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## EVOLUTION, CHILD ABUSE AND THE CONSTITUTION

*Christopher Marlborough\**

### INTRODUCTION

The presence of a non-genetic parent in a child's home is the largest single risk factor for severe child maltreatment yet discovered.<sup>1</sup> Professor Owen Jones has used the example of stepparent infanticide to explain how evolutionary analysis in law can serve society's goals when prevailing theories have failed.<sup>2</sup>

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\* Brooklyn Law School Class of 2003; B.A., State University of New York at Purchase, 1991. I would like to thank Professors Jennifer Rosato and Bailey Kuklin for their input and guidance in writing this note and my lovely wife Jennifer for her infinite patience.

<sup>1</sup> MARTIN DALY & MARGO WILSON, *THE TRUTH ABOUT CINDERELLA: A DARWINIAN VIEW OF PARENTAL LOVE* 7 (1998) [hereinafter DALY & WILSON, CINDERELLA].

<sup>2</sup> Owen Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117 (1997) [hereinafter Jones, *Child Abuse*]. Professor Jones suggests a four-stage process to determine when evolutionary principles can be helpful to inform legal policy. *Id.* at 1158. First, "[t]he Identification Stage frames the subject to analyze it. It clarifies one's legal goal with respect to a law-relevant of human behavior and assesses the likelihood that evolutionary analysis can aid in the pursuit of that goal." *Id.* at 1157-58. Second, "[t]he Information Stage uncovers and organizes new information on the multiple causes of the defined behavior. It describes how one can explore evolutionary theories, examine the evidence bearing on their falsifiable predictions, and assess the fit between the theory and the available evidence." *Id.* at 1158. Third, "[t]he Integration Stage describes how to expose true conflicts between evolutionary and prevailing theories and how to integrate the best parts of each into a comprehensive understanding of the behavior, generate new legal strategies for pursuing pre-articulated legal goals, improve the cost-benefit analyses that often drive various legal policies,

Specifically, Jones has made a compelling case for the consideration of evolutionary theories in legal policies relating to child abuse and has brought some startling facts to the attention of the legal community.<sup>3</sup> Children living with one genetic parent and one non-genetic parent are up to one hundred times more likely to suffer fatal abuse than those living with two genetic parents.<sup>4</sup> While one might think this enormous disparity would inspire lawmakers to address the problem head on, thus far they have not. The implementation of laws targeting non-genetic parents presents unique moral and ethical conflicts to legislators who largely rely on the social science community for scientific information.<sup>5</sup> Research that has led to the discovery of differential abuse rates among non-biological parents, however, did not arise from the traditional social sciences, but from the field of evolutionary psychology.<sup>6</sup> Unfortunately, the social

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and provide new directions for future research initiatives.” *Id.* Finally, “[t]he Application Stage applies the information generated by the previous stages to effect concrete improvements in the legal system.” *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See DALY & WILSON, CINDERELLA, *supra* note 1, at 28.

<sup>5</sup> Owen D. Jones, *On the Nature of Norms: Biology, Morality and the Disruption of Order*, 98 MICH. L. REV. 2072, 2072 (2000). Jones notes that lawmakers have traditionally looked to philosophy for moral guidance and to sociology for information on norms. *Id.* “To the extent that legal thinkers have in fact begun to move beyond philosophy and sociology for more information, they have turned primarily to economics, psychology and game theory.” *Id.* at 2073. Nevertheless, “[a]s consumers and appliers of knowledge from other disciplines, legal thinkers should play—indeed should feel obligated to play—far more active role in furthering interdisciplinary integration of subjects relevant to law.” *Id.* at 2073. Jones points out that behavioral biology has at least as much to offer to the study of norms as these other disciplines and that by ignoring contributions from this field of inquiry, legal thinkers risk errors that are both intellectually embarrassing and harmful. *Id.*

<sup>6</sup> DALY & WILSON, CINDERELLA, *supra* note 1, at 21. Evolutionary psychology is the scientific study of the effects of the human biological evolutionary history on modern day human behavior. See STEPHEN PINKER, HOW THE MIND WORKS 23 (1997) [hereinafter PINKER, MIND WORKS]. It is an interdisciplinary science, which gathers evidence from numerous other disciplines, including biology, paleontology, ethology, anthropology, sociology, economics, cognitive psychology and linguistics in order to make predictions about human behavior. See EDWARD O. WILSON, CONSILIENCE:

## EVOLUTION AND CHILD ABUSE

689

science and academic communities have gone beyond a healthy skepticism and have displayed unprecedented hostility to evolutionary explanations for human behavior.<sup>7</sup> Much of this criticism is unwarranted and comes from people who should know better, based on their training and expertise.<sup>8</sup> As

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THE UNITY OF KNOWLEDGE 10 (1997) [hereinafter WILSON, CONSILIENCE]. Therefore, a common understanding of the world among the various disciplines is critical to the success of evolutionary psychology. *Id.* A more general term, "sociobiology" is the study of the evolutionary history of animal behavior, including humans. *Id.* at 150.

<sup>7</sup> See, e.g., PINKER, MIND WORKS, *supra* note 6, at 45. "The biologist E.O. Wilson was doused with a pitcher of water at a scientific convention and students yelled for his dismissal over bullhorns and put up posters urging people to bring noisemakers to his lectures." *Id.*

<sup>8</sup> STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 108-09 (2002) [hereinafter PINKER, BLANK SLATE]. Scholars have suggested a variety of reasons evolutionary psychology has had difficulty gaining acceptance in the social science community. *Id.* First, evolutionary psychology is often inappropriately compared with the social Darwinist and the eugenics movements. *Id.* at 109. For a comprehensive discussion of the history of social Darwinism, see DANIEL J. KEVLES, IN THE NAME OF EUGENICS (1985). Social Darwinism referred to class stratification within society, postulating that people are socially disadvantaged because of their genetic inferiority, which had left them unable to compete with those in the upper classes. See STEPHEN JAY GOULD, THE Mismeasure of Man 396 (2d ed. 1996). The eugenics movements went one step further and attempted to improve the human race by giving the "more suitable races" an upper hand in the survival of the fittest. See KEVLES, *supra*, at ix. At one time, evolutionary explanations for human behavior were widely accepted among the intellectual community in this country, with results that are repugnant by today's standards. See PINKER, MIND WORKS, *supra* note 6, at 47. The eugenics agenda has been used to assert the supremacy of the Aryan race and to support the mandatory sterilization of convicts and the disabled. *Id.*

Second, critics of evolutionary psychology suggest that biological considerations of human behavior will lead to inappropriate ethical and moral conclusions, such as biological determinism and conflicts with the concept of free will. See generally DANIEL C. DENNETT, FREEDOM EVOLVES (2003) (arguing that biological determinism and free will are compatible); see also, PINKER, BLANK SLATE, *supra*, at 174 -79 (arguing that free will is unnecessary to preserve personal responsibility for our actions). One such moral conclusion was a key flaw in social Darwinist thought. DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF

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LIFE 467-68 (1995) (hereinafter DENNETT, DARWIN'S DANGEROUS IDEA). Social Darwinists were misguided by what has been termed the "the naturalist fallacy," confusing the reality of "what is" from the moral and ethical judgments of what "ought to be." PINKER, BLANK SLATE, *supra*, at 150. Some have asserted that evolutionary psychology presents a similar moral threat. *Id.* Even Susan Blaffer Hrdy, a leading sociobiologist and the originator of the sexual selection hypothesis of infanticide discussed in this note, has questioned whether sociobiology should be taught at the high school or even undergraduate level. PINKER, MIND WORKS, *supra* note 6, at 47. Hrdy suggests, "[U]nless a student already has a moral framework in place, we could be creating social monsters by teaching this." *Id.* at 45. In fact, if evolutionary psychologists promoted biological determinism in its strictest form, there would be no impetus for them to seek change in social policy at all. Social policy would be irrelevant to the issue of stepparents biologically determined to abuse the stepchildren. *See* PINKER, BLANK SLATE, *supra*, at 177. The nature versus nurture dichotomy is not the "winner take all" battle of the century as it is often portrayed. HENRY PLOTKIN, DARWIN MACHINES AND THE NATURE OF KNOWLEDGE 164 (1993). Nevertheless, there is legitimate debate over the relative influence of each. *See* PINKER, BLANK SLATE, *supra*, at vii-x, 35. The answers to this inquiry come from culture's most accurate method for finding the truth, science. WILSON, CONSILIENCE, *supra* note 6, at 45. Evolutionary psychologists argue that biology is just as important as culture; while biology imposes constraints on behavior, all behavior results from the interaction of biology and culture. Steven Pinker, *Language is a Human Instinct*, in THE THIRD CULTURE: BEYOND THE SCIENTIFIC REVOLUTION 223, 234 (John Brockman ed. 1995) (tracing the idea of the mind as a blank slate to the 1920s, when it arose as a politically motivated reaction to the social Darwinist and eugenics movements). Pinker contends that this idea was strongly supported by now discredited theories in anthropology and psychology. *Id.* Anthropologists claimed that nothing could be said about the human species because cultures vary without limit, while psychology contributed the idea of the mind as a "general all-purpose learning mechanism." *Id.*

Third, the jargon in the field often leads to gross generalizations and misunderstandings. *See* PINKER, BLANK SLATE, *supra*, at 114. Popular science writers often rely heavily on analogy and metaphor to make their points. *Id.* Thus, the field does not lend itself well to sound bites or short descriptions which can be taken out of context or too literally. *Id.*; *see also* MATT RIDLEY, THE GENOME 226 (1999) (explaining how even the common terminology used in genetics to describe the inheritability of disease as "a gene for sickle cell anemia" or "a gene for diabetes," is used loosely in media reports, leading to even greater confusion for an underinformed public); GEORGE C. WILLIAMS, THE PONY FISH'S GLOW AND OTHER CLUES TO PLAN AND PURPOSE IN

## EVOLUTION AND CHILD ABUSE

691

evolutionary psychology has entered the legal arena, new opportunities develop to allow critics to knowingly mislead the public at large. Law Professor Steven Goldberg, a critic of evolutionary analysis in law, has suggested the need for close scrutiny of these proposals based on principles of fairness to stepparents<sup>9</sup> and constitutional limitations of the use of statistical

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NATURE 43 (1997) (providing another example of confusing terminology). The reader may well believe that grandparents share “one-quarter of their genes” with their grandchildren and one-half of their genes with their parents and siblings. This is a common generalization. In fact, humans share 98.6 % of their genes with chimpanzees. WILLIAMS, *supra*, at 43. The 1.4% difference is what separates humans from our closest living relatives. *Id.* More accurately, humans share 99.9% of their genes with one another. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 576 (3d ed. 1996). The phrase “one-quarter of their genes” is a colloquialism standing for the assertion that a grandparent has on average a 25% (of the .1% difference) greater similarity in their genetic composition than a person chosen at random from the human population. WILLIAMS, *supra*, at 43.

<sup>9</sup> Steven Goldberg, *Statistics Law and Justice*, 39 JURIMETRICS J. 255, 255 (1999). This note takes no exception to Professor Goldberg’s suggestion that fairness to disaffected parties should be considered, as should be the case with any legislation that is under consideration.

For the purposes of this note and for the research and scientific theories discussed herein, the term “stepparent” is used broadly to describe a non-biological mate of a biological parent living in the home with a child. Martin Daly & Margo Wilson, *An Assessment of Some Proposed Exceptions to the Phenomenon of Nepotistic Discrimination Against Stepchildren*, 38 ANN. ZOOL. FENNICI 287, 290 (2001) [hereinafter Daly & Wilson, *Nepotistic Discrimination*]. This includes formal stepparent relationships and live-in boyfriends. *Id.* The definition excludes all “murders perpetrated by mothers’ boyfriends who were not co-residing with their victims.” *Id.* The definition also excludes adoptive parents. See DALY & WILSON, CINDERELLA, *supra* note 1, at 45. Daly and Wilson explain that the evolutionary influences predicting greater incidence of abuse in non-biological families may operate differently in adoptive relationships than in other parent-substitute relationships. *Id.* The attendant evolutionary pressures “have been prevalent features of the human [ancestral environment] for as long as men and women have formed parentally investing couples,” but adoptive relationships are “a modern novelty.” *Id.* at 45-46. The adoptive relationships differ from stepparents in that, “adoptive parents are eager to adopt, are screened for suitability, and have the option of changing their minds (an option that they exercise surprisingly often).” *Id.* at 45. Although the term “stepparents” is not

evidence.<sup>10</sup>

In response, this note addresses the constitutional concerns to a few of the proposed remedies, examining the differential treatment of stepparents and its application to the Equal Protection Clause.<sup>11</sup> Part I of this note presents the facts indicating the greater incidence of child abuse by non-genetic parents compared to that of genetic parents and provides the evolutionary theories that predict and explain that difference. Part II presents three proposals from evolutionary scholars that legislators might consider to address the crisis of stepparent child abuse and infanticide. Finally, with emphasis on the Supreme Court cases discussed in Goldberg's article, Part III analyzes the equal protection issues raised by these proposed changes. This note concludes that although the issue of fairness to stepparents warrants substantial debate, there are no significant constitutional obstacles to any of the proposals put forth by evolutionary psychologists and their supporters.

#### I. THE CASE AGAINST STEPFAMILIES

Unquestionably, stepparents have been much maligned throughout literary history, the story of Cinderella being the most obvious example.<sup>12</sup> Folklorists have catalogued stories of

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entirely accurate, it is consistent with the literature in this area. When a legal distinction is made between non-biological mates living in the home, persons standing in loco parentis to the child and legal stepparents, it will be noted in the text.

<sup>10</sup> See Goldberg, *supra* note 9, at 255-56 (arguing that the statistics of differential abuse say nothing about any individual's situation and offering several examples of how the Supreme Court has rejected such statistical evidence).

<sup>11</sup> Family law issues such as child abuse are dealt with largely on the state level. See *Simms v. Simms*, 175 U.S. 162 (1899). For the purposes of this note, the proposals will be presented in the context of New York law and scrutinized under the federal Constitution. When necessary, scientific terms will be italicized and defined in the text or in footnotes.

<sup>12</sup> See DALY & WILSON, *CINDERELLA*, *supra* note 1, at 1-5. The Grimm brothers alone have chronicled several European folk tales of wicked stepparents including *Cinderella*, *Hansel and Gretel*, *Snow White* and *The*

## EVOLUTION AND CHILD ABUSE

693

“wicked stepparents” across cultures in Europe, Asia and other parts of the world.<sup>13</sup> Psychological studies reveal that people tend to view steprelations pessimistically.<sup>14</sup> Social scientists have often regarded the results of these studies as stemming from myths and stereotypes that create negative relationships between stepparents and stepchildren.<sup>15</sup> More likely, a stepparent mythology has been created by the social scientists themselves.<sup>16</sup> The social science myth, as it turns out, is that steprelations are not significantly different from biological relationships.<sup>17</sup> As one researcher has noted, “[I]n attempting to counteract stepfamily ‘myths,’ [social scientists] have created a counter-factual mythology of their own in which social relationships can be reordered by fiat and the

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*Juniper Tree. Id.* at 2.

<sup>13</sup> *Id.* at 5. Negative characterizations of steprelations can even be found in botanical literature. *Id.* A Japanese spiny broad-leaved plant bears the botanical name *Mamako-no-shiri-nugui. Id.* Translation: The stepchild’s bottom-wiper. *Id.* Daly and Wilson argue that “[t]he cross-cultural ubiquity of Cinderella stories is revealing . . . for they would not persist where their themes had no resonance.” *Id.*

<sup>14</sup> David R. Fine & Mark A. Fine, *Learning from Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies*, 97 DICK. L. REV. 49, 63-64 (1992) (“Empirical investigations have consistently found that stepparent-stepchild relationships are perceived by many to be inferior to parent-child relationships.”).

