

## Using a Narrative Lens to Understand Empathy and its Role in Judging

### I. Contested understandings of empathy and its role in judging

--Issue joined during Senate Judiciary Committee hearings on nomination of Sonia Sotomayor to U.S. Supreme Court

--What is empathy?

feeling or seeing?

emotion or capacity?

partiality or heightened attentiveness?

subjectivity or identity/perspective?

A multidimensional concept encompassing cognitive and affective domains?

Davis<sup>1</sup>: four dimensions (perspective taking, empathic concern, fantasy, experiencing personal distress at others' distress)

Alcoff<sup>2</sup>: a mode of attentiveness, informed by social identity/baseline knowledge

Bandes<sup>3</sup>: a capacity distinguishable from emotion, a tool for understanding others' perspectives

McLane Wardlaw<sup>4</sup>: for judges, an ability to exercise judgment or discretion in unclear cases, informed by life experience and a capacity to appreciate the views and situations of others

Gallacher<sup>5</sup>: a capacity to make strategic lawyering decisions that resonate with cultural narratives and expectations of lawyers' non-lawyer audiences

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<sup>1</sup> M. H. Davis *A Multidimensional Approach to Individual Differences in Empathy*. JSAS Catalog of Selected Documents in Psychology, 10, 85 (1980).

<sup>2</sup> Linda Martin Alcoff, *Sotomayor's Reasoning*, Southern Journal of Philosophy 48 (1):122-138 (2010)

<sup>3</sup> Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 Cardozo L. Rev. De Novo 133 (2009)

<sup>4</sup> Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons From Judge Cardozo*, 85 Notre Dame L. Rev. 1629 (2010)

<sup>5</sup> Ian Gallacher, *Thinking Like Non-Lawyers: Why Empathy Is A Core Lawyering Skill And Why Legal Education Should Change To Reflect Its Importance*, available at <http://ssrn.com/abstract=1693146>

## II. How does empathy matter to judging?

--Illustrative cases: *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)

--cases decided same term

--both involved compelling facts implicating family relationships

--cases involved either state's failure to intervene in, or failure to entertain, a father-child relationship

--both rejected opportunity to give a more capacious scope to "liberty" in the due process clause

--both cases featured an engaged dissent by Justice Brennan

--Using a narrative lens, it is possible to identify various narrative structures of judicial decision making (narratives of facts, law, interpretation). These narrative structures help to uncover the workings--or absence--of empathy in judicial opinions and illuminate how a judge's application of empathy can contribute to a richer understanding of facts, legal argument, and legal and social context

A. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989)

### **Narrative structure of main opinion (Rehnquist, J.):**

Opening: identifies parties and their conduct:

"Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived."

"Respondents are social workers who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father's custody."

### **Part I—Fact narrative**

**"The facts of this case are undeniably tragic."**

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--Joshua born in 1979

--Joshua's mother and father divorce in 1980

--Custody of one-year-old Joshua awarded to father

--Father and son move to Winnebago County, father remarries, and later divorces

--Father's second wife alerts police in the county at time of divorce in January 1982 that father had hit Joshua causing marks and "was a prime case for child abuse"

--County DSS interviews father, who denies abuse, and the matter is dropped

--In January 1983, Joshua is admitted to a local hospital with multiple bruises and abrasions; suspecting abuse, examining physician notifies DSS, which "immediately" secures an order from juvenile court placing Joshua in hospital's temporary custody

--Three days later, the county convenes ad hoc "Child Protection Team," including medical personnel, caseworkers, a police detective, and county lawyer, and decides there is insufficient evidence of child abuse to retain Joshua in the custody of the court. The Team recommends preschool program, counseling for Joshua's father, and encouraging father's girlfriend to move out of the home.

