examines current New York law and practice with respect to unwed fathers' rights to prevent adoption of their children. Part IV argues that the current New York practice of rigidly applying law that was developed in the private adoption context to the public adoption context patently violates modern equal protection doctrine. This Section includes a discussion of how weak New York case law in the area has been, while recognizing two notable exceptions at the trial court level. Part V concludes with some thoughts on what might replace the current discriminatory practice and how the analysis in this Article might be relevant to analyzing other sex discrimination in the child welfare system.

A. Kevin's Father: An Example of New York's Blatant Discrimination Against Unmarried Fathers

Robert S. and Jennifer G. were an unmarried couple living together in the Bronx when their son, Kevin, was born.[8] The three of them lived as a family for

6. *See, e.g.*, U.S. DEP'T OF HEALTH AND HUM. SERVS. ADMIN. FOR CHILD. AND FAMS., LOG NO. ACF-ACF-IM-18-01, INTEGRATING APPROACHES THAT PRIORITIZE AND ENHANCE FATHER ENGAGEMENT, 1–2 (2018), https://www.acf.hhs.gov/sites/default/files/documents/ofa/acffatherhoodim_final.pdf [https://perma.cc/XW5C-SM46]; JEFFERY ROSENBERG & W. BRADFORD WILCOX, U.S. DEP'T OF HEALTH AND HUM. SERVS., THE IMPORTANCE OF FATHERS IN THE HEALTHY DEVELOPMENT OF CHILDREN, 6–7 (2006), https://www.childwelfare.gov/pubpdfs/fatherhood.pdf [https://perma.cc/9XHA-DM5Q]. Consistent with the broad support for increasing the child welfare system's involvement of fathers, the Fostering Connections to Success and Increasing Adoptions Act of 2008 provided federal funds to locate and engage relatives of children who enter the system. Pub. L. No. 110-351, § 102, 122 Stat. 3949, 3953–56 (describing "intensive family-finding efforts that utilize search technology to find biological family members for children in the child welfare system, and once identified, work to reestablish relationships and explore ways to find a permanent family placement for the children").

7. *See, e.g.*, *In re* Angelina J.W., 159 N.Y.S.3d 877 (App. Div. 2022); *In re* Floyd J.B., 102 N.Y.S.3d 54 (App. Div. 2019); *In re* Elijah Manuel V. (Ismanuel V.), 78 N.Y.S.3d 312 (App. Div. 2018).

8. *In re* Leake & Watts Servs. Inc. (Kevin G.), 2016 N.Y. Slip Op. 50447(U), at *7 (Fam. Ct. Apr. 5, 2016). Names have been changed.

the first couple months of Kevin's life, until child protective services removed him because of allegations of child neglect and put him into foster care.[9] As directed by federal and state law, the foster care agency offered to provide Robert and Jennifer social services and to work out a plan with them for how they could safely reunify with their son.[10] Jennifer did not actively engage in service planning with the foster care agency, but Robert met with agency staff regularly to discuss what the agency expected of him.[11] The caseworkers explained that Robert could get his son back if he completed substance abuse treatment, domestic violence counseling, anger management classes, and parenting classes, and also regularly visited his son.[12]

At first, Robert did not follow up with the service referrals, though he remained in touch with the agency.[13] As required under New York law,[14] the agency made additional service referrals and continued to advise Robert that he needed to comply with the service plan if he wanted his son home.[15] Eventually, Robert began actively engaging in the services and completed a drug program, an anger management class, a parenting class and domestic violence services.[16] He also cooperated with drug tests requested by the agency and tested negative.[17]

At the beginning of Kevin's foster care placement, Robert's visitation was spotty, but after a few months, he settled into a regular visitation schedule, seeing his son weekly.[18] During these visits, Robert fed Kevin, played games with him, read with him, and developed a positive father-son relationship.[19]

Once Robert began making progress with the recommended services, the caseworker advised him that if he wanted Kevin to be able to live with him, he would have to obtain suitable housing and maintain a stable income.[20] Robert was unable to obtain steady employment or his own housing, but after he had completed all the programs required of him, the agency agreed that his son could be discharged to Robert at his mother's home, where he was residing.[21]

---

9. *Id.* at *5–7.

10. *Id.* at *2–4. *See generally* 42 U.S.C. § 671(a)(15) (2018) (requiring states to make reasonable efforts to "preserve and reunify families"); N.Y. SOC. SERV. LAW § 384-b(7) (McKinney 2021) (referring to agencies' "diligent efforts to encourage and strengthen the parental relationship").

11. *In re Leake & Watts Servs. Inc. (Kevin G.)*, 2016 N.Y. Slip Op. 50447(U), at *2.

12. *Id.* The general policy of the Review of Law & Social Change is to use gender neutral language. We use gendered pronouns, which is the approach most typical among the Family Court litigants with whom we have worked.

13. *See id.*

14. *See* N.Y. SOC. SERV. LAW §§ 384-b(4), (7) (McKinney 2021).

15. *Id.*

16. *In re Leake & Watts Servs. Inc. (Kevin G.)*, 2016 N.Y. Slip Op. 50447(U), at *2–3.

17. *Id.* at *3.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

Kevin was discharged on a trial basis on the condition that Robert and his son were to reside with Robert's mother.[22] An additional condition of the release was that Robert was not to allow Kevin to have unsupervised contact with his mother, Jennifer.[23] Before long, the agency began to suspect that Robert was allowing Kevin to see his mother unsupervised. One day, they sent a caseworker to the mother's home and discovered Kevin alone there with her.[24] Robert said that he had left Kevin with his mother because he had gotten an opportunity to make money shoveling snow that day and had no one else to leave his son with.[25] Because Robert had violated a condition of the trial discharge, the agency took Kevin back into foster care and changed the permanency goal to adoption.[26]

Ordinarily, no child may be adopted unless his or her parent consents to the adoption or there is a statutory basis for involuntarily terminating the parent's rights.[27] Kevin's mother, Jennifer, agreed to consent for him to be adopted, but Robert did not.[28] He continued to visit with Kevin regularly and continued to tell the agency he wanted to work to get him back.

When Robert refused to consent to his son's adoption, the agency filed a termination of parental rights petition against him. The petition alleged "permanent neglect," which is the most common ground for terminating parental rights in New York. To demonstrate permanent neglect, New York requires agency officials to show by clear and convincing evidence that a parent has either failed to maintain contact with the child or "failed to plan" for the future of the child.[29] Failing to plan is commonly understood to mean failing to take steps to ameliorate the issues that brought the child into foster care and, in particular, failing to follow the agency's recommendations to engage in services.[30]

Robert and his lawyer participated in a trial in the Bronx Family Court that stretched over ten months, with many hours of witness testimony and substantial documentary evidence. The court heard testimony about the visits Robert had with his son while he was in foster care, the many services Robert had done at the recommendation of the agency, the delays in his engaging in those services at the outset of the case, and the events that occurred during the trial discharge, including Robert's having left Kevin alone with his mother on the occasion when an agency caseworker found him there with her.

---

22. *Id.*

23. *Id.*

24. *Id.* at *3–4.

25. *Id.* at *4.

26. *Id.*

27. *See* N.Y. DOM. REL. LAW § 111(1)–(2) (McKinney 2021) (listing the parties whose consent is required for an adoption throughout).

28. *In re Leake & Watts Servs. Inc. (Kevin G.)*, 2016 N.Y. Slip Op. 50447(U), at *1.

29. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2019); Santosky v. Kramer, 455 U.S. 745, 748 (1982).

30. *See* Anne Crick & Gerald Lebovits, *Best Interests of the Child Remain Paramount in Proceedings to Terminate Parental Rights*, 73 N.Y. STATE BAR ASS'N J. 41, 44 (2001).

At the conclusion of the trial, the court determined that Robert did not have the right to prevent his son from being put up for adoption. The court found that there was a basis to terminate Robert's parental rights, but—far more troublingly—held that there was no need to terminate them because he didn't have parental rights.[31] Robert was not a "consent father" within the meaning of Domestic Relations Law § 111(1)(d).[32] Therefore all the questions at issue in the permanent neglect claim—such as whether Robert had sufficiently planned for the future of his son by completing all the recommended services, whether he had taken too long to do so, and whether violating the conditions of the trial discharge supported a finding of failure to plan—became irrelevant.

It was uncontested that Robert was Kevin's biological father and that no other man had ever tried to claim a parental role as to Kevin. Robert had been living with Kevin and Kevin's mother as a family and had been charged as the respondent father in the original child neglect case that led to Kevin's entering foster care;[33] he had regularly visited Kevin while he was in foster care; the agency had developed a service plan and worked with him for over three years with the explicit goal of returning Kevin to him; and that plan had been effectuated with a trial discharge, which the agency anticipated would lead to permanent parental custody unless and until Robert violated the conditions of the discharge. The final decision emphasized that Robert "struck [the court] as sincere in his love for his child" and found that it was undisputed that Kevin valued having his father in his life.[34] Nonetheless, the agency pled, and the court found, that Robert did not have the parental rights that most parents have.[35]

However we might want child welfare law to treat the parenting choices Robert made, it should be shocking for that law to deny him the right to choose whether his child would be put up for adoption—and particularly disturbing that it did so in a circumstance in which a woman who had behaved identically would have had that right. So how did the court reach this result? It found that Robert's failure to pay child support vitiated his right to prevent the adoption of his child despite the fact that no one asked him to pay child support or explained that it was required.[36] This outcome becomes even more troubling once it is understood that there is no administrative mechanism in New York City by which foster care agencies can accept child support funds from a parent; neither Jennifer nor any other mother of a child in foster care in New York is required to pay child support in order to maintain her parental rights; and a father who had been married to

31. *In re Leake & Watts Servs. Inc. (Kevin G.)*, 2016 N.Y. Slip Op. 50447(U), at *7–9, *11–12.

32. *Id.* at *9, *11–12.

33. *Id.* at *9.

34. *Id.* at *10.

35. *Compare id.* at *9, *11–12 *with* N.Y. DOM. REL. LAW § 111(1)(b)–(e) (McKinney 2021).

36. *In re Leake & Watts Servs. Inc. (Kevin G.)*, 2016 N.Y. Slip Op. 50447(U), at *7–9.

Kevin's mother at his conception or birth would not have had to pay child support to have full parental rights.[37]

New York, like every state, treats every birth mother as having full parental rights from the moment of birth unless and until the mother voluntarily surrenders those rights or they are involuntarily terminated based on a showing of a cause of action for terminating parental rights by clear and convincing evidence.[38] Also like every state, New York treats some birth fathers as having full parental rights and others as not. The United States Supreme Court has laid down the constitutional parameters of when the state must treat fathers as parents with rights, and each state has both statute and case law that develop the state's particular approach.

Non-lawyers are generally quite surprised to learn that a father as involved in his son's life as Robert would lack the right to prevent the adoption of his child. The fathers we know who find themselves in such situations are bewildered by it. Lawyers even casually familiar with the laws involving the rights of unwed fathers also might well be surprised. After all, what we learn in law school is that an unwed father's parental rights turn on whether he grasped the opportunity to establish a parent-child relationship.[39] Whatever failings Robert may have had, it seems impossible to dispute that he established such a relationship. It might be argued that his failings were grounds to terminate his rights, but a New York court found in 2016 that there was no need to terminate his parental rights because he had none.[40] This is not an outlier. It accurately reflects New York's current approach to determining the rights of unwed fathers of children in foster care. This Article is our effort to explain how this could be and to explain why this approach cannot withstand constitutional scrutiny. It is written to encourage courts and litigants to bring New York's outdated law in this area into the 21st century. Additionally, we believe that unpacking how New York has come to regularly violate the constitutional rights of unwed fathers—with notably little challenge or even discussion—reveals the hazards of moving between private and public family law without paying sufficient attention to the differing underlying

37. *See* E-mail from Zainab Akbar, Managing Att'y, Fam. Def. Prac., Neighborhood Def. Serv. Of Harlem, to author Chris Gottlieb (May 12, 2022, 10:51 EST) (on file with authors); E-mail from Maura Keating, Dir. of Litig., Ctr. For Fam. Representation, to author Chris Gottlieb (May 11, 2022, 6:03 EST) (on file with authors); E-mail from Emma Ketteringham, Managing Dir., Fam. Def. Prac., The Bronx Defs., to author Chris Gottlieb (May 11, 2022, 7:02 EST) (on file with author); E-mail from Lauren Shapiro, Managing Dir., Fam. Def. Prac., Brooklyn Defs., to author Chris Gottlieb (May 11, 2022, 5:45 EST) (on file with authors).

38. *See* Santosky v. Kramer, 455 U.S. 745 (1982) (establishing that a clear and convincing standard is constitutionally required in termination of parental rights proceedings); N.Y. DOM. REL. LAW § 111(1)(c), (2) (McKinney 2016) (requiring the consent of mothers for adoption absent a termination of parental rights).

39. *See* Caban v. Mohammed, 441 U.S. 380, 392–94 (1979); Lehr v. Robertson, 463 U.S. 248, 248–49 (1983).

40. *In re Leake & Watts Servs. Inc. (Kevin G.)*, 2016 N.Y. Slip Op. 50447(U), at *9. There is perhaps some irony in the fact that for ease of exposition in our discussion of the case, we changed one name: the father's name was actually Kevin, like his son's.

constitutional interests in play. We hope to offer a robust example to Family Court practitioners of how we must highlight the differences in the two realms in order to better protect the rights of families.

II.
THE DEVELOPMENT OF THE RIGHTS OF UNWED FATHERS TO PREVENT ADOPTION OF THEIR CHILDREN

For most of American history, fathers of children born out of wedlock had no rights to their children. There was no subject in the law called "rights of unwed fathers." Children born out of wedlock were "*filius nullius*," literally "the child of no one."[41] Beginning in the 1930s, laws were enacted in most parts of the United States to impose financial responsibilities on unwed fathers, requiring them to pay child support for children they had conceived.[42] But until 1972, few states paid attention to the rights of unwed fathers, even to the limited extent of mentioning them in statutes. In New York, as in other states, the statutes involving the adoption of non-marital children focused exclusively on mothers giving consent to adoptions, with no consideration whatsoever of fathers.[43]

The starting point for any discussion of fathers' rights regarding children born out of wedlock is 1972, when the Supreme Court decided *Stanley v. Illinois*.[44] For a short decision (it runs only 12 pages in the United States Reports), *Stanley*'s importance is difficult to overstate.[45] *Stanley* held, for the first time, that a man who never married his child's mother may possess the same constitutional right to raise his children as the mother.

In *Stanley*, the local child welfare agency took custody of Peter Stanley's out-of-wedlock children after their mother died, reasoning the children were orphans because their only legally recognized parent was dead.[46] Stanley argued that Illinois had violated his rights and was legally obligated to recognize him as a

41. *Illegitimates: Definition of "Children" under Federal Welfare Legislation*, 67 COLUM. L. REV. 984, 991 n.36 (1967) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *458; WILFRID HOOPER, THE LAW OF ILLEGITIMACY 25 (1911)).

42. *See* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 647 (2001) (citing David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2583–88 (1995)); *id.* at 648 ("With the creation in the 1930s of federal welfare benefits for needy children came federal interest in ensuring that adult family members who had the resources to pay child support did so.").

43. *See* Ruth-Arlene W. Howe, *Adoption Practice, Issues and Laws 1958-1983*, 17 FAM. L.Q. 173, 181–82 (1983).

44. 405 U.S. 645 (1972).