<sup>15</sup> See Stephen Claxton-Oldfield, *Deconstructing the Myth of the Wicked Stepparent*, 30 MARRIAGE AND FAM. REV. 51, 56 (2000).

<sup>16</sup> DALY & WILSON, CINDERELLA, *supra* note 1, at 58. Critics of the social sciences have argued that leading sociologists, anthropologists and political scientists satisfy themselves with “folk psychology” in favor of empirically tested evidence from biology and scientific psychology. See WILSON, CONSILIENCE, *supra* note 6, at 183. Ironically, in the case of steprelations, sociologists argue against “folk psychology” when those alleged “myths” concur with the results of empirical evidence.

<sup>17</sup> See Fine & Fine, *supra* note 14, at 63-64. After noting the negative perception of stepparent relationships, the authors maintain that “actual differences in quality have been found to be small and *some* stepparents and stepchildren have reported that, *over time*, they have been able to establish relationships that were mutually supportive and endearing.” *Id.* (emphasis added). It would be interesting to know whether more than “some” genetic parents would qualify their feelings for their children so explicitly.



statistical facts about differential violence can be dismissed.”<sup>18</sup> As study after study continues to provide more evidence on the subject, the facts become increasingly difficult to ignore.<sup>19</sup>

### A. *The Facts*

Child maltreatment in the United States is a national emergency.<sup>20</sup> In 2000 alone, 879,000 children were abused or neglected.<sup>21</sup> Although child fatalities are relatively rare in comparison to abuse cases, they have increased over the last ten years.<sup>22</sup> The federal government reported 1,200 substantiated cases of fatal child abuse or neglect in 2000.<sup>23</sup> Some government officials believe this number to be too low, suggesting at least 2,000 and as many as 5,000 child fatalities per year.<sup>24</sup> The fact that children living with stepparents are disproportionately the victims of severe and fatal abuse is not included in the report.<sup>25</sup> Meanwhile, evidence continues to mount that residing with a non-biological parent greatly increases a child’s risk of being

<sup>18</sup> DALY & WILSON, CINDERELLA, *supra* note 1, at 58.

<sup>19</sup> *Id.*; *see infra* notes 28-42 and accompanying text (documenting the increased risk of abuse to stepchildren).

<sup>20</sup> PANEL ON RESEARCH ON CHILD ABUSE AND NEGLECT, NAT’L RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT 42 (1993).

<sup>21</sup> NAT’L CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP’T OF HEALTH AND HUMAN SERVS., 11 YEARS OF REPORTING CHILD MALTREATMENT 2000 11 (2002) [hereinafter CHILD MALTREATMENT 2000], available at <http://www.acf.hhs.gov/programs/cb/publications/cm00/cm2000.pdf>.

<sup>22</sup> NAT’L CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFO., CHILD FATALITIES FACT SHEET, at <http://www.calib.com/nccanch/pubs/factsheets/fatality.cfm> (last visited Mar. 12, 2003) [hereinafter FACT SHEET].

<sup>23</sup> CHILD MALTREATMENT 2000, *supra* note 21, at 53. “‘Substantiated’ is a conclusion that the allegation of maltreatment or risk of maltreatment was supported by state law or state policy.” *Id.* at 9.

<sup>24</sup> *See* FACT SHEET, *supra* note 22.

<sup>25</sup> CHILD MALTREATMENT 2000, *supra* note 21; *see also* DALY & WILSON, CINDERELLA, *supra* note 1, at 39 (describing the general lack of recognition of children living in stepparent homes as being at high risk for abuse).

## EVOLUTION AND CHILD ABUSE

695

abused.<sup>26</sup>

In the United States, a study by the American Humane Association of 87,789 children identified as maltreated revealed that twenty-five percent of severe abuse cases resided with one genetic parent and one non-biological parent, and forty-three percent of children killed by abuse lived with substitute parents.<sup>27</sup> These statistics are even more disturbing when we consider that the mean age of the victims was 3.6 years old and only a small percentage of children at such a young age live in stepparent families.<sup>28</sup> Based on conservative population estimates, the increased risk of infanticide for children under four in stepparent families was one hundred times greater than children living with two genetic parents.<sup>29</sup> These studies are consistent with those conducted in other western countries.<sup>30</sup>

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<sup>26</sup> See *infra* notes 28-42 and accompanying text (documenting the increased risk of abuse to stepchildren).

<sup>27</sup> MARTIN DALY & MARGO WILSON, HOMICIDE 88 (1988) [hereinafter DALY & WILSON, HOMICIDE]. The researchers used data from infanticide and substantiated allegations of severe abuse. *Id.* They recognize the potential for detection bias in child abuse. *Id.* That is to say, if stepparents are already more suspect, they may also be more likely to get caught or be falsely accused of abuse. *Id.* They contend any possible allegations of abuse against stepparents based on “myths and stereotypes” of the reporters (consistent with social scientists’ claims) will be minimized by the substantiated homicide of an infant. DALY & WILSON, CINDERELLA, *supra* note 1, at 31.

<sup>28</sup> See Daly & Wilson, *Nepotistic Discrimination*, *supra* note 9, at 289. The proportion of children who reside with a stepparent at birth is near zero and increases steadily with age. *Id.*

<sup>29</sup> DALY & WILSON, HOMICIDE, *supra* note 27, at 88. “Census bureaus of the United States and Canada d[id] not distinguish natural parents from substitutes.” *Id.* The researchers reported that they relied on conservative estimates based on other surveys and that the true proportion of stepchild murder is likely to be even higher. *Id.* at 88-89. The 1990 U.S. Census provides some information on stepparent families. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995 64 tbl.77 (1996). According to the Census Bureau, “[c]ategories showing natural born, step and adoptive children are necessary to reflect increasingly complex family structures created as a result of remarriage, disruption or cohabitation.” *Id.*

<sup>30</sup> DALY & WILSON, CINDERELLA, *supra* note 1, at 32-36. In addition, recent research indicates that this is a global phenomenon, indicating that it is

A 1984 study of Canadian families found that the increased risk of child abuse was forty times greater for preschoolers when the child lived with one biological parent and one non-biological parent (the increased risk was only ten times greater for teenage victims).<sup>31</sup> The risk of fatal child abuse was seventy times greater.<sup>32</sup> Another Canadian study, based on the Canadian National Homicide Archive with data as recent as 1994, found that stepfathers were sixty times more likely to kill their children than were biological parents.<sup>33</sup>

A 1973 study in England reveals that British men acting *in loco parentis* were 150 times more likely to commit infanticide and were responsible for fifty-two percent of the infant deaths studied.<sup>34</sup> The average age of the victim was only fifteen months.<sup>35</sup> Although the statistics vary considerably, a clear trend emerges. Children living with one biological parent and a non-genetic parent are at a substantially higher risk of abuse and

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less likely to be culturally dependent. *Id.* “Researchers have reported that children incurred excess risk of various sorts of mistreatment and/or mortality at the hands of stepparents among Ache hunter-gatherers [of Paraguay], and in Australia, Columbia, Finland, Korea, Malaysia and Trinidad.” *Id.* Hunter-gatherer societies like the Ache “provide the best model to which the human animal evolved and to which our psyches are adapted.” *Id.* at 36. Life is challenging for the Ache, especially if you are a stepchild. *Id.* Nineteen percent of Ache children raised by two genetic parents die by age fifteen. *Id.* For Ache children raised by a mother and a stepfather, forty-three percent die before their fifteenth birthday. *Id.*

<sup>31</sup> *Id.* at 30.

<sup>32</sup> *Id.* at 32. Though this result is significantly lower than the American study, this sample also included single mothers, another high risk group, which was not included in the American study. *Id.*

<sup>33</sup> *Id.* at 210; Martin Daly & Margo Wilson, *Some Differential Attributes of Lethal Assaults on Small Children by Stepfathers Versus Genetic Fathers*, 15 ETHOLOGY AND SOCIOBIOLOGY 207, 209 (1994). “Stepfathers” in this study are defined as non-biological parents married to the child’s biological mother and common law fathers. *Id.* Common law fathers are defined as “a substitute father in loco parentis by virtue of his de facto or common law relationship with the victim’s mother.” *Id.*

<sup>34</sup> DALY & WILSON, HOMICIDE, *supra* note 27, at 90.

<sup>35</sup> *Id.*

## EVOLUTION AND CHILD ABUSE

697

infanticide than children living with two genetic parents.<sup>36</sup>

Not only does stepparent abuse differ from parental abuse in frequency, studies indicate that there are significant differences in the circumstances under which the abuse occurs.<sup>37</sup> Fatal abuse at the hands of stepparents is most likely to occur when the child is very young,<sup>38</sup> is less likely to be the result of a psychiatric condition in the abuser,<sup>39</sup> and is likely to result from different forms of assault.<sup>40</sup> These data suggest that, aside from the greater likelihood of violence against their stepchildren, non-biological parents may have different motivations or factors influencing their acts of violence.<sup>41</sup>

If stepchild abuse is both quantitatively and qualitatively different from child abuse committed by biological parents, what could possibly account for these differences? Society's aversion to child abuse and infanticide and the enormous disparity in abuse rates suggest a particularly compelling need for a fearless search for answers to this problem. Unfortunately, traditional cultural-based theories of the social sciences have been unable to adequately explain the wide discrepancy in the incidence of abuse between these groups.<sup>42</sup>

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<sup>36</sup> DALY & WILSON, CINDERELLA, *supra* note 1, at 26-36.

<sup>37</sup> *Id.* at 34-35.

<sup>38</sup> *Id.* at 91. The increased risk for fatal abuse by a non-biological parent is greatest when the child is under two years old and diminishes over time. *Id.*

<sup>39</sup> DALY & WILSON, CINDERELLA, *supra* note 1, at 34-35.

<sup>40</sup> DALY & WILSON, HOMICIDE, *supra* note 27, at 90. While biological parents and stepparents in the Canadian Study were equally likely to kill their children using a firearm, stepparents in Canada were 120 times more likely to beat their children to death. *Id.* In England and Canada, eighty percent of homicidal stepparents were found to have battered, kicked or bludgeoned their victims to death, while the majority of homicidal genetic parents used less assaultive means. *Id.* at 34. In addition, while nineteen percent of men who killed their own children also killed themselves in the same violent act, only 1.5% of murdering stepparents took their own life. DALY & WILSON, CINDERELLA, *supra* note 1, at 34 (noting the twelve-fold difference).

<sup>41</sup> DALY & WILSON, CINDERELLA, *supra* note 1, at 35.

<sup>42</sup> See Jones, *Child Abuse*, *supra* note 2, at 1167-70 (noting that the prevailing social science theories of child abuse all focus on the present, fail to account for the biological relationship and have been unsuccessful in

**Figure 1: The Risk of Being Killed by a Stepparent Versus a Natural Parent in Relation to the Child's Age.** Canada 1974-1983. *Source:* Reprinted with permission from Martin Daly and Margo Wilson. *Homicide.* (New York: Aldine de Gruyter).  
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### *B. The Theories*

By recognizing the importance of biology in human behavior, evolutionary psychologists predicted greater incidence of abuse among non-biological parents before the statistical data was even available.<sup>43</sup> The following section provides a brief evolutionary primer and explains the specific theories posited to account for stepparent abuse.<sup>44</sup>

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attempting to stem the rising tide of the child abuse problem in the last twenty years). In fact, prior to the researchers' evolutionary approach to child abuse, no studies existed comparing the incidence of abuse between genetic and non-genetic parents. DALY & WILSON, *CINDERELLA*, *supra* note 1, at 20. It took an evolutionary perspective of the problem to even think to ask the right question. *Id.*

<sup>43</sup> DALY & WILSON, *CINDERELLA*, *supra* note 1, at 20.

<sup>44</sup> See Jones, *Child Abuse*, *supra* note 2, at 1129-57 (providing a more thorough evolutionary primer and explaining the concepts discussed in this section).

*EVOLUTION AND CHILD ABUSE*

699

“Evolutionary theory” is a general metatheory that explains the fact of biological evolution as stemming from natural selection and sexual selection.<sup>45</sup> Under the larger umbrella theory of evolution by natural selection, other midlevel theories such as kin selection explain a wide variety of phenomenon in various domains of functioning.<sup>46</sup> There are two more specific evolutionary theories that predict greater incidence of infanticide and abuse of stepchildren at the hands of their stepparents: Discriminative Parental Solicitude Theory (DPST) and Reproductive Access Theory (RAT).<sup>47</sup> DPST is based on Darwin’s theory of natural selection and kin selection,<sup>48</sup> while RAT is based on the notion of sexual selection.<sup>49</sup>

*1. Natural Selection, Kin Selection and Discriminative Parental Solicitude*

A brief explanation of natural selection and kin selection is necessary for a proper understanding of the mechanics of DPST.

*a. Natural Selection*

Natural selection is the primary force that drives biological evolution.<sup>50</sup> It is “the process through which certain types of organisms are more reproductively successful than other types, thereby disproportionately passing along those traits that led to their success.”<sup>51</sup> Natural selection requires the interaction of three factors: variation, heredity and differential reproduction.<sup>52</sup> Individuals differ in their behavioral and physical traits.<sup>53</sup> Traits

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<sup>45</sup> See Jones, *Child Abuse*, *supra* note 2, at 1171.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1175.

<sup>48</sup> DALY & WILSON, *CINDERELLA*, *supra* note 1, at 11-14.

<sup>49</sup> SARAH BLAFFER HRDY, *THE LANGURS OF ABU: FEMALE AND MALE STRATEGIES OF REPRODUCTION* 246 (1977).

<sup>50</sup> See DENNETT, *DARWIN’S DANGEROUS IDEA*, *supra* note 8, at 43.

<sup>51</sup> MORTON JENKINS, 101 KEY IDEAS IN EVOLUTION 71 (2000).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

are inherited from ancestors and modified by genetic mutation and sexual recombination.<sup>54</sup> Due to these differences, some individuals may have a reproductive advantage over others and produce more viable offspring.<sup>55</sup> As a result of greater reproductive success, individuals surviving into future generations will tend to be better equipped than their ancestors to deal with the challenges of the environment of their ancestors.<sup>56</sup> Over successive generations the advantages inevitably produced through natural selection are called “evolutionary adaptations.”<sup>57</sup>

*b. Kin Selection*

“If evolution consists of a competition among individuals for survival and reproduction, it makes little sense to help others.”<sup>58</sup> While cooperative behavior is common when both parties stand to gain from the interaction,<sup>59</sup> altruistic behavior is relatively rare in the biological world.<sup>60</sup> The fact that altruistic behavior exists at all in the natural world presented a paradox for evolutionary

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* For most organisms throughout history, the ancestral environment was substantially similar to the present environment, so any advantage gained based on the ancestral environment would also be advantageous in the organism’s present environment. DALY & WILSON, CINDERELLA, *supra* note 1, at 40-43. As a result of human cultural evolution, however, adaptations in our ancestral environment can sometimes be maladaptive in the present environment. *Id.* (discussing the legal considerations stemming from these “maladaptive adaptations”) See Owen Jones, *The Evolution of Irrationality*, 41 JURIMETRICS J. 289 (2001). [hereinafter Jones, *Irrationality*]; Owen Jones, *Time-Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141 (2001).

<sup>57</sup> DENNETT, DARWIN’S DANGEROUS IDEA, *supra* note 8, at 43.

<sup>58</sup> See CARL ZIMMER, EVOLUTION: THE TRIUMPH OF AN IDEA 249 (2001).

