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Comments

AN ANALYSIS OF THE UNWED FATHER'S ADOPTION RIGHTS IN LIGHT OF *CABAN V. MOHAMMED*: A FOUNDATION IN FEDERAL LAW FOR A NECESSARY REDRAFTING OF THE PENNSYLVANIA ADOPTION ACT

I. INTRODUCTION

In the 1972 decision of *Stanley v. Illinois*,¹ the United States Supreme Court held that *all* parents, whether married or unmarried, are constitutionally entitled to a hearing on their fitness as parents before their children can be removed from their custody.² Following this decision, lawsuits were initiated by unwed fathers seeking a determination of their rights with respect to the adoption of their illegitimate children.³ Two major issues were raised by these cases: 1) whether an unwed father's consent is constitutionally required in adoption proceedings;⁴ and 2) whether notice must be given to an unwed father prior to terminating his rights over his illegitimate child and, if so, how must this notice be given.⁵ Since the *Stanley* Court did not address these issues,⁶ the states lacked Supreme Court guidance and, thus, differed over what constitutional rights the unwed father possessed with respect to the adoption of his illegitimate children.⁷ However, in

1. 405 U.S. 645 (1972).

2. *Id.* at 658. For a discussion of *Stanley*, see notes 17-25 and accompanying text *infra*.

3. See, e.g., *Miller v. Miller*, 504 F.2d 1067 (9th Cir. 1974); *Slawek v. Covenant Children's Home*, 52 Ill. 2d 20, 284 N.E.2d 291 (1972); *Vanderlaan v. Vanderlaan*, 9 Ill. App. 3d 260, 292 N.E.2d 145 (1972); *Catholic Charities v. Zalesky*, 232 N.W.2d 539 (Iowa 1975); *Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511, *appeal dismissed sub nom.* *Orsini v. Blasi*, 423 U.S. 1042 (1977); *Doe v. Department of Social Servs.*, 71 Misc. 2d 666, 337 N.Y.S.2d 102 (1972); *Adoption of Walker*, 468 Pa. 165, 360 A.2d 603 (1976); *Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

4. See *Miller v. Miller*, 504 F.2d 1067, 1067 (9th Cir. 1974); *Slawek v. Covenant Children's Home*, 52 Ill. 2d 20, 21, 284 N.E.2d 291, 292 (1972); *Catholic Charities v. Zalesky*, 232 N.W.2d 539, 542 (Iowa 1975); *Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 569, 331 N.E.2d 486, 487, 370 N.Y.S.2d 511, 513, *appeal dismissed sub nom.* *Orsini v. Blasi*, 423 U.S. 1042 (1977); *Doe v. Department of Social Servs.*, 71 Misc. 2d 666, 667-68, 337 N.Y.S.2d 102, 104 (1972); *Adoption of Walker*, 468 Pa. 165, 167, 360 A.2d 603, 604 (1976); *Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 9, 207 N.W.2d 826, 830 (1973). For a discussion of how the states dealt with this issue, see notes 26-65 and accompanying text *infra*.

5. See *Miller v. Miller*, 504 F.2d 1067, 1067 (9th Cir. 1974); *Slawek v. Covenant Children's Home*, 52 Ill. 2d 20, 21, 284 N.E.2d 291, 292 (1972); *Catholic Charities v. Zalesky*, 232 N.W.2d 539, 542 (Iowa 1975); *Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 569, 331 N.E.2d 486, 487, 370 N.Y.S.2d 511, 513, *appeal dismissed sub nom.* *Orsini v. Blasi*, 423 U.S. 1042 (1977); *Doe v. Department of Social Servs.*, 71 Misc. 2d 666, 667-68, 337 N.Y.S.2d 102, 104 (1972); *Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 8, 207 N.W.2d 826, 830 (1973). For a discussion of how the states dealt with this issue, see notes 26-65 and accompanying text *infra*.