45. *See generally* Josh Gupta-Kagan, *Stanley v. Illinois's Untold Story*, 24 WM. & MARY BILL RTS. J. 773, 774 (2016) (describing *Stanley* as "a foundational case about parents' rights to the custody of their children"); Josh Gupta-Kagan, *In re Sanders and the Resurrection of Stanley v. Illinois*, 5 CALIF. L. REV. CIR. 383, 383 (2014) (noting that *Stanley* held that "the State cannot constitutionally deprive a parent of custody, or make 'the children suffer from [the] uncertainty and dislocation' inherent in foster care, without first proving the parent unfit") (quoting *Stanley*, 405 U.S. at 647–49).

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

parent even though he never married the children's mother,[47] adopted them, or secured a court order recognizing him as their father. The Supreme Court agreed with him, holding that, under the circumstances of the case, Stanley was the children's father for purposes of the Constitution and Illinois could only keep the children from his custody upon a showing that he was unfit to raise them.[48]

Technically, *Stanley* was a case squarely within the realm of public family law: it involved the state as a party and was triggered by state intervention in a family's life when it sought to make Peter Stanley's children wards of the state. But the realm most shaken by the decision was the world of private placement adoption, which at that time was responsible for arranging tens of thousands of adoptions each year.[49] Many adoptions involved young, unmarried mothers, often teenagers who surrendered their parental rights shortly after the baby's birth because they wanted their children to be raised by someone else who became the legal parent.[50] And, because the laws through 1972 in almost every jurisdiction treated mothers as the only unwed parent who had any kind of legal rights to the child, no one gave any thought to fathers when facilitating these adoptions. *Stanley* changed all of that.

The field of traditional (private) family law is organized around an overarching theme: families are free to decide for themselves, within extremely broad limits, what their family arrangement will be. Parents are entirely free to agree between themselves that only one of them will raise their child, that they will share child-rearing on whatever schedule they want, or that they will allow another adult to share child-rearing responsibility.[51] The state has no more than what *Stanley* called a "*de minimis*" interest in those choices.[52] For the most part, the state becomes involved in private ordering of families only when the principals cannot work things out themselves and one or both of them solicit state involvement in the decision-making in run-of-the-mill custody or visitation

47. *Id.* at 646–47.

48. *Id.* at 645.

49. *See* JO JONES & PAUL PLACEK, NAT'L COUNCIL FOR ADOPTION, ADOPTION BY THE NUMBERS 7–8 (2017), https://adoptioncouncil.org/article/adoption-factbook/ [https://perma.cc/J7KJ-YPQ9]. According to the National Council for Adoption, the number of adoptions in the United States peaked in 1970 at 175,000. *Id.* Between 24 percent and 40 percent of these were likely to be private adoptions. *Id.*

50. Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 114 (2013) ("[F]rom the period following World War II until Roe v. Wade ushered in legalized abortion, a legal solution for white minors' pregnancy was adoption.").

51. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) (recognizing "the fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *see also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating there is a "private realm of family life which the state cannot enter").

52. *See Stanley*, 405 U.S. at 657; *Troxel*, 530 U.S. at 68–69 ("[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

disputes.[53] For such situations, states have created an avenue for dispute resolution through the judicial process.[54]

In designing statutory schemes to govern these private disputes about adoption, states must make substantive decisions regarding how to weigh the interests of birth mothers and birth fathers. States can choose to take sides in weighing some of those interests more heavily than others. Even when the state's goal is not to treat the interests differently, they must make decisions about what it means to treat mothers and fathers "equally." Many states have chosen to treat mothers and fathers the same under the law if they are married at the time of conception or birth, but to impose different duties on unwed fathers than they impose on any mothers. In particular, state laws generally impose obligations that only men must meet before they are treated as having full rights as parents. What matters for this Article is not as much what those burdens are—though necessarily, they will be described—but *why* they were imposed. Much of the what and why of these obligations was developed in the context of private adoption law.

Broadly speaking, children born out of wedlock ("nonmarital children") are adopted through one of two very different routes. Voluntary adoptions occur with the parent's permission (but very often only the mother's).[55] Involuntary adoptions take place over the objection of the parent after a state entity has successfully terminated the parent's parental rights, eliminating the requirement for her consent to the child's adoption.[56]

Voluntary adoptions often involve the mother surrendering her parental rights and giving consent for her child to be adopted by someone else, either a couple or a single person. In many of these adoptions, the mother surrenders her rights shortly after the child is born. In these cases, the mother often never has physical custody of the child. Typically, at some point during the pregnancy, the mother decides to carry the pregnancy through to the child's birth, but not to remain the child's parent once the child is born. [57] In a small number of closely related cases, the mother may begin with a plan to raise her child but change her mind shortly after the child's birth. At that point, the mother surrenders her rights to the child in order to have someone else raise the child as the child's adoptive parent.

---

53. *See, e.g.*, N.Y. DOM. REL. LAW § 70 (McKinney 2017).

54. *Id.*

55. CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2 (2021), https://www.childwelfare.gov/pubPDFs/groundtermin.pdf [https://perma.cc/TB5Y-QE76]. It is important to note that historically not all formally "voluntary" adoptions have involved meaningful consent. *See, e.g.*, Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 442 n.316 (1996) (noting the "massive infirmities in the voluntariness of maternal consent in the post-war period") (citing RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE 168–77 (1990).

56. *Id.* In either instance, the adoption is, of course, "involuntary" when the birth father opposes it; but, following common practice in the field, the modifying term here is focused on the desires of the mother.

57. *See, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).

Another common kind of voluntary adoption of out-of-wedlock children are those in which the mother wants her partner, often her legally married partner, to adopt her child and become the child's other legal parent. In these cases, the mother does not surrender her parental rights but grants permission to another person to become the child's second legal parent.[58] Historically, of course, this set of adoptions were adoptions by a man the mother married after the birth of the child.[59] Today, it frequently includes adoptions by the mother's female partner, and the adopting partner (whether male or female) is not always married to the mother.

Both these voluntary adoption scenarios—where the mother is surrendering her parental rights to put a child up for adoption and where she is allowing a second parent to adopt—raise the question of whether anyone's consent to the adoption is required other than the mother's. For wed fathers (fathers married to the mother of the child at the time of the child's birth), there has never been a question that an adoption cannot proceed without the father's consent. Put another way, wed fathers have the right (as all mothers do) to veto an adoption.[60]

The regulation of private placement adoptions is, at least as a theoretical matter, entirely family-of-origin friendly. The state regulates who gets to become the next parents by ensuring that the prospective parents have the resources and intention to raise them well, but, basically, the governing legislative schemes in the United States maximize the birth parents' stated preferences about when an adoption will occur.[61]

For much of American history, maximizing private ordering meant empowering the preferences of married parents and, as adoption became more widely accepted, empowering the preferences of unwed mothers. Until 50 years ago, there was no expectation that private ordering would entail empowering the preferences of unwed fathers.[62] One significant explanation for this is that there simply wasn't a cultural context in which unwed fathers tended to exert preferences regarding who would raise a child. But it is understandable that legislators have chosen to prioritize unwed mothers' choices over unwed fathers' choices since the choice to keep a child after the birth or to give the child up for adoption is so closely connected to a woman's right to procreate. Although we do not often speak this way, for nearly 50 years American constitutional law gave

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

59. *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979). If the marriage occurred before the birth of the child, the child was a marital child with the presumption of legitimacy and the husband did not need to adopt to have full parental rights, regardless of whether the husband was the biological father.

60. *See, e.g.*, N.Y. DOM. REL. LAW § 111(1)(b) (McKinney 2021).

61. *Id.* § 111(1)(b)–(e).

62. *See supra* notes 45–49 and accompanying text.

women greater procreational rights than men.[63] Women had the right to terminate an unwelcomed pregnancy[64] and could do so over the express objection of the father;[65] even more, married women had the right not to tell their husbands that they are pregnant.[66] Although these differences could be seen as equal rights to bodily integrity, giving women but not men the right to consent to the adoption of their children who are born out of wedlock is a gendered right limited to women.

There are several possible reasons for states to grant new mothers as much power as possible to control the decision whether to place infants up for adoption. First, a mother's right to have control over the adoption of her newborn child might be regarded as part of the package of her procreative rights because such control or lack thereof might affect her decision to continue with or terminate the pregnancy. Second, states may have an interest in minimizing the number of abortions.[67] Third, states may want to serve newborns' interests in being adopted quickly when their mothers choose not to raise them. Given the possible complications in identifying and locating fathers, requiring only the mothers' consent expedites adoptions. This speedier process also serves the interests of those wishing to adopt newborns as close to birth as possible. Fourth, there is a long-held preference for having children raised in two-parent families, which historically was more likely to be achieved by allowing a mother to determine whether a stepfather could adopt than by empowering unwed fathers to veto adoptions of their children.[68]

Thus, even as our society has moved away from traditionally gendered parenting roles, leaving decision-making rights regarding adoption wholly to mothers may serve important interests. These policy reasons for giving mothers greater rights might be contested today, but there are at least articulable interests behind legislative decisions to treat mothers and fathers differently in this regard. Following *Stanley's* breakthrough holding that unwed fathers have at least some parental rights, the questions became what rights they have to prevent adoptions. The Supreme Court began to articulate those limits in three cases decided between

63. In June of 2022, the Supreme Court overruled the constitutional right to abortion established in *Roe v. Wade* and upheld in *Planned Parenthood v. Casey*, holding there is no right to an abortion in the U.S. Constitution. Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 5 (U.S. June 24, 2022).

64. Roe v. Wade, 410 U.S. 113, 114 (1973).

65. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 53 (1976) (striking down the spousal consent provision of a Missouri abortion statute).

66. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (striking down the spousal notification provision of a Pennsylvania abortion statute).

67. *Id.* at 834.

68. *See* Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 53 (1995) ("[T]ransferring a child from a disfavored single mother to a favored two-parent marital family is the paradigm."); Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 113 (2013) (discussing the privileging of traditional notions of the "normative family").

1978 and 1983 involving the adoption of children born out of wedlock.[69] All three involved the second kind of voluntary adoptions, i.e., where mothers of children born out of wedlock want their husbands (the children's stepfathers) to become their legal parents.

In the first of these, *Quilloin v. Walcott*, the birth father wanted to prevent the proposed adoption of his child by the mother's husband.[70] He had never lived with the mother or the child and had not helped raise the child.[71] Three years after the child's birth, the mother married. Her husband lived with her and the child for the next eight years and filed a petition to adopt when the child was 11 years old.[72]

Under Georgia law, a married father's consent to such an adoption was required, but an unwed father who did not seek to "legitimate" his child did not have the same right to veto the proposed adoption.[73] Georgia law gave the birth father the opportunity to be heard on the child's best interests, but it did not afford the father the right to veto the adoption of his child unless he "legitimated" the child first.[74] The birth father objected to the adoption, claiming that the Constitution's guarantee of equal protection required that he have the same right to veto the adoption that married fathers had under Georgia law.[75]

The Supreme Court rejected the equal protection claim and allowed the adoption over the father's objection after concluding that his interests were distinguishable from those of a married father who is separated or divorced from the mother.[76] Stressing that "the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except [the father],"[77] and that the father "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child,"[78] the

69. Altogether, the Supreme Court addressed the rights of unwed fathers when their children were being considered for adoption four times: in *Quilloin v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), *Lehr v. Robertson*, 463 U.S. 248 (1983), and *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013). All involved voluntary adoptions. Only one of the four, *Adoptive Couple v. Baby Girl*, involved the first type of voluntary adoption, in which the birth mother gives up her own parental rights so that her child can be adopted by a couple who would become the child's legal parents. That case, however, turned on an interpretation of the Indian Child Welfare Act and therefore is not relevant for our purposes here. *Id.* at 638–39.

70. 434 U.S. at 246.

71. *Id.* at 247.

72. *Id.* at 247, 249.

73. *Id.* at 248–49 ("To acquire the same veto authority possessed by other parents, the father of a child born out of wedlock must legitimate his offspring, either by marrying the mother and acknowledging the child as his own, or by obtaining a court order declaring the child legitimate and capable of inheriting from the father.") (citations omitted).

74. *Id.* at 253–54.

75. *Id.* at 253, 256.

76. *Id.* at 256 (contrasting appellant birth father with a hypothetical divorced father who "bor[e] full responsibility for the rearing of his children during the period of the marriage").

77. *Id.* at 255.

78. *Id.* at 256.

Supreme Court held that Georgia "was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child."[79]

The next two cases came from New York and turned on the legality of Domestic Relations Law § 111 (the statute that will be our focus in Parts III and IV below). One year after *Quilloin*, the Court decided *Caban v. Mohammed*,[80] in which, once again, the husband of the mother of a child born out of wedlock sought to adopt the child with the mother's consent and over the objection of the father. Like Georgia, New York law treated unwed mothers and fathers differently when it came to the adoption, granting mothers, but not fathers, the power to veto adoptions of their children born out of wedlock.[81] Applying the statute, the trial court granted the proposed adoption of the child over the birth father's objection.[82]

But in this case the facts regarding the father's involvement in the child's life were quite different than in *Quilloin*. The birth parents had lived together with their two children for five years, although they never married, and the father helped raise the children until the parents separated.[83] After they separated, the father saw his children regularly when they visited with his mother-in-law, who lived near his apartment.[84] The father even had custody of the children for a short period of time. That led to a custody dispute when the mother filed a petition in court seeking to resume custody. The court awarded temporary custody to the mother and her husband with visitation rights to the father and his new wife.[85] Shortly after the custody case was filed, and two years after the parents first separated, the mother and her husband filed their adoption petition. The court granted the adoption over the father's objection, finding it to be in the children's best interests. The appellate courts in New York affirmed, and the father appealed to the Supreme Court raising two claims: that New York law (1) violated his constitutional rights to equal protection as applied in the case and (2) also violated his substantive rights by permanently taking away his children without a finding of unfitness.[86]

At that time, the governing statute simply said that children born out of wedlock may be adopted with the mother's consent.[87] No comparable provision mentioned unwed fathers, who had no rights under New York law to prevent adoption. The Supreme Court held that, as applied to these facts, the statutory scheme offended the Equal Protection Clause of the Constitution. When the unwed father's parent-child relationship is substantial, the father may not be treated differently than unwed mothers. It is not permissible for the state to rely on

79. *Id.*
80. 441 U.S. 380 (1979).
81. *Id.* at 380.
82. *Id.* at 383–84.
83. *Id.* at 382.
84. *Id.*
85. *Id.* at 383.
86. *Id.* at 385.
87. N.Y. DOM. REL. LAW § 111 (McKinney 2016).

generalizations about the traits of men and women to define parental rights. In the Court's words (echoing *Stanley*),

> The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. . . . There is no reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother unrivaled by the affection and concern of their father. We reject, therefore, the claim that the broad, gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development.[88]

The Court explained that "[g]ender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause.'"[89] However reasonable the state's interest in encouraging the adoption of children born out of wedlock (an interest the New York Court of Appeals had articulated as serving the welfare of children in a 1975 case[90]), the Constitution requires that the means chosen be "structured reasonably to further these ends."[91] The Court concluded that "the distinction in § 111 between unmarried mothers and unmarried fathers," as applied to these parents, "does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children."[92]

Striking the law as an "'overbroad generalization[]' in gender-based classifications," the Court explained that "[t]he 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."[93] The law "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."[94] Accordingly, it violated the Constitution.