<sup>59</sup> See Jones, *Child Abuse*, *supra* note 2, at 1149. See also ROBERT WRIGHT, NONZERO 253 (2000) (noting the importance of cooperative interaction between organisms since the earliest life forms appeared on earth).

<sup>60</sup> See DENNETT, DARWIN’S DANGEROUS IDEA, *supra* note 8, at 478. In all mammalian species studied so far, the rate of intra-species killing is several thousand times greater than the highest homicide rate in any American city. *Id.*

## EVOLUTION AND CHILD ABUSE

701

theorists.<sup>61</sup> Kin selection provided the solution, harmonizing altruistic behavior with natural selection when that behavior benefits genetically related individuals.<sup>62</sup> While altruistic behavior may not benefit the altruistic individual, it is a good way to make more copies of an altruistic individual's genes.<sup>63</sup> Kin selection is "the evolutionary process that maximizes one's ability to treat others [preferentially] according to their genetic similarity to oneself."<sup>64</sup> Altruistic behavior among kin is the result of an unconscious cost-benefit analysis considering both the risk to the actor and the mathematical degree of relatedness to the party to whom the benefit is being offered.<sup>65</sup> An organism whose genes predispose it to act in the interest of those most genetically similar will benefit when the cost of that act is outweighed by its

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<sup>61</sup> ZIMMER, *supra* note 58, at 249.

<sup>62</sup> See DENNETT, DARWIN'S DANGEROUS IDEA, *supra* note 8, at 478. Social species that help one another most often share a high degree of genetic relatedness. *Id.* Examples of kin selection at work include the fact that individuals in closely related groups of animals within a species are much more likely than groups that are not closely related to provide alarm calls to their group drawing attention to themselves from predators. *Id.* Without producing any offspring, an organism can increase its genetic success, merely by supporting and protecting its close relatives. *Id.* at 479. Female drone bees who share three-fourths (as opposed to one-half in most other animals) of their genes with siblings, forego reproduction altogether, in support of their unusually closely related queen. See ZIMMER, *supra* note 58, at 248-49.

Reciprocal altruism explains the much less common occurrence of altruistic behavior toward non-related individuals. See DENNETT, DARWIN'S DANGEROUS IDEA, *supra* note 8, at 479. The most frequently cited example occurs in vampire bats who will occasionally share their bloody bounty with their unsuccessful cavemates after a night of hunting. *Id.* Reciprocal altruism, however, also requires self-interest in that the benefit conferred is based on the expectation of a future benefit from the recipient. *Id.* Reciprocal altruism requires advanced cognitive abilities to keep score of who owes a favor to whom. *Id.* This explains its rarity in the animal kingdom and its more common occurrence among humans. *Id.* Dennett describes reciprocal altruism as "the first steps toward human promise keeping." *Id.*

<sup>63</sup> ZIMMER *supra* note 58, at 249.

<sup>64</sup> WILLIAMS, *supra* note 8, at 42-43.

<sup>65</sup> See DENNETT, DARWIN'S DANGEROUS IDEA, *supra* note 8, at 478.



genetic relatedness to the relative being helped.<sup>66</sup>

*c. Discriminative Parental Solicitude Theory*

DPST is based on the concept of kin selection and relates more directly to the issue of infanticide.<sup>67</sup> Other than identical twins, no one is more closely related to an individual than his own genetic children.<sup>68</sup> According to the theory, “[p]arental care makes a clear direct contribution to parental fitness.”<sup>69</sup> Parents will invest in offspring most capable of turning that investment into reproductive success for the parent.<sup>70</sup> Investing in unrelated children, without a reciprocal payoff for the caregiver, decreases fitness when the cost is considered in terms of foregone opportunities to reproduce.<sup>71</sup> Application of the theory rephrases the question of increased danger to stepchildren. Instead of asking “why do stepparents abuse their stepchildren?” theorists inquire, “why are parents less inclined to abuse their children

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<sup>66</sup> WILLIAMS, *supra* note 8, at 44. For this reason, many scientists prefer the term “inclusive fitness,” as opposed to reproductive success, because the former includes the concept of kin selection. See ZIMMER, *supra* note 58, at 249.

<sup>67</sup> Jones, *Child Abuse*, *supra* note 2, at 1177.

<sup>68</sup> DAVID BURNE, GET A GRIP ON EVOLUTION 137 (1999). Individuals share fifty percent of their genes with their parents, their full siblings and their own genetic children. *Id.* See *supra* note 8 (acknowledging the technical inaccuracy of this statistic).

<sup>69</sup> DALY & WILSON, HOMICIDE, *supra* note 27, at 42.

<sup>70</sup> *Id.* The theory is broader than just step-relations. *Id.* at 44. DPST considers three classes of factors that may contribute to reduced parental investment in a child. *Id.* The first class includes the likelihood that the parent lacks a genetic relationship to the child (including not only step-relations, but also uncertain paternity). *Id.* “The second class encompasses indications that the offspring itself may be of dubious quality, and hence a poor prospect to contribute to parental fitness, even if nurtured properly.” *Id.* The third class includes indications that circumstances are not favorable for child rearing and takes into account such factors as scarce resources, lack of social support, alternative avenues of parental investment, such as older siblings, and whether there are likely to be future opportunities to reproduce. *Id.*

<sup>71</sup> *Id.*

## EVOLUTION AND CHILD ABUSE

703

than unrelated stepparents?”<sup>72</sup> The theory predicts that “where parental feeling is weak, the risk of parental mistreatment is exacerbated.”<sup>73</sup> Proponents of the theory argue that the interaction of biological and environmental factors will make a child more or less likely to suffer abuse.<sup>74</sup>

Ultimately, the primary factor creating strong parental feelings is the genetic relationship.<sup>75</sup> Considering the general evolutionary principles discussed thus far, several reasons for preferential treatment to biological children emerge.<sup>76</sup> Genetic success is only enhanced when it benefits children who survive to reproductive age.<sup>77</sup> Organisms can adopt different reproductive strategies, such as providing few resources to many offspring with hopes that at least a few survive or, as humans tend to do, investing an enormous amount of resources in only a few children, thereby greatly increasing each child’s chances of survival.<sup>78</sup> The killing of one’s own offspring will often defeat those reproductive strategies.<sup>79</sup> Considered from the perspective of kin selection, generously providing for one’s own offspring, who share fifty percent of each parent’s genes, will often be in

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<sup>72</sup> See Jones, *Child Abuse*, *supra* note 2, at 1177. “[N]ot caring for infants is the default evolved predisposition . . . .” *Id.*; see also Daly & Wilson, *Nepotistic Discrimination*, *supra* note 9, at 294. The authors emphasize that infanticide committed by stepparents is not itself an adaptive behavior but merely “[a] predictable by-product of the fact that costly parental care can be parasitized and that parental solicitude has therefore evolved to be individualized and preferentially directed to one’s own children.” *Id.*

<sup>73</sup> See Martin Daly & Margo Wilson, *Discriminative Parental Solicitude Theory: A Biological Perspective*, 42 J. OF MARRIAGE AND THE FAM. 277, 281 (1980).

<sup>74</sup> DALY & WILSON, HOMICIDE, *supra* note 27, at 44.

<sup>75</sup> DALY & WILSON, CINDERELLA, *supra* note 1, at 37.

<sup>76</sup> DALY & WILSON, HOMICIDE, *supra* note 27, at 44.

<sup>77</sup> See Jones, *Child Abuse*, *supra* note 2, at 1195 (noting the common practice of infanticide of the disabled in other cultures).

<sup>78</sup> See JARED DIAMOND, WHY IS SEX FUN: THE EVOLUTION OF HUMAN SEXUALITY 16-17 (1997).

<sup>79</sup> *Id.* There may be some instances when the killing of one’s own offspring will be beneficial to the reproductive success of the organism. See *supra* note 71.

the best interest of that parent when a cost benefit-analysis is applied; whereas providing for a biological stranger generally will not be in one's genetic interest.<sup>80</sup>

In many ways, predictions of DPST are consistent with empirical social science findings.<sup>81</sup> Even with a biological relationship, parents discriminate among their own children based on a number of factors.<sup>82</sup> In some instances, a biological parent may "choose"<sup>83</sup> to sacrifice a present child's best interest in favor of retaining her ability to have more children in the future.<sup>84</sup> A younger parent, with more reproductive years remaining, would receive a greater benefit from this choice.<sup>85</sup> Conversely, an older parent may find that her opportunities to bear more children are foreclosed by age, therefore making it more beneficial to invest in presently living offspring.<sup>86</sup> DPST predicts higher incidence of infanticide and abuse in general among young mothers compared to older mothers.<sup>87</sup> It is well established that children born to young mothers are at greater risk of maltreatment.<sup>88</sup> A parent

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See DIAMOND, *supra* note 78, at 24.

<sup>83</sup> The term "choose" does not mean to imply a conscious choice on the part of a parent, but rather unconscious considerations in a cost-benefit analysis. *Id.* at 16-17. "Many of the so-called choices are actually programmed into an animal's anatomy and physiology." *Id.* at 17.

<sup>84</sup> See DALY & WILSON, HOMICIDE, *supra* note 27, at 52.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See CHILD MALTREATMENT 2000, *supra* note 21, at 52 tbl.4-3. In 2000, female parents were perpetrators of child maltreatment in 65.1% of cases compared with 37.3% for male parents. *Id.* Of female perpetrators, 41.9% were less than thirty years of age. *Id.* at 47.

Though the fact that children born to young mothers are at higher risk of abuse is consistent with social science findings, the theories social scientists use to explain this phenomenon do not include evolutionary considerations. See Jones, *Child Abuse*, *supra* note 2, at 1168. "The conspicuous absence from the prevailing theories of any mention of human evolution, or evolved behavioral predispositions of any kind, reflects a passive and unexamined assumption that, absent genetic defects, human behavior is not significantly influenced by the cumulated effects of natural selection on our species." *Id.*

*EVOLUTION AND CHILD ABUSE*

705

may consider the likelihood of the child surviving to reproductive age.<sup>89</sup> A parent may also consider alternative recipients of the parent's investment of resources and preserve parental resources to present children most likely to benefit from them.<sup>90</sup> These other factors are more likely to play the strongest roles when resources are scarce and there is not enough to go around among biological children.<sup>91</sup> Prevailing theories and social science findings recognize that children born into poverty are at a greater risk of physical abuse and infanticide.<sup>92</sup> DPST is consistent with present empirical findings and explains more phenomenon than prevailing theories.<sup>93</sup>

*2. Sexual Selection and Reproductive Access Theory*

The second theory predicting greater incidence of infanticide among stepparents is Reproductive Access Theory, which is based on the Darwinian concept of sexual selection.<sup>94</sup>

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<sup>89</sup> See DALY & WILSON, HOMICIDE, *supra* note 27, at 52. As a child gets older, her chances of living to reproductive age increase, and the prospective burden she places on her parents decreases. *Id.*

<sup>90</sup> DIAMOND, *supra* note 78, at 23.

<sup>91</sup> See DALY & WILSON, HOMICIDE, *supra* note 27, at 43-53.

<sup>92</sup> See FACT SHEET, *supra* note 22. See also Jones, *Child Abuse*, *supra* note 2, at 1164. The Social-Cultural Model emphasizes the contributions of social pressure including economic hardship. *Id.*

<sup>93</sup> See Jones, *Child Abuse*, *supra* note 2, at 1223. To the extent that the evolutionary theory has more predictive power than social science theories, it should receive greater consideration. *Id.* It should be reiterated that evolutionary analysis recognizes the importance of cultural explanations, and an integrated world view that includes both biological and cultural influences can, when the two are not directly conflicting, provide the most accurate understanding of many behavioral phenomena. *Id.* "The point of integration is to construct a unified, coherent, interwoven, historically accurate, and generally superior theory of behavior that impedes or furthers social access to the specified goal." *Id.* at 1223-24.

<sup>94</sup> See generally CHARLES DARWIN, THE ORIGIN OF SPECIES 136 (Gramercy Books 1979) (1859).

*a. Sexual Selection*

Unlike natural selection, sexual selection “depends not on a struggle for existence, but on a struggle between the males for possession of the females; the result is not death to the unsuccessful competitor, but few or no offspring.”<sup>95</sup> In most species who invest a significant amount of resources in raising their young, females have a disproportionately large investment in creating children.<sup>96</sup> Among internally fertilizing species, the males of that species can adopt a reproductive strategy of low parental investment and attempt to sire a large number of offspring, whereas childbearing puts practical limitations on the same strategy for women.<sup>97</sup> Males compete both directly and

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<sup>95</sup> *Id.* The classic example is that of the peacock and the peahen. *Id.* at 137. See also ZIMMER, *supra* note 58, at 236-38. The male peacock is known for its elaborate tail display with more than 150 brightly colored “eyes,” while the female peahen looks drab in comparison. *Id.* The peacocks compete for the attention of the peahens by displaying their tail, the theory being that the bright plumage and decorative pattern provide key markers of genetic health. *Id.* The peahens are very selective and will reject a peacock with less than 130 “eyes” on his tail. *Id.* at 238. The peahens, through their preference for larger tails with lots of eyes, provide the selection pressure necessary for males to develop more and more ornate displays. *Id.* This occurs in spite of the fact that the peacock may be more conspicuous to predators and less able to fend off attacks due to his cumbersome tail feathers. *Id.* at 235. The individual peacock’s survival does him little good in the “survival of the fittest” unless he can successfully reproduce. *Id.*

The sex-specific definition is outdated, as instances of sexual selection have since been noted in both males and females. See ZIMMER, *supra* note 58, at 238. For example, among pipefish, it is the females who are brightly colored and compete for the attention of males. *Id.* In this species, it is the male pipefish who carry the eggs in a pouch and provide the majority of the parental investment, while the females can have several males carry their eggs simultaneously. *Id.* Jared Diamond provides a more complete description of this phenomenon, known as “sex-role reversal polyandry,” and the limited circumstances in which it is likely to occur. See DIAMOND, *supra* note 78, at 26-29.

<sup>96</sup> *Id.* at 238.

<sup>97</sup> *Id.* at 234. The most fecund woman in recorded history bore a “mere” sixty-nine children, while Moroccan Emperor Ismael the Bloodthirsty was the most fruitful male, siring approximately fourteen hundred children. DIAMOND,

## EVOLUTION AND CHILD ABUSE

707

indirectly for reproductive access to females, who are in a position to be more selective because they sacrifice more in bearing children.<sup>98</sup> The most frequently cited examples of sexual selection at work include characteristics related to direct male-male combat, such as large antlers or sexual dimorphism and characteristics related to male sexual display, such as a peacock's tail.<sup>99</sup> RAT is an even less direct form of male to male competition and brings sexual selection to a grisly extreme.<sup>100</sup>

*b. Reproductive Access Theory*

RAT is based on the concept of sexual selection.<sup>101</sup> The theory predicts that, under some circumstances, males will be more likely to kill young unweaned infants in order to make a female more reproductively available to sire his children.<sup>102</sup> Species most likely to be influenced by selection pressure leading to infanticide of unrelated infants include those in which females experience reduced fertility while weaning an infant.<sup>103</sup> This phenomenon is known as "lactational amenorrhea" and is well documented in a variety of mammals, including humans.<sup>104</sup> When a mother stops nursing, her fertility immediately increases, making her available to bear the children of another male.<sup>105</sup> As a result, a male who murders the unweaned infants of his new mate

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*supra* note 78, at 36-37.

<sup>98</sup> See ZIMMER, *supra* note 58, at 235-39.

<sup>99</sup> See DARWIN, *supra* note 94, at 136-37.