--Father enters into voluntary agreement with DSS to accomplish these goals

--Juvenile court dismisses the case and returns Joshua to father's custody

--One month later, emergency room personnel call DSS caseworker to report once again suspicious injuries

--Caseworker concludes there is no basis for action

--For the next six months, caseworker makes monthly visits to the DeShaney home, observes a number of suspicious injuries on Joshua's head, that he had not been enrolled in school, and that girlfriend had not moved out

--Caseworker "dutifully" records incidents in files, and her "continuing suspicions that someone in the DeShaney household was physically abusing Joshua," but does not otherwise act

--In November 1983, the emergency room notifies DSS that Joshua is treated again for injuries apparently caused by child abuse

--Caseworker is told in next two visits to the DeShaney home that Joshua was "too ill" to see her. DSS takes no action.

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--In March 1984, father beats 4-year-old Joshua “so severely that he fell into a life-threatening coma.” Joshua undergoes emergency surgery revealing a series of hemorrhages caused by traumatic head injury “inflicted over a long period of time” ---Joshua suffers brain damage “so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded”

--Father is tried and convicted of child abuse

--Joshua and his mother sue Winnebago County, DSS, and individual DSS employees alleging respondents deprived Joshua of his liberty without due process of law, in violation of the 14<sup>th</sup> Amendment, by failing to intervene to protect him against a risk of violence at his father’s hands of which they knew or should have known.

--The District Court granted summary judgment for respondents, and 7<sup>th</sup> Circuit affirms

## **Part II—Discussion of law and parties’ arguments: the due process narrative**

Opinion quotes DP clause.

Opinion briefly summarizes DeShaney’s argument/legal theory

Opinion responds to argument (invoking DP clause language, history, then cases interpreting it—Court cites cases and follows with explanatory parentheticals)

Opinion returns to DeShaney’s argument in somewhat more detail

Opinion then rejects the argument and sets out reasons why, and distinguishes *Estelle/Youngberg* lines of cases that DeShaney relies on, reasoning that harms in those cases occurred with plaintiffs who were in state’s custody

Opinion differentiates DP claim from tort law

Opinion distinguishes sympathetic facts from what the DP clause allows: “Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua’s

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father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship”

Opinion returns to tort law theme: not at issue in this claim.

### **Narrative-analytic structure of Brennan dissent: “action” narrative**

“ ‘The most that can be said of the state functionaries in this case,’ the Court today concludes, “is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.’ Ante, at 1007. Because I believe that this description of respondents' conduct tells only part of the story and that, accordingly, the Constitution itself ‘dictated a more active role’ for respondents in the circumstances presented here, I cannot agree that respondents had no constitutional duty to help Joshua DeShaney.”

--Presents the idea of a different “perspective”

-- Court's “baseline” is the absence of positive rights in the Constitution

-- From this perspective, the DeShaneys' claim is about inaction

-- Begin from the opposite direction: focus on action that Wisconsin *has* taken with respect to Joshua and children like him

-- Does not see in *Youngberg* (involving claim by institutionalized person of failure to provide safe conditions) a neat and decisive divide between action and inaction: “fact of hospitalization was critical in *Youngberg* not because it rendered Romeo helpless to help himself, but because it separated him from other sources of aid that, we held, the State was obligated to replace”

“ A State's prior actions may be decisive in analyzing the constitutional significance of its inaction”:

--Wisconsin has established a child-welfare system that places upon local departments of social services a duty to investigate reports of child abuse.

-- Wisconsin law directs all such reports to local departments of social services to evaluate and, if necessary, for further action

-- Only exception occurs when the person reporting fears for the child's “immediate safety”

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- Each time someone raised suspicion that Joshua was being abused, information was conveyed to DSS for investigation and possible action
- Social worker's reaction to the news that Joshua's injuries resulted in his serious brain damage: “ ‘I just knew the phone would ring some day and Joshua would be dead’”
- DSS controls decision whether to take steps to protect a particular child from suspected abuse; it is up to the people at DSS to make the ultimate decision (subject to the approval of the local government's Corporation Counsel) whether to alter the family's current arrangements
- Through its child-welfare program, Wisconsin relieves ordinary citizens and governmental bodies of sense of obligation to do anything other than report suspected child abuse to DSS

“Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney’s violent home until such time as DSS took action to remove him . . . Through its child-protection program, the State actively intervened in Joshua's life and . . . acquired ever more certain knowledge that Joshua was in grave danger . . . oppression can result when a State undertakes a vital duty and then ignores it”

### **Narrative-emotive structure of Blackmun dissent:**

“the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts”

“the facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney”

“The Court fails to recognize this duty because it attempts to draw a sharp and rigid line between action and inaction”

“the broad and stirring Clauses of the Fourteenth Amendment . . . were designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence”

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“Like the antebellum judges who denied relief to fugitive slaves . . . the Court today claims that its decision, however harsh, is compelled by existing legal doctrine”

“Our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them”

“Faced with the choice, I would adopt a ‘sympathetic’ reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging”

“Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, *ante*, at 1001, ‘dutifully recorded these incidents in [their] files.’”

“a sad commentary upon American life, and constitutional principles . . . that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded”

“Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U.S.C. § 1983 is meant to provide”

#### Discussion Questions on *DeShaney*:

1. What kind of narrative and rhetorical work is the introductory paragraph doing?
2. What effect did the Court's choice and level of detail in Part I have on you as a reader? (How) does the Court reconcile these details with its conclusion and rationale?
3. In addressing the law in Part II, the Court incorporates the contentions of the losing parties (petitioners Joshua DeShaney and his mother). How does the structure of the legal discussion proceed in this section?

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- What sorts of distinctions/binaries does the Court invoke to support its legal conclusion?
4. What is the progress of the law that the majority opinion tells?
  5. What is the difference in "baseline" or perspective that distinguishes the approach of Justice Brennan's dissent from the majority's approach?
  6. How does Justice Brennan's reading of the *Youngberg* facts challenge the majority's interpretation of the scope of the due process clause?
  7. What facts in *DeShaney* does Justice Brennan's dissent illuminate that were not addressed in the majority opinion?
  8. In what way does he use these facts to support his view that *DeShaney* falls within the tradition of *Youngberg/Estelle*?
  9. Does the majority opinion or the Brennan dissent manifest empathy? If so, how?
  10. Justice Blackmun's dissent in *DeShaney* has been referred to as an example of "situational emotionalism," in which he failed to support his position with legal reasoning. What is the gist of Justice Blackmun's critique when he refers to the Court's "sterile formalism"? To the "choice" presented by the Fourteenth Amendment precedents?
  11. What effect does Justice Blackmun's statement beginning "Poor Joshua" have on you as a reader? Is it rhetorically compelling? Justifiable? An instance of "undisciplined sympathy"?
  12. Is Justice Blackmun's dissent an expression of empathy or "righteous anger"? What, if anything, does it add to the force of Justice Brennan's dissent?

*B. Michael H. v. Gerald D.*, 491 U.S.110 (1989)

**Plurality: narrative-historical framework (Scalia, J.)**

### **Part I: Fact narrative**

The appeal presents the claim that the presumption [of legitimacy] codified in California law infringes upon the due process rights of a man who wishes to establish his paternity of a child born to the wife of another man, and the claim that it infringes upon the constitutional right of the child to maintain a relationship with her biological father. "The facts of this case are, we must hope, extraordinary"  
--Carole D., an international model, and Gerald D., a top executive in a French oil company, married on May 9, 1976 and lived in a home in



Andrea McArdle

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Applied Legal Storytelling Conference, July 8-10, 2011

Playa del Rey, California, when one or the other was not out of the country on business.

-- In summer 1978, Carole became involved in an "adulterous affair" with a neighbor, Michael H. In September 1980, she conceived a child, Victoria D., born on May 11, 1981. Gerald was listed as father on the birth certificate and has always held Victoria out to the world as his daughter.

--Soon after Victoria was born, Carole told Michael that he might be the father.

"In the first three years of her life, Victoria remained always with Carole but found herself within a variety of quasi-family units."