After *Caban* was decided, the New York Legislature amended its adoption laws to conform to *Caban*, but also, decidedly, to maintain a strong preference for privileging mothers over fathers with respect to the adoption of children born out of wedlock. The statutory scheme in place when *Caban* was decided had denied all birth fathers any power to veto a proposed adoption of children born out of wedlock. In the wake of *Caban*, the legislature revised the law to provide, for the

88. Caban v. Mohammed, 441 U.S. 380, 389 (1979).
89. *Id.* at 388 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).
90. *In re* Malpica-Orsini, 331 N.E.2d 486, 491 (N.Y. 1975).
91. *Caban*, 441 U.S. at 391.
92. *Id.*
93. *Id.* at 394 (quoting Califano v. Goldfarb, 430 U.S. 199, 211 (1977)).
94. *Id.*

first time, certain unwed fathers the right to veto adoptions proposed for children born out of wedlock.[95] It also clarified when birth fathers had the right to be given notice of an adoption proceeding involving their child. The category of fathers entitled to notice under the revised statute was substantially larger than the category entitled to veto an adoption.[96]

Four years after *Caban*, the Supreme Court had an opportunity to determine the constitutionality of New York's revised adoption scheme as it relates to children born out of wedlock. In *Lehr v. Robertson*,[97] a birth father challenged the constitutionality of the notice provision that New York had incorporated into its Domestic Relations Law in the wake of *Caban*.[98] In this case, the father claimed not the right to veto the adoption, but "an absolute right to notice and an opportunity to be heard" on whether the adoption was in the child's best interests.[99] The mother and her husband had filed a petition for adoption without providing notice of it to the father and the adoption was granted without input from him. The Supreme Court denied the father's constitutional challenge.

According to the *Lehr* majority, the father rarely saw the child in the two years after her birth and never supported her or the mother.[100] Because he was not named on the birth certificate[101] and because he had failed to file any kind of document identifying himself as the father before the adoption petition was filed,[102] the Court ruled that New York did not offend the Constitution by denying him a right to notice and an opportunity to appear in the adoption proceeding.[103] The Court rejected his Due Process claim, explaining that "the mere existence of a biological link does not merit equivalent constitutional protection."[104] The Court recognized New York's legitimate interest in facilitating adoptions of non-marital children by avoiding notice requirements that would "complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees."[105] In its equal protection analysis, the Court held that the mother and the father in this case were not similarly situated, noting that equal treatment is not required

95. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2021).

96. *Compare id.* (consent fathers), *with* N.Y. DOM. REL. LAW § 111-a(2) (McKinney 2013) (notice fathers).

97. 463 U.S. 248 (1983).

98. *Id.* at 271 n.3 (1983) (White, J., dissenting) (citing N.Y. DOM. REL. LAW § 111(1)(d) (McKinney Supp. 1982–83) (as amended by 1980 N.Y. Laws 1695)).

99. *Id.* at 250.

100. *Id.* at 249–50.

101. *Id.* at 252.

102. *See id.* at 250–51.

103. *Id.* at 253–54. He did file a petition seeking paternity, visitation, and an order of support, but only after the adoption petition had been filed, which the Court deemed too late to matter. *Id.* at 252.

104. *Id.* at 261.

105. *Id.* at 264 (citation omitted).

when "one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship."[106]

Stanley, *Quilloin*, *Caban*, and *Lehr*—two wins and two losses for unwed fathers—make clear that laws involving the adoption of children born out of wedlock may discriminate between fathers and mothers if states do "not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective."[107] States may not "subject men and women to disparate treatment when there is no substantial relation between the disparity and an important state purpose."[108]

The upshot of this area of the law is that states may impose certain obligations on unwed fathers that are not imposed on unwed mothers, but only when the added burdens on fathers further a legitimate state interest and the burden is substantially related to fit that interest. The state's legitimate interests can often be best understood as preferring private ordering that empowers unwed mothers to make decisions regarding adoption. This is allowed so long as the privileging of mothers over fathers is appropriately tailored in that states may recognize that at birth, a mother stands in different relation to the child, but beyond the point of birth, states cannot assume that a father does not have a meaningful relationship with the child simply because he is a man. It is not biology alone, but the parent-child relationship that grounds the constitutional right to parent. If the father has a meaningful relationship with the child, then his parental rights are entitled to equal protection.

We now turn our attention to the particulars of New York law and the burdens it imposes on unwed fathers.

III.
NEW YORK'S TREATMENT OF UNWED FATHERS OF CHILDREN IN FOSTER CARE

A. The Governing Statute and Case Law

The New York statute that demarcates when unwed fathers have the right to veto adoptions of their children makes no explicit distinction between private placement adoptions and foster care adoptions ("involuntary adoptions").[109] The law does, though, make distinctions regarding a father's rights based on whether a child is placed for adoption before six months of age or after.[110] For a child

106. *Id.* at 267–68.

107. *See id.* at 265 (citing Reed v. Reed, 404 U.S. 71, 76 (1971)). For an insightful analysis of conflicting feminist perspectives on these cases and of the Court's shift over the course of them away from sex-based equal protection analysis to a focus on marital status, see Serena Mayeri, *Foundling Fathers: (Non-)marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2335–69 (2016).

108. *Id.* at 266 (first citing *Reed*, 404 U.S. at 76; and then citing Craig v. Boren, 429 U.S. 190, 197–99 (1976)).

109. N.Y. DOM. REL. LAW § 111(1)(d)–(e) (McKinney 2021).

110. *See id.*

placed for adoption under six months of age, the relevant law, Domestic Relations Law § 111(1)(e), requires an unwed father's consent to the adoption only if the father lived with the child or the child's mother, claimed to be the father of such child, and paid a reasonable sum towards the pregnancy and birth expenses.[111]

The part of this statute that requires a father to live with the mother or the child as a precondition to securing the right to veto a proposed adoption was struck down as unconstitutional by New York's highest court in 1990.[112] In doing so, in *Matter of Raquel Marie X.*, the court expressed sympathy to the "substantial State interests . . . at stake in the adoption laws,"[113] specifically in facilitating the adoption of infants born out of wedlock.[114] The court appreciated the challenges confronting "an unwed mother alone faced with the enormous responsibility of making crucial decisions about the future of her newborn child"[115] and the state's "interest in encouraging the adoption of these children" by making the adoption "process surer and speedier."[116] It also recognized the state's legitimate interest in limiting the rights of unwed fathers who have failed to show a meaningful interest in their child.[117] But it concluded that the means employed by the statute was unconstitutional because it imposed an obligation on fathers that was beyond their control to meet.[118] Requiring birth fathers to live with the mother or child was not in their sole control and, for that reason alone, the court held the law unconstitutional.[119]

When the court declared the law unconstitutional, it chose not to sever the clause found wanting (the requirement that the father live with the child or mother). In the court's words:

> [W]e know with certainty from the format of the existing statute as well as the contemporaneous expressions of intent that the Legislature would not have wished to have the unchallenged portions of the statute stand alone as the sole measure of an unwed father's commitment to the child, entitling him to veto an adoption.[120]

Therefore, the court explained, it had "no recourse but to declare section 111(1)(e) unconstitutional in its entirety."[121]

---

111. N.Y. DOM. REL. LAW § 111(1)(e).

112. *In re* Raquel Marie X., 559 N.E.2d 418, 419 (N.Y. 1990).

113. *Id.* at 425.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 425–29. "[T]he 'living together' requirement [improperly] stems from its focus on the relationship between father and mother, rather than father and child." *Id.* at 426.

119. *Id.* at 427.

120. *Id.*

121. *Id.*

Recognizing that there would be a gap between the declaration of the law's unconstitutionality and the enactment of a replacement law, the New York Court of Appeals gave guidance to lower courts on what to consider when unwed fathers challenge the adoption of children placed before six months of age pending new legislation. It instructed lower courts to "include such considerations as [the birth father's] public acknowledgement of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child."[122] For better or worse, the legislature has not seen fit to rewrite this law. Consequently, there is no applicable statute currently addressing the rights of unwed fathers of children placed for adoption before six months of age, and the court's guidance in *Raquel Marie X.* governs those situations.

Involuntary adoptions out of foster care almost never involve children less than six months old in New York.[123] Thus, to consider the rules for adoptions out of foster care, one must look to the statutory provision involving children who are over the age of six months when placed for adoption: Domestic Relations Law § 111(1)(d), a companion provision to the one involving younger children, which was enacted simultaneously.

For children placed for adoption after the age of six months, the law does not require that the father have lived with the child or mother (the fatal defect in the law concerning children less than six months of age). Instead, Domestic Relations Law § 111(1)(d) requires that a father have "maintained substantial and continuous or repeated contact" with his child as manifested by paying child support and visiting or (when unable to visit) regularly communicating with the child or the child's custodian.[124] The statute further provides that men who held themselves out to be the father and openly lived with the child for six months within the year immediately preceding the child's placement for adoption are deemed to have maintained substantial and continuous contact for purposes of establishing their right to veto an adoption.[125] But for fathers who did not live with their children for six months in the year immediately preceding placement for

122. *Id.* at 428.

123. New York law sets forth grounds for terminating parental rights early on in a small category of child abuse cases, where parents "severely abuse" or "repeatedly abuse" their children by knowingly committing certain very serious felonies. N. Y. SOC. SERV. LAW § 384-b(4)(e), (8). But these provisions are rarely invoked. Instead, in the overwhelming percentage of adoptions of foster children in New York, the children were in foster care for at least a year. *See In re* St. Vincent's Servs., Inc., 841 N.Y.S.2d 834, 845 (Fam. Ct. 2007) ("Based on the statutory requirements, [termination of parental rights petitions] generally will not be filed within six months of a child's birth.").

124. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2021).

125. *Id.*

adoption—which means for virtually all fathers of children in foster care[126]—paying child support is a precondition to securing the substantive right to prevent their child's adoption over their objection. Both mothers and wed fathers possess this substantive right without regard to whether they ever financially supported their child.

Unlike the constitutionality of the portion of the statute regarding children placed for adoption before they are six months old, the requirement that fathers pay child support to secure substantive parental rights pursuant to § 111(1)(d) has never been carefully examined by an appellate court.[127] To the contrary, virtually all of the appellate case law consists of peremptory affirmances of findings that fathers of children in foster care lack the right to veto their children's adoption, without providing enough factual detail for lower courts or practitioners (or writers of law review articles) to determine the extent of the father's involvement in the children's lives.[128] These decisions ignore the crucial question of whether there is any reason to consider private placement adoptions and foster care adoptions differently, and most wholly fail to address the embedded as-applied equal protection inquiry whether it is constitutional to impose obligations on unwed fathers of foster children that the law does not impose on unwed mothers.[129] Indeed, many of the decisions blur the distinction between a finding

126. Fathers will not have lived with their children for six months within the year prior to "placement for adoption" because children are typically not considered placed for adoption when they go into foster care. Some courts have considered children to be placed for adoption when the permanency goal is officially changed to adoption; others have said it is when a termination of parental rights petition is filed or sustained. *See, e.g.*, *In re* Leake & Watts Servs. Inc. (Kevin G.), 2016 N.Y. Slip Op. 50447(U), at *7 (Fam. Ct. Apr. 5, 2016) ("[F]or the purposes of DRL § 111, the children would not be considered 'placed for adoption' or 'placed with the adoptive parents' on the date they were removed from their parents' care, as for some time after that the goal was still for them to be reunited."); *In re* St. Vincent's Servs., Inc., 841 N.Y.S.2d at 844–45 (for purposes of the Domestic Relations Law, a child is placed for adoption "when the goal is changed to adoption and a cause of action has accrued, been filed, and, arguably, even sustained, to terminate the mother's parental rights"). These events virtually always occur after children have been in foster care—and therefore not living with their fathers—for over a year.

127. An equal protection challenge was raised to New York Domestic Relations Law § 111(1)(d) in the private adoption context in *Matter of Andrew Peter H.T.*, but the court reversed on other grounds, deeming it premature to address the constitutional issue. 479 N.E.2d 227, 229 (N.Y. 1985).

128. *See., e.g.*, *In re* Lambrid Shepherd C. (Jeffrey S.), 899 N.Y.S.2d 837 (App. Div. 2010); *In re* Chandel B., 872 N.Y.S.2d 438 (App. Div. 2009); *In re* Aaron P., 877 N.Y.S.2d 30 (App. Div. 2009); *In re* Sharisse G., 859 N.Y.S.2d 246 (App. Div. 2008). A striking number of these cases involve incarcerated fathers. *See id.*

129. One of the few decisions that mentions the constitutional dimensions of the issue summarily rejected an equal protection challenge without even clarifying whether it was a facial or as-applied challenge. *See In re* Jonathan Logan P., 765 N.Y.S.2d 506, 506 (App. Div. 2003) ("Nor is there merit to respondent's claim that the statute is unconstitutional in imposing support and visitation requirements on unwed fathers but not unwed mothers."). Another offered only the most cursory consideration of the constitutional question. *See In re* Elijah Manuel V. (Ismanuel V.), 78 N.Y.S.3d 312 (App. Div. 2018). Other attempts to challenge the constitutionality of the statute have been unpreserved for appellate review. *See, e.g.*, *In re* Gabrielle G., 92 N.Y.S.3d 36, 37 (App. Div. 2019); *In re* Tiara A., 988 N.Y.S.2d 56, 58 (App. Div. 2014).

that the father failed to manifest a relationship with a child by maintaining contact (the appropriate inquiry under the Supreme Court law) and a finding that the father failed to provide sufficient financial support (as required by the New York statute).

The question of whether the requirement of child support is constitutional as applied to fathers of children in foster care has become ever more critical as foster care agencies have come under increasing pressure in recent years to move children toward adoption. In 2005, New York passed legislation implementing the requirements of the federal Adoption and Safe Families Act, which tied federal funding of foster care to efforts that promote having foster children adopted.[130]

The significance of the question grows further still when we recognize that the majority of families affected are families of color, with Black families particularly overrepresented.[131] Given the child welfare system's shameful history of racism,[132] any mechanism that contributes to the disproportionate break-up of Black families should be carefully scrutinized. And the mechanism we examine here—which allows unwed fathers of children in foster care to be more easily excised from their children's lives—should be interrogated with an appreciation of what Melissa Murray has described as "the racialized stigma of illegitimacy."[133] We must, that is, question the extent to which the legal effects of illegitimacy are supported not only by stereotypes based on sex, but also the extent to which any sex discrimination may be based on or exacerbate intersectional harms for Black and brown men.[134]

---

130. 2005 N.Y. Laws 35, 48.

131. *See* CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2–3 (2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf [https://perma.cc/RP5J-DPCE]. The disparity is even more extreme in New York than nationally. GREGORY OWENS, N.Y. STATE OFF. OF CHILD. & FAM. SERVS., THE OCFS INITIATIVE TO ADDRESS RACIAL DISPROPORTIONALITY IN CHILD WELFARE AND JUVENILE JUSTICE 52 (2011), http://ww2.nycourts.gov/sites/default/files/document/files/2018-09/ocfs-disproportionality.pdf [https://perma.cc/K3GS-KSMG] ("[R]elative to white children, Black/African American children are more than 6 times as likely to be in the foster care system in New York . . . .").

132. *See* LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR (2020); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE vi–vii, 48 (2002); CHILD. RTS., FIGHTING INSTITUTIONAL RACISM AT THE FRONT END OF CHILD WELFARE SYSTEMS: A CALL TO ACTION 6–7 (2021), https://www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf [https://perma.cc/6R4Y-G6WS].

133. Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 416 (2012).