<sup>100</sup> See ZIMMER, *supra* note 58, at 248. While male to male competition for mates can be a rather bloody business, as evidenced by an elephant seal's fight to the death to "protect" his harem, both combatants are willing participants. MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* 133 (1993). Infanticide, however, results in the slaughter of helpless innocents.

<sup>101</sup> See HRDY, *supra* note 49, at 246.

<sup>102</sup> *Id.* at 277.

<sup>103</sup> *Id.*

<sup>104</sup> See DALY & WILSON, *CINDERELLA*, *supra* note 1, at 9; see also M.S. Kramer & R. Kauma, *Optimal Duration of Exclusive Breastfeeding*, *MEDSCAPE* (2002), at <http://www.medscape.com/viewarticle/435888>.

<sup>105</sup> See Kramer & Kauma, *supra* note 104.

will have a reproductive advantage over those who do not by accelerating his mate's ability to bear his children (provided there are no other repercussions to the act).<sup>106</sup> This phenomenon is seen widely in the animal kingdom, including in some of human's closest living primate relatives, most notably chimpanzees and gorillas.<sup>107</sup> While DPST applies to both men and women, if RAT is applicable to humans, then children living with stepfathers are at an even greater risk than those living with stepmothers.<sup>108</sup> It should be noted that application of RAT to humans is far more controversial than DPST, even among evolutionary psychology scholars.<sup>109</sup> The theory is mentioned here, however, to point out

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<sup>106</sup> See HRDY, *supra* note 49, at 277.

<sup>107</sup> *Id.* at 244-47; see also Jones, *Child Abuse*, *supra* note 2, at 1190.

<sup>108</sup> See Jones, *Child Abuse*, *supra* note 2, at 1159. Although DPST applies to men and women, it may not apply equally. DIAMOND, *supra* note 78, at 37. "[A]nimals have programmed instincts that lead them to provide (or not to provide) parental care, and this instinctive 'choice' of behavior can differ between sexes of the same species." *Id.* Men may still be more predisposed to abuse or infanticide because the cost-benefit analysis will be different for men and women. See Jones, *Child Abuse*, *supra* note 2, at 1159.

For the implications of RAT, see HRDY, *supra* note 49, at 277. The rarity of very young children living with a stepmother has limited research in this regard. See DALY & WILSON, *HOMICIDE*, *supra* note 27, at 85. The pool of data for the kind of large-scale longitudinal study necessary to examine the problem has been unavailable. *Id.*

Although the sexual selection hypothesis appears to apply exclusively to males among mammals, this is not an exclusively male phenomenon in the entire animal kingdom. See ZIMMER, *supra* note 58, at 247. The jacana is a Panamanian bird that provides the exception that proves the rule. *Id.* Unlike most animals, the male jacana sits on the eggs and raises the young while the females defend the territory. *Id.* When a female defeats a rival and takes over the nest and her opponent's mate, the first order of business is to destroy all of the eggs before mating with the male. *Id.* at 247-48. Birds can share the responsibility of caring for their developing embryos, whereas that opportunity is not available for mammals due to internal fertilization. DIAMOND, *supra* note 78, at 25-29.

<sup>109</sup> See DALY & WILSON, *CINDERELLA*, *supra* note 1, at 37. Daly & Wilson assert that sexually selected infanticide is not a human adaptation. *Id.* First, infanticide is rare in the human population relative to those animals where sexually selected infanticide is common. *Id.* Second, "[s]tepfathers are much more likely to inflict non-lethal abuse than to kill, and such abuse is

*EVOLUTION AND CHILD ABUSE*

709

that evolutionary psychology does present the potential for sex-based classifications which becomes relevant in Part III of this note.

## II. LEGISLATIVE PROPOSALS

While an evolutionary perspective has been useful in directing research in the area of child abuse and has led to extraordinary discoveries such as those discussed in Part I, the potential legal remedies to the child abuse crisis offered by Professor Jones and likeminded contemporaries have been relatively modest. This section discusses three of those proposals.<sup>110</sup>

First, improved data collection methods might be implemented in order to get a better understanding of the exact scope of the problem. Second, consideration of the presence of a stepparent in the risk assessment phase of child abuse investigations may help child welfare investigators focus their attention on cases that are most likely to result in substantiated instances of abuse. Third, in the event of the unexplained death of an infant in a stepparent family, requiring child fatality review

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obviously not a 'well designed' means to hasten the production of one's own children, nor even reduce the costs of stepparental investment." *Id.* Third, "humans live [and evolved] in a complex social environment, which involves maintaining one's reputation and the possibility of retribution." *Id.* at 38. Considering these factors, "the average benefits conferred for killing stepchildren would [n]ever have outweighed the average costs enough" to provide the selection pressure necessary for "specifically infanticidal inclinations." *Id.* Jones points out that the [reproductive access] theory would be expected to have greater vitality in a species in which the average tenure of a male to a female is short, as it is in lions and langurs, than when the average tenure is longer, as it is in humans. Jones, *Child Abuse*, *supra* note 2, at 1213-14. "Moreover, the widely documented and substantial differences among the social organization of primate species suggests further caution and recommends that the more general DPST may better explain observable, human stepfather infanticide." *Id.* at 1214.

<sup>110</sup> These proposals are put forward for consideration, not to advocate for their appropriateness, but for their potential effectiveness in combating the problem of child abuse. Other than discussing potential constitutional barriers, weighing the benefits of these proposals against their harm to stepparents is beyond the scope of this note.



team investigations may cause more cases of infanticide to be discovered.

*A. Improved Data Collection*

The most modest proposal to be examined is the suggestion that increased study and improved data collection can increase our understanding of the scope of the problem.<sup>111</sup> Currently, most state and federal agencies do not distinguish between stepfamilies, adoptive families and families with two genetic parents.<sup>112</sup> Researchers and legal scholars, including Jones, have proposed mandating state agencies to collect data in ways that differentiate between genetic and non-genetic parents.<sup>113</sup>

Although child abuse investigations are conducted exclusively on the state level, Congress has recognized that child abuse is a national problem and has addressed the issue by establishing the National Clearinghouse on Child Abuse and Neglect Information.<sup>114</sup> The National Clearinghouse collects child abuse data from the states for purposes of a national study of the issue, makes recommendations to the states on productive areas for legislation and acts as a distribution center for information on child abuse for state and local governments as well as researchers.<sup>115</sup> At present the National Clearinghouse does not

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<sup>111</sup> See DALY & WILSON, *CINDERELLA*, *supra* note 1, at 52-53.

<sup>112</sup> Jones, *Child Abuse*, *supra* note 2, at 1229. Even though evolutionary psychologists have proposed this remedy for more than a decade, "most studies and reporting procedures that today capture information regarding a perpetrator's relationship to an abused child continue to collapse 'stepparents' into the definition of 'parents.'" *Id.* at 1230.

<sup>113</sup> *Id.* at 1235.

<sup>114</sup> 42 U.S.C. § 5105 (2002).

The Secretary shall, in consultation with other Federal agencies and recognized experts in the field, carry out a continuing interdisciplinary program of research that is designed to provide information needed to better protect children from abuse or neglect and to improve the well-being of abused or neglected children, with at least a portion of such research being field initiated.

*Id.*

<sup>115</sup> See CHILD MALTREATMENT 2000, *supra* note 21, at 1-3.

## EVOLUTION AND CHILD ABUSE

711

report or maintain statistics distinguishing stepparents from biological parents.<sup>116</sup> Improved data collection can lead to a more precise understanding of the problem and might be welcomed even by critics eager to disprove what they believe to be a myth.<sup>117</sup> In the absence of administrative initiative in this area, the following provision (hereinafter Proposed Data Collection Statute), which would amend the statutory scheme creating the National Clearinghouse, could at least partially remedy the problem.<sup>118</sup>

The National Clearinghouse on Child Abuse and Neglect Information shall include in its data the living arrangement of the victim and the biological relationship of the victim to the perpetrator.<sup>119</sup>

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<sup>116</sup> See *id.* at 52 tbl.4-3. Currently the National Clearinghouse provides data on family relationships with the following categories in gathering data on abuse: parents (distinguished by sex), other relatives, foster parents, residential facility staff, child day care, non-caretakers and unknown. *Id.* The categories do not distinguish stepparents or adoptive parents from genetic parents. *Id.* at 47. Furthermore, according to the previous edition of the same report, “[s]tates define child maltreatment as the abuse or neglect of their parents or by ‘other caretakers’ responsible for their children’s care.” ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 1999 33 (2000) [hereinafter CHILD MALTREATMENT 1999], available at <http://www.acf.hhs.gov/programs/cb/publications/cm99/cm99.pdf>. But, “[s]tates differ in definitions of who count as caretakers.” *Id.*

<sup>117</sup> See Claxton-Oldfield, *supra* note 15, at 54; see also DALY & WILSON, CINDERELLA, *supra* note 1, at 52-53 (alleging that the absence of accurate federal data on stepparent abuse and the prevalence of stepparents—as defined broadly in this note to include live-in boyfriends and legal stepparents—required them to use conservative estimates based on less reliable sources thereby providing ideological critics with an excuse to ignore their work).

<sup>118</sup> 42 U.S.C. §§ 5101-5119c (2003).

<sup>119</sup> Jones has offered a similar suggestion. See Jones, *Child Abuse*, *supra* note 2, at 1235.

Currently, the U.S. Census uses the following categories to define a child’s family relationship: adopted children; children in traditional nuclear families; cohabitating parent-child families; “blended,” or stepparent, families; and children in extended family households. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, LIVING ARRANGEMENTS OF CHILDREN (2001). This might make a good starting point, with further classification provided for

*B. Risk Assessment*

Researchers and legal scholars have suggested considering familial status as a factor in the risk assessment phase of child abuse investigations.<sup>120</sup> Many child abuse investigators are overworked and lack sufficient resources to thoroughly investigate every claim.<sup>121</sup> Efforts to increase the likelihood of finding substantiated cases of abuse, when they are present, would allow these beleaguered investigators protect children more efficiently.<sup>122</sup>

New York is a prime candidate for this proposal. New York City, for example, has seen a dramatic decline in substantiated cases of abuse, from forty-one percent in 1990 to twenty percent in 1996.<sup>123</sup> “Absent other evidence, the . . . decline in . . . [substantiated] cases would be good news. However, these trends were accompanied by a sharp cut in [Child Protective Service] staff, and this cut likely had an effect on the quality of the investigations.”<sup>124</sup> During the same period, the average child protective worker caseload soared from twelve to twenty-four.<sup>125</sup>

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cohabitating parents that are biologically related to the child and those that are not.

<sup>120</sup> Jones, *Child Abuse*, *supra* note 2, at 1237 (noting the need for child protective agencies to weigh the risk of stigmatizing stepfamilies against the potential benefits of stepchild abuse prevention programs); Colin Tudge, *Relative Danger*, NAT. HIST., Sept. 1997, at 28-31 (interviewing Martin Daly, who calls for child protective agencies to recognize children in stepparent families as being at high risk for child abuse); *see also* PINKER, BLANK SLATE, *supra* note 8, at 165.

<sup>121</sup> Jones, *Child Abuse*, *supra*, note 2, at 1237 (noting this common criticism of the child protection system).

<sup>122</sup> *Id.* at 1238. “Evolutionary analysis suggests that, if the agency were to ascribe more weight to the presence of a stepparent, say by modifying its standard operating procedures to preferentially investigate reports of child abuse in homes with substitute parents, children would be better protected.” *Id.*

<sup>123</sup> CITIZENS BUDGET COMM’N, THE STATE OF MUNICIPAL SERVICES IN THE 1990’S: SOCIAL SERVICES IN NEW YORK CITY 24 (1997), at <http://www.cbcny.org/socserv2.html>.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 25.

*EVOLUTION AND CHILD ABUSE*

713

Staff reductions and budget cuts have created incentives for workers to err on the side of failing to report a finding of abuse in borderline cases rather than refer the case for preventive services or foster care.<sup>126</sup> In New York, 67.4 percent of investigated cases led to a finding that the allegation of maltreatment was unsubstantiated in the year 2000, while the national average for same period was 58.4 percent.<sup>127</sup> The proposed New York statute, to be titled “Consanguinity as a Factor in Child Abuse Investigations” (hereinafter Proposed Risk Assessment Statute) reads as follows:

The Legislature recognizes that a child living in the home with a non-biological parent is at a high risk of child abuse. When conducting a risk assessment of potential victims of child abuse, investigators shall consider this risk in prioritizing cases for review. These cases should be given priority in the speed with which they are addressed.<sup>128</sup>

*C. Child Fatality Review Teams*

This section proposes requiring child fatality review teams to investigate the presence of infanticide when the death of an infant occurs in a stepparent family. More diligent investigations into mysterious child deaths in stepparent families can result in the detection of more substantiated cases of infanticide, which in turn provides greater protection for other children who may be living in the home of an abuser.

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<sup>126</sup> *Id.* The Child Welfare League of America (CWLA) reports that the benchmark for CPS worker caseloads is twelve. *Id.* According to the Citizens Budget Commission report, New York CPS workers are maintaining double their recommended capacity of cases. *Id.*

<sup>127</sup> See CHILD MALTREATMENT 2000, *supra* note 21, at 17 tbl.2-5.

<sup>128</sup> At present, “decisions made by child protection agencies are not affected by the fact a child resides in a stepfamily.” Jones, *Child Abuse*, *supra* note 2, at 1237 n.363. Jones has suggested that such a proposal, informed by the underlying evolutionary principles discussed herein, may provide greater protection to children, admittedly at the potential to cost of stigmatizing stepparents. *Id.* at 1237-38.

Sudden Infant Death Syndrome (SIDS) “is the sudden death of an infant under one year of age that remains unexplained after thorough case investigation, including performance of a complete autopsy, examination of the death scene and a review of the clinical history.”<sup>129</sup> Because instances of fatal abuse are often difficult to detect when the manner of death is shaken baby syndrome or soft suffocation,<sup>130</sup> which can often be detected only through an autopsy, the National Clearinghouse recommends that all states implement mandatory autopsy statutes and child fatality death review teams to distinguish true SIDS cases from fatal abuse.<sup>131</sup> The National Clearinghouse estimates that five percent of reported cases of SIDS are in fact undetected instances of fatal child abuse, and that the best means of distinguishing infanticide from SIDS cases is through mandatory autopsy and child fatality review teams.<sup>132</sup> “By the end of 1999, seventeen states had

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<sup>129</sup> Comm. on Child Abuse and Neglect, Am. Acad. of Pediatrics, *Distinguishing Sudden Infant Death Syndrome From Child Abuse Fatalities*, in 107(2) PEDIATRICS 437 (2001) [hereinafter *Distinguishing SIDS*]. Further confounding the detection of abuse cases, is the fact that SIDS is correlated with several of the same high risk factors as child abuse, including young maternal age, siblings who have died under similar circumstances, lack of prenatal care and low birth weight. *Id.* In addition, “[t]he SIDS rate is 2 to 3 times higher among African American and some American Indian populations.” *Id.* African American and American Indian children are also significantly more likely to suffer from maltreatment. CHILD MALTREATMENT 1999, *supra* note 116, at 28 tbl.2-10.