6. See 405 U.S. at 658; notes 17-25 and accompanying text *infra*.

7. See *Barron, Notice to the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois*, 9 FAM. L.Q. 527, 529-38 (1975); *Comment, Rights of Putative Fathers in Custody and Adoption Proceedings—Washington's Law in Perspective*, 9 GONZ. L. REV. 826, 830-35 (1974). For a discussion of the differing views among the states, see notes 26-65 and accompanying text *infra*.

two subsequent Supreme Court decisions, *Quilloin v. Walcott*⁸ and *Caban v. Mohammed*,⁹ these narrower adoption issues have been specifically addressed so that the lower courts and state legislatures have now obtained sufficient guidance to determine the constitutional rights of the unwed father in adoption proceedings.¹⁰

This comment will analyze the *Stanley* decision and the manner in which the states have responded to this case.¹¹ It will then examine *Quilloin* and *Caban*, considering the consistency of these decisions with *Stanley*,¹² the effects which these two cases may have on state statutes and decisions handed down in response to *Stanley*,¹³ and their potential effect on the adoption of newborns.¹⁴ Finally, this comment will suggest that sufficient guidelines are now available such that those portions of the Pennsylvania Adoption Act declared unconstitutional in *Adoption of Walker*¹⁵ can now be rewritten to comply with the requirements of the Federal Constitution.¹⁶

II. BACKGROUND

A. *Stanley v. Illinois and Its Impact*

In *Stanley*, the natural father of three illegitimate children challenged the constitutionality of an Illinois statute which declared illegitimate children wards of the state upon their mother's death.¹⁷ The Stanleys had lived together intermittently for eighteen years and, during this period, the father had actively supported the three children, whose paternity he did not dispute.¹⁸ Upon the death of the mother, dependency proceedings were initiated under the Illinois statute and the children were declared wards of the

8. 434 U.S. 246 (1978).

9. 441 U.S. 380 (1979).

10. See *Caban v. Mohammed*, 441 U.S. at 385-87, 391-94; *Quilloin v. Walcott*, 434 U.S. at 247, 253-56.

11. See notes 17-65 and accompanying text *infra*.

12. See notes 66-109 and accompanying text *infra*.

13. See notes 110-23 and accompanying text *infra*.

14. See notes 124-46 and accompanying text *infra*.

15. 468 Pa. 165, 170-71, 360 A.2d 603, 606 (1976). For a discussion of *Walker*, see notes 147-49 and accompanying text *infra*.

16. See notes 150-61 and accompanying text *infra*.

17. 405 U.S. at 646. See ILL. ANN. STAT. ch. 37, §§ 701-14, 702-1, -5 (Smith-Hurd 1972) (current version at ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd Supp. 1979)). The Illinois law set forth a dependency proceeding under which the state was able to have a minor child declared a ward of the state by proving that the child had no surviving parents, guardian, or legal custodian. *Id.* Because the Illinois statute defined "parent" as "the father and mother of a legitimate child, . . . or the natural mother of an illegitimate child," it was clear that unwed fathers were not included in this statutory definition. *Id.* § 701-14 (current version at ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd Supp. 1979)). Therefore, if the only surviving parent was the unwed natural father, a child would be deemed to have no surviving parent and would become a ward of the state. *Id.* §§ 701-14, 702-5 (current version at ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd Supp. 1979)). The provision which defines "parent" has since been changed to mean "the father or mother of a legitimate child, or illegitimate child." Act of Sept. 6, 1973, Pub. A. No. 78-531, § 1, 1973 Ill. Laws 1503 (codified at ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd Supp. 1979)).

18. 405 U.S. at 646, 651 n.4.

state.¹⁹ On appeal, the Supreme Court of Illinois affirmed the lower court's holding that the children could be properly separated from their father because he had never married the children's mother.²⁰

In reversing the Illinois courts, the United States Supreme Court held that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."²¹ The Court found that denying a fitness hearing to Stanley, an unwed parent, while granting a hearing in similar circumstances to other parents, was contrary to the equal protection clause of the United States Constitution.²² The *Stanley* Court further held that the Illinois statute, which was based upon the presumption that unwed fathers are unfit to care for their children, violated the due process provision of the fourteenth amendment.²³ The Court reasoned that the procedural benefits of speed and efficiency to be gained by presuming that the unwed father is unfit did not outweigh the father's right to a

19. *Id.* at 646.

20. *In re Stanley*, 45 Ill. 2d 132, 133-35, 256 N.E.2d 814, 815-16 (1970). Stanley argued the the Illinois law violated the equal protection clause of the United States Constitution because it required a showing of unfitness before a child could be taken from married parents or an unwed mother's custody, but did not require such a showing when a child was to be taken from an unwed father. *Id.* at 135, 256 N.E.2d at 815-16.