134. The concept of intersectional harms was introduced by Kimberlé Crenshaw. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40 (1989) (discussing the "problematic consequence of the tendency to treat race and gender as mutually exclusive categories of experience and analysis" and arguing that a "single-axis framework" for analyzing discrimination "obscures claims that cannot be understood as resulting from discrete sources of discrimination").

B. New York's Current Practice Regarding Adoptions from Foster Care

As pressure to pursue adoptions has increased,[135] New York foster care agencies increasingly plead in the alternative when petitioning to terminate a father's rights. It is now common to plead both a cause of action to terminate a father's parental rights and alternatively that the father lacks substantive parental rights that require termination prior to adoption. In this alternative pleading, the agency is asking the court to find that, under the Domestic Relations Law, the father is not what has come to be called a "consent father." In these lawsuits, the agencies seek to deny—rather than overcome—the unwed father's right to prevent an adoption for the simple reason that the father failed to pay child support. By doing this, agencies are able to circumvent the need to prove a legal basis to terminate the father's rights. What is important to appreciate is that when fathers possess those substantive rights, the legal bases for terminating them are difficult for agencies to meet because state (and constitutional) law fiercely protect the parent-child relationship.[136] We explore in the next Section whether refusing to recognize fathers' relationship to their children born out of wedlock solely because of their failure to pay child support can survive equal protection scrutiny when no similar requirement exists for mothers.[137]

Were agencies required to treat birth parents of children born out of wedlock equally, the agency would have to "prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family."[138] Only upon such a showing "may a court consider and determine whether the parent has fulfilled his or her duties to maintain contact with and plan for the future of the child."[139] In other words, for all parents except unwed fathers who fall outside the parameters of Domestic

---

135. *See supra* note 3.

136. *See* Santosky v. Kramer, 455 U.S. 745 (1982) (holding the clear and convincing standard constitutionally required in termination of parental rights); N.Y. SOC. SERV. LAW § 384-b (McKinney 2021). Indeed, in dissenting from the opinion that established the clear and convincing standard, Justice Rehnquist emphasized that New York had other strong protections in place. *Santosky*, 455 U.S. at 780–81 (Rehnquist, J., dissenting) ("As this description of New York's termination procedures demonstrates, the State seeks not only to protect the interests of parents in rearing their own children, but also to assist and encourage parents who have lost custody of their children to reassume their rightful role. Fully understood, the New York system is a comprehensive program to aid parents such as petitioners. Only as a last resort, when 'diligent efforts' to reunite the family have failed, does New York authorize the termination of parental rights."). *See also* Amanda S. Sen, *Measuring Fatherhood: "Consent Fathers" and Discrimination in Termination of Parental Rights Proceedings*, 87 N.Y.U. L. REV. 1570, 1577–80, 1583–84 (2012).

137. We leave to another day the different question that is certainly worth of analysis as well: whether the disparate treatment of wed and unwed fathers can survive equal protection review.

138. *In re* Sheila G., 462 N.E.2d 1139, 1140 (N.Y. 1984). Diligent efforts are required in terminations of parental rights based on permanent neglect, which is our focus here because that is the most commonly used cause of action for termination in New York. *See* Crick & Lebovits, *supra* note 30, at 44 ("The permanent-neglect cause of action is the most commonly used of the four causes of action. If a cause of action can be found in permanent neglect and another cause of action, permanent neglect is often easier to prove.").

139. *In re Sheila G.*, 462 N.E.2d at 1140 (referencing N.Y. SOC. SERV. LAW § 384-b(7)(a)).

Relations Law § 111(1)(d), the agency has an affirmative duty in most cases to take proactive steps to help the parent succeed in overcoming the barriers to the child's return from foster care.[140]

Indeed, New York law is remarkably ambitious in defining what constitutes "diligent efforts,"[141] and New York's highest court has found the agency's duty is to "determine the particular problems facing a parent with respect to the return of his or her child and make *affirmative, repeated, and meaningful* efforts to assist the parent in overcoming these handicaps."[142] As the Court of Appeals emphasizes, the legislature

> has recognized that the degree to which a parent has upheld his or her obligations to such children cannot be meaningfully measured when the agency itself has not undertaken diligent efforts on behalf of reuniting parent and child [and] has declared as a matter of public policy that the State may not intervene to terminate a parent's rights when assistance in strengthening the family has not been forthcoming.[143]

Thus, the initial bar an agency must reach to justify severing parental rights is quite high. And once there has been a showing that the agency met its obligation to diligently support reunification of parent and child, it must also show by clear and convincing evidence that the parent has "substantially and continuously or repeatedly" failed to maintain contact with or plan for reunification with the child.[144] Moreover, physical or financial inability is a defense.[145]

Many states have made it easier to terminate rights, and some state courts might even be said to be rubber stamping agency petitions to terminate since passage of the federal Adoption and Safe Families Act (ASFA) and its financial

140. The statute provides exceptions when agencies are not obliged to offer diligent efforts to parents. These exceptions include when parents have failed to keep the agency apprised of their location, N.Y. SOC. SERV. LAW § 384(b)(7)(e)(i) (McKinney 2021), and when such efforts would be detrimental to the best interests of the child, N.Y. SOC. SERV. LAW § 384-b(7)(a), (8) (McKinney 2021). By circumventing the termination statute, petitioning agencies avoid the need to prove that it made diligent efforts or that one of the exceptions applies.

141. See N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney 2021).

142. *In re Sheila G.*, 462 N.E. 2d at 1148 (emphasis added).

143. *Id.*

144. *Id.* at 1145.

145. *See* N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2021).

incentives for adoption.[146] But New York has steadfastly continued to enforce a high bar for justifying the extreme step of terminating a parent's rights.[147] As we will show in the next Section, New York's insistence that the children of unwed fathers can be adopted out of foster care without the father's consent solely because the father did not pay child support is inconsistent with the state's articulated interest in these cases and cannot survive modern constitutional examination.

IV.
MODERN EQUAL PROTECTION SCRUTINY OF NEW YORK'S TREATMENT OF UNWED FATHERS OF CHILDREN IN FOSTER CARE[148]

Modern sex discrimination doctrine demands that courts review laws with a level of scrutiny that rejects overbroad generalizations about people based on their gender.[149] A 2017 Supreme Court case is particularly instructive for our purposes. In *Sessions v. Morales-Santana*,[150] the Supreme Court reviewed a federal immigration law that conferred citizenship on children born out of wedlock differentially based on the years that their citizen mothers or citizen fathers resided in the United States.[151] Under the law, unwed mothers were able to confer citizenship on non-marital children born outside the United States after the mother

146. Arizona is a prime example of this practice. For the six-month period from January 1, 2018, through June 30, 2018, 99.5 percent of the termination petitions filed in the state were granted. ARIZ. DEP'T OF CHILD SAFETY, SEMI-ANNUAL CHILD WELFARE REPORT FOR JAN. 1, 2018 THROUGH JUNE 30, 2018, at 24 (2018), https://dcs.az.gov/file/12268/download?token=SbNdKuUT [https://perma.cc/6QUA-C9QY]. From October 1, 2017 through March 31, 2018, 99.6 percent were granted. ARIZ. DEP'T OF CHILD SAFETY, SEMI-ANNUAL CHILD WELFARE REPORT FOR OCT. 1, 2017 THROUGH MAR. 31, 2018, at 63 (2018), https://dcs.az.gov/file/10899/download?token=2qvjd8dy [https://perma.cc/XTT3-QRPZ]. From April 1, 2017 through September 30, 2017, 99.9 percent were granted. ARIZ. DEP'T OF CHILD SAFETY, SEMI-ANNUAL CHILD WELFARE REPORT FOR APR. 1, 2017 THROUGH SEPT. 30, 2017, at 68 (2017), https://dcs.az.gov/file/8923/download?token=OjCfkppw [https://perma.cc/8XSJ-JJD8].

147. *See generally, e.g.*, *In re Sheila G.*, 462 N.E.2d at 1139; *In re* Leon RR, 397 N.E.2d 374 (N.Y. 1979); *In re* Medina Amor S., 856 N.Y.S.2d 35, 41 (App. Div. 2008) (reversing a termination of parental rights and emphasizing that a "termination of parental rights is a drastic event"); *In re* Child Aid Soc'y (Xavier Blade Lee Billy Joe S.), 2019 N.Y. Slip Op. 50120(U) (Fam. Ct. Jan 9, 2019) (dismissing a termination of parental rights petition because the agency failed to make sufficient efforts to accommodate the parent's developmental disabilities when working with her to plan for reunification), *aff'd*, 131 N.Y.S.3d 541 (App. Div. 2020).

148. We will not consider the constitutionality of the provision in private adoptions, though that might well be a worthy inquiry. Our focus here is fathers' rights with respect to adoptions out of foster care, where we believe the answer is more clear-cut.

149. *See* Craig v. Boren, 429 U.S. 190, 204 (1976) (rejecting gender as a proxy for risk of drinking and driving); United States v. Virginia, 518 U.S. 515, 534 (1996) (rejecting gender-based generalizations about suitability for the training model and physical demands of a military academy as justification for excluding women).

150. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

151. *Id.* at 1687; *see* 8 U.S.C. §§ 1401, 1409.

had lived in the United States for a year.[152] In contrast, unwed fathers had to have lived in the United States for five years to confer citizenship on their children.[153]

The Court began its discussion of the constitutional validity of this law by reminding the reader of the soil in which it was promulgated. Justice Ginsburg's opinion explained that the law is "from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are."[154] Though that once carried the day, Justice Ginsburg explained, it no longer does. "Today," she wrote, "[L]aws of this kind are subject to review under the heightened scrutiny that now attends 'all gender-based classifications.'"[155]

Modern constitutional law requires that "[l]aws granting or denying benefits 'on the basis of the sex of the qualifying parent,' . . . attract heightened review under the Constitution's equal protection guarantee."[156] Courts now must view "with suspicion laws that rely on 'overbroad generalizations about the different talents, capacities, or preferences of males and females.'"[157] Legislatively enacted sex discrimination requires an "exceedingly persuasive justification,"[158] including a showing "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[159]

Most significantly, courts today are obligated to consider changes in American culture when reviewing gendered laws of the kind that is the focus of this Article. In Justice Ginsburg's words, laws that treat men and women differently "must substantially serve an important governmental interest *today*."[160] That's because, Justice Ginsburg explained, "in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged."[161]

When the Supreme Court struck down the federal immigration law at issue in *Morales-Santana*, it did so because when the law was enacted, "now untenable[ ]

152. 8 U.S.C. § 1409(c).

153. *Id.* § 1409(a).

154. *Morales-Santana*, 137 S. Ct. at 1689 (citations omitted).

155. *Id.* (quoting J.E.B. v. Alabama *ex rel.* T. B., 511 U.S. 127, 136 (1994)) (citing United States v. Virginia, 518 U.S. 515, 555–56 (1996)).

156. *Id.* (citing Califano v. Westcott, 443 U.S. 76, 84 (1979)).

157. *Id.* at 1692 (quoting *United States v. Virginia*, 518 U.S. at 533).

158. *Id.* at 1690 (quoting *United States v. Virginia*, 518 U.S. at 531; Kirchberg v. Feenstra, 450 U. S. 455, 461 (1981)).

159. *Id.* (quoting *United States v. Virginia*, 518 U.S. at 533).

160. *Id.*

161. *Id.* (alteration in original) (quoting Obergefell v. Hodges, 576 U.S. 644, 673 (2015)).

assumptions pervaded" our culture.[162] Among these untenable assumptions was that the "unwed mother is the natural and sole guardian of a nonmarital child."[163]

Thus, *Morales-Santana* is highly instructive when reviewing the constitutionality of imposing New York's obligation of financial support on unwed fathers but not unwed mothers. In *Morales-Santana*, the federal government attempted to defend treating unwed fathers differently from unwed mothers in the immigration context because mothers of children born out of wedlock are "the child's only 'legally recognized' parent at the time of childbirth."[164] Because "[a]n unwed citizen father enters the scene later, as a second parent," the government argued, it is permissible to have different criteria for evaluating his connection to his children.[165] But the problem with this line of argument, the Supreme Court explained, is that it is the result of an

> assumption that the [noncitizen] father of a nonmarital child born abroad to a U.S.-citizen mother will not accept parental responsibility. Hardly gender neutral, that assumption conforms to the long-held view that unwed fathers care little about, indeed are strangers to, their children. Lump characterization of that kind, however, no longer passes equal protection inspection.[166]

This analysis makes clear that in assessing how New York law delineates which parents have rights to veto adoption, we must examine the historical context in which the lines were drawn. Two aspects of the context in which the Domestic

---

162. *Id.* at 1691.

163. *Id.* at 1695. The Court added:

> For unwed parents, the father-controls tradition never held sway . . . . At common law, the mother, and only the mother, was "bound to maintain [a nonmarital child] as its natural guardian." In line with that understanding, in the early 20th century, the State Department sometimes permitted unwed mothers to pass citizenship to their children, despite the absence of any statutory authority for the practice.

Id. at 1691–92 (alteration in original) (citation omitted) (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *215–16 (8th ed. 1854). The Court also noted that in hearings before Congress recommending the enactment of the law, federal officials had stated, "[T]he mother [of a nonmarital child] stands in the place of the father . . . [,] has a right to the custody and control of such a child as against the putative father, and is bound to maintain it as its natural guardian." *Id.* at 1692 (alteration in original) (quoting *To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings on H.R. 6127 Before the H. Comm. on Immigr. & Naturalization*, 76th Cong. 431 (1940)).

164. *Id.* at 1695.

165. *Id.* The opinion goes on to explain the government's position:

> A longer physical connection to the United States is warranted for the unwed father, the Government maintains, because of the "competing national influence" of the [noncitizen] mother. Congress, the Government suggests, designed the statute to bracket an unwed U.S.-citizen mother with a married couple in which both parents are U.S. citizens, and to align an unwed U.S.-citizen father with a married couple, one spouse a citizen, the other, [a noncitizen].

Id. (quoting Brief for Petitioner at 9–10, *Morales-Santana*, 137 S. Ct. 1678 (No. 15-1191)).

166. *Id.* (citations omitted).

Relations Law was amended to define "consent fathers" are particularly important: that the legal focus at the time was predominantly on private adoptions,[167] and that it was an era in which stereotypes loomed large regarding the role unwed fathers played in their children's lives.[168] Consider, for example, the views expressed in a 1972 dissenting opinion in *Stanley v. Illinois*.[169] As previously discussed, in *Stanley* the Court reviewed an Illinois law that allowed state officials to remove children from the custody of unwed fathers without bothering to charge them with unfitness.[170] Illinois unsuccessfully defended that statute on the reasoning that unwed fathers are notoriously uninterested in or ill-equipped to take care of children.[171] Dissenting from the Court's holding, Chief Justice Burger, joined by Justice Blackmun, complained that the majority blinked at

> common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers. While these, like most generalizations, are not without exceptions, they nevertheless provide a sufficient basis to sustain a statutory classification whose objective is not to penalize unwed parents but to further the welfare of illegitimate children in fulfillment of the State's obligations as *parens patriae*.[172]

In particular, the dissenters believed the irrebuttable presumption that unwed fathers don't step up and care for their children passed constitutional muster because they considered it so "unusual" for unwed fathers to be as interested in

---

167. Each of the three Supreme Court cases that had recently addressed when an unwed father has the right to consent to the adoption of his child involved private adoption. Quilloin v. Walcott, 434 U.S. 246, 247 (1978); Caban v. Mohammed, 441 U.S. 380, 381–82 (1979); Lehr v. Robertson, 463 U.S. 248, 250 (1983).