--While Gerald was residing in NYC for business, in October 1981 blood testing indicated a 98.07% probability that Michael was Victoria's biological father. In January 1982, Carole visited Michael in St. Thomas, and he held out Victoria as his daughter.

--In March, Carole left Michael, returned to California, and lived with "yet another man" (Scott K.)

-- Later in spring and in summer, Carole and Victoria spent time with Gerald in NYC, and also in Europe.

--In fall, they went back to Scott in California

--In November 1982, Michael filed action to establish paternity and visitation rights when he was not permitted to visit Victoria.

--Attorney appointed to represent Victoria's interests asserted that if she had more than one psychological parent, she was entitled to maintain a filial relationship with both.

--Carole, now living with Gerald in NYC, moved for summary judgment.

--Returning to California in the summer of 1983, Carole became involved with Michael again and instructed her attorneys to remove summary judgment motion from the calendar.

--For the next eight months, Michael stayed with Carole and Victoria when he was in California and held Victoria out as his daughter.

--In April 1984, Carole and Michael signed a stipulation that Michael was Victoria's biological father.

--The following month, Carole instructed her attorneys not to file the stipulation.

--In June 1984, Carole and Gerald reconciled and since have lived in NYC with Victoria and two other children born to the marriage.

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Applied Legal Storytelling Conference, July 8-10, 2011

--In May 1984, Michael and Victoria sought visitation rights for Michael and court allowed him restricted visitation rights during pendency of litigation.

--In October 1984, Gerald intervened and moved for summary judgment on basis of California statute establishing conclusive presumption of legitimacy where child is conceived and born during a marriage while husband and wife are cohabiting and husband is not impotent or sterile.

--In January 1985, court granted Gerald summary judgment and denied Michael's and Victoria's challenges to constitutionality of the statute and denied motion for continued visitation under a statute allowing court to grant visitation rights to any person having an interest in the welfare of a child, finding that such visitation would "impugn [] the integrity of the family unit."

--On appeal, Michael and Victoria challenged the legitimacy statute on due process grounds and Victoria also challenged it on equal protection grounds. Appellate court affirmed court judgment, and California Supreme Court denied discretionary review.

## **Part II—The statutory scheme**

### **Part III—due process narrative**

At the outset, it is necessary to clarify what he sought and what he was denied. California law, like nature itself, makes no provision for dual fatherhood. Michael was seeking to be declared *the* father of Victoria. The immediate benefit he evidently sought to obtain from that status was visitation rights. (citation omitted)(parent has statutory right to visitation "unless it is shown that such visitation would be detrimental to the best interests of the child"). But if Michael were successful in being declared the father, other rights would follow—most importantly, the right to be considered as the parent who should have custody . . . All parental rights, including visitation, were automatically denied by denying Michael status as the father. While [the statute] places it within the discretionary power of a court to award visitation rights to a nonparent, the [courts here] held that California law denies visitation, against the wishes of the mother, to a putative father who has been prevented . . . from establishing his paternity (citations omitted).

- (1) Rejects Michael's procedural due process claim
- (2) Substantive due process claim (Michael asserts constitutionally protected liberty interest in relationship with Victoria):

Andrea McArdle

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Applied Legal Storytelling Conference, July 8-10, 2011

Plurality: “In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a “liberty” be “fundamental” (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society . . . [cases addressing liberty interest] rest . . . upon the historic respect--indeed, sanctity would not be too strong a term--traditionally accorded to the relationships that develop within the unitary family”

“issue . . . whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection”

“quite to the contrary, our traditions have protected the marital family . . . against the sort of claim Michael asserts”

“common law’s severe restrictions on rebuttal of the presumption . . . ‘the law retained a strong bias against ruling the children of married women illegitimate’”

“Thus, it is ultimately irrelevant, even for purposes of determining current social attitudes towards the alleged substantive right Michael asserts, that the present law in a number of States appears to allow the natural father-including the natural father who has not established a relationship with the child-the theoretical power to rebut the marital presumption (citations omitted) What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.”<sup>6</sup>

From footnote 6:

*“ . . . We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, Justice BRENNAN would choose to focus instead upon “parenthood.” Why should the relevant*

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Applied Legal Storytelling Conference, July 8-10, 2011

*category not be even more general—perhaps “family relationships”; or “personal relationships”; or even “emotional attachments in general”? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent . . .”*

“In accord with our traditions [in addition to a limit imposed by lack of biological father’s marital tie with the mother], a limit is also imposed by the circumstance that the mother is, at the time of the child’s conception and birth, married to, and cohabiting with, another man, both of whom wish to raise the child as the offspring of their union.”

