

## Behavioral Biology and Michael H. v. Gerald D.

Behavioral biology is helpful in understanding what is important about the family. In *Michael H. v. Gerald D.*,<sup>1</sup> the main issue was whether application of a California statute (Cal. Evid. Code Ann. §621) that presumes a child born to a married woman living with her husband is a child of that marriage violated the due process rights of a man who was almost certainly the child's natural father.<sup>2</sup> Carole D. and Gerald D. were married in 1976.<sup>3</sup> Carole had an affair with Michael H. beginning in 1978.<sup>4</sup> In 1981, she conceived a child, Victoria, and the birth certificate listed her husband Gerald as the father, and he always acted like Victoria's father.<sup>5</sup> Over the next few years, Carole and Victoria lived at different times with Gerald, Michael, and another man.<sup>6</sup> In 1983, Michael filed a filiation action in California, and Carole withdrew a motion for summary judgment that she had filed in that action when she again became involved with Michael.<sup>7</sup> In April 1984, Carole and Michael signed a stipulation that Michael was Victoria's father.<sup>8</sup> However, two months later, Carole reconciled with Gerald.<sup>9</sup>

Michael and Victoria, through a *guardian ad litem*, sought visitation rights for Michael with his daughter, which the court granted.<sup>10</sup> Gerald then intervened and moved for summary judgment, claiming that under Cal. Evid. Code Ann § 621 there was no triable issue concerning Victoria's paternity.<sup>11</sup> Under the statute, "[t]he presumption [of paternity] may be rebutted by blood tests, but only if a motion for such tests is made, within two years of the child's birth, either by the husband or, if the natural father has filed an affidavit acknowledging paternity, by the wife."<sup>12</sup> The court granted Gerald's motion for summary judgment, and it also denied Michael visitation rights during the pendency of the appeal.<sup>13</sup>

Michael's appeal asserted that the court's application of § 621 violated his procedural and

substantive due process rights, and Victoria raised due process and equal protection claims.<sup>14</sup> The Court of Appeals rejected Michael's and Victoria's arguments, and the California Supreme Court denied their petition for discretionary review.<sup>15</sup> They then appealed to the United States Supreme Court, which granted certiorari.<sup>16</sup>

Justice Scalia began the main part of the plurality opinion with an observation based on nature: "California law, like nature itself, makes no provision for dual fatherhood."<sup>17</sup> He noted that, although Michael was initially seeking only visitation, under California law, if he were successful in establishing paternity, he could sue for custody.<sup>18</sup> Scalia rejected Michael's procedural due process claim on the ground that § 621 was actually the implementation of substantive law.<sup>19</sup>

Scalia began the substantive due process part of his opinion with the observation that "[i]t is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint."<sup>20</sup> Scalia found some need for constraint because of the possibility of an expansive reading of the clause under this interpretation.<sup>21</sup> He found that constraint in tradition: "[T]he Due Process Clause affords only those protections 'so rooted in the roots and conscience of our people as to be ranked as fundamental.'"<sup>22</sup> He then stated, "the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection."<sup>23</sup> After examining common law authorities dating back to the eighteenth century, like Blackstone's *Commentaries*, he concluded that there was no such tradition.<sup>24</sup> He declared: "The primary policy rationale underlying the common law's severe restrictions on rebuttal of the

presumption appears to have been an aversion to declaring children illegitimate . . . thereby depriving them of their inheritance and succession, . . . and likely making them wards of the state. A secondary policy concern was the interest in promoting the ‘peace and tranquility’ of States and families, . . . a goal that obviously is impaired by facilitating suits against husband and wife asserting that their children are illegitimate.”<sup>25</sup> He continued, “even in modern times—when, as we noted, the rigid protection of the marital family has in other respects been relaxed—the ability of a person in Michael’s position to claim paternity has not been generally acknowledged.”<sup>26</sup> In addition, what Michael is trying to assert in this case is the right to obtain parental prerogatives, and “[w]hat he must establish, therefore, is not that society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least not traditionally denied them.”<sup>27</sup> He concluded: “This is not the stuff of which fundamental rights qualifying as liberty interests are made of.”<sup>28</sup>

He responded to Justice Brennan’s criticism in the dissent that the plurality opinion “‘squashes’ the liberty that consists of ‘the freedom not to conform’” by stating “to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa.”<sup>29</sup> In other words, the expansion of one liberty interest contracts another.<sup>30</sup> He concluded: “Our disposition does not choose between those two ‘freedoms,’ but leaves that to the people of California.”<sup>31</sup>

Scalia also rejected Victoria’s due process claim, asserting that her claim was even weaker than her father’s.<sup>32</sup> Despite any psychological benefits to Victoria, Scalia thought that “the claim that a state must recognize multiple fatherhood has no support in the history or

traditions of this country.”<sup>33</sup> Scalia also denied Victoria’s equal protection claim, rejecting her argument for strict scrutiny analysis on the ground that the state was discriminating against her because she was illegitimate, because she was not illegitimate under California law. He noted that “[i]llegitimacy is a legal construct, not a natural trait.”<sup>34</sup>