168. *See, e.g.*, *Caban*, 441 at 399 (Stewart, J., dissenting) (asserting that "the vast majority of unwed fathers have been unknown, unavailable, or simply uninterested"); *id.* at 413 (Stevens, J., dissenting) (asserting that "the far surer assumption is that in the more common adoption situations, the mother will be the more, and often the only responsible parent"); Fiallo v. Bell, 430 U.S. 787, 799 (1977) (noting that for purposes of establishing immigration status, "Congress obviously has determined that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties").

169. Stanley v. Illinois, 405 U.S. 645 (1972).

170. *Id.* at 647.

171. *Id.* at 654 n.6.

172. *Stanley*, 405 U.S. at 665–66 (Burger, C.J., dissenting).

raising their children as Peter Stanley was. [173] The dissent said the Equal Protection Clause did require Illinois to tailor its definition of parents "so meticulously" as to include such unusual fathers. [174]

Central here, of course, is the gendered meaning our laws and culture give to the terms "mother" and "father." The former are nurturers and caregivers. The latter are material providers. The trope most often applied to unwed fathers not only focuses on the fathers' financial role, it defines them as failing to meet the obligations of that role; they are best known as "deadbeat dads."[175] Significantly, this trope was racialized so that Black fathers in particular are stereotyped as being unwilling or unable to meet the chief obligation of fatherhood as it's been constructed. [176]

This emphasis on financial support (or lack thereof) as the critical characteristic of unwed fathers' relationships to their children is traceable, at least in part, to actions by the federal government aimed at recouping government funds spent to support children. The federal government's most important and visible effort concerning unwed fathers was to spur states to construct an elaborate scheme imposing financial obligations on them and a connected arrangement for enforcing those obligations.[177]

Both the Supreme Court and New York's highest court have made clear that the actions men take after their children are born (indeed, after conception) can be considered when determining which unwed fathers count as parents with substantive rights. [178] As the Court stated in *Lehr v. Robertson*, "The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures."[179] But it is now equally clear that there are constitutional limits on what legislatures may require of men as a precondition to substantive parental rights.

---

173. *Id.* at 666.

174. *Id.*

175. *See, e.g.*, Daniel L. Hatcher, *Forgotten Fathers*, 93 B.U. L. REV. 897, 901 (2013); Roger J.R. Levesque, *Targeting "Deadbeat" Dads: The Problem with the Direction of Welfare Reform*, 15 HAMLINE J. PUB. L. & POL'Y 1, 9, 14–23 (1994).

176. *See* Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 238 (2014) ("The image of the Deadbeat Dad also slowly emerged as a racialized trope: an uncaring Black father unwilling to pull his weight, often with multiple families, who expects taxpayers to carry his burden.").

177. *See* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 344–50 (2005); *see also* NANCY E. DOWD, REDEFINING FATHERHOOD 118 (2000) (describing how the Supreme Court's holding in *Gomez*, which recognized nonmarital children's right to child support, pushed states to "amend child support laws to include nonmarital children" to shift the burden of associated welfare costs).

178. Lehr v. Robertson, 463 U.S. 248, 261–62 (1983); *In re* Raquel Marie X., 559 N.E.2d 418, 428 (N.Y. 1990).

179. *Lehr*, 463 U.S. at 260 n.16 (quoting Caban v. Mohammed, 441 U. S. 380, 397 (1979)).

As the courts began to recognize the constitutional rights of unmarried fathers in the 1970s, the biological relationship provided its starting point.[180] Fathers were uniquely situated to claim the constitutional right to be a legal parent. Achieving that protected liberty interest turns on whether a father "grasps [the] opportunity" to form a parent-child relationship, as the Supreme Court has put it,[181] or, in the New York Court of Appeals' words, on the father's "manifestation of responsibility for the child."[182] While these holdings, unsurprisingly, leave to be determined the exact outer boundaries of a state's power to deny rights to unwed fathers, they espouse a robust notion of father-child relationships, emphasizing their value and their weighty constitutional dimension.

New York's law, however, sets a rigid, single-minded requirement that unwed fathers pay money or else forgo all substantive rights.[183] This test violates the Constitution because its fixation on child support is an unacceptable gauge for the appropriate substantive inquiry, which is whether the father manifested sufficient commitment to the child. Although paying money can be one relevant factor in assessing commitment, the flaw with New York's approach is that it makes financial contribution an absolute precondition to securing substantive rights as a parent. This is unconstitutional because it is insufficiently tailored to meet a legitimate state interest. It is insufficiently tailored precisely because it relies on the kind of "overbroad generalizations about the different talents, capacities, or preferences of males and females" that equal protection doctrine no longer tolerates.[184] To the extent the state interest is purely financial, there is no justification for requiring money from fathers but not mothers.[185] If financial support is being used as a proxy for the commitment of fathers, but not mothers, it rests on a generalization about the gendered significance of financial support as an indicator of a parent's commitment to his child. In our view, even if financial support ever reasonably could have been viewed as the single contribution a father made to his children, that day has long since passed.

---

180. *See* Stanley v. Illinois, 405 U.S. 645, 652 (1972).

181. *Lehr*, 463 U.S. at 262.

182. *In re Raquel Marie X.*, 559 N.Y.S.2d at 865.

183. *See* N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2021).

184. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1692 (2017) (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

185. Not only is the financial interest the same in obtaining support payments from either parent, but notably the financial interests of the state are opposed in the public adoption context compared to the private adoption context. The state may have a financial interest in facilitating private adoptions when a mother has indicated she does not want to support the child and the father has not demonstrated an interest in doing so because the child might otherwise be likely to become a ward of the state. But in public adoption, the financial incentive is against adoption. If an unwed father obtains custody of his child who has been in foster care, the state's financial burden ends, but if the child is adopted from foster care, the state will typically be providing an adoption subsidy to the adoptive parent until the child comes of age. *See US Adoption Assistance/Subsidy*, N. AM. COUNCIL ON ADOPTABLE CHILD., https://www.nacac.org/help/adoption-assistance/adoption-assistance-us/ [https://perma.cc/2U8Z-Q45T] (last visited Apr. 3, 2022) ("In the US, about 90 percent of children adopted from foster care are eligible for adoption assistance.").

Although we believe this argument establishes that placing a financial condition on unwed fathers is unconstitutional whenever treated as a dispositive test, rather than as one among other factors considered, it is important to see that the constitutional violation is particularly problematic in the foster care context.

To determine whether the invasion of a fundamental right is narrowly tailored as required under heightened scrutiny, the government interest must be so strong that it provides an "exceedingly persuasive justification."[186] As discussed above, in private adoption cases, the government may have interests in empowering mothers' choices and in avoiding delay in adoption that can sometimes justify treating men and women differently under the law.[187] But what are the government's interests in foster care cases? To answer that question, we must look to the statutes and case law that establish New York's foster care scheme.

A. The Purposes of New York's Child Welfare Law (as Informed by Federal Funding Mandates)

Since the federal government first became involved in child welfare issues in the wake of public attention to the problem of child abuse, it has embraced both child safety and family integrity as important principles.[188] Under the Child Abuse Prevention and Treatment Act, passed in 1974 and subsequently amended, Congress has encouraged states to rely on children's relatives to care for them whenever the children might otherwise end up in state-supervised foster care.[189] As the Supreme Court explained in 1979, Congress developed the modern child welfare system on the understanding "that homes of parents and relatives provide the most suitable environment for children."[190] In 1980, Congress set the current course for the child welfare system by enacting the Adoption Assistance and Child Welfare Act of 1980,[191] which requires states as a condition for receiving federal matching funds for foster care expenditures to ensure "reasonable efforts will be made (1) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (2) to make it possible for

186. *Morales-Santana*, 137 S. Ct. at 1690 (citing *United States v. Virginia*, 518 U.S. at 531).

187. *See supra* notes 65–66 and accompanying text.

188. Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, § 2, 88 Stat. 4, 5 (1974) ("[N]ational policy should strengthen families to prevent child abuse and neglect, provide support for needed services to prevent the unnecessary removal of children from families, and promote the reunification of families where appropriate."), *amended by* CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, § 101, 124 Stat. 3459, 3459–60 (codified as amended at 42 U.S.C. § 5101 Note (Congressional Findings)); 42 U.S.C. § 671(a)15(B).

189. Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974), *amended* in 1996 by Pub. L. No. 104-235, 110 Stat. 3069) (codified as amended at 42 U.S.C. § 5106(a)(4) (2018) (authorizing grants aimed at "developing or implementing procedures using adult relatives as the preferred placement for children removed from their home").

190. Miller v. Youakim, 440 U.S. 125, 142 n.21 (1979).

191. Adoption Assistance and Child Welfare Act of 1980 (AACWA), Pub. L. No. 96-272, 94 Stat. 501.

the child to return to his home."[192] Even when Congress enacted the Adoption and Safe Families Act of 1997, which placed new emphasis on increasing adoptions of foster children who cannot be safely reunited with their families, it reiterated its judgment that placement with family should be prioritized.[193]

New York's scheme has fully embraced (often more strongly than other states) federal values preferring that children be raised by relatives when circumstances require state intervention to protect children from a parent. In establishing its child protective scheme in 1976, the New York legislature explained that it is organized around a preeminent principle: "it is generally desirable" for children to be raised "in the home of the birth parent,"[194] and that, as a consequence, the state's "first obligation" is "to help the family with services to . . . reunite" the family.[195] Only "when it is clear" that the child cannot safely be allowed to reside with their family of origin does the New York legislature want to set into motion the process of securing "a permanent alternative home" for the child.[196] And, even then, the legislature first requires that the agency put forth its best efforts to help the parents get to the place where they are capable of providing a safe home for their child.[197] Only when meaningful efforts by the agency prove fruitless does the legislature want children to move into the adoption stream. This is supposed to happen when a "positive, nurturing parent-child relationship[] no longer exist[s]."[198]

In other words, New York means to play the smallest possible role in reorganizing or replacing families that come into contact with its child protective system. New York's preeminent interest is in child safety and well-being, and it understands that it serves children best by intruding least in the family. This means the state may not remove children from a parent's custody unless there is a compelling reason to do so.[199] When a child does have to be separated, the child welfare agency must strive "to reunite and reconcile families whenever possible

192. *Id.* § 101(a)(1), 94 Stat. at 503 (codified as amended at 42 U.S.C. § 671(a)(15)(B)).

193. *See* 42 U.S.C. § 671(a)(19).

194. N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii).

195. *Id.* § 384-b(1)(a)(iii).

196. *Id.* § 384-b(1)(a)(iv).

197. *Id.* § 384-b(7)(a) (referring to "diligent efforts" agencies should undertake "to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child"); *see also In re* Sheila G., 462 N.E.2d 1139, 1140 (N.Y. 1984) ("When a child-care agency has custody of a child and brings a proceeding to terminate parental rights on the ground of permanent neglect, it must affirmatively plead in detail and prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family.").

198. N.Y. SOC. SERV. LAW § 384-b(1)(b).

199. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 845 (N.Y. 2004) (holding that in cases of neglect of children by parents, "in deciding whether to authorize state intervention, [the Family Court] will focus on serious harm or potential harm to the child, not just on what might be deemed undesirable parental behavior").

and to offer services and assistance for that purpose."[200] Even when a child has been with a foster parent for a considerable period of time, there is a distinct preference for returning the child to a fit parent rather than pursuing adoption by the foster parent.[201]

New York's foster care system is also designed to prefer keeping children in their own families by encouraging family members to qualify for the financial support that non-kinship foster parents receive. Family members are supposed to be approved as foster parents on an expedited basis,[202] and the agency "must consider giving preference to placement of a child with an adult relative over a non-related caregiver."[203] As Merril Sobie explains in the Practice Commentaries to the governing statute, the intent of the legislature is "to encourage kinship placements whenever possible."[204] Children are only supposed to go into non-kinship foster care when "the court determines that a suitable non-respondent parent or other person related to the child cannot be located."[205]

Despite this long-standing preference in federal and New York law for avoiding placing children in foster care, the foster care population continued to rise in the United States in the 1980s, 1990s, and 2000s.[206] To address this, in recent years, Congress has continually tinkered with federal law, striving to find new ways to prevent separation of children from parents, and encouraging states to do better at keeping children with relatives when it is necessary to remove them from the custody of a parent.[207]

In 2008, both federal and New York laws were amended to maximize the probability that if children must be removed from a parent, they will be placed

---

200. N.Y. FAM. CT. ACT § 1055(b)(ii), (iii)(C) (McKinney 2021); *see also id.* § 1089(c)(4)(i), (d)(2)(iii)(A) (McKinney 2021).

201. *See, e.g.*, *id.* § 1089; *In re* Michael B., 604 N.E.2d 122, 130–31 (N.Y. 1992) (describing "the legislative policies that underlie temporary foster care, including the preeminence of the biological family" and quoting from legislative history that "establish[ed] a clear policy of exploring all available means of reuniting the child with his family before the Court decides to continue his foster care or to direct a permanent adoptive placement") (quoting Governor's Bill Jacket, L 1976, ch. 667, N.Y. State Bd. Of Social Welfare, A 12801-B (1976) (Mem. Accompanying Comments on Bill); *In re* Sanjivini K., 391 N.E.2d 1316, 1320–21 (N.Y. 1979) (overturning a termination of parental rights despite a "prolonged separation of mother and daughter" and explaining that "it is fundamental to our legal and social system, that it is in the best interest of a child to be raised by his parents, unless the parents are unfit").

202. N.Y. STATE OFF. OF CHILD. & FAM. SERVS., ADMIN. DIRECTIVE NO. 20-OCFS-ADM-08, APPROVAL OF EMERGENCY FOSTER BOARDING HOMES AND EXPANDED WAIVER AUTHORITY (2020), https://ocfs.ny.gov/main/policies/external/ocfs_2020/ADM/20-OCFS-ADM-08.pdf [https://perma.cc/YPM5-KZT3].

203. N.Y. SOC. SERV. LAW § 398(16) (McKinney 2021).

204. Merril Sobie, Practice Commentaries, McKinney's Cons. Laws. of NY, Fam. Ct. Act § 1052(c).

205. N.Y. FAM. CT. ACT § 1017(2)(b) (McKinney 2006).

206. *See* Martin Guggenheim, *Review: Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1727 (2000).

207. *See, e.g.*, Bipartisan Budget Act of 2018, div. E, tit. VII, Pub. L. No. 115-123, 132 Stat 64 (2018) (Family First Prevention Services Act enacted as part of omnibus appropriations bill).

with relatives, whenever that is consistent with the children's safety.[208] New York now requires agencies to search for relatives, including non-custodial fathers, of children who are at risk of being placed into foster care.[209] The state has gone even further since then, emphasizing in particular the importance of locating non-custodial parents when children are removed from the custodial parent[210]—an effort clearly aimed at locating fathers. In 2015, the legislature amended the statute to specifically require an investigation to locate any person who has filed with the state's putative father registry, has a pending paternity petition, or has been identified as a parent of the child by the mother in a written sworn statement, even when that person has not been recognized to be the child's legal parent.[211]

The legislative history of this amendment explains that this new emphasis reflects a "sea-change in attitudes and policies" toward parents who have not been charged with neglect or abuse, which stems from recognition that these parents are "vital resources for their children."[212] The legislative history also explains that the requirement to locate all fathers was added to "expand the scope of potential resources for children who have been removed from their homes, and provide an opportunity for non-respondent, non-adjudicated birth fathers to take necessary steps to establish their paternity and plan for their children."[213] Thus, an explicit goal of the current statute is to identify fathers who have not yet taken steps to assert their paternity and provide them an opportunity to do so when children are removed from their mothers' care.