Although the Illinois Supreme Court recognized that Stanley's unfitness as a parent had never been established, it still rejected the equal protection claim, holding "that Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother had not been married." *Id.* at 134, 256 N.E.2d at 815. In so ruling, the court concluded that Stanley's actual fitness as a father was irrelevant in this situation. *Id.* The result of this holding was such that an unwed father would be subjected to a uniquely simplistic procedure in which the state could rely upon a presumption of unfitness to remove the children from the unwed father's custody, thereby avoiding any questions concerning his fitness. *See* 405 U.S. at 650.

21. 405 U.S. at 658.

22. *Id.* The equal protection clause of the fourteenth amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

Criticizing the majority's equal protection analysis, the dissent maintained that the equal protection clause was not violated because the state gave full recognition only to those father-child relationships that arose in the context of family units bound by legal obligations arising from marriage or from adoption proceedings. 405 U.S. at 663-65 (Burger, C.J., dissenting). The dissent argued that Illinois can constitutionally distinguish between unwed fathers and unwed mothers because of the state's interest in protecting the welfare of illegitimate children within its jurisdiction. *Id.* at 665 (Burger, C.J., dissenting). The dissent stressed that ordinarily the mother is readily identifiable, whereas the unwed father is traditionally difficult to locate or identify. *Id.* Additionally, the unwed father generally denies all responsibility, exhibits no interest in the welfare of the child, and in many instances may be unaware of his paternity. *Id.* Finally, the dissent emphasized the biological role of the mother in carrying and nursing the offspring, concluding that the mother thereby establishes stronger bonds with the child than those normally established between the unwed father and the child. *Id.* This analysis by the dissent was reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring, either permanently or until they are safely placed for adoption, while the same cannot be said of the typical unwed father. *Id.* at 665-66 (Burger, C.J., dissenting). The dissent therefore concluded that there were no grounds for determining that the Illinois statutory definition of "parent" violated the equal protection clause. *Id.* at 667 (Burger, C.J., dissenting).

23. 405 U.S. at 657-58. The due process clause of the fourteenth amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law . . ." U.S. CONST. amend. XIV.

hearing on his fitness when dismemberment of the family unit is involved.²⁴ Finally, the *Stanley* Court suggested in dictum that an unwed father is entitled to a hearing prior to the termination of his parental rights when he claims competency and the desire to care for his children.²⁵

Following the Supreme Court's decision in *Stanley*, problems arose concerning the extent to which the Court's analysis applied to adoption proceedings.²⁶ While many states granted rights to unwed fathers in adoption proceedings,²⁷ the courts differed in their determinations of the nature of these rights and the class of unwed fathers who could exercise them.²⁸

Illinois, Wisconsin, and Washington took a broad view of the *Stanley* decision and gave fathers of illegitimate children extensive rights.²⁹ The Illinois Attorney General took the broadest position, stating that "to effectuate a valid adoption under United States and Illinois law, consent to adoption must be obtained from both the father and mother of an illegitimate child" ³⁰ This view led to the Illinois practice of requiring that unwed fathers be notified and given the opportunity of a hearing as a prerequisite to the adoption of their children.³¹ If the father's consent was withheld, or if his identity was not known, Illinois required that he be made a party defendant in any adoption proceeding.³²

24. 405 U.S. at 658. The Court, in its due process balancing analysis, emphasized its tradition of protecting the family unit and found that *Stanley* had a substantial interest in retaining the custody of his illegitimate children. 405 U.S. at 651-52. The state's interest, on the other hand, was determined to be the protection of the emotional, physical, and moral welfare of illegitimate children, and the protection of the best interest of the community. *Id.* at 652. The majority also recognized that the establishment of prompt, efficient procedures to achieve legitimate state goals is an additional state interest worthy of constitutional protection. *Id.* at 656. The Court noted, however, that the Constitution recognizes higher values than speed and efficiency, and that the due process clause was designed to protect citizens from an overbearing concern by the state for expediency. *Id.* Consequently, the state's implementation of a procedure which presumed the unwed father's unfitness, though faster and cheaper than a case-by-case determination, was found by the Court to foreclose determination of the issues of competence and care by explicitly ignoring present realities in favor of past history. *Id.* at 656-57. The Court thus concluded that such a procedure needlessly risks "running roughshod over the important interests of both parent and child," and must, therefore, be declared invalid. *Id.* at 656-57.