“Here, to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa. If Michael has a ‘freedom not to conform’ (whatever that means), Gerald must equivalently have a ‘freedom to conform.’ One of them will pay a price for asserting that ‘freedom’—Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established. Our disposition does not choose between these two ‘freedoms,’ but leaves that to the people of California.

#### **Part IV—equal protection narrative**

(1) “[Victoria’s] claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country.”

(2) “Since it pursues a legitimate end [not undermining the integrity of the marital union] by rational means, California’s decision to treat Victoria differently from her parents [in not affording her an opportunity to rebut the presumption of legitimacy] is not a denial of equal protection.”

## **Justice Brennan's dissent: narrative-interpretive framework**

### **Part I: Tradition as an Interpretive Method**

“Apparently oblivious to the fact that this concept can be as malleable and as elusive as “liberty” itself, the plurality pretends that tradition places a discernible border around the Constitution.”

“Because reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of “liberty,” the plurality has not found the objective boundary that it seeks.”

“Even if we could agree, moreover, on the content and significance of particular traditions, we still would be forced to identify the point at which a tradition becomes firm enough to be relevant to our definition of liberty and the moment at which it becomes too obsolete to be relevant any longer. The plurality supplies no objective means by which we might make these determinations.”

“It is not that tradition has been irrelevant to our prior decisions. Throughout our decision making in this important area runs the theme that certain interests and practices—freedom from physical restraint, marriage, childbearing, childrearing, and others—form the core of our definition of “liberty”. . . In deciding cases arising under the Due Process Clause, therefore, we have considered whether the concrete limitation under consideration impermissibly impinges upon one of these more generalized interests.”

“Instead, the plurality asks whether the specific variety of parenthood under consideration—a natural father's relationship with a child whose mother is married to another man—has enjoyed such protection.”

“In the plurality's constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.”

Andrea McArdle

City University of New York School of Law

Applied Legal Storytelling Conference, July 8-10, 2011

“Moreover, by describing the decisive question as whether Michael's and Victoria's interest is one that has been “traditionally *protected by* our society,” *ante*, at 2341 (emphasis added), rather than one that society traditionally has thought important (with or without protecting it), and by suggesting that our sole function is to “*discern* the society's views,” *ante*, at 2345, n. 6 (emphasis added), the plurality acts as if the only purpose of the Due Process Clause is to confirm the importance of interests already protected by a majority of the States.”

“I cannot accept an interpretive method that does such violence to the charter that I am bound by oath to uphold.”

## **Part II: Re-narrating the family**

“The better approach—indeed, the one commanded by our prior cases and by common sense—is to ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected to be deemed an aspect of “liberty” as well. On the facts before us, therefore, the question is not what “level of generality” should be used to describe the relationship between Michael and Victoria, see *ante*, at 2344, n. 6, but whether the relationship under consideration is sufficiently substantial to qualify as a liberty interest under our prior cases.”

“Though different in factual and legal circumstances, these [prior unwed father] cases have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so.”

“Claiming that the intent of these cases was to protect the “unitary family,” *ante*, at 2342, the plurality waves *Stanley*, *Quilloin*, *Caban*, and *Lehr* aside. In evaluating the plurality's dismissal of these precedents, it is essential to identify its conception of the ‘unitary family.’”

“The evidence is undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the same household, Victoria called Michael ‘Daddy,’ Michael contributed to Victoria's support, and he is eager to continue his relationship with her. Yet they are not, in the

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Applied Legal Storytelling Conference, July 8-10, 2011

plurality's view, a 'unitary family,' whereas Gerald, Carole, and Victoria do compose such a family. The only difference between these two sets of relationships, however, is the fact of marriage."