In short, New York's child welfare law has been designed to achieve objectives that are vastly different than the state's objectives in the private adoption context. In the private adoption context, New York has chosen to empower mothers to place their children for adoption and imposed affirmative duties on fathers who seek a legally recognized relationship to their children.[214] In contrast, in the public child welfare law context, New York's policy strongly favors having children raised by parents over adoption, even when a mother would prefer the adoption, and requires state agents to look proactively for fathers, to offer them the opportunity to play a prominent part in their children's lives, and to support their relationships with their children. New York has determined that actively engaging fathers when children need to be removed from their mothers' custody is in children's best interests—whether or not the father had previously formed a significant relationship with his children and regardless of the mother's preferences once she has forfeited or otherwise lost her parental rights.[215] Thus, to

208. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 102, 122 Stat. 3949, 3953–56; 2007 N.Y. Laws 3273.

209. *See* 2015 N.Y. Laws 1229.

210. *Id.* at 1230.

211. *Id.*

212. Sponsor's Mem., Bill Jacket, L. 2015, ch. 567.

213. *Id.*

214. *See generally In re* Raquel Marie X., 559 N.E.2d 418 (N.Y. 1990).

215. See N.Y. FAM. CT. ACT § 1017(2)(b) (McKinney 2006).

apply New York's Domestic Relations statute rigidly to require fathers to pay child support when children are in foster care as a precursor to counting as fathers runs directly against the Legislature's current vision of how New York's foster care system is supposed to work.[216]

1. What About Other State Interests in Promoting Adoption?

As strong as New York's articulated interest in keeping children with their families is, it is not, of course, the only objective of state's child welfare system. Like all states, New York has a compelling interest in keeping children safe from harm.[217] That interest is served by the portions of the Family Court Act that grant state officials the power to separate children from their parents when being with the parents presents a risk of significant harm.[218] The interest in protecting children is what can justify putting them into foster care, but it does not offer a justification for any particular approach to adoption because the interest in protecting children from unsafe parents has been met when they enter foster care. Once in foster care, however, another government interest in children may emerge: an interest in achieving what has come to be known as "permanency." The state's interest in children's well-being includes serving their need for stability and finality in their custodial arrangements. As discussed above, the preferred permanency plan for foster children is to release them from foster care to their parents.[219] But when release to parents cannot be achieved safely, the state then has an interest in pursuing other permanency plans for them, including

---

216. There is an argument to be made that rigidly applying the child support provision of the Domestic Relations Law is so far at odds with New York's statutory scheme that the statute should be interpreted to have an exception for children in foster care. Such a reading is supported by two cannons of statutory interpretation that have been adopted by the Court of Appeals. First, it would avoid the constitutional infirmity that is the subject of this Article. *See In re* Jacob, 660 N.E.2d 397, 405 (N.Y. 1995) ("Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids . . . constitutional doubts . . . .") (quoting Kauffman & Sons Saddlery Co. v. Miller, 80 N.E.2d 322 (N.Y. 1948)). Second, it would follow the canon of reading statutory schemes holistically to reconcile provisions that would otherwise work at cross purposes. The Court of Appeals has favored such readings particularly when interpreting statutes on children and families. *See, e.g.*, *In re* Michael B., 604 N.E.2d 122, 130–131 (1992); *In re Jacob*, 660 N.E.2d at 399; *In re* Jamie J., 89 N.E.3d. 468, 475 (N.Y. 2017). Such a reading could also be supported by the fact that the Legislature was focused primarily on private adoptions when it amended the Domestic Relations Law in the wake of *Caban v. Mohammed*. *See supra* notes 95–96. Moreover, the Court of Appeals specifically noted the possibility of exceptions to the child support requirement when it deferred as premature an equal protection challenge in the private adoption context. *In re* Andrew Peter, 479 N.E. 227, 229 (N.Y. 1985) (directing the lower courts to consider whether the father "was somehow excused from satisfying the threshold support provision of section 111(1)(d)(i)" before the constitutional question was considered).

217. *See* N.Y. FAM. CT. ACT § 1011 (McKinney 1970) ("This article is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being.").

218. *See, e.g.*, N.Y. FAM. CT. ACT § 1027 (McKinney 2016); N.Y. FAM. CT. ACT § 1028 (McKinney 2010).

219. *See supra* notes 192–99 and accompanying text.

adoption. That brings some of the interests that we saw in the private adoption context[220] into play, but with consequential differences.

The state has a legitimate interest in ensuring it knows which adults it must treat as parents whenever children are the subject of custodial proceedings because of the importance of clarity and finality in these cases. Historically, the question of who counts as a legal parent has not been an issue for birth mothers.[221] But for biological and social reasons, there has often been a question as to which fathers have legal rights. Given the history of fathers' rights—recall that it is only in the last 50 years that unwed fathers have had any legal rights to their children[222]—the starting point for any discussion comparing laws involving fathers and mothers of children born out of marriage is that the Constitution permits states to treat men and women differently. The question is not whether any difference is constitutional;[223] it is whether the particular way a state treats them differently is justified under the Constitution.

The legitimate state interest served by imposing responsibilities on unwed fathers to take certain steps not required from mothers has been explained by the New York Court of Appeals in the private adoption context:

> States have a legitimate concern for prompt and certain adoption procedures and their determination of the rights of unwed fathers need not be blind to the 'vital importance' of creating adoption procedures possessed of 'promptness and finality,' promoting the best interests of the child, and protecting the rights of interested third parties like adoptive parents. Recognizing those competing interests—all of which are jeopardized when an unwed father is allowed to belatedly assert his rights—we . . . . limited the period in which the father must act to the six continuing months immediately preceding the child's placement for adoption.[224]

When fathers fail to take those necessary steps, the state interest in the private adoption context is in allowing adoption agencies and prospective adoptive parents to move forward without fear that a child's placement and the consequent

220. *See supra* notes 65–66 and accompanying text.

221. There can be questions regarding the rights of mothers who give birth as surrogates. *See* Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2301–06 (2017) (discussing the evolution of parental rights for those who have children through surrogates). There are also questions regarding whether and when women playing a parental role to children to whom they did not give birth are legal parents. *See id.* at 2331–37. Although these are critical contemporary issues, they did not play a role in the historical legal developments discussed in the text.

222. *See supra* notes 39–43 and accompanying text.

223. Some scholars argue that the Constitution requires that unwed fathers and mothers be treated the same. *See, e.g.*, Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 CASE W. RES. L. REV. 541, 585–86 (2019). To the extent that treating fathers and mothers the same is taken to mean that all genetic fathers have full constitutional parental rights, we do not share that view and the constitutional argument offered in this Article does not rest on or support such a claim.

224. Robert O. v. Russell K., 604 N.E.2d 99, 103 (N.Y. 1992) (citation omitted).

bonding that will follow will be disrupted when a late-acting unwed father emerges from the dark. As Judge Titone wrote:

> The importance of finality in the lives of the children involved in the adoption process is so obvious as to require little elaboration. One of the most crucial elements of a healthy childhood is the availability of a stable home in which each family member has a secure and definite place. In addition to the stake of the adopted child, the adoptive family is unquestionably adversely affected by any lingering uncertainty about the permanence of the adoption.[225]

States are free to fashion laws that advance sound public policy by encouraging unwed mothers to place children for adoption when the children are infants and by encouraging adoptive couples to accept children into their home free from fear that months after they have bonded with a child, a stranger will emerge and demand that child. New York furthers a legitimate interest in "ensuring swift, permanent placements" of newborns in particular, who "are more likely to be adopted and more readily bond with adoptive parents."[226] "Certainty and finality" are what the law seeks to achieve to protect the infliction of needless harm.[227]

Notably, none of those interests is at stake when the question involves terminating parental rights of parents of children in foster care. When these children are placed with adults who are not their parents, they are not being placed for the purpose of adoption. All the adults involved—the parents, the government agents who do the placement, and the foster parents—are supposed to be operating on the understanding that foster care is intended to be a temporary arrangement.[228] In contrast with the private adoption context where there is reason to give pre-adoptive parents assurance that a child is adoptable, best social work practice is for foster parents to be told that the preferred goal is to reunite foster children with their families of origin and that one of the foster parent's responsibilities is to facilitate that goal.[229]

---

225. *Id.* at 106 (Titone, J., concurring).

226. *In re* Raquel Marie X., 559 N.E.2d 418, 425 (N.Y. 1990).

227. *See In re* Sarah K., 487 N.E.2d 241, 246 (N.Y. 1985); *see also* Raymond v. Doe, 629 N.Y.S.2d 321, 324 (App. Div. 1995) ("It is axiomatic that the State has a legitimate interest in establishing procedures which assure both a prompt adoption and the stability of the adopted child.").

228. *See* Smith v. Org. for Foster Fams. for Equal. & Reform, 431 U.S. 816, 856 (1977) (Stewart, J., concurring) ("The New York Legislature and the New York courts have made it unmistakably clear that foster care is intended only as a temporary way station until a child can be returned to his natural parents or placed for adoption."); Spence-Chapin Adoption Serv. v. Polk, 274 N.E.2d 431, 436 (N.Y. 1971) ("[F]oster care custodians must deliver on demand not 16 out of 17 times, but every time . . . .").

229. *See, e.g.*, ADOPTUSKIDS, EQUIPPING FOSTER PARENTS TO ACTIVELY SUPPORT REUNIFICATION 1 (2019), https://www.adoptuskids.org/_assets/files/AUSK/Publications/equipping-foster-parents-to-support-reunification-web508.pdf [https://perma.cc/3MYX-8QDD].

Nor can it be said that facilitating adoption by a foster parent discourages abortion or enhances mothers' interests or procreative rights in the way that empowering their ability to surrender infants for adoption does. The child is most often going into foster care over the mother's objection, and in the less common scenario of mothers voluntarily placing their children into foster care, it is still intended by all—including the mother—to be a temporary placement. A choice by a mother to voluntarily put her child in foster care is distinctly not a choice to give that child up for adoption.

Thus, the interests that may sometimes justify differential treatment of mothers and fathers in the private adoption context are simply non-existent in the foster care context. To determine whether there is a different justification in the foster care context, we must consider the interests in permanency and finality in that realm. In particular, we must look at the state's articulated interests in how and when to pursue adoption of foster children over the objection of a parent.

When the preferred permanency goal of release to a parent is unavailable, New York has established statutory bases on which to terminate parental rights. New York's procedure for making foster children eligible for adoption is for the Family Court to issue an order committing the child's guardianship to a foster care agency which then has the authority to consent to the child's adoption.[230] This guardianship transfer is commonly known as "freeing" a child for adoption because once such a transfer is made, the child's parent's consent is no longer needed for the child to be adopted. Excluding when both parents are deceased,[231] there are four ways in which a foster child may be "freed for adoption." The agency must show by clear and convincing evidence: (1) that the parent abandoned the child; (2) that the parent is unable by reason of mental illness or intellectual disability to be able to care for the child; (3) permanent neglect; or (4) severe or repeated abuse.[232]

The abandonment cause of action for termination may easily be put aside because a father who abandoned a child under this portion of the termination statute would, by definition, not have met the non-financial requirements of the Domestic Relations Law.[233] An unwed father who has "abandoned" his child within the meaning of New York's statute would not be a father whose consent to adoption is required for that reason alone, without any consideration of a gendered obligation to provide support for a child.

Turning to the mental illness or intellectual disability cause of action, the state's interest in such cases is in accurately determining whether there is a disability that will prevent a parent from safely caring for the child. It is

230. N.Y. SOC. SERV. LAW § 384-b(3)(a), (10); N.Y. DOM. REL. LAW § 113.

231. N.Y. SOC. SERV. LAW § 384-b(4)(a).

232. *Id.* § 384-b(4)(b)–(e).

233. *Compare id.* § 384-b(4)(b), (5)(a) (defining the abandonment cause of action for termination of parental rights), *with* N.Y. DOM. REL. LAW § 111(d)(ii)–(iii) (McKinney 2016) (explaining that consent to adoption is not required from unwed fathers who have not maintained contact with their children).

implausible to imagine any interest in treating fathers and mothers differently in such determinations. The same is true when the question is whether a parent inflicted severe abuse on a child serious enough to permanently banish the parent from the child's life.

The remaining question is what possible state objective could there be that would justify treating fathers differently from mothers when the lawsuit is based on New York's "permanent neglect" cause of action, the most commonly asserted basis on which agencies seek to terminate parental rights in New York.[234] The governing statute only allows a finding of permanent neglect if the parent has failed for a period of 12 months or for 15 out of the last 22 months "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child."[235] In describing the kind of contact that is required, the statute uses the terms "affectionate and concerned parenthood."[236] The statute's explicit purpose is to reunify families except "where positive, nurturing parent-child relationships no longer exist."[237] There is no rigid, absolute requirement with respect to that relationship at all, let alone a specific financial requirement.

Moreover, in assessing the planning requirement, New York recognizes that addressing the common obstacles to reunification (e.g., substance abuse, mental health concerns, lack of adequate housing) is challenging, that successfully addressing them should be expected to involve setbacks, and that it does not serve children to demand perfection in parents' efforts.[238] Even when a parent has not fully overcome the barriers to an early return to the parent's custody, an agency's petition to terminate parental rights will be dismissed if that parent has made sufficient efforts and progress toward reunification.[239]

---

234. *See* Crick & Lebovits, *supra* note 30, at 44 ("The permanent-neglect cause of action is the most commonly used of the four causes of action.").

235. N.Y. FAM. CT. ACT § 614(d) (McKinney 2005).

236. N.Y. SOC. SERV. LAW § 384-b(7)(b) (McKinney 2019).

237. *Id.* § 384-b(1)(b).

238. *See, e.g.*, *In re* Kobe D., 948 N.Y.S.2d 716, 718–19 (App. Div. 2012) (reversing decision changing permanency goal from family reunification to termination of parental rights and adoption despite the fact that "respondent has failings as a parent and continues to require petitioner's support for her success"); *In re* Legend S. (Tawana T.), 66 N.Y.S.3d 2, 3 (App. Div. 2017) (affirming dismissal of termination of parental rights and discussing that "certain housing-related issues were beyond the [parents'] control"); *In re* Leon RR, 397 N.E.2d 374, 379 (N.Y. 1979) ("[T]he adequacy of the parents' plan must not be evaluated with reference to unrealistically high standards.").

239. *See, e.g.*, *In re* Javon J., 7 N.Y.S.3d 494, 496 (App. Div. 2015) (reversing a termination of parental rights where the father, who failed to complete the mandated programs in the statutory time period, nevertheless "made sufficient progress toward strengthening his relationship with the subject children"); *In re* Christopher Lee B., 882 N.Y.S.2d 913, 914 (App. Div. 2009) (reversing a termination of parental rights where the mother had failed to enroll in court-ordered psychotherapy during the relevant statutory time period and finding that she nonetheless "made sufficient progress toward strengthening her relationship with the child, such that the Family Court's disposition terminating her parental rights was unwarranted"). In contrast, some states require that a parent have successfully accomplished reunification within a specific timeframe. *Compare* N.Y. SOC. SERV. LAW § 384-b(7), *with* OHIO REV. CODE ANN. § 2151.414(E)(1) (LexisNexis 2021), *and* S.C. CODE. ANN. § 63-7-2570(2) (2021).