The dissent in *Stanley*, however, criticized the majority for even considering the due process question because *Stanley* had never made a due process argument in the lower courts and the Illinois Supreme Court had not addressed the issue. *Id.* at 659 (Burger, C.J., dissenting).

25. See *id.* at 657 n.9. See also Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115, 125-26 (1973). See also *Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

26. See Comment, *supra* note 7, at 830. See also Barron, *supra* note 7, at 532.

27. See notes 29-65 and accompanying text *infra*. See also Comment, *supra* note 7, at 830.

28. See notes 33-42 & 56-65 and accompanying text *infra*. See also Comment, *supra* note 7, at 830-42; Comment, *supra* note 25, at 126-32.

29. See notes 30-51 and accompanying text *infra*.

30. 1972 Op. Ill. Att'y Gen. 140, 142-43. See also Barron, *supra* note 7, at 529-30.

31. 1972 Op. Ill. Att'y Gen. at 143.

32. *Id.* The unknown father was made a party defendant under the name of "[a]ll whom it may concern," and therefore was entitled by statute to notice. ILL. ANN. STAT. ch. 4, § 9.1-7 (Smith-Hurd 1975). This Illinois practice was criticized by the Child Welfare League of America

The broad view taken by the Illinois Attorney General was a result of both the *Stanley* decision,³³ and the Illinois Supreme Court's decision in *Slawek v. Covenant Children's Home*.³⁴ In *Slawek*, the court was faced with an equal protection challenge to the Illinois Adoption Act, which precluded the father of an illegitimate child from asserting any rights in adoption proceedings.³⁵ In holding that sections of this Act were unconstitutional under *Stanley*,³⁶ the court stated that the interests of the father of an illegitimate child are the same as those of other parents.³⁷ The Illinois court therefore concluded that it is an unreasonable distinction to allow the mother of an illegitimate child the rights of notice and consent prior to an adoption, but to deny these rights to the father.³⁸

The state of Wisconsin also interpreted the *Stanley* decision broadly.³⁹ In *Lewis v. Lutheran Social Services*,⁴⁰ the Wisconsin Supreme Court held that either consent of both the unwed father and the unwed mother or the consent of one parent with proper termination of the other's parental rights was required before adoption.⁴¹ In addition, the court held that the notice

on the basis that it unduly delayed the placement of children. CHILD WELFARE LEAGUE OF AMERICA, THE CHILD WELFARE LEAGUE NEWSLETTER 1, 6 (August 1972). In a meeting of the Child Welfare League to discuss the implications of *Stanley*, the following statement was adopted by the League with respect to the rights of unwed fathers:

At the present time there is no unanimity as to the constitutionally required legal rights of fathers of children born out of wedlock. There are those who hold that all known fathers must be notified as part of any action to terminate parental rights, whether voluntary or judicial. Others hold that only fathers who have formally or informally acknowledged paternity need to be notified

. . . However, as the standard-setting agency in child welfare, the League believes that in order to protect the best interest of the child, the preferred social policy would be to involve only those fathers who have either acknowledged paternity or been so adjudicated.

Id. See also Barron, *supra* note 7, at 530-31.

33. See 1972 Op. Ill. Att'y Gen. at 141-42.

34. 52 Ill. 2d 20, 284 N.E.2d 291 (1972). See 1972 Op. Ill. Att'y Gen. at 142.

35. 52 Ill. 2d at 21, 284 N.E.2d at 292.

36. The court ruled that provisions of the Illinois Adoption Act were unconstitutional "insofar as they [were] in conflict with *Stanley* [and] *Rothstein*." *Id.* at 22, 284 N.E.2d at 292. For a discussion of *Rothstein*, see note 41 *infra*. See also *Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 207 N.W.2d 826 (1973); notes 40-47 and accompanying text *infra*.

37. 52 Ill. 2d at 21, 284 N.E.2d at 292. The trial court had held that Illinois could enact a statute which allowed an adoption without notice to, or the consent of, the unwed father. *Id.*

38. *Id.*

39. See *Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 207 N.W.2d 826 (1973); notes 40-47 and accompanying text *infra*. See also Barron, *supra* note 7, at 535.