<sup>130</sup> See *Distinguishing SIDS*, *supra* note 129, at 437. Shaken baby syndrome is the medical term used to describe the violent shaking and resulting injuries sustained from shaking. *Id.*

<sup>131</sup> See FACT SHEET, *supra* note 22. Child fatality review teams “are comprised of prosecutors, coroners and medical examiners, law enforcement personnel, CPS workers, public health care providers and others.” *Id.* “The teams review cases of child death and facilitate appropriate follow-up,” which may include support services for surviving family members and provide information necessary for prosecution of perpetrators. *Id.* They can also be instrumental in providing information and recommendations to local community support systems and CPS workers. *Id.* “Well designed, properly organized child fatality review teams appear to offer the greatest hope for defining the underlying nature and scope of fatalities due to child abuse and neglect and for offering solutions.” *Id.*

<sup>132</sup> *Id.* Five percent may be a conservative estimate. Task Force on Infant

## EVOLUTION AND CHILD ABUSE

715

passed mandatory autopsy statutes and thirty-two states had passed statutes mandating child death fatality review teams in the event of an unexplained death of a child under two years old.<sup>133</sup>

In 2002, New York passed a law mandating autopsies in cases of unexplained deaths of all children under one year of age.<sup>134</sup> Nevertheless, the state allows for child fatality review

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Sleep and Sudden Infant Death Syndrome, *Am. Acad. of Pediatrics, Changing Concepts of Sudden Infant Death Syndrome: Implications for Infant Sleeping Environment and Sleep Position*, 105(3) PEDIATRICS 650 (2000). Some researchers believe that as many as ten percent of reported SIDS cases are, in fact, instances of infanticidal abuse. *Id.*

<sup>133</sup> See ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD ABUSE AND NEGLECT STATE STATUTES ELEMENTS 1-2 (1999) [hereinafter *State Statutes*], available at <http://www.calib.com/nccanch/pubs/stats00/cdrtaut.pdf>. For example, the Illinois mandatory autopsy statute reads as follows:

Where an infant under two years of age has died suddenly and unexpectedly and the circumstances surrounding the death are unexplained, an autopsy shall be performed by a physician licensed to practice medicine in all of its branches who has special training in pathology. When an autopsy is conducted under this Section, the parents or guardian of the child shall receive a preliminary report of the autopsy within five days of the infant's death.

55 ILL. COMP. STAT. ANN. § 5/3-3016 (West 1993).

The Virginia child fatality review teams statute reads in pertinent part:

There is hereby created the State Child Fatality Review Team . . . [,] which shall develop and implement procedures to ensure that child deaths occurring in Virginia are analyzed in a systematic way. The team shall review (i) violent and unnatural deaths, (ii) sudden child deaths occurring within the first eighteen months of life, and (iii) those fatalities for which the cause or manner of death was not determined with reasonable medical certainty.

VA. CODE ANN. § 32.1-283.1 (Michie 2002).

<sup>134</sup> N.Y. PUB. HEALTH LAW § 4210(2) (McKinney 2002).

The commissioner shall adopt regulations to establish standard autopsy protocols for any person under the age of one year who dies under circumstances in which death is not anticipated by medical history or the cause is unknown. . . . In developing and implementing such regulations and protocols, the commissioner shall consult with health professionals, families and other persons participating in the implementation of the sudden infant death syndrome program.

teams to investigate the unexplained death of an infant *only* when a complaint has been lodged with the Central Registry on Child Abuse or when the child is in foster care at the time of her death.<sup>135</sup> Thus, many child murders will likely remain undetected.<sup>136</sup>

The National Clearinghouse believes that the five percent chance of finding a substantiated case of abuse is enough to warrant a complete investigation of all unexplained infant deaths.<sup>137</sup> While this is the preferred solution, child fatality review teams can be resource-intensive, expensive and invasive of family privacy. At some point, the potential of discovering substantiated cases of fatal child abuse makes the investment cost-effective both economically and personally.<sup>138</sup> Since very young infants living with one genetic parent and a stepparent in the United States are up to one hundred times more likely to suffer fatal child abuse, New York should consider passing a statute requiring child fatality review teams in cases where the child is living with a biological parent and a non-biological adult in a parental role. This would significantly increase the state's return

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*Id.*

<sup>135</sup> N.Y. SOC. SERV. LAW § 422-b (McKinney 1999).

A fatality review team may be established at a local or regional level, with the approval of the office of children and family services, for the purpose of investigating the death of any child whose care and custody or custody and guardianship has been transferred to an authorized agency, or in the case of a report made to the central register involving the death of a child.

*Id.*

<sup>136</sup> See THE CITY OF NEW YORK HUMAN RES. ADMIN., NEW YORK CITY CHILD FATALITY REVIEW PANEL, ANNUAL REPORT FOR 1991 4 (1992). In 1991, there were 102 child fatalities in New York City alone, and less than half were investigated by the child fatality review team. *Id.* More than half of the cases that were reviewed were substantiated as cases of infanticide. *Id.*

<sup>137</sup> See FACT SHEET, *supra* note 22.

<sup>138</sup> See Jones, *Child Abuse*, *supra* note 2, at 1236-37. While Jones does not discuss this proposal specifically, he does clarify how evolutionary analysis can help improve cost-benefit analysis. *Id.* "Although evolutionary analysis generally says little about which goals society should favor, it can (as here) highlight previously unconsidered costs of legal and social policies." *Id.*

*EVOLUTION AND CHILD ABUSE*

717

on its investment. The proposed statute (hereinafter Proposed Child Fatality Review Team Statute), which would amend the current provision outlining the use of fatality review teams,<sup>139</sup> reads as follows:

In the event of an unexplained death of an infant under one year old, where the infant resides with a biological parent and a non-biological adult, a child fatality review team will investigate the possibility of fatal child abuse. This investigation will be conducted regardless of the presence or absence of a complaint filed with the central register.<sup>140</sup>

### III. EQUAL PROTECTION ANALYSIS

A critic of evolutionary psychology, Professor Steven Goldberg, has said that “[t]he evolutionary evidence burdening [a stepparent] is a statement about stepparents generally. It is not a statement about him individually.”<sup>141</sup> Commentators on both sides of the debate on the use of evolutionary thought in legal decision making have recognized that “[i]f evolutionary analysis ever has a direct impact on American law, it will be through statistical generalizations about human behavior rather than explanations of why a specific individual acted in a certain way.”<sup>142</sup> While this contention is undisputed, Goldberg goes on to unfairly stack the deck.<sup>143</sup> Goldberg cites a number of examples implying that the

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<sup>139</sup> § 422-b.

<sup>140</sup> This proposal has not been made before, probably because the preferred solution is to authorize a child fatality review team to review all unexplained deaths. *See supra* text accompanying note 137. The New York legislature, however, has shown its willingness to split hairs, distinguishing between children in foster care and those in intact families. *See* § 422-b. Whether the legislature’s concern is financial or based on parental rights to privacy, the one hundred fold increased risk might be enough to shift the balance toward protecting children in this cost-benefit analysis.

<sup>141</sup> Goldberg, *supra* note 9, at 257.

<sup>142</sup> *Id.* at 255.

<sup>143</sup> *Id.*



use of statistical evidence is disfavored by the Supreme Court.<sup>144</sup> Goldberg offers these cases “not for their doctrinal significance, but to provide a general sense of the problems statistics, including evolutionary-based evidence, must overcome.”<sup>145</sup> It is, however, precisely because of their doctrinal significance that the statistical evidence presented in those cases was rejected.<sup>146</sup> In fact, there are no significant constitutional barriers to any of the proposed statutes.

#### *A. Fundamental Liberty Interest and Family Privacy*

First, a court will consider whether a fundamental liberty interest is implicated.<sup>147</sup> If the proposed statutes substantially

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<sup>144</sup> *Id.* at 257-59. Criticizing the use of statistical evidence in legal decision making, Goldberg presents three examples of Supreme Court decisions where arguments based on that evidence have failed. *Id.* Specifically, he cites *Palmore v. Sidoti*, 466 U.S. 429 (1984), *Craig v. Boren*, 429 U.S. 190 (1976) and *McClesky v. Kemp*, 481 U.S. 279 (1987). *Id.*

<sup>145</sup> Goldberg, *supra* note 9, at 257.

<sup>146</sup> *See Id.* The author uses cases involving discrimination based on race and sex to make the point that distinctions between various groups are disfavored by the courts. *Id.* “Two disparate Supreme Court cases in which statistical arguments fare poorly, illustrate the hurdles evolutionary based evidence will face in the future.” *Id.* at 258. Elsewhere in his article, Goldberg concedes no court is likely to question most decisions based on statistical evidence, however his rhetorical use of clearly distinguishable cases is puzzling. *Id.* at 257.

<sup>147</sup> U.S. Const. amend. XIV, § 1. The Due Process Clause of the Fourteenth Amendment states that no state shall “deprive any person of life, liberty, or property without due process of law.” *Id.* In a due process analysis, one must first define what liberty interest is affected before determining whether the interference is substantial. *See Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942). When due process claims arise in the context of an equal protection challenge, the intrusion need not rise to a level that would preclude all people from exercising the right. *Id.* at 540. Therefore, actions that would be constitutional if applied to all citizens may be unconstitutional when arbitrarily applied to one group over another. *Id.* Ironically, the consideration of due process issues in equal protection analysis was first applied in a eugenics case. *See generally id.* In *Skinner*, the Court held that a forced sterilization law was unconstitutional, not because the practice of mandatory sterilization of convicted felons without a hearing was a per se violation of due

*EVOLUTION AND CHILD ABUSE*

719

interfere with a fundamental liberty interest, the courts would subject the statutes to strict scrutiny. Under strict scrutiny, a law would be struck down unless it is narrowly tailored to further a compelling state interest. Here the interests of both the biological parent and the stepparent must be considered. It is likely that a court would not recognize the existence of a fundamental liberty interest for stepparents, as has been recognized for biological and adoptive parents. Even if an interest similar to that of biological parents was recognized, however, it is unlikely that the modest proposals presented here would warrant strict scrutiny.

*1. Parents*

A biological and adoptive parent each has a protected liberty interest in the “companionship, care, custody and management of his or her children.”<sup>148</sup> Any substantial interference with a biological parent’s fundamental liberty interest is subject to strict scrutiny.<sup>149</sup> Even if stepparents have no familial rights, the fundamental liberty interest of biological parents may be infringed by substantial, unwarranted intrusions into family privacy. The biological parent is at least equally affected by an investigation into an allegation of abuse.<sup>150</sup> Child abuse investigations do not, at least initially, focus on an individual

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process, but because the arbitrary distinction between white collar and blue collar crimes violated equal protection when examined under a more intensive scrutiny. *Id.* at 540. Higher scrutiny was warranted because the liberty interest of procreative freedom was at stake. *Id.* Ultimately, the plaintiff was allowed a hearing before being involuntarily sterilized. *Id.*

<sup>148</sup> *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that absent a finding of unfitness, an unwed father has a right to custody of his children without a hearing upon the death of the child’s mother); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The “Constitution protects the sanctity of the family because the institution of the family is so deeply rooted in this Nation’s history and traditions.” *Id.*

<sup>149</sup> *Moore*, 431 U.S. at 499.

<sup>150</sup> *See DALY & WILSON, CINDERELLA*, *supra* note 1, at 34. DPST appears to suggest that biological parents would be even more disaffected, because a child abuse investigation potentially interrupts their closer relationship. *Id.* Ultimately, the biological parent has more to lose. *Id.*

suspect, but on the specific facts of the case.<sup>151</sup> Therefore, the biological parent who chooses to remarry or cohabit with a new mate would have standing to make an equal protection claim against arbitrary state invasion in the care, custody and management of his or her child if that interference were substantial.

## 2. Stepparents

Most likely, courts would find that stepparents do not have the same fundamental liberty interest as a biological parent in the care, custody and management of their children.<sup>152</sup> To establish the liberty interest, the step-relationship must satisfy the Supreme Court's definition of "family."<sup>153</sup> The Court has only loosely defined the parameters of what constitutes a family and has not specifically determined whether stepparents are included.<sup>154</sup> In fact, the First Circuit declined to extend the previously recognized parental liberty interest in "companionship of . . . children" to a stepparent absent Supreme Court precedent.<sup>155</sup>

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<sup>151</sup> See Jones, *Child Abuse*, *supra* note 2, at 1238. Criticism from the social science community of the findings presented in this note has centered less on the objective findings that stepparent families present greater potential for abuse than the fact that stepparents are the perpetrators of that abuse. DALY & WILSON, *CINDERELLA*, *supra* note 1, at 51-52. Critics argue that child abuse investigations data available at the time is unreliable because it does not indicate the perpetrator was a stepparent even when it does indicate that the victim came from a stepparent family. *Id.* In either event, more intensive investigations into stepparent families as opposed to traditional families would still result in more substantiated cases of abuse, regardless of who is found to be the perpetrator.

<sup>152</sup> See *Ortiz v. Burgos*, 807 F.2d 6 (1st Cir. 1986) (declining to extend parental rights to a stepparent, absent Supreme Court precedent).

<sup>153</sup> *Id.* at 504-06.

<sup>154</sup> Compare *Moore v. City of East Cleveland*, 431 U.S. 494, 505-06 (1977) (holding that a household composed of a grandparent and grandchild satisfies the requirements of zoning ordinances requiring family status), with *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (holding that foster parents do not possess the parental liberty interest of biological parents).

<sup>155</sup> *Ortiz*, 807 F.2d at 6. "Some Supreme Court cases acknowledging the

## EVOLUTION AND CHILD ABUSE

721

First, because a stepparent's familial rights remain an open question, it may be helpful to examine what is and is not a family for constitutional purposes. Several decisions defining what triggers the rights of family have stressed the biological nature of the relationship.<sup>156</sup> The Court has noted, "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring."<sup>157</sup> Grandparents and extended biological relations receive some constitutional protection in the absence of a competing biological parent's interest.<sup>158</sup> Foster parents have

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personal liberty interest of parents in the 'companionship, care, custody, and management of his or her children,' suggest that this right may extend only to natural parents." *Id.* (citation omitted). "Our conclusion is simply that, in light of the limited nature of the Supreme Court precedent in this area, it would be inappropriate to extend recognition of an individual's liberty interest in his or her family or parental relationship to the facts of this case." *Id.* at 10.

<sup>156</sup> See *Moore*, 431 U.S. at 505-06. "[T]he choice of *relatives* in this degree of *kinship* to live together may not lightly be denied by the state." *Id.* (emphasis added); see also *Org. of Foster Families for Equality and Reform*, 431 U.S. at 843. "The usual understanding of families implies biological relationships and most decisions treating the relationship between parent and child have stressed this element." *Id.* Cf. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *Michael H.* provides an exception to the Court's preference for biology and demonstrated commitment in establishing parental rights. *Id.* In *Michael H.*, a genetic father who had established a parental relationship with the child was denied an order of filiation when the child in question was born to a woman married to another man. *Id.* The Court determined that there is no fundamental right available to an unwed father in such a case, noting the absence of such a right at common law. *Id.* at 125-26.

<sup>157</sup> *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (holding that a *biological* father who takes an active role in his child's life is entitled to constitutional interest in the care, custody and management of his children, but absent that demonstrated commitment, no such liberty interest is recognized).

<sup>158</sup> See *Moore*, 431 U.S. at 504-06. In *Moore*, the Court held that a zoning ordinance could not arbitrarily define the standards of what constitutes a family and consequently prohibit a grandmother from living with her grandchildren. *Id.* at 499-502. For the first time, the Court extended the definition "family" beyond the traditional, nuclear family. *Id.* In doing so, however, the Court repeatedly emphasized the significance of the biological relationship. *Id.* at 503-04. "The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and

been specifically denied parental privileges when the competing interest of a biological parent is present.<sup>159</sup> Stepparent relations arguably fall somewhere in between biological grandparents and foster parents.<sup>160</sup> While no biological relationship exists between a stepparent and stepchild, there may be more potential for permanency in a stepparent relationship than in a foster care situation, where the relationship results from a contractual relationship with the state.<sup>161</sup>

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children . . . is equally deserving of constitutional recognition,” when compared to biological parents. *Id.* at 504. *See also* Quilloin v. Walcott, 434 U.S. 246 (1978) (making no attempt to consider the rights of the adoptive stepparent, while holding that the natural father had no right to veto a stepparent adoption, since he had not taken an active role in the child’s life prior to the adoption proceeding). *But see* Troxel v. Granville, 530 U.S. 57 (2001) (striking down an Oregon statute that afforded special rights to grandparents in visitation of children against the biological parents’ wishes).