In determining whether it is appropriate to seek a termination of parental rights, the legislature lists the following considerations:

> [A] parent's expressions or acts manifesting concern for the child, such as letters, telephone calls, visits, and other forms of communication; efforts by the parent to communicate and work with the authorized agency, attorney for the child, foster parent, the court, and the parent's attorney or other individuals providing services to the parent . . . ; a positive response by the parent to the authorized agency's diligent efforts . . . ;and whether the continued involvement of the parent in the child's life is in the child's best interest.[240]

Again, none of the considerations contemplated by the statute has anything to do with providing financial support during the time the child is in foster care.[241]

In short, New York's interest in pursuing adoption for foster children is triggered only when there is convincing evidence that the parent-child relationship has substantially deteriorated or that the parent is not effectuating a plan to gain custody. Even this is insufficient unless there is convincing evidence that the agency affirmatively made diligent efforts to support the parent in unification efforts.[242] Even assuming there is any basis for treating fathers and mothers differently immediately following birth, there is not any state interest in the foster care context in speeding adoptions more for fathers than mothers if a father-child relationship has developed.

To be sure, permanency is delayed when a termination petition against a father is dismissed because of the agency's failure to undertake the statutory reunification efforts. But New York intentionally imposed that delay as the price to be paid when agencies fail to take the required steps to make it feasible for children to end up in the custody of their family of origin.

Thus, in the public family law context, there is neither a non-stereotyped gender distinction nor a compelling state interest to support the differential treatment of fathers and mothers in New York's Domestic Relations Law. It is a blatant violation of equal protection to require child support payments from men, but not women, whose children are in foster care. Yet New York courts commonly

240. N.Y. SOC. SERV. LAW § 384-b(3)(l)(v) (McKinney 2021).

241. Although a parent's ability to provide financial support can certainly be viewed as relevant to "whether the continued involvement of the parent in the child's life is in the child's best interest," *id.*, that would only indicate his ability to provide financial support upon reunification. While the child is in foster care, any child support goes to the state, which provides the same resources to the child regardless of whether child support is paid. Moreover, New York has made clear that its policy is not to separate children from parents because a parent lacks financial means. *See* N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 2010) (defining neglect without discussing financial support outside of provision of "food, clothing, shelter, . . . education . . . [and] medical . . . care").

242. N.Y. SOC. SERV. LAW § 384-b(7)(a); *see also supra* notes 137–41 and accompanying text.

have held that foster children of unwed fathers may be adopted over their father's objection on this basis.[243]

B. New York Appellate Courts' Failure to Address the Constitutional Rights of Unwed Fathers of Foster Children (with More Sophisticated Treatment in Some Trial Courts)

As we noted above, many of the appellate decisions do not explain their reasoning when holding a father's consent to adoption was not required. But several decisions have clearly found that, when a father fails to provide child support, that alone is a sufficient basis for depriving the father of the right to prevent his child's adoption.[244] These decisions characterize the failure of an unwed father to provide financial support for his child while that child is in foster care (at least when the father is not impoverished) as "fatal," eliminating all need for any further inquiry.[245] This is precisely the rule that cannot withstand equal protection scrutiny, as it confines the constitutional inquiry of whether a father has grasped the opportunity "to develop a relationship with his offspring" and "accept[ed] some measure of responsibility for the child's future"[246] to the single question of monetary payments—a requirement not imposed on mothers and which serves no legitimate state interest in treating the sexes differently. But none of these cases address the constitutional issue, likely because it was not raised by the parties.

Additionally, appellate courts have shown disregard for estoppel claims that would prevent an agency from complaining that an unwed father failed to provide child support. They have rejected estoppel claims even when the agency omitted any mention of paying child support when informing the father what he needed to do in order to obtain custody of his child.[247] Instead, these courts hold that the statutory duty for unwed fathers to provide child support is absolute. One decision went so far as to hold that even when the agency actively misinformed the father by telling him that he *does not* have to pay child support, the father's failure to make such payments was nonetheless fatal to his efforts to retain substantive

243. *See, e.g.*, *In re* Angelina J.W., 159 N.Y.S.3d 877 (App. Div. 2022); *In re* Floyd J.B., 102 N.Y.S.3d 54 (App. Div. 2019); *In re* Elijah Manuel V. (Ismanuel V.), 78 N.Y.S.3d 312 (App. Div. 2018). The *Elijah* court explicitly denies the claim that this treatment is unconstitutional with a cursory citation to *Lehr*. *Id.* at 665 (citing Lehr v. Robinson, 463 U.S. 248, 266 (1983)).

244. *See, e.g.*, *In re* Isaac Ansimeon F., 9 N.Y.S.3d 232, 233 (App. Div. 2015); *In re* Marc Jaleel G., 905 N.Y.S.2d 160, 161 (App. Div. 2010); *In re* Aaron P., 877 N.Y.S.2d 30, 31 (App. Div. 2009).

245. *See, e.g.*, *In re Isaac Ansimeon F.*, 9 N.Y.S.3d at 233; *In* re *Marc Jaleel G.*, 905 N.Y.S.2d at 161; *In re Aaron P.*, 877 N.Y.S.2d at 31.

246. *Lehr*, 463 U.S. at 262; *see also In re* Raquel Marie X., 559 N.E.2d 418, 423 (N.Y. 1990).

247. *See, e.g.*, *In re* Savannah Love Joy F. (Andrea D.), 973 N.Y.S.2d 165, 167 (App. Div. 2013); *In re* Giovannie Sincere M. (Dennis M.), 952 N.Y.S.2d 881, 881–82 (App. Div. 2012); *In re* Cassandra Tammy S. (Babbah S.), 933 N.Y.S.2d 227, 227 (App. Div. 2011).

parental rights.[248] This decision seems indefensible even before recognizing that it invites agencies to subvert New York's requirement that they make diligent efforts to assist parents to achieve reunification prior to terminating parental rights.

We know of only one decision in which an appellate court in New York seemed troubled by the agency's "somewhat misleading conduct" in failing to inform the father of his responsibility to provide financial support for his child.[249] In that case, the agency was unsuccessful in its effort to terminate the father's rights based on a permanent neglect cause of action because the agency failed to show that it had made diligent efforts to work with the father toward family reunification.[250] After losing on that theory, the trial court prevented the agency from pleading as an alternative that it did not need to show a basis to terminate the father's rights because of the father's failure to meet the financial support requirement. Thus, the court prevented an end-run around the diligent efforts requirement, and the Appellate Division affirmed.[251] However, the possibility of such an end-run is not foreclosed—indeed, it seems to be invited by much of the case law.

For a time, it appeared that New York courts denied substantive parental rights even to fathers who would have been able to establish them when their children entered foster care solely because they stopped paying support after foster care placement.[252] In *In re Latricia M.*, the appellate division held that an unwed father lacked any substantive rights to his child, even though he had formally acknowledged paternity, established the paternity through blood tests, and visited with the child weekly.[253] The court apparently deemed irrelevant the financial support he provided before the child went into foster care, relying solely on his concession that he stopped making such payments once his daughter entered foster care.[254] Similarly, in *In re Jamize G.*, the court held that an unwed father lacked substantive parental rights where he discontinued financial support when the child went into foster care, even though he established paternity and provided financial

248. *In re* Star Natavia B., 33 N.Y.S.3d 896, 897 (App. Div. 2016) (father "was not excused from paying child support simply because an agency caseworker allegedly told him not to do so").

249. *In re* Sean Michael P., 868 N.Y.S.2d 705, 706 (App. Div. 2008).

250. *Id.*

251. *Id.*

252. *See, e.g.*, *In re* Latricia M., 867 N.Y.S.2d 402, 402–03 (App. Div. 2008) (noting that while the father maintained weekly visitation, he discontinued child support after four months and failed to meet obligations under Domestic Relations Law § 111(1)); *In re* Jamize G., 838 N.Y.S.2d 499, 500 (App. Div. 2007) (denying father's request to be deemed a "consent father" and noting that he neither provided child support after 1.5 months, "[n]or did he seek custody, or recommend viable alternative caretakers" and "failed to meet his parental obligations"). *See also In re* Shatavia Jeffeysha J., 954 N.Y.S.2d 60, 60 (App. Div. 2012) (establishing that evidence that a father lived with his child for several years prior to the year before the child's foster care placement was not considered relevant to determining his status as a father).

253. *In re Latricia M.*, 867 N.Y.S.2d at 402.

254. *Id.*

support during the mother's pregnancy and from the birth until the child entered foster care.[255]

These rulings treat unwed fathers and unwed mothers manifestly differently, without any nod to the idea that such sex discrimination requires a powerful governmental justification. Prior to foster care placement, a father's provision of support may be important to ensure that the child's caregiver has sufficient financial resources to take care of the child and financial support could be viewed as a proxy for a father's willingness to accept the responsibilities of parenthood.[256] But even if one believes there is reason to use such a measure or otherwise treat fathers and mothers differently when determining whether they have attained parental rights in the first instance, it is difficult to identify any reason to treat them differently once a child becomes a temporary state ward. There is simply no justification for holding, as the cases cited in the last paragraph do, that men who once had full parental rights can lose them solely for failure to pay child support while children are in foster care when women would not.[257]

Thankfully, it appears this approach now has been rejected.[258] In 2019, in *Matter of Amanda N.*, the Appellate Division reversed a Family Court's determination that a father had no rights to prevent adoption of the daughter he had been raising while residing in an intact family with her and her mother solely because he had not paid child support once she went into foster care,[259] holding that the trial court "erred in limiting the evidence solely to the time that the child was in foster care."[260] The decision explained that "[t]he fact that the child resided with the father and was financially supported by him from her birth until her removal from the home at the age of five plainly qualified him as a consent father under the statute."[261] Because the *Amanda N.* court interpreted the statute not to cut off a father's rights solely based on what financial support was provided during a foster care placement, it did not reach the question of the constitutionality of applying it to the father as the trial court had. As noted above,[262] we believe the statute could reasonably be interpreted not to apply to adoptions from foster care,

255. *In re Jamize G.*, 838 N.Y.S.2d at 500.

256. *See* Lehr v. Robertson, 463 U.S. 248, 267–68 (1983) (comparing the mother's "continuous custodial responsibility" for the child to the father's failure to establish "any custodial, personal, or financial relationship" with the child and finding that a state may constitutionally accord the parents different legal rights under the Equal Protection Clause because of this difference in involvement in raising the child).

257. Separate from the equal protection issue, there also might well be a substantive due process violation entailed in severing anyone's parental rights based solely on failure to pay child support.

258. *In re* Amanda N. (Ping N.), 112 N.Y.S.3d 490 (App. Div. 2019). This case was co-counseled on appeal by the NYU Family Defense Clinic, which we co-direct.

259. *In re Amanda N. (Ping N.)*, 112 N.Y.S.3d 490, Appellant's Br. At 9, 13, 19–20 on file with authors.

260. *In re Amanda N. (Ping N.)*, 112 N.Y.S.3d at 490.

261. *Id.*

262. *See supra* note 216.

thereby avoiding the constitutional problem entirely, but courts have generally shown no inclination to do so.

New York's case law on the constitutional question is disturbingly sparse. Two trial court cases that undertook careful analysis of the constitutional rights of unwed fathers whose children are in foster care both go against the grain of what currently is considered the "hornbook law."[263] In *Matter of M./B. Children*, Judge Nora Freeman held that it was unconstitutional to require an unwed father to pay child support as a precondition to having substantive parental rights where he secured orders of filiation for his children and raised the children for nearly a year before he became incarcerated.[264] After the children were voluntarily placed in foster care by his mother, the children's grandmother, the father maintained regular phone contact with them from prison and then had regular visits with them after his release.[265] The court concluded the father was more like Peter Stanley or Abdiel Caban than Leon Quilloin because he grasped his inchoate right to become a father to his children.[266]

Judge Freeman explained that because what the father did with respect to his children would have been sufficient for a mother to preserve her parental rights, the Equal Protection Clause forbade holding him to a different standard.[267] The critical inquiry, according to Judge Freeman, was whether the father "manifest[ed] his significant, substantial relationship with his children."[268]

In *In re Elijah A.*, a child was placed in foster care after allegations that his father inflicted domestic violence on his mother and that the mother provided inadequate supervision.[269] Two years later, the agency sought to have the child freed for adoption.[270] The agency sought to terminate the unwed mother's parental

263. In addition to the two cases discussed in the text, there is a third Brooklyn Family Court case that considers the constitutionality of Domestic Relations Law § 111(d), finding it was constitutional as applied. *See In re* St. Vincent's Servs., Inc., 841 N.Y.S.2d 834, 834 (Fam. Ct. 2007) (distinguishing the facts of the case from *In re* M./B. Children, 792 N.Y.S.2d 785 (Fam. Ct. 2004), which found the statute unconstitutional as applied). There is also a Bronx Family Court case in which a party raised a constitutional challenge to Domestic Relations Law § 111(d), but the Family Court declined to reach the question, finding instead that the father was a consent father. *See In re* Smith, 2005 N.Y. Slip Op. 52250(U) (Fam. Ct. 2005).

264. *In re M./B. Children*, 792 N.Y.S.2d at 793.

265. *Id.* at 794.

266. *Id.*

267. *Id.* The court found the statute as applied violated equal protection based on both sex and marital status with respect to four of the father's five children. The fifth child was differently situated because there was no order of filiation for that child and the father never had custody of him. *Id.* at 787–88.

268. *Id.* at 793. The court applied the same inquiry the New York Court of Appeals used in *In re* Raquel Marie X., 559 N.E.2d 418, 428 (N.Y. 1990).

269. *In re* Elijah A., 2012 NY Slip Op 52220(U), (Fam. Ct. Sept. 10, 2012), *aff'd sub nom. In re* Elijah M.A., 976 N.Y.S.2d 402 (App. Div. 2013).

270. *Id.* at *3. The decision also addresses the father's rights to another child, to whom he was the legal father but not the biological father. The text discusses the case's analysis only with respect to Elijah, who was the father's biological son.

rights based on permanent neglect.[271] Against the unwed father, the agency filed both a petition to terminate his parental rights based on permanent neglect and pled in the alternative that he lacked parental rights because he had failed to pay child support while the child was in foster care.[272]

In a lengthy decision following a trial, Judge Daniel Turbow detailed complications and agency failures that are all too common in foster care cases. The court described how, over the course of two years during which the father worked with the foster care agency for the return of his son, the father had made "efforts to develop a strong, affectionate and nurturing relationship with Elijah,"[273] but the agency had failed to make diligent efforts to assist. Concluding that the agency failed to "address the [father's] problem in a meaningful way" and that the evidence demonstrated "a debilitating uncertainty on the part of the agency as to what was needed to achieve reunification,"[274] the court dismissed the termination petition.[275]

Having ruled that the agency's efforts to extinguish the father's parental rights failed, Judge Turbow addressed the agency's alternative claim—that the father lacked such rights in the first place. The court chastised the agency for pursuing a claim which was at such dramatic odds with its alternative claim that, despite the agency's best efforts, the father failed to do enough to maintain his parental rights. In the court's words:

> it is one thing for an agency, in a vacuum, simply not to inform a father of his support obligation. It is quite another for it to refrain from any mention of the obligation during the planning process so as to lead a father to believe it is irrelevant to the expectation of reunification, and to then turn around and assert that the failure to pay support permits a critical diminishment of that father's parental rights. We find that under such circumstances the agency is equitably estopped from succeeding on such a claim.[276]

On these facts, Judge Turbow explained, "[I]t would simply be unjust to deprive [the father] of his status as a 'consent' father" for no reason except that he did not pay child support while the child was in foster care.[277] It was unacceptable to the court that "[o]ver the period of two years, the agency led Mr. A. to believe that he had a right to have Elijah live with him if he demonstrated he were able to care for the child," and then to turn on him in court and condemn him for not doing something that the agency never mentioned.[278] Concluding that "it would simply

271. *Id.*
272. *Id.*
273. *Id.* at *5.
274. *Id.* at *8.
275. *Id.* at *10.
276. *Id.* at *23.
277. *Id.*
278. *Id.* at *20.

be unfair upon these facts to find that Mr. A's relationship with Elijah was of such limited significance that his consent to Elijah's adoption is not required,"[279] the court held that the father had substantive rights to his child.[280]

The court essentially found that when an agency develops a case plan with a parent for the express purpose of clarifying the steps the parent must take to secure the custody of his child, the agency is estopped from later claiming the parent has no rights to the child because the parent failed to take steps he was never advised to take. In this way, the court was able to rule against the agency without reaching the constitutionality of requiring financial payments of the father and not the mother, [281] though it indicated it would have found the governing statute unconstitutional as applied if it had reached the question.[282]

Elijah A. highlights the practical consequences of allowing the constitutional violation of basing fathers' rights on financial payment in the foster care context. Undoubtedly, there are fathers whose rights could be relatively easily terminated once it was recognized that they had rights (if, for instance, they had failed to regularly visit the child in foster care).[283] But there are also fathers whose rights could not be terminated because they maintained a meaningful relationship with their children while actively engaging in service planning or, like Elijah's father, had been deprived of the assistance that New York requires agencies to provide. Both parents and children are entitled to this assistance because it is New York's considered judgment that it serves children's best interests to keep families together when such assistance would make that safely possible.[284] The *Elijah A.* court held the petitioning agency to their statutory obligation. Allowing agencies to ostensibly work with a father on reunification planning as the agency in *Elijah A.* had, but then to pursue adoption without showing that the agency had made the requisite diligent efforts is to eliminate the enforcement mechanism that ensures agencies meet their obligations to families.