40. 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

41. *Id.* at 8, 207 N.W.2d at 830. On August 7, 1968, a county court order terminated Karen Lewis' parental rights over her illegitimate child, and the child was placed in the home of the prospective adoptive parents. *Lewis v. Lutheran Social Servs.*, 47 Wis. 2d 420, 421, 178 N.W.2d 56, 57 (1970), *vacated sub nom. Rothstein v. Lutheran Social Servs.*, 405 U.S. 1051 (1972). The natural father, Jerry Rothstein, had not been given notice of, nor had he consented to, the termination of his parental rights. 47 Wis. 2d at 422, 178 N.W.2d at 57. In December of 1968, the father petitioned the county court for an order vacating the order of August 7, and granting him a hearing concerning his rights to the custody of his child. *Id.* Rothstein was granted a hearing concerning his petition, but the county court refused to receive any evidence

of the termination of the unwed fathers' parental rights must be the same as that required for married parents or unwed mothers, and that this notice could be either personal or constructive.⁴²

Subsequently, the Wisconsin legislature enacted a new statute to deal with the issues raised by *Stanley*.⁴³ Taking an expansive view of *Stanley*, the legislature required that notice of adoption proceedings should be served on the unwed parents and, in those situations where notice by publication is permitted, the mother's name should be included in the publication if such inclusion is necessary to give effective notice to the natural father.⁴⁴ Al-

concerning his fitness to have custody of his illegitimate child. *Id.* The court held that unwed fathers have "no right to the custody of their illegitimate children," and therefore denied Rothstein's petition. *Id.* at 423, 178 N.W.2d at 57. Rothstein took no appeal from the judgment denying this petition. *Id.* Subsequently, he petitioned the Wisconsin Supreme Court for a writ of habeas corpus, in order to determine who had the right of custody to his child. *Id.* at 421, 178 N.W.2d at 56. The Wisconsin Supreme Court denied the petition, holding that the Wisconsin statutes clearly granted the mother alone the power to terminate parental rights or to veto the adoption of any child born to her out of wedlock. *Id.* at 427, 178 N.W.2d at 60. The court also held that the failure of the statutes to grant notice of a hearing to an unwed father prior to the termination of his parental rights did not violate the state or federal constitutions because there was a rational basis for distinguishing between wed and unwed fathers, in that unwed fathers have consistently shown no interest in their children. *Id.* at 432, 178 N.W.2d at 62. Further justification for this classification was that if an unwed father were given such rights, he might decide to interfere with the adoption process so that prospective adoptive parents will be discouraged from seeking placement from the agencies. *Id.* at 433, 178 N.W.2d at 63, citing *In re Brennan*, 270 Minn. 455, 134 N.W.2d 126 (1965).

This Wisconsin Supreme Court decision was appealed to and vacated by the United States Supreme Court, with an order that on remand it should be considered in light of the *Stanley* decision. *Rothstein v. Lutheran Social Servs.*, 405 U.S. 1051 (1972). The Wisconsin Supreme Court reconsidered its decision in *Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

42. 59 Wis. 2d at 8, 207 N.W.2d at 830. The Wisconsin Supreme Court interpreted *Stanley* as holding that

the termination of a natural father's parental rights to a child born out of wedlock without actual notice to him, if he was known, and without giving him the right to be heard on the termination of his rights denied him due process of law.

Id. at 4-5, 207 N.W.2d at 828. Relying on this interpretation of *Stanley*, and the fact that there could not be a valid adoption without the proper termination of parental rights, the Wisconsin Supreme Court concluded that the Wisconsin statutes regulating the termination of parental rights were unconstitutional because a more adequate procedure of notice was required prior to the termination of an unwed father's parental rights. *Id.* at 8, 207 N.W.2d at 829-30.

43. Act of June 15, 1974, ch. 263, § 12, 1973 Wis. Laws 771 (codified at WIS. STAT. ANN. § 48.84(3) (West 1979)). See Barron, *supra* note 7, at 535-36. The Wisconsin statute provides that "[t]he consent of the father of a minor born out of wedlock and not subsequently legitimated or adopted shall be necessary unless his rights have been legally terminated." WIS. STAT. ANN. § 48.84(3) (West 1979). The statute also requires that a hearing be held before the court may terminate any parental rights. *Id.* § 48.42(1).

44. WIS. STAT. ANN. § 48.41(1) (West 1979). This statute provides:

The termination of parental rights . . . shall be made only after a hearing before the court. The court shall have notice of the time, place and purpose of the hearing served on the parents personally at least 10 days prior to the date of the hearing. If the court is satisfied that personal service . . . cannot be effected, then such notice may be given by registered mail. . . . If notice by registered mail is not likely to be effective, the court may order notice to be given by publication. . . . If notice is given by publication, the name of the mother shall be included in such notice only if the court following a hearing . . . determines in any termination proceeding that such inclusion is essential to give effective notice to the natural father.