In general, when there are competing interests, a biological parent’s liberty interest trumps those of a grandparent. *Id.* The cases defining what constitutes a family often make for a difficult comparison to the proposed statutes because, like the visitation statute in *Troxel*, the party seeking substantive rights may be in conflict with a biological parent. *See Org. of Foster Families for Equality and Reform*, 431 U.S. at 846.

<sup>159</sup> *Org. of Foster Families for Equality and Reform*, 431 U.S. at 845-46 (denying a foster parent the same protections that parents and grandparents receive when removing a child from the foster home in order to return the child to the natural parent). One “consideration related to this [decision] is that ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. Here, however, such a tension is virtually unavoidable.” *Id.* at 846. “Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.” *Id.*

<sup>160</sup> *See* text accompanying note 159.

<sup>161</sup> *See Org. of Foster Families for Equality and Reform*, 431 U.S. at 845.

There is an “important distinction” between the foster family and the natural family. . . . [U]nlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements.

*Id.*

## EVOLUTION AND CHILD ABUSE

723

In addition, the court has noted that a fundamental liberty interest may derive from rights or obligations granted under state law.<sup>162</sup> Nevertheless, no state, including New York, has a particularly expansive view of stepparent rights from which an interest in the care, custody and management of one's stepchildren would likely emerge.<sup>163</sup>

Finally, in determining stepparent rights, a court might

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<sup>162</sup> See *id.* at 844 n.51 (citing New York State law for the proposition that “adoption is the legal equivalent of biological parenthood”); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 664 (1966) (holding that there is not necessarily a constitutional right to vote in state elections but that, nevertheless, “once the franchise is granted to the electorate [by the state], lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment”).

<sup>163</sup> MARGARET M. MAHONEY, *STEFFAMILIES AND THE LAW* 6 (1994) (“The legal system has failed to recognize, on any consistent basis, that the relationship between stepchild and stepparent entails any enforceable rights and duties.”); N.Y. DOM. REL. LAW §§ 70-71 (McKinney 2003) (allowing court-ordered visitation to biological parents and siblings); N.Y. SOC. SERV. LAW § 101 (McKinney 2003) (limiting a stepparent's obligation of support to a stepchild to situations where the child would otherwise require public assistance and that even an adoptive stepparent has no obligation of support if living separate and apart from his/her spouse and stepchild); Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 2001) (noting that, unlike many other states, a “biological stranger” lacks standing to request visitation in New York); Hertz v. Hertz, 717 N.Y.S.2d 497, 498 (App. Div. 2000) (following Troxel v. Granville, 530 U.S. 57 (2001), and holding N.Y. DOM. REL. LAW § 72, New York's grandparent visitation statute, unconstitutional). The same limited view applies in the law regarding inheritance. See *In re Peer's Estate*, 245 N.Y.S. 298 (Sur. Ct. 1930), *aff'd*, 249 N.Y.S. 900 (App. Div. 1930) (holding that stepchildren inherit only if decedent leaves no next of kin.). The statute upon which *Peer's Estate* was based, however, has since been repealed, removing any potential for an unadopted stepchild to inherit through intestacy. See MAHONEY, *supra*, at 57 n.14. New York is not one of the four states that recognize a stepchild's right to recover in wrongful death suits. *Id.* at 103. New York recognizes worker's compensation survivor benefits for stepchildren, but not stepparents. *Id.* at 116 n.8. New York does, however, recognize some limited rights for stepparents. N.Y. DOM. REL. LAW § 110 (McKinney 2003) (recognizing stepparent adoption as all other states do); Rosenberg v. Silver, 762 F.2d 255 (2d Cir. 1985) (holding that a stepfather is entitled to parental tort immunity if he can establish in loco parentis relationship to his stepchild.).

choose to consider a stepparent's efforts to be a substantial part of the child's life, the amount of time spent in the home and the permanency of the relationship.<sup>164</sup> This "psychological parent" argument has failed twice before the Court, although both cases involved competing interests between biological parents and more remotely related or unrelated caretakers.<sup>165</sup> "[T]he importance of

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<sup>164</sup> See *Drummond v. Fulton County Dep't of Children's Servs.*, 547 F.2d 835 (5th Cir. 1977). The court recognized the liberty interest of a pair of foster parents in the adoption of their foster child based on psychological parent theory. *Id.* The court noted the close relationship the foster parents had developed with the child over the five years the child had been living with them. *Id.* at 857. Under procedural due process, the foster parents were allowed a hearing before they could be denied an opportunity to adopt. *Id.* This case was decided shortly before the Supreme Court spoke on the issue and relied in part on the circuit court opinion in *Org. of Foster Families for Equality and Reform* case to the same effect. See *Org. of Foster Families for Equal. & Reform v. Dumpson*, D.C., 418 F. Supp. 277 (S.D.N.Y. 1976), *rev'd*, 431 U.S. 816 (1977).

<sup>165</sup> See *Org. of Foster Families for Equality and Reform*, 431 U.S. at 847 n.54. The Court noted that both litigants discussed the validity of the "psychological parent" theory in their briefs. *Id.* Without determining the theory's validity, the Court rejected its relevance in determining the legal relationship of a foster parent to a foster child. *Id.* at 845 n.52. The Court recognized the "undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families." *Id.*; See also *Troxel*, 530 U.S. at 91 (Kennedy, J., dissenting). "Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto." *Id.* at 98. While this argument was not accepted by the majority, *Troxel* involved conflicting interests between grandparents asserting their rights to visitation and biological parents, whose interests clearly trump those of grandparents. *Id.*

The Court's rulings in a line of paternity cases may also be instructive on this point. Compare *Caban v. Mohammed*, 441 U.S. 380 (1979) (finding that by coming forward to participate in the rearing of his child, a putative father's continued interest in the custody of his children warrants protection), with *Quilloin v. Walcott*, 434 U.S. 246 (1978), and *Lehr v. Robertson*, 463 U.S. 248 (1983) (declining to find the same right in a putative father who did not make attempts to involve himself in the child's life before attempts were made to terminate his parental rights). When a non-custodial biological father attempts to assert paternity rights, courts require not only a biological

## EVOLUTION AND CHILD ABUSE

725

the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in '[promoting] a way of life' through the instruction of children."<sup>166</sup> This argument may be more viable when a stepparent's claim is not in conflict with the biological parent's wishes.<sup>167</sup>

The distinction between different kinds of "stepparents" as broadly defined in this note becomes increasingly important if contributions to the child's well-being are considered. A stepparent who has legally adopted his stepchild would be in the best position to invoke the liberty interest because adoptive parents are treated as biological parents under the law.<sup>168</sup> In

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relationship, but also parental contributions to the quality of the child's life. "In some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father." *Lehr*, 434 U.S. at 260. In these cases, however, a biological relationship was present or presumed.

<sup>166</sup> *Lehr*, 463 U.S. at 261 (quoting *Caban*, 441 U.S. at 261).

<sup>167</sup> See *Org. of Foster Families for Equality and Reform*, 431 U.S. at 846.

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that individuals may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right . . . .

*Id.*

<sup>168</sup> *Id.* at 845 n.51. "Adoption . . . is recognized as the legal equivalent of biological parenthood." *Id.*; N.Y. DOM. REL. LAW § 110 (McKinney 2003) (defining "adoption" as "the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of [a] parent in respect of such other person"). A person may adopt the child of his spouse without terminating the parental rights of his spouse. *Id.* "Approximately one-half of all adoptions are by relatives, defined to include stepparents." MARGARET M. MAHONEY, STEPFAMILIES AND THE LAW 161 n.1 (1994). "Through such an adoption, the stepfamily is transformed from [an] uncertain legal entity . . . into a legal family." *Id.* at 161.



contrast, one who is simply married to the child's mother might be less likely to receive constitutional recognition as family.<sup>169</sup> A live-in boyfriend would be unlikely to have a right in the "care, custody and management" of his girlfriend's children.

### 3. Substantial Interference

Even if stepparents were granted all of the rights of a biological parent, the level of interference with a stepparent's fundamental liberty interest in the care, custody and management of his or her stepchildren must be substantial in order for strict scrutiny to apply. While the collection of anonymous data does not interfere with individual family privacy, the Proposed Risk Assessment and Proposed Child Fatality Review Team statutes warrant further examination.<sup>170</sup>

Any interference in family privacy caused by the Proposed Risk Assessment Statute is *de minimis*.<sup>171</sup> In the context of child abuse investigations, this liberty interest is most often invoked when the termination of parental rights are at stake.<sup>172</sup> The

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<sup>169</sup> See *Ortiz v. Burgos*, 807 F.2d 6 (1st Cir. 1986) (declining to extend constitutional liberty interest to a stepparent). *But see* *Gribble v. Gribble* 583 P.2d 64 (Utah 1978). In *Gribble*, the Supreme Court of Utah determined that a stepparent requesting court-ordered visitation was entitled to a hearing as to whether he stood "in loco parentis" to a child against the wishes of the biological parent. *Id.* at 66. If found to be in loco parentis, the plaintiff would be entitled to all of the rights and obligations of a parent and child, even without a formal adoption. *Id.* As a case of non-parental visitation rights, it appears that this decision is no longer good law under *Troxel v. Granville*, 530 U.S. 57 (2001), which declared that when competing interests between biological parents and others are at stake, the parental rights supercede those of a biological stranger or even a grandparent. See generally *Gribble*, 583 P.2d 64. Absent a competing parental interest, however, the argument may still have some vitality.

<sup>170</sup> Data collection would involve no personally identifiable information and would compile merely demographic data, therefore no individual liberties are infringed.

<sup>171</sup> See *Moore v. Sims*, 442 U.S. 415 (1979) (refusing to scrutinize a state's decision to take temporary custody of children whose parents were suspected of child abuse).

<sup>172</sup> See *Santosky v. Kramer*, 455 U.S. 755 (1982) (holding that the Due

## EVOLUTION AND CHILD ABUSE

727

proposed statute would serve to prioritize an inevitable investigation or, at most, trigger a more thorough investigation.<sup>173</sup> This is, however, a long way from the termination or suspension of parental custody, which requires a showing of clear and convincing evidence of parental guilt.<sup>174</sup>

The analysis of the Proposed Child Fatality Review Team Statute is much the same as in the Proposed Risk Assessment Statute, but strict scrutiny is even less applicable in the context of fatality review teams. First, since most cases reviewed by child fatality review teams involve very young children, a truly committed stepparent may not be able to accrue enough time in the child's life to prove that commitment to a court and be treated as a parent.<sup>175</sup> Second, there is no fundamental liberty interest at stake, even for a biological parent,<sup>176</sup> as the death of the child terminates the interest in protecting the care, custody and management of that child.<sup>177</sup> The Fifth Circuit specifically

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Process Clause requires a clear and convincing evidentiary standard in order to terminate parental rights, but also noting the profound significance of the state's interference into a family's privacy when it seeks to terminate those rights). "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Id.* at 759.

<sup>173</sup> See *Sims*, 442 U.S. 415.

<sup>174</sup> *Santosky*, 455 U.S. at 769.

<sup>175</sup> See CHILD MALTREATMENT 2000, *supra* note 21, at 53 tbl.5-1. In 2000, more than seventy percent of all fatality victims of child maltreatment were under three years old. *Id.*

While the paternity cases require a biological father's "attempt" to become a substantial part of a child's life, the psychological parent theory is concerned with the actual bond that has developed between the child and the substitute. See *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978). "In light of the fact that the record does not disclose . . . the extent to which their foster parents have become their psychological parents during the last three years, we are hard pressed to determine who would be most harmed by the denial of custody." *Id.*

<sup>176</sup> See *Arnaud v. Odom*, 870 F.2d 304 (5th Cir. 1989). The court noted that recognizing a constitutionally protected interest in a deceased infant's remains would be more than an extension or interpretation of any preexisting right, but a new liberty interest altogether. *Id.* at 311.

<sup>177</sup> *Id.*; see also *In re Stephanie WW*, 623 N.Y.S.2d 404 (3d Dep't 1995)

declined to recognize “a liberty interest in the next of kin to be free from state-occasioned mutilation of the body of a deceased relative.”<sup>178</sup>

*B. Protected Classes*

Strict or intermediate scrutiny may also be applied when a law discriminates against suspect classes, including race, alienage, national origin and sex. The proposed statutes do not discriminate against any of these classes in a manner that would trigger heightened scrutiny.

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(holding that although a neglect action could not be brought on behalf of a dead child, the child’s death could be used to substantiate a neglect action brought on behalf of her surviving sister).

<sup>178</sup> *Arnaud*, 870 F.2d at 305. *Arnaud* involved both a SIDS death and a resulting autopsy required by a mandatory autopsy statute. *Id.* The plaintiff parent was not challenging the constitutionality of the mandatory autopsy itself, but whether the coroner’s performance of “gruesome experiments” on the infant’s corpse (that clearly exceeded his authority) in preparation for expert testimony in an unrelated case, violated a substantive due process right of the plaintiff. *Id.* The court rejected the argument that the child’s parents had a liberty interest in their deceased child’s remains, but found that the parents had a “quasi-property” right in their child’s corpse, allowing them the potential to recover in tort. *Id.* at 309.

*EVOLUTION AND CHILD ABUSE*

729

*1. Strict Scrutiny and Racial Discrimination*<sup>179</sup>

Professor Goldberg cites the case of *Palmore v. Sidoti* as analogous to the issues of child abuse prevention presented in this note.<sup>180</sup> *Palmore*, however, involved a suspect classification based on race and was subject to strict scrutiny.<sup>181</sup> When a court

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<sup>179</sup> See *Att’y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898 (1986). “It is well established that where a law classifies by race, alienage or national origin, and where a law classifies in such a way as to infringe constitutionally protected fundamental rights, heightened scrutiny under the Equal Protection Clause is required.” *Id.*

These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

<sup>180</sup> See Goldberg, *supra* note 9, at 256; *Palmore v. Sidoti*, 466 U.S. 429 (1984). Jones points out that a supporter of evolutionary biology in law might favor targeting stepparents for child abuse prevention and education programs. By way of analogy, it was plausible to argue, as a Florida court did in 1982, that an interracial couple should not be granted custody of a white child because racial prejudice would make life difficult for the child. But the United States Supreme Court concluded that the law should not tolerate such prejudice. *Id.*

<sup>181</sup> *Palmore*, 466 U.S. 429. In *Palmore*, the Supreme Court applied strict scrutiny and overruled a judge’s custody determination in favor of the child’s father based solely on the fact that the child’s white mother was cohabitating with a black man. *Id.* The court rejected the argument that the racial distinction was appropriate because the child would be subject to increased risk of suffering from racial prejudice. *Id.* at 431. The reasoning of the trial court was that there are social consequences for children in an interracial family and that the child would be subject to discrimination by society. *Id.* The Supreme Court recognized the potential that the child may suffer from these pressures, but determined under strict scrutiny that the justification was insufficient to warrant such a profound intrusion. *Id.* “The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.” *Id.* at 434. “The Constitution cannot control

applies strict scrutiny, it almost invariably strikes down the law.<sup>182</sup> Undoubtedly, if strict scrutiny were applied to the proposed statutes in this note they would be deemed unconstitutional.<sup>183</sup> Race, alienage and national origin classifications, however, are not implicated by the proposed statutes, and stepparents are not a suspect class; therefore, strict scrutiny would not be triggered.<sup>184</sup>

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such prejudices, but neither can it tolerate them.” *Id.* at 433.