"The plurality's exclusive rather than inclusive definition of the 'unitary family' is out of step with other decisions as well. This pinched conception of "the family," crucial as it is in rejecting Michael's and Victoria's claims of a liberty interest, is jarring in light of our many cases preventing the States from denying important interests or statuses to those whose situations do not fit the government's narrow view of the family."

"The plurality's focus on the 'unitary family' is misdirected for another reason. It conflates the question whether a liberty interest exists with the question what procedures may be used to terminate or curtail it."

"It is a bad day for due process when the State's interest in terminating a parent-child relationship is reason to conclude that that relationship is not part of the "liberty" protected by the Fourteenth Amendment."

### **Part III—the due process narrative**

(A) California's presumption of legitimacy cuts off the relationship between Michael and Victoria—a liberty interest protected by the Due Process Clause—without affording the least bit of process.

(B) "The question before us, therefore, is whether California has an interest so powerful that it justifies granting Michael *no* hearing before terminating his parental rights."

"invalidation of [the presumption of legitimacy] would not, as Gerald suggests, subject Gerald and Carole to public scrutiny of . . . private matters. Family finances and family dynamics are relevant, not to paternity, but to the best interests of the child—and the child's best interests are not . . . in issue at the hearing that Michael seeks."

"The only private matter touching on the paternity presumed by [the statute] is the married couple's sex life. Even there, [the statute] pre-empts inquiry into a couple's sexual relations, since 'cohabitation'

Andrea McArdle

City University of New York School of Law

Applied Legal Storytelling Conference, July 8-10, 2011

consists simply of living under the same roof together; the wife and husband need not even share the same bed (citation omitted).”

“[The statute] does not foreclose inquiry into the husband's fertility or virility . . . however, proving paternity by asking intimate and detailed questions about a couple's relationship would be decidedly anachronistic. Who on earth would choose this method of establishing fatherhood when blood tests prove it with far more certainty and far less fuss?”

“The State's purported interest in protecting matrimonial privacy . . . does not measure up to Michael's and Victoria's interest in maintaining their relationship with each other.”

“Make no mistake: to say that the State must provide Michael with a hearing to prove his paternity is not to express any opinion of the ultimate state of affairs between Michael and Victoria and Carole and Gerald. In order to change the current situation among these people, Michael first must convince a court that he is Victoria's father, and even if he is able to do this, he will be denied visitation rights if that would be in Victoria's best interests. (Citation omitted.). It is elementary that a determination that a State must afford procedures before it terminates a given right is not a prediction about the end result of those procedures.”

#### **Part IV**

“The atmosphere surrounding today's decision is one of make-believe.”

Discussion questions on *Michael H.*:

1. How does Justice Scalia frame the facts in Part I? What narrative does it invoke?
2. In what way does Justice Scalia, at the beginning of Part III, liken California law to nature?
3. What is the state policy that the conclusive presumption of legitimacy ostensibly advances?
4. In what way does Justice Scalia in Part III seek to cabin the concept of liberty protected by the due process clause?



Andrea McArdle

City University of New York School of Law

Applied Legal Storytelling Conference, July 8-10, 2011

5. How does Justice Scalia then characterize the legal issue in the case?

6. How does Justice Scalia in footnote 6 identify the relevant category for assessing historical traditions? What category would Justice Brennan in dissent focus on?

7. In what sense does Justice Scalia see the interests of the biological and marital father as of the nature of a zero sum game? Is that a necessary conclusion? A natural one?

8. In Part I of his dissent, what is Justice Brennan's critique of the plurality's premise and approach in resorting to tradition?

9. How does Justice Brennan critique the plurality's treatment of the unitary family in Part II? What narrative of family does he offer? Is it law- or fact-based, or both?

10. What is the structure of Justice Brennan's procedural due process analysis in Part III of his dissent?