Behavioral biology shows the problem with Scalia’s evaluation of liberty through the lens of tradition. Tradition concerns a continuation of the past for the past’s sake. It is anti-change. However, mankind’s nature can change as the environment changes, which includes technological change. The rule that one could not generally attack the paternity of a child of a marriage may have been a good rule for Blackstone’s time because at that time there were no blood tests that could determine paternity. Today, the environment has “changed”; we have such tests. Consequently, the traditional rule should be altered. In addition, even in Blackstone’s time, there were exceptions to the rule; the presumption could be rebutted if the husband was sterile or had no access to the wife at the relevant time.<sup>35</sup> This means that, if it were impossible for the husband to be the father, paternity could be attacked. Thus, the rule isn’t different today, just the methods of establishing paternity have expanded.

In addition, tradition is not the best choice as a basis for liberty; something is not fundamental solely because it has been done a long time. There are traditions that go against human nature or that encourage behavior that are remnants of a different environment. Slavery was a tradition, but our leaders in the nineteenth-century eliminated it because it was repugnant to human nature.

Justice Scalia argued that the peace and tranquility of the family was another reason for the rule.<sup>36</sup> Of course, the peace and tranquility of the family is also different today from what it

was in Blackstone's time. There is a much greater incidence of divorce, and living arrangements exist that Blackstone would not recognize. In *Michael H.*, the mother separated from her husband several times, and she lived with at least two other men.<sup>37</sup> There was little peace and tranquility to interfere within that marriage. More importantly, it is not the adjudication of paternity that interferes with the peace and tranquility of the family, but the accusation or knowledge of the paternity.

Nor does the stigma of illegitimacy continue as a basis for the traditional rule. It is true that in Blackstone's time illegitimacy was a real stigma, and it caused numerous other problems, such as loss of inheritance or the danger that the child would become a ward of the state.<sup>38</sup> Today, however, that stigma does not exist, and the law has changed to treat illegitimate children in the same manner as children born of a marriage.<sup>39</sup>

The real problem here is that Scalia holds too narrow a concept of liberty that ignores human nature. This author believes that, because individuals are autonomous, human nature supports that the government should not interfere with a person's liberty unless there is harm to another.<sup>40</sup> Moreover, the right of a father to have a relationship with his natural child is a liberty that the government should not generally interfere with.<sup>41</sup> As Professor McGinnis has remarked, "family affections are not mere social constructs but are deeply rooted in our behavior and psyche."<sup>42</sup> In fact, unlike most other mammals, human fathers also have strong parental bonds with their children.<sup>43</sup> It is the natural relationship between father and child that is fundamental, not the legal one, which is contrary to nature in this instance.

However, as Scalia pointed out, the husband had a liberty, too.<sup>44</sup> Nevertheless, the answer is not to let the state decide, as Scalia suggested. Rather, this is a constitutional question

that the Supreme Court must decide. In other words, basic liberty is a question of principle, not policy.

Clashes of liberty occur all the time. Which is a more important liberty, a person's right to not associate with a race of people he dislikes or the right of a person of that race to have a fair opportunity for a job? Such questions can be answered with the help of behavioral biology. In the case of the above discrimination hypothetical, a person's right to equal opportunity in the job market to feed himself and his family should trump a person's liberty of nonassociation in the public sphere, especially when it is based on a taboo mentality.<sup>45</sup> In private life, a person might have the liberty to not associate with whomever he likes for whatever reason, but this liberty is restricted in public life when it harms others.

In *Michael H.*, Michael had an interest in a paternal relationship with his daughter because he was Victoria's natural father—she shared his genes—and because of the paternal bond that is essential to human nature.<sup>46</sup> As mentioned above, human fathers have strong parental bonds with their children. Victoria also had a liberty interest in a relationship with her father because she shared his genes; it will usually be in the best interest of the child to have a relationship with her father, absent an abusive relationship.<sup>47</sup> Gerald did have the liberty of association with anyone he pleased, and it is certainly reasonable that he would want a relationship with his wife's daughter. However, since paternity and the paternal bond are central to human nature, Michael's and Victoria's liberty trumps Gerald's. Carole also had a liberty in protecting her daughter, but there was no harm here because it had never been alleged that Michael was a threat to Victoria in any way.<sup>48</sup>

Scalia also had it backwards in favoring the sanctity of the marriage over Michael's

paternal interest. Marriage is a way that society protects paternity and the paternal bond that are essential to human nature.<sup>49</sup> Accordingly, paternity and the paternal bond are more important than marriage.<sup>50</sup> The pair-bond between Gerald and Carole are also essential to human nature, but it is not an adjudication of paternity that threatened that pair-bond, but Victoria's unfaithfulness to her husband. Scalia also ignored Victoria's interest.<sup>51</sup> It was not the psychological benefit from having two fathers that was important, it was the fact that Michael shared her genes, which is the most essential connection in human nature.