Id.

though Wisconsin did not require that the mother testify to the whereabouts and identity of the father,⁴⁵ other proposals, such as the Uniform Parentage Act,⁴⁶ have included such extensive requirements in order to assure proper notice to the unwed father.⁴⁷

In addition to Illinois and Wisconsin, the State of Washington also took a broad view of *Stanley*.⁴⁸ The Washington legislature amended its adoption statute and gave unwed fathers the same rights as unwed mothers.⁴⁹ Under the new act, the consent of the unwed father was required before

45. *Id.*

46. UNIFORM PARENTAGE ACT §§ 1-25, *reprinted in* 9 UNIFORM LAWS ANN. 521-42 (Supp. 1979).

47. *See* Barron, *supra* note 7, at 537. Section 24 of the Uniform Parentage Act provides in pertinent part:

(a) If a mother relinquishes or proposes to relinquish for adoption a child who has (1) a presumed father . . . (2) a father whose relationship to the child has been determined by a court, or (3) a father as to whom a child is a legitimate child . . . , the father shall be given notice of the adoption proceeding . . . unless the father's relationship to the child has been previously terminated or determined by a court not to exist.

(c) In an effort to identify the natural father, the court shall cause inquiry to be made of the mother. . . .

(d) If, after inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding.

UNIFORM PARENTAGE ACT § 24, *reprinted in* 9 UNIFORM LAWS ANN. 538-39 (Supp. 1979). *See* Barron, *supra* note 7, at 537.

The Uniform Act also provides that the failure of a witness or a party to testify is equivalent to civil contempt. UNIFORM PARENTAGE ACT § 10(b). Therefore, if the mother in a Uniform Act jurisdiction would refuse to identify the father, the court could compel her testimony under the threat of civil contempt. *See id.*; Barron, *supra* note 7, at 537. The principle draftsman of the Uniform Act, Professor Krause, has supported this approach, stating:

[The Act's] guiding principle is full equality for all children, legitimate and illegitimate, in their legal relationships with both parents (§§ 1, 2). Moreover, the Act emphasizes the right in question is the right of the child (§§ 6(a), 9)—not the right of his mother as current state laws insist. Accordingly, the mother may not stand in the child's way and, if necessary, may be compelled to testify as to the father's identity and whereabouts—just as any other witness (§ 10(b)).

Krause, *Uniform Parentage Act*, 8 FAM. L.Q. 1, 8 (1974), *quoted in* Barron, *supra* note 7, at 538. Another commentator, however, has been critical of the Uniform Act and the Wisconsin approach because extensive notice requirements delay the adoption process, and because notice by publication is not likely to reveal the identity of the natural father even if the mother's name is used. *See* Barron, *supra* note 7, at 538.

48. *See* Comment, *supra* note 7, at 834.

49. Act of Mar. 20, 1973, ch. 134, § 2, 1973 Wash. Laws 396 (codified at WASH. REV. CODE ANN. § 26.32.030(2) (Supp. 1979)). The prior Washington statute only required the consent of the mother if the child being adopted was illegitimate. WASH. REV. CODE ANN. § 26.32.030(3) (1961). The revised statute provides that "if the person to be adopted is a minor, then [consent to the adoption must be given] by each of his living parents . . ." WASH. REV. CODE ANN. § 26.32.030(2) (Supp. 1979). However, consent to the adoption of a minor is not required 1) when a parent has been deprived of the custody of the child by a court of competent jurisdiction; and 2) when a parent has neither acknowledged parentage nor attempted to establish a relationship with the child as required by the statute. *Id.* § 26.32.040(2), (5).

adoption,⁵⁰ and comprehensive notice procedures were established to notify all unwed fathers of the pendency of adoption and custody proceedings.⁵¹

There are, however, states which have taken a narrow view of *Stanley*.⁵² With respect to the notice issue, Minnesota⁵³ and South Dakota⁵⁴ enacted legislation which does not require the state to afford notice to the unwed father unless he has taken some form of affirmative action in recognizing or supporting the child.⁵⁵ New York also construed *Stanley* narrowly,⁵⁶ as is evidenced by two principal cases: *Doe v. Department of Social Services*⁵⁷ and *Adoption of Malpica-Orsini*.⁵⁸