<sup>182</sup> Gerald Gunther, *Foreward: A Search for Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (coining the oft-repeated phrase that strict scrutiny is “strict in theory and fatal in fact”). *But see* *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“dispel[ling] the notion that strict scrutiny is strict in theory, but fatal in fact”); *see also* *Korematsu v. United States*, 323 U.S. 214 (1944) (applying strict scrutiny and upholding the internment of Japanese-Americans during World War II because the action was narrowly tailored to the Government’s purported compelling interest in national security).

<sup>183</sup> *See Palmore*, 466 U.S. at 432. A law that is overinclusive or underinclusive will not be upheld when this standard is applied. *Id.* A law is overinclusive to the extent it affects more people than necessary to serve the government’s interest. *See Craig v. Boren*, 423 U.S. 1047 (1976) (holding that a different drinking age for men and women is overinclusive because it disaffects drinkers who don’t drive). A law is underinclusive to the extent that it does not reach every person necessary to serve the governmental purpose. *Id.* (holding that the same law is underinclusive because it does not address all drunk drivers including older drunk drivers and female drunk drivers). The proposed statutes in this note are overinclusive to the extent that they would target stepparent families where there is no abuse and underinclusive to the extent that they would not target every instance of child abuse.

<sup>184</sup> *See* Oliver R. Goodenough, *Biology, Behavior and Criminal Law: Seeking a Responsible Approach to an Inevitable Interchange*, 22 VT. L. REV. 263, 282-84 (1997). It is unlikely that proposals for race-based distinctions will come from the field of evolutionary psychology at all. First, evolutionary psychology looks at the human species as a whole and not at the differences between individuals or groups within the species (except for sex-based differences). Jones, *Child Abuse*, *supra* note 2, at 1120. In addition, the scientific consensus indicates that race is largely a social construct. Goodenough, *supra*, at 283. The physical differences between the races are primarily specific adaptations to local climate, disease and diet. *Id.*; Nina Jablonski & George Chaplin, *Skin Deep*, SCI. AM., Oct. 2002, 75, 75-81 (explaining the mechanics of skin color evolution). Theorists believe that dark skin evolved in sunnier parts of the globe either as a natural sunscreen to

*EVOLUTION AND CHILD ABUSE*

731

*2. Quasi-Suspect Class and Sex Discrimination*<sup>185</sup>

Additionally, Goldberg cites *Craig v. Boren* as an example of

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prevent skin cancer or to prevent the breakdown of vitamin B folate, which is important for reproductive processes. *Id.* Lighter skin evolved in areas with little sunlight in order to absorb more ultraviolet radiation and maximize vitamin D production. *Id.* at 79.

Goodenough points out that science and the law have independently reached the same conclusion: distinctions based on racial classifications are inherently suspect. Goodenough, *supra*, at 284. “[S]cientific explanations’ stigmatizing persons according to their race or ethnicity are much more likely to reflect racial prejudice than legitimate scientific activity.” *Id.*

<sup>185</sup> *Craig*, 429 U.S. 190. An intermediate level of scrutiny is applied to cases involving legal distinctions based on sex. *Id.* For discrimination based on sex, a law must be sufficiently related to an important government interest in order to withstand intermediate scrutiny. *Id.* The court’s rationale for this rule is that laws discriminating on the basis of sex are “inherently suspect” because sex “frequently bears no relation to ability to contribute to society,” and legal distinctions based on sex often “reflect outmoded notions of the relative capabilities of men and women.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985) (quoting *Frontiero v. Richardson*, 411 U.S. 677 (1973)). The Court recognizes that men and women do have some biological differences that might be relevant to law and, therefore, the test is not as stringent as strict scrutiny. *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981) (upholding a statutory rape law that criminalized sex with females but not males under the age of 18). Much like evolutionary theories have noted with regard to sexual selection, the Court recognized that the burdens of teen pregnancy fall disproportionately on females. *Id.* at 471. “We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. *Id.* The Court “has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.” *Id.* at 465. *See also Trimble v. Gordon*, 430 U.S. 762 (1977) (striking down an Illinois law that allowed illegitimate children to inherit in intestacy only from their mothers but not from their unwed fathers even if they could prove paternity). “The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers’ estates than that required . . . under their mothers’ estates.” *Id.* at 770. “Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective.” *Tuan Anh Nguyen v. I.N.S.*, 553 U.S. 53, 63

the failure of statistical evidence under constitutional scrutiny.<sup>186</sup> In *Craig*, however, the discrimination was based on the quasi-suspect class of gender and subjected to intermediate scrutiny.<sup>187</sup> Statistical evidence has a poor track record under intermediate scrutiny.<sup>188</sup> While sex based classifications can potentially arise

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(2001). *Lehr*, 463 U.S. at 267-68 (upholding a New York statutory scheme that gave mothers of children born out of wedlock notice of an adoption hearing, but only extended that right to fathers who mailed a postcard to a putative fathers registry).

<sup>186</sup> See *Craig*, 429 U.S. 190; Goldberg, *supra* note 9, at 258. In *Craig*, the Court examined an Oklahoma statute that established a drinking age of eighteen for women and twenty-one for men (for beer with low alcohol content). *Id.* at 190. Oklahoma based its legislative decision on the state's interest in traffic safety and statistical evidence that men were more likely to be arrested for drunk driving. *Id.* at 200, 222. In a 7-2 decision, the Court struck down the statute, finding that the law invidiously discriminated against men and violated the male plaintiff's guarantee of equal protection. *Id.* "Even where this statistical evidence is accepted as accurate, it offers only a weak answer to the equal protection questions presented here." *Id.* at 201. The Court emphasized both the overinclusive nature of the prohibition, referring to the fact that a significant number of men are not arrested for drunk driving, and underinclusiveness, because the statute applied only to males between eighteen and twenty-one, even though the drunk driving statistics considered by the Court included men of all ages. *Id.* While the majority applied intermediate scrutiny, both dissenting opinions applied the rational basis test. *Id.* at 217, 220-21. In dissent, Justice Rehnquist argued that the statute in question was not based on prejudice but emphasized the fact that men are much more likely to be arrested for drunk driving. *Id.* at 222 (Rehnquist, J., dissenting). This suggests that the level of scrutiny was critical to the majority's decision.

<sup>187</sup> See *Craig*, 429 U.S. at 199.

<sup>188</sup> See generally *id.* at 208-09 ("The principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the . . . tendencies of aggregate groups."); see also *Tuan Anh Nguyen*, 533 U.S. 53 (2001) ("[O]verbroad sex-based generalizations are impermissible even though they enjoy empirical support."); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

Obviously, the notion that men are more likely to be the primary supporters of their spouses is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support.

## EVOLUTION AND CHILD ABUSE

733

from the field of evolutionary psychology, that is not the case here.<sup>189</sup> The proposed statutes do not facially discriminate on the basis of sex.<sup>190</sup> Stepparents are not a quasi-suspect class and are unlikely to be deemed so in the future.<sup>191</sup> One could argue that

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*Id.* at 646.

<sup>189</sup> As evidenced by the discussion regarding sexual selection and reproductive access theory in Part I of this note, evolutionary theories sometimes distinguish between men and women based on the different environmental pressures present for each sex. Some notable differences include sexual dimorphism, hormonal differences, the relative size of certain brain structures and behavioral differences. *See* Goodenough, *supra* note 184, at 285-86. Nonetheless, the dangers of reinforcing stereotypes to the detriment of both men and women are real and significant. *Id.* at 285. Goodenough posits that the law strikes a reasonable compromise. *Id.* at 287. "We should cautiously explore the scope of the enduring gender differences, while taking care to avoid denigration and artificial constraints on both men and women." *Id.*

<sup>190</sup> *See* Proposed Data Collection Statute, *supra* text accompanying note 119; Proposed Risk Assessment Statute, *supra* text accompanying note 128; Proposed Child Fatality Review Team Statute, *supra* text accompanying note 140.

<sup>191</sup> *See* *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 452 (1985) (indicating the Court's reluctance to define new quasi-suspect classes). While a number of disaffected groups have sought the advantages of being considered a suspect class, none have been successful. *Id.*

[I]t would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

*Id.* at 446.

In *Cleburne*, the Court reversed the Fifth Circuit's determination that mental retardation was a quasi-suspect classification and that plaintiff's equal protection claim warranted intermediate scrutiny. *Id.* at 438. *See also* *Maier v. Roe*, 432 U.S. 464, 470 (1977) (holding that indigent women's claim contesting a state policy that refused to publicly fund abortions was not entitled to heightened scrutiny of the policy); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (denying suspect class status to homosexuals). For a brief period of time, the Ninth Circuit held that homosexuals were a suspect class in a case involving the military's discrimination against homosexuals. *Watkins v. U.S.*



the proposed statute results in sex discrimination, since the overwhelming majority of stepparents residing with young stepchildren are male.<sup>192</sup> In cases of disparate impact, however,

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Army, 847 F.2d. 1329 (1989) That decision was quickly vacated by the full circuit. *Watkins v. U.S. Army*, 875 F.2d 699, 731 (1989), *cert. denied*, 498 U.S. 957 (1990).

The Supreme Court has looked at a number of factors in determining whether a group should receive protected status, including a history of purposeful discrimination, immutability of the trait in question, and whether that class is a “discrete and insular minority” unable to rally its own political support. *See* *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (discussing the history of discrimination and immutability requirements in establishing sex to be a suspect classification); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” *Id.* Stepparents are not prime candidates for the protections of heightened scrutiny. First, stepparents have not had the kind of purposeful discrimination relevant for consideration. *But see* DALY & WILSON, CINDERELLA, *supra* note 1, at 1-8, 21-25 (noting historical prejudice and distrust of stepparents). Despite the fact that stepparents may be viewed suspiciously by some, they have not been subject to the same institutional discrimination as women, racial minorities, or even other groups that have been denied suspect class status, such as the mentally retarded. Second, stepparenthood is not an immutable trait. *See Plyler v. Doe*, 457 U.S. 202, 220 (1982) (denying suspect class status to undocumented aliens and finding that undocumented alien status is not an immutable characteristic because it is the product of conscious action). *Id.* Unlike race and gender, stepparents can change their status at any time by leaving a relationship or adopting a child (when the biological father has waived or lost his parental rights). Third, stepparents are not a discrete and insular minority. In fact, many states have shown special consideration to custodial stepparents in relation to both visitation and adoption rights. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 64 (2001) (striking down a Washington state statute that afforded special rights to grandparents in their visitation of children against the biological parents’ wishes). In New York, before 1995, stepparents were the only individuals who could adopt a child without terminating the other (opposite sex) parent’s parental rights. *See* N.Y. DOM. REL. LAW § 110 (McKinney 2003). The New York Court of Appeals has since afforded the same rights to non-marital couples. *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995).

<sup>192</sup> U.S. DEP’T OF COMMERCE, BUREAU OF THE CENSUS STATISTICAL ABSTRACT OF THE UNITED STATES 1995 64 tbl.77 (1996). Census Data

## EVOLUTION AND CHILD ABUSE

735

the court will rarely inquire beyond a rational basis test.<sup>193</sup> If a statute is neutral on its face, a court will inquire further only when a clear pattern emerges that can only be explained as

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indicates that ninety-two percent of children living with stepparents reside with a biological mother and a male stepparent. *Id.* Here a stepparent is defined in the traditional sense of an unrelated person married to the child's parent. *Id.* Considering that the mandatory autopsy statute would affect only children under two years old, the percentage of stepfathers in households with children of nursing age may be much higher than households with older children. *See* Daly & Wilson, *Nepotistic Discrimination*, *supra* note 9, at 289. While the anonymous data collection does not discriminate based on sex at all, implementation of the Proposed Child Fatality Review Team Statute and (to a lesser extent) the Proposed Risk Assessment Statute may disproportionately affect males more than females.

<sup>193</sup> *See* *McClesky v. Kemp*, 481 U.S. 279 (1987). In *McClesky*, the plaintiff argued that his death sentence violated the Equal Protection Clause because the death sentence is more often imposed on black defendants convicted of killing white victims than on white defendants convicted of killing black victims. *Id.* The Court refused to apply strict scrutiny and held that "a defendant alleging an equal protection violation has the burden of proving purposeful discrimination" in his particular case. *Id.* at 291-92. Goldberg presents *McClesky* as an example of yet another failure of statistical evidence. Goldberg, *supra* note 9, at 258. The case is a better example of how disparate impact of a protected class is insufficient to trigger heightened scrutiny and how the Court will defer to the legislature in most cases when heightened scrutiny is inapplicable. *See* *McClesky*, 481 U.S. 279.

For the rare instances where higher scrutiny is involved, *compare* *Washington v. Davis*, 426 U.S. 229 (1976) (refusing to apply strict scrutiny to determine if a police exam was racially discriminatory because more blacks than whites passed), *with* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down a law requiring laundry permits for wooden laundries when all but one white applicant was granted a permit and all 200 Chinese applicants were denied), *and* *Gomillion v. Lightfoot*, 364 U.S. 339, at 340 (1960) (striking down a racial gerrymandering scheme that changed the boundaries of a city "from a square to an uncouth twenty-eight sided figure" that excluded 395 of the 400 black citizens from the city without excluding a single white person). The latter two examples are instances of de facto discrimination and represent "the rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation." *McClesky*, 481 U.S. at 294. In these cases, statistical proof must present a "stark" pattern in order to overcome the standard rule of deference to legislative decisions. *Id.* at 293.

discriminatory intent against the protected class.<sup>194</sup> Stepparents would not be distinguished by the fact that they may be male but because of the increased risk of abuse that their presence presents to their infant stepchildren.<sup>195</sup>

### 3. Rational Basis Scrutiny and Everything Else

One broad group of cases that are conspicuously absent from Goldberg's analysis are the vast majority of opinions construing legislative decisions based on statistical evidence that do not substantially interfere with a fundamental liberty interest or disaffect a suspect class.<sup>196</sup> In such cases, courts will apply a "rational basis test" and generally uphold a law in deference to the legislature.<sup>197</sup> Under this test, a law will be upheld if it bears a rational relationship to a legitimate government interest,

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<sup>194</sup> See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (upholding administrative decision refusing a zoning reclassification request that had a racially discriminatory impact and holding that a racially motivated purpose must also be behind the law).

<sup>195</sup> See DALY & WILSON, *HOMICIDE*, *supra* note 27, at 88. In fact, some of the strongest advocates for better recognition of this fact come from fathers' rights organizations. See Fathers for Life, *Child Abuse and Neglect Data at the National Clearinghouse*, Health Canada, at <http://fatherless.net/Sodhi/cancan1.htm> (last visited Mar. 12, 2003). Fathers for Life contends that the National Clearinghouse on Family Violence (in Canada) presents distorted and inaccurate information to promote their political agenda, ignoring the greater risk of children in stepparent families. *Id.* By combining statistics for biological male parents and substitute male parents, the National Clearinghouse reports a greater overall percentage of abuse perpetrated by male parents. *Id.* See also, Dads Against the Divorce Industry, *The Human Carnage of Fatherlessness*, at <http://www.dadi.org/carnage.htm>. (last visited Mar. 12, 2003).