V.
CONCLUSION

The current practice of requiring monetary payments from unwed fathers, but not from mothers or wed fathers of children in foster care is, in the words of Justice Ginsburg, "stunningly anachronistic."[285] Over 40 years ago, the Supreme Court wrote that such "statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their

279. *Id.*

280. *Id.*

281. *See id.* at *18.

282. The court wrote that it "would likely reach the same conclusion" regarding the constitutionality of the Domestic Relations Law as the court had in *Matter of M./B. Children*. *Id.* at *22.

283. N.Y. SOC. SERV. LAW § 384-b(4)(d), (7)(a) (McKinney 2021).

284. *See supra* notes 192–99 and accompanying text.

285. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693 (2017).

relationship with the child."[286] As the case example at the beginning of this Article illustrated, mothers and fathers are similarly situated with regard to children in foster care. In that case, the father, not the mother, was the one who had a strong enough relationship with Kevin that the agency discharged Kevin to his care.[287] Whatever blame the agency might have been able to place on Robert for the failure of the trial discharge—i.e., whatever cause of action the agency might have had to justify ending his parental rights—Robert and Kevin deserved for their relationship to be treated as the parent-child relationship it was.

A. Where Would Striking the Child Support Provision as Unconstitutional Lead?

We want to underscore that striking down the child support requirement in Domestic Relations Law § 111(1)(d)(i) will not open the door to fathers swooping in at the last moment to disrupt permanency for children. The post-*Stanley* fear that a father could come in at the 11th hour and disrupt an adoption has long been put to rest. The Supreme Court has made clear that only fathers who have grasped their inchoate right "and accept[ed] some measure of responsibility for the child's future" will "enjoy the blessings of the parent-child relationship."[288] Any reasonable interpretation of New York law would include the idea that a father would have had to substantially manifest his interest in the child in order to secure substantive rights.[289] Indeed, in the private family law context, in striking down the provision of the Domestic Relations Law that applies to children placed for adoption under six months old, the Court of Appeals suggests that to secure rights, a father must "demonstrate that he is willing and able to enter into the fullest possible relationship" with his child.[290] A father whose child is in foster care can meet this standard by coming forward, meeting with the agency, regularly visiting his child, and engaging in a service plan that will allow him to prepare to safely care for his child. Once fathers have done that (which happens to be precisely what New York law requires of mothers of children in foster care[291]), the law should treat them as it would any other parent.

Thus, in the public family law context, an interpretation of the Domestic Relations Law that rejected the rigid requirement of child support payments would simply: (1) protect the substantive parental rights of fathers who had already developed a substantial relationship with their child prior to the foster care

286. Lehr v. Robertson, 463 U.S. 248, 267 (1983).

287. *See supra* Part I.A.

288. *Lehr*, 463 U.S. at 262.

289. *See In re* Raquel Marie X., 559 N.E.2d 418, 428 (N.Y. 1990) ("An assertion of custody is not all that is required. The Supreme Court's definition of an unwed father's qualifying interest recognizes as well the importance to the child, the State and all concerned that, to be sufficient, the manifestation of parental responsibility must be prompt.").

290. *Id.* at 425.

291. *See* N.Y. DOM. REL. LAW § 111(1)(b)–(c), (2)(c) (McKinney 2016); N.Y. SOC. SERV. LAW § 384-b(4)(d), (7)(a) (McKinney 2021).

placement,[292] and (2) protect the relationships that develop when fathers are encouraged to and do become involved with their children once they learn they are in foster care. While the details of the required level of involvement will need to be developed for the second category (which could be done through statutory change or case law), we are unable to identify a good-faith policy objection to the basic structure of this approach. We are unaware of any policy justification offered for requiring child support in the foster care context from unwed fathers, but no others.[293]

B. Implications for Further Sex Discrimination Challenges in Child Welfare

We hope this Article will encourage practitioners and courts to address the glaring constitutional violation we have been discussing. We hope, as well, that the analysis in this Article will support related efforts. Most obviously, other states use different rules for determining when an unwed father has the substantive right to prevent adoption of his child,[294] and those might be similarly discriminatory. A review of the laws and practices in other states is beyond the scope of this Article, but we hope this piece will encourage practitioners and courts to review their states' rules concerning fathers' rights as applied in the child welfare context from the perspective developed here. The details of the analysis will vary based on state law, but each analysis should be informed by the insight that the interests relevant to a constitutional assessment of the treatment of unwed fathers are significantly different with respect to public and private adoption. Practitioners and courts should consider that fathers' and mothers' interests are not as likely to be at odds in the foster care context,[295] and that the state's interests are significantly different

---

292. This is the rule that was adopted by the First Department in *In re* Amanda N. (Ping N.), 112 N.Y.S.3d 490 (App. Div. 2019).

293. By "requiring," we mean requiring child support as a prerequisite to having substantive parental rights. Nothing in this argument would prevent the state from seeking child support from unmarried fathers in a proceeding that would not affect the right to veto an adoption—just as they could for mothers or married fathers. In any event, a potential fiscal argument would fail to justify linking child support to preventing the adoption of one's child out of foster care. The costs to the state of public adoptions are higher than any potential child support because the state typically pays a subsidy to the adoptive parent until the child turns 21. *US Adoption Assistance/Subsidy*, *supra* note 185. New York City alone spends more than $210,000,000 a year on adoption subsidies. MARJORIE LANDA, CITY OF NEW YORK, OFF. OF THE COMPTROLLER, AUDIT REPORT ON THE ADMINISTRATION FOR CHILDREN'S SERVICES' CONTROLS OVER ADOPTION SUBSIDIES 1 (2021), https://comptroller.nyc.gov/wp-content/uploads/documents/FP19_090A.pdf [https://perma.cc/4WNU-XV96].

294. *See* CHILD WELFARE INFO. GATEWAY, THE RIGHTS OF PRESUMED (PUTATIVE) FATHERS: SUMMARY OF STATE LAWS 6–102 (2007), https://www.childwelfare.gov/pubPDFs/putativeall.pdf [https://perma.cc/4GJC-YUGM].

295. This is not to say, of course, that mothers and fathers will always have the same preference in foster care cases, but the issue of whether an unwed father has the right to prevent adoption will typically only come to the fore if the mother loses that right or is deceased. In the less common situation in which the mother of a child in foster care prefers to surrender her child for adoption rather than have the child released to the father, there is a conflict, but the other interests in play, as discussed in the text, will still be different than in the private adoption context.

there. The strong preference for private ordering of custody arrangements does not resolve how to weigh a father's versus a mother's preference in the private adoption context, but for public adoption, preferring private ordering will almost always favor providing substantive rights to fathers because that decreases the ease with which the state can intervene in otherwise private decision-making. Additionally, while there is some variation among states as to their level of commitment to keeping families together, every state's law is shaped to some extent by the federal funding mandates that require efforts to unify foster children with their families of origin[296] and by Supreme Court case law that presumes parents act in their children's best interests unless and until there is a showing of parental unfitness.[297] Thus, states will always have an interest in trying to release children from foster care to their fathers when safely possible. Finally, there will be the distinction between the public and private contexts that there is no justification related to reducing abortion for limiting unwed fathers' rights to foster children. All of these distinctions must be considered to determine whether a rule about unwed fathers is constitutional as applied in any particular state's foster care system.

Beyond challenges to the treatment of unwed fathers regarding their right to prevent adoption, there may well be other types of sex discrimination in foster care policy and practice that would benefit from careful review focused on the state interests in the child welfare system discussed here. Too often, we fear, analysis is imported from other areas of law that does not fit the unique interests and dynamics in play in child welfare.

For instance, one issue that might merit further investigation is that fathers are sometimes civilly charged with child neglect when they knew or should have known about behaviors by the mother during pregnancy that allegedly indicate risk to the child at the time of birth,[298] while mothers are not typically charged when they knew or should have known about fathers' behavior during a pregnancy the father helped conceive. Although there are likely multiple objections to these types of allegations against fathers, some grounded in the pregnant women's rights,[299] one strand of objection might be based in their discriminating against fathers based on sex.

Child welfare agencies may also discriminate against fathers when offering parent-child residential services, such as residential drug or mental health

296. *See* CHILD WELFARE INFO. GATEWAY, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 1 (2019), https://www.childwelfare.gov/pubPDFs/reunify.pdf [https://perma.cc/KKL9-SGQ8].

297. *See* Troxel v. Granville, 530 U.S. 57, 68 (2000).

298. *See, e.g.*, *In re* Orlando R., 977 N.Y.S.2d 30, 31 (App. Div. 2013); *In re* K. Children, 677 N.Y.S.2d 379, 379–80 (App. Div. 1998).

299. *See generally* Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999 (1999) (discussing the connections between criminal and civil prosecutions for drug use during pregnancy and broader legal questions concerning bodily autonomy and reproductive rights).

treatment, to prevent the need for foster care, or when teen parents who themselves are in foster care are more likely to be able to reside in foster homes with their children if they are mothers. Perhaps there are justifications for these disparities; mothers and fathers who come into contact with child welfare agencies are certainly sometimes differently situated, and their interests may at times conflict with respect to access to certain services in ways they do not with respect to rights to prevent adoption of their children from foster care. But the disparities in the way the child welfare system treats fathers calls out for examination in an age in which fathers are taking on more child-rearing responsibility than ever before,[300] and in which those on all sides of the ideological spectrum emphasize the importance of fathers' involvement in their children's lines.[301]

The last thing we mean to suggest is that the child welfare system treats mothers fairly or that it treats mothers better than fathers. On the contrary, we share the view of other commentators that the child protective system unfairly targets women and that patriarchal notions of motherhood infuse the child welfare system's treatment of mothers.[302] In child welfare, as is so often the case, gender stereotyping has harmful effects on both women and men. The point is that sex

---

300. *See* Claire Cain Miller, *Men Do More at Home, but Not as Much as They Think*, N.Y TIMES: THE UPSHOT (Nov. 12, 2015), https://www.nytimes.com/2015/11/12/upshot/men-do-more-at-home-but-not-as-much-as-they-think-they-do.html [https://perma.cc/4QPR-V5EY] (noting that since 1965, "[f]athers nearly tripled their child care hours to 7 from 2.5 and more than doubled the hours they spent on housework to 9.5 from 4.4"). Notably, empirical evidence suggests that Black non-custodial fathers are more actively involved in their children's lives in some ways than white non-custodial fathers. JO JONES & WILLIAM D. MOSHER, CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L HEALTH STATS. REPS. NO. 71, FATHERS' INVOLVEMENT WITH THEIR CHILDREN: UNITED STATES, 2006–2010 (2013), https://www.cdc.gov/nchs/data/nhsr/nhsr071.pdf [https://perma.cc/2XXF-NLRS]. This suggests that if the child welfare system is not discriminating against Black fathers, they would likely continue to be more involved than white fathers in the lives of their children who are in foster care.

301. *See, e.g.*, Jesse Lee, *President Obama Promotes Responsible Fatherhood: "No Excuses,"* WHITE HOUSE: PRESIDENT BARACK OBAMA (June 21, 2010, 3:14 PM), https://obamawhitehouse.archives.gov/blog/2010/06/21/president-obama-promotes-responsible-fatherhood-no-excuses [https://perma.cc/L9XD-28QU]; Rick Santorum, *Fathers Will Always be Essential*, NAT'L REV. (June 21, 2020, 6:30 AM), https://www.nationalreview.com/2020/06/fathers-day-respect-for-fatherhood-vital/ [https://perma.cc/72AD-NJDL].

302. *See, e.g.*, Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 589 (2012) (citing Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 584 (1997) ("[T]he vast majority of the parents involved in the child protective system are mothers. Men are rarely brought into court, held accountable, or viewed as resources for their children. When fathers are involved in the proceedings, they are usually subject to lower expectations and are significantly less likely to be criminally charged with neglect or passive abuse of their children. Women, on the other hand, are more frequently charged under such laws, even when they had nothing to do with the abuse."); Mary Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for the Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 14–15 (1995) ("Because of this [gender] bias, mothers are likely to be found liable for abuse and neglect regardless of the identity of the actor. If one looks at who is charged with abuse and neglect in juvenile courts, this worry is verified: it is almost always only the mother, though often the mother is charged with failing to protect and the active abuser was a man.").

discrimination claims in the field must be understood as arising in a context in which even when mothers and fathers are treated differently, their interests are likely to be aligned against the state on issues of family integrity.

As we said of the inquiry pursued here, other inquiries into sex discrimination in the child welfare system are especially important in light of the fact that this system intervenes far more often in the lives of poor families of color than others, with Black families affected particularly disproportionately.[303] This raises the specter that Black fathers and other fathers of color are subject to additional, intersectional harms as they interact with a system that discriminates in terms of both race and sex. Further inquiry into potential intersectional harms—which might include aspects of the analysis of the state interests in child welfare that we've discussed—is certainly merited.

There has been a surprising dearth of sex discrimination analysis on the specific question of when relationships between unwed fathers and their children in foster care deserve constitutional protection and more broadly with respect to the treatment of fathers by the child welfare system. More is required if we take to heart the Supreme Court's admonition that "discrimination itself . . . perpetuat[es] 'archaic and stereotypic notions'" incompatible with the equal treatment guaranteed by the Constitution.[304] Nowhere is the self-perpetuating harm of equal protection violations more vivid than in the realm of child welfare, where discrimination against parents inevitably hurts their children.

303. *See* ROBERTS, *supra* note 132, at vi–vii, 48; CHILD. RIGHTS, *supra* note 132, at 12–14.

304. Heckler v. Mathews, 465 U.S. 728, 739 (1984) (quoting Miss. Univ. Hosp. for Women v. Hogan, 458 U.S. 718, 725 (1982)).