50. WASH. REV. CODE ANN. § 26.32.030(2) (Supp. 1979). See note 49 *supra*.

51. WASH. REV. CODE ANN. § 26.32.085. The statute provides in pertinent part:

The following requirements regarding notice of hearing on a petition for adoption shall apply to an alleged parent of a child who has not acknowledged the relationship and action has not been taken to establish such relationship . . . and who has not consented to the adoption of such child:

(1) Where the court has reason to believe or suspect that any person not before the court is or might be the parent of such child, the court shall direct the clerk to issue the notice prescribed in . . . this section to such person.

Id.

52. See note 53-65 and accompanying text *infra*.

53. Act of Feb. 21, 1974, ch. 66, H.F. No. 2332, 1974 Minn. Laws 91-93 (codified at MINN. STAT. ANN. § 259-26 (West Supp. 1979)).

54. Act of Feb. 20, 1974, ch. 176, 1974 S.D. Laws 303 (codified at S.D. COMP. LAWS ANN. § 25-6-1.1 (1976)).

55. The Minnesota statute provides that notice of a hearing for adoption shall be given to the parent of an illegitimate child only if

- (a) The person's name appears on the child's birth certificate, as a parent, or
- (b) The person has substantially supported the child, or
- (c) The person either was married to the person designated on the birth certificate as the natural mother within 325 days before the child's birth, or married that person within the ten days after the child's birth or
- (d) The person is openly living with the child or the person designated on the birth certificate as the natural mother of the child, or both, or
- (e) The person has been adjudicated the child's parent, or
- (f) The person has filed an affidavit [stating his intention to retain parental rights within 90 days of the child's birth or within 60 days of the child's placement with prospective adoptive parents, whichever is sooner]

MINN. STAT. ANN. § 259.26 (West Supp. 1979).

The South Dakota statute provides:

Notwithstanding any other provision of law or court rule the father of an illegitimate child shall, as a requirement of due process, have no rights to the service of process in adoption, dependency, delinquency, or termination of parental rights proceedings unless he is known and identified by the mother or unless he, prior to the entry of a final order, in any of the three proceedings, shall have acknowledged the child as his own by affirmatively asserting paternity, within sixty days after the birth of the child,

- (1) as outlined in § 25-6-1, or
- (2) by causing his name to be affixed to the birth certificate . . . or
- (3) otherwise by commencing a judicial proceeding claiming a parental right.

S.D. COMPILED LAWS ANN. § 25-6-1.1 (1976). Section 25-6-1 of the South Dakota statute provides that "[t]he father of an illegitimate child by publicly acknowledging it as his own, receiving it as such into his family . . . and otherwise treating it as if it were a legitimate child, thereby adopts it as such . . ." S.D. COMPILED LAWS ANN. § 25-6-1 (1976).

56. See notes 59-65 and accompanying text *infra*; Comment, *supra* note 7, at 831.

57. 71 Misc. 2d 666, 337 N.Y.S.2d 102 (1972).

58. 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511, *appeal dismissed sub nom.* Orsini v. Blasi, 423 U.S. 1042 (1977).

In *Doe*, the Supreme Court of Dutchess County held that, in light of *Stanley*, the New York Adoption Statute must be construed to mean "that the mother's exclusive or sole consent suffices only where there has been no formal or unequivocal acknowledgment or recognition of paternity by the father."⁵⁹ While the court found that the father's consent was not a condition precedent to adoption of his illegitimate child, it stated that the unwed father, who has unequivocally acknowledged or recognized paternity, is entitled to notice so that he may appear at the hearing and present facts to aid the court in its determination of what is in the best interests of the child.⁶⁰

Following the *Doe* decision, New York's highest court upheld the constitutionality of the state's adoption law in *Malpica-Orsini*.⁶¹ As in *Doe*, paternity was not disputed in *Malpica-Orsini*.⁶² Thus, the New York Court of Appeals approved the procedure which required that the unwed father be given notice of the adoption proceedings as well as the opportunity to be heard on the issue of what was in the best interests of the child.⁶³ Therefore, it appears that the New York courts interpreted *Stanley* as guaranteeing an unwed father 1) notice of the proceedings to terminate his parental rights, and 2) the right to be heard concerning the child's best interests—at least in cases where paternity was not in dispute. Nevertheless, unlike some states,⁶⁴ New York did not read *Stanley* to require the unwed father's consent as a prerequisite to the adoption.⁶⁵

59. 71 Misc. 2d at 671, 337 N.Y.S.2d at 107. In *Doe*, the natural father, who had previously been adjudicated to be the father of the offspring by the family court sought to block the adoption of his child. *Id.* at 666-67, 337 N.Y.S.2d at 103-04. At the time of his suit, the New York Domestic Relations Law only required the consent of the unwed mother and, by omission, denied the father any rights. N.Y. DOM. REL. LAW § 111(3) (McKinney 1977). See 71 Misc. 2d at 671, 337 N.Y.S.2d at 107.

60. 71 Misc. 2d at 671, 337 N.Y.S.2d at 107. In its rationale, the court stated that *Stanley* totally revised previous law which had held that the unwed father had no right to custody and that his consent to the adoption was unnecessary. *Id.* at 668, 337 N.Y.S.2d at 104. The court concluded that it would be erroneous to hold that a man who acknowledged fathering a child would have no rights, such as being notified prior to the adoption of his children. *Id.* at 670, 337 N.Y.S.2d at 106. Although the court recognized that adoptions may be delayed, it stated that when there is no issue as to the father's paternity, no undue burden would be imposed by requiring that an unwed father be notified of the impending adoption of his child. *Id.*

61. 36 N.Y.2d at 577-78, 331 N.E.2d at 492-93, 370 N.Y.S.2d at 520-21. In *Malpica-Orsini*, the child was born in 1970, and the unwed parents lived together with the child until June, 1972. *Id.* at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513. In September, 1972, the unwed father was adjudicated by the family court to be the father of the child, was directed to pay support, and was granted visitation rights. *Id.* The mother subsequently married and her husband petitioned for the adoption of her illegitimate child. *Id.* In response to this petition, the unwed father moved for an order enforcing his visitation rights and affording him notice and an opportunity to be heard in all proceedings involving his child. *Id.* Although the court granted the father an opportunity to be heard, the adoption was permitted over his objection. *Id.* at 570, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.

62. Compare 71 Misc. 2d at 667, 337 N.Y.S.2d at 104 with 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513. In cases where there has been no formal or unequivocal acknowledgment or recognition of paternity by the father, New York would consider the mother's unilateral consent to be sufficient. See note 59 and accompanying text *supra*.

63. 36 N.Y.2d at 578, 331 N.E.2d at 493, 370 N.Y.S.2d at 521.

64. See notes 30-38 & 49-51 and accompanying text *supra*.

65. 36 N.Y.2d at 576-77, 331 N.E.2d at 492, 370 N.Y.S.2d at 519-21. In reaching this conclusion, the majority in *Malpica-Orsini*, after analyzing the private and state interests, con-

B. *The Quilloin v. Walcott Decision*

Faced with these various state interpretations of *Stanley*, the United States Supreme Court, in 1978, considered a challenge to the constitutionality of Georgia's adoption laws.⁶⁶ In *Quilloin*, an illegitimate child lived with his mother and his mother's spouse, who later petitioned to adopt the child.⁶⁷ In response to the adoption petition, the natural father filed a legitimation petition which was denied as not being in the best interests of the child.⁶⁸ The adoption was subsequently granted over his objections.⁶⁹ The applicable Georgia statute required only the consent of the unwed mother prior to the adoption of the illegitimate child.⁷⁰ Under this statute an unwed father had power to veto the adoption of his child only after legitimating the child either by marrying the mother and acknowledging the child as his own,⁷¹ or by obtaining from the court an order declaring the child legitimate and capable of inheriting from him.⁷² The unwed father in *Quilloin* claimed, however, that he was constitutionally entitled to an *absolute* power to veto the adoption of his child.⁷³

cluded that there were sufficient compelling state interests to justify a difference in classification between wed and unwed fathers. *Id.* at 574-77, 331 N.E.2d at 490-92, 370 N.Y.S.2d at 517-20. The state interests discussed by the court were the welfare of the child, the potential for extortion, the efficient operation of the adoption process, and the fostering of marriage between the unwed mother and a potential adoptive father. *Id.* at 572-73, 331 N.E.2d at 489-90, 370 N.Y.S.2d at 516-17. The dissent