<sup>196</sup> See Goldberg, *supra* note 9. Although these cases would more accurately represent "the constitutional hurdles . . . statistical evidence must overcome," those hurdles are easily surmounted. *Id.* at 258-59.

<sup>197</sup> *Id.* "[L]egislatures are presumed to have acted within their constitutional power, despite the fact that in practice the law results in some inequality." *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding the constitutionality of Maryland's Sunday Blue Laws under rational basis scrutiny).

## EVOLUTION AND CHILD ABUSE

737

provided it is not motivated solely by invidious discrimination or a bare desire to harm a politically unpopular group.<sup>198</sup> When the rational basis test is applied, most legislation, including legislation based on statistical evidence, is upheld.<sup>199</sup> The rational basis test applies to all of the proposed statutes.

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<sup>198</sup> See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (rejecting heightened scrutiny for the mentally retarded, but striking down a zoning ordinance under rational basis scrutiny that was motivated by a bare desire to harm); see also *Romer*, 517 U.S. 620 (1996) (rejecting heightened scrutiny for homosexuals as a class, but striking down a statewide voter referendum prohibiting protections for homosexuals from discrimination under rational basis scrutiny).

<sup>199</sup> See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). In *Williamson*, the Court upheld a state law preventing opticians from fitting old lenses into new frames without a prescription from an ophthalmologist or optometrist. *Id.* In deference to the legislature, the Court noted that the “law may exact a needless wasteful requirement in many cases, but it is for the legislature not the courts to balance the advantages and disadvantages of the . . . requirement.” *Id.* at 487. See also *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979). *Beazer* provides a prime example of the successful use of statistical evidence under rational basis review. *Id.* In *Beazer*, the Supreme Court ruled that the Transit Authority (TA) employment policy of refusing to hire methadone users was constitutional under rational basis scrutiny. *Id.* The court noted that the recidivism rate for methadone users in treatment was high and that the law was overinclusive to the extent that it refused consideration for employment to “the strong majority” of methadone users who would neither return to illicit drug use nor pose a threat to job safety. *Id.* at 576. “The ‘no drugs’ policy now enforced by the TA is supported by the legitimate inference that as long as a treatment program . . . continues, a degree of uncertainty persists.” *Id.* at 591. “No matter how unwise it may be for [the] TA to refuse employment to individual [applicants] simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere with that policy decision.” *Id.* at 594.

Goldberg appears to acknowledge the *Beazer* decision, though not by name. See Goldberg, *supra* note 9, at 257. Specifically, he notes, “When we consider educational attainment in awarding a job or a history of drug abuse in denying one, we are in part relying on a statistical prediction about who is more likely to be a successful worker. Yet no court is likely to set aside our decision.” *Id.* While this case did not warrant a citation as a case exemplifying “the hurdles statistics, including evolutionary-based evidence, must overcome,” cases involving race and sex discrimination received a more thorough analysis. *Id.* at 258-59.

*a. Proposed Data Collection Statute Under the Rational Basis Test*

Challenges to data collection are invariably scrutinized under the rational basis test even when the protected classes of race and sex are involved.<sup>200</sup> Courts consistently recognize the government's broad discretionary powers to conduct research.<sup>201</sup> The National Clearinghouse already collects data on the sex of perpetrators and victims of child abuse, and the statute would do nothing to alter this practice.<sup>202</sup> By collecting more accurate

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<sup>200</sup> See *Caulfield v. Bd. of Educ. New York*, 583 F.2d 605 (2d Cir. 1978). For example, the U.S. Census Bureau has been collecting racial data since its inception in 1790 and it has withstood numerous constitutional challenges under rational basis scrutiny. See, e.g., *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000). In *Morales*, the plaintiff argued that the U.S. Census questions pertaining to race were discriminatory on their face and that the tracking of racial statistics was a violation of equal protection under strict scrutiny. *Id.* In addition to the recognition of racial classification as a per se violation of equal protection, the plaintiffs claimed that census data was inappropriately used to identify Japanese-Americans for internment. *Id.* at 811. The *Morales* court granted the government's motion for summary judgment and noted that the potential for misuse of otherwise legally obtainable information does create an equal protection violation. *Id.* at 814. "Plaintiff's position is based on a misunderstanding of the distinction between collecting demographic data so that the government may have the information it believes at a given time it needs in order to govern, and government use of suspect classifications without a compelling interest." *Id.*; see also *Wisconsin v. New York*, 517 U.S. 1 (1996) (rejecting the state's argument that a decision of the Secretary of Commerce to apply one statistical method in enumerating the census in favor of another should be reviewed applying strict scrutiny because the decision had a disproportionate impact on racial minorities).

<sup>201</sup> See *supra* note 199 (discussing applicable case law).

<sup>202</sup> See CHILD MALTREATMENT 2000, *supra* note 21, at 25, 47. Although the report contains a fair amount of data on the demographics of perpetrators of child abuse that mirrors the demographics of the victims (age, economic status, etc.), data on the race of the perpetrator of child maltreatment is not included. *Id.* This may have resulted from a policy choice by the government. Another such choice may be reflected in the latest publication of Child Maltreatment, which obfuscates the racial data of victims by not comparing the incidence of maltreatment with the racial demographics of the general population. Compare CHILD MALTREATMENT 2000, *supra* note 21, at 26, with

*EVOLUTION AND CHILD ABUSE*

739

information, the data collection statute does not disaffect individual stepparents. In fact, if the preliminary studies mentioned throughout this note are inaccurate, more extensive data on the subject could serve to vindicate stepparents. The statute merely allows the National Clearinghouse to gather anonymous data and assess the scope of the problem of stepparent abuse. The government has a legitimate interest in ensuring that the National Clearinghouse carries out its legislative mandate of preventing harm to minors.<sup>203</sup> Since the statistical evidence indicates that the presence of stepparents presents a high risk, the statute is rationally related to that goal and would pass rational basis scrutiny.

*b. Proposed Risk Assessment Statute Under the Rational Basis Test*

The government has a compelling interest in protecting the safety of children.<sup>204</sup> The Supreme Court has recognized that child abuse investigations are “in aid of and closely related to criminal statutes,” and law enforcement is a state interest.<sup>205</sup>

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CHILD MALTREATMENT 1999, *supra* note 116, at 14 (providing a per capita abuse rate for victims by race).

<sup>203</sup> 42 U.S.C. § 5105 (2002) (requiring the National Clearinghouse to carry out “an interdisciplinary program of research that is designed to provide information needed to better protect children from abuse or neglect”); *see also Morales*, 116 F. Supp. 2d. at 814 (noting that Congress has delegated to the Census Bureau the authority to decide what is needed and to ask the appropriate questions).

<sup>204</sup> *Osbourne v. Ohio*, 495 U.S. 103 (1990). “It is evident beyond the need for elaboration that a State’s ‘interest in safeguarding the physical and psychological well-being’ of a minor is ‘compelling.’” *New York v. Ferber*, 458 U.S. 747, 756-57 (1982).

<sup>205</sup> *Moore v. Sims*, 442 U.S. 415 (1979) (abstaining from hearing a case of an ongoing child abuse investigation at the state level). Although the focus of the *Moore* case is federalism, the Court’s language clearly shows deference to the state’s plenary power over individual interests absent unusual circumstances. *Id.* at 415. The state not only investigated a family suspected of child abuse, but took temporary custody of the children during the investigation. *Id.* The Court suggested that not “every attachment issued to protect a child, creates great, immediate and irreparable harm.” *Id.* at 417.

Although such a law may be both overinclusive (to the extent that it would disaffect some non-abusing stepparents) and underinclusive (to the extent that it would not target all abusers), this is not a significant factor under rational basis scrutiny.<sup>206</sup> In addition, the proposal does not require a finding of abuse in stepparent families but merely contributes one more factor to an exhaustive list of factors relevant to child risks. Additionally, because “clear and convincing evidence” is constitutionally required to terminate the parental relationship, it is unlikely that this one factor would tip the scales in favor of a finding of abuse where none exists.<sup>207</sup> This is especially true if caseworkers are more likely to err on the side of caution and report borderline cases as unsubstantiated.<sup>208</sup>

*c. Proposed Child Fatality Review Team Statute Under the Rational Basis Test*

The Proposed Child Fatality Review Team Statute also bears a rational relation to the legitimate state interest in crime prevention and detection.<sup>209</sup> Although highly overinclusive and underinclusive, the statute is rationally related to the state’s interest if it can reasonably be perceived to have the potential to uncover undetected instances of abuse or prevent future abuse.

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<sup>206</sup> *Beazer*, 440 U.S. at 592. “Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this ‘perfection is by no means required.’” *Id.* at 592 n.39, quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979), quoting *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376, 385 (1960).

<sup>207</sup> *Santosky v. Kramer*, 455 U.S. 755 (1982) (setting the minimum standard for termination of parental rights under the Due Process Clause).

<sup>208</sup> See CITIZENS BUDGET COMM’N, *supra* note 123, at 25. The Commission noted that “the staff reductions led to less timely initiation of investigations, and the staff cuts and other budget cuts created incentives for workers to err on the side of failing to ‘found’ a report rather than refer the case for preventive services or foster care.” *Id.*

<sup>209</sup> *Michigan v. Long*, 463 U.S. 1032, 1047 (1983) (noting that the state’s legitimate interest in crime prevention and detection is one factor in determining the reasonableness of a police search).

*EVOLUTION AND CHILD ABUSE*

741

*4. Other Proposals*

The preceding examples represent only three of the proposed legislative changes that might be considered when applying an evolutionary perspective to the current social problem of child abuse and stepparents. Professor Jones and other commentators have suggested a number of other proposals for receptive legislatures to consider in addressing the increased risk of abuse to children living with stepparents.<sup>210</sup> Jones has not necessarily advocated any of these proposals but offers them as examples of the role evolutionary analysis can play in legal decision making.<sup>211</sup> These proposals present considerations that can be divided into several categories.

First, like the Proposed Data Collection Statute, several proposals would escape serious constitutional scrutiny altogether due to the legislature's broad discretionary spending and fact-finding powers. One such proposal is to increase funding for education of mandatory reporters and counseling to families at risk.<sup>212</sup> Second, some proposals are more similar to the Proposed Risk Assessment and Proposed Child Fatality Review Team statutes, which directly disaffect stepparents. Those proposals would be subject to a similar equal protection analysis. These proposals include creating a separate legal standard for a stepparent's right to discipline their children, creating deterrents

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<sup>210</sup> See Jones, *Child Abuse*, *supra* note 2; Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251 (2001) (assessing the risk of child sexual abuse at the hands of both biological parents and stepparents after divorce and suggesting legal interventions to mitigate the problem).

<sup>211</sup> See Jones, *Child Abuse*, *supra* note 2, at 1233-35.

<sup>212</sup> *Id.* See also N.Y. SOC. SERV. LAW § 418 (McKinney 2003). The statute defines "mandatory reporters" as:

Any person or official required to report cases of suspected child abuse or maltreatment, including workers of the local child protective service, as well as an employee of or official of a state agency responsible for the investigation of a report of abuse or maltreatment of a child in residential care.

*Id.*



through harsher punishment for non-related child abusers<sup>213</sup> or providing a preference for biological parents in child custody determination.<sup>214</sup> Third, consideration of biological influence on behavior can invigorate preexisting debate with a new perspective. Here, the constitutional implications are minor because the policy considerations would not rest solely on statistical evidence. For example, the subject of kinship care has been hotly debated.<sup>215</sup> Kinship care, an alternative to traditional foster care, creates a preference for relatives of the parent.<sup>216</sup> The debate is not currently centered around the best interest of the child but questions the wisdom of paying grandparents, uncles and aunts to care for their own relatives.<sup>217</sup> As dangers to children living in a home absent biological relatives are more clearly defined, however, the best interest of the child may take a prominent role in the debate. Other proposals, such as making divorce more difficult when children are present in the family, is another example of a debate that could benefit from this discussion.<sup>218</sup> Arguably, this could avoid the increased risk of

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<sup>213</sup> See Jones, *Child Abuse*, *supra* note 2, at 1235.

<sup>214</sup> See Jones, *Irrationality*, *supra* note 56, at 311. Jones has suggested that behaviors that are biologically based may be more resistant to traditional methods of deterrence, such as imprisonment. *Id.*

<sup>215</sup> Gabrielle A. Paupeck, Note, *When Grandma Becomes Mom: The Liberty Interests of Kinship Foster Care*, 70 *FORDHAM L. REV.* 527 (2001) (arguing that kinship foster parents should have the same constitutional liberty interest in their wards as traditional nuclear family parents).

<sup>216</sup> *Id.* at 529.

<sup>217</sup> *Id.* at 535.

<sup>218</sup> See, e.g., ARK. CODE ANN. § 9-11-808 (Michie 2001). Arkansas is one of three states, along with Arizona and Louisiana, that allow marrying couples to opt into a covenant marriage. Nicole Licata, Note, *Should Premarital Counseling Be Mandatory as a Prerequisite to Obtaining a Marriage License*, 40 *FAM. CT. REV.* 518, 525 (2001). "The covenant marriage enables couples to bind themselves to a stricter marital agreement than the traditional agreement." Kimberly Miller, *Survey of Legislation 2001 General Assembly: Title 9: Family Law*, 24 *U. ARK. LITTLE ROCK L. REV.* 483, 484 (2002). For dissolution of a covenant marriage in Arkansas,

[T]he parties must prove one of the more egregious grounds for traditional divorces or live separate and apart for two years. If, however, the couple has a minor child of the marriage, then they

## EVOLUTION AND CHILD ABUSE

743

abuse to children after divorce altogether. Finally, Jones notes that some of these suggestions are admittedly absurd in our society but are nonetheless thought provoking.<sup>219</sup> For example, one suggestion encourages single parents to marry their in-laws.<sup>220</sup> Like kinship care, a child whose mother marries her brother-in-law retains at least some biological connection to her

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must first obtain a judgment of judicial separation and live apart continuously for two years and six months from the date of the judgment before seeking divorce.

*Id.* at 484. *Cf.* Wilson, *supra* note 210, at 319 (noting that educating parents to the risks of sexual abuse to children after divorce may, for better or for worse, discourage divorce).

[A]ny effort to raise awareness about the sexual vulnerability of girls following divorce will empower currently married parents to consider their options when making the decision whether to divorce. Arguably, society should not keep families in “blissful ignorance” simply because they may not react appropriately to information about this risk.

*Id.*

<sup>219</sup> See Jones, *Child Abuse*, *supra* note 2, at 1235.

<sup>220</sup> *Id.* As absurd as this suggestion may seem, several cultures have included marital preferences for relatives. See DALY & WILSON, *HOMICIDE*, *supra* note 27, at 85. Under the levirate custom of Talmudic law, when a man dies, his brother is given a right of marriage to the decedent’s wife. See, e.g., *Deuteronomy* 25:5 (King James).

If bretheren dwell together, and one of them die, and have no child, the wife of the dead shall not marry, without unto a stranger: her husband’s brother shall go in unto her, and take her to him to wife, and perform the duty of an husband’s brother unto her.

*Id.* This rule, however, would not protect stepchildren to childless widows. But see Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 509, 540 (1998) (recognizing the levirate custom in some Native American cultures without a requirement that the widow be childless). Some Native American cultures also encourage sororal polygyny, the polygamous marriage of a man and two sisters. *Id.* at 539-40. In one of the few recorded polyandrous societies, women of the Tre-ba culture of Tibet often marry two brothers. DIAMOND, *supra* note 78, at 36. While the author cites the culture’s land tenure system of the Tre-ba as the reason for this practice, some evolutionary safeguards against stepparent abuse are nonetheless present to children in Tre-ba families because their nonparental caretakers are closely related. *Id.*