In sum, Justice Scalia came to the wrong outcome in *Michael H.* because he favored tradition over evolution, a choice that ignored human nature. He should have seen that technology had eliminated the foundation for the rule that the paternity of a child born in a marriage should be challenged only in limited circumstances. Moreover, he wrongly favored marriage over protecting paternity and the paternal bond because paternity and the paternal bond are essential to human nature, while marriage is only a way to protect those attributes. Scalia had it right that there is no dual fatherhood in nature. However, in nature Michael was Victoria's father.<sup>52</sup> If California law interferes with Michael's relationship with his natural daughter, it has violated his due process rights under the Fourteenth Amendment.

Scott Fruehwald. Neurojurisprudnce Website. Last updated December 27, 2009.

1. 491 U.S. 110 (1988).
2. *Id.* at 113.
3. *Id.*
4. *Id.*
5. *Id.*

6. *Id.* at 114.
7. *Id.*
8. *Id.* at 114-15.
9. *Id.* at 115.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 115-16.
14. *Id.* at 116.
15. *Id.*
16. *Id.*
17. *Id.* at 118. Justice Scalia provided no citation for his observation about nature.
18. *Id.*
19. *Id.* at 119.
20. *Id.* at 121.
21. *Id.* at 121-22.
22. *Id.* at 122 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).
23. *Michael H.*, 491 U.S. at 124.
24. *Id.* at 124-27.
25. *Id.* at 125.
26. *Id.*
27. *Id.* at 126.
28. *Id.* at 127.
29. *Id.* at 130.

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 130-31.
34. *Id.* at 131.
35. *Id.* at 124.
36. *Id.* at 125.
37. *Id.* at 115.
38. AM.JUR.2D, *Illegitimate Children* § 7 (1995).
39. *Id.*; C.J.S. *Child Born Out of Wedlock* §§5, 63 (1991).
40. Scott Fruehwald, *The Emperor Has No Clothes: Postmodern Legal Thought and Cognitive Science*, 23 GA. ST. U. L. REV. 48-49 (2006).
41. Of course, the government should be able to interfere with this liberty if the father were abusing the child, but there is no such allegation here.
42. John O. McGinnis, *The Human Constitution and Law: A Prolegomenon*, 8 J. CONTEMP. L. ISSUES 211, 215 (1997).
43. ANTHONY WALSH, BIOSOCIOLOGY: AN EMERGING PARADIGM 209 (1995). (“Most primate fathers are unable to identify their offspring, let alone form a bonded relationship with them.” *Id.* at 211.); *see also* STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 252 (2002).
44. *Michael H.*, 491 U.S. at 130.
45. Taboo mentality refers to irrational prejudices. Professor Pinker has written that “the design of the moral sense leaves people in all cultures vulnerable to confusing defensible moral judgements with irrelevant passions and prejudices.” PINKER, *supra* note 43, at 272.
46. Justice Brennan’s dissent noted that Michael H. had lived with his daughter, and supported her, and maintained a relationship with her. *Michael H.*, 491 U.S. at 143 (Brennan, J., dissenting).
47. Professor Mary Kay Kisthardt has observed that, despite the fact that Victoria was the focus of the case, it became a battle over the rights of the parents, with “the plurality simply defin[ing]

her individual existence out of existence.” Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TULANE L. REV. 585, 628 (1991); see also Lawrence C. Nolan, “*Unwed Children*” and their Parents before the United States Supreme Court from Levy to Michael H: *Unlikely Participants in Constitutional Jurisprudence*, 28 CAPITAL U. L. REV. 1, 67 (1999) (“Often, in cases dealing with parental rights, the child is subjected to the adult’s claim, or it is ignored.”). Professor Kisthardt has also noted that “the continuity of relations [which had been established in this case] is extremely significant for healthy psychological development of children.” Kisthardt, *supra*, at 630.).

48. In addition, Professor Kisthardt has pointed out that Carole had at one point encouraged the contact between Victoria and Michael. Kisthardt, *supra* note 47, at 626. She has stated: “The reader is left with the sad feeling that the mother is the only person whose rights were truly vindicated in this case and that she is, in all likelihood, the least deserving of vindication. *Id.* at 627.

49. WALSH, *supra* note 43, at 212-13.

50. Justice Brennan’s dissent also criticized the plurality’s emphasis on the “unitary family,” noting that the only difference between the relationship among Michael, Victoria, and Carole and that of Gerald, Victoria, and Carole was the fact of marriage. *Michael H.*, 491 U.S. at 143-44 (Brennan, J., dissenting). He added: “It is a bad day for due process when the State’s interest in terminating a parent-child relationship is reason to conclude that that relationship is not part of the ‘liberty’ protected by the Fourteenth Amendment.” *Id.* at 146-147.

51. Professor Janet Dolgin has pointed out that “[i]n order to preserve traditional families, in general, or one family, courts have been willing to manipulate, even to dismiss, the biological facts.” Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 U.C.L.A. L. REV. 637, 644 (1993). She has noted that a natural father’s paternity is often ignored because the law defines fathers, in contrast to mothers, through their cultural selves, rather than through their biological selves. *Id.* at 669.

52. As Professor Dolgin has remarked: “Thus, in effect, Justice Scalia argued that a child’s stepfather is a more ‘natural’ father than the child’s genitor.” *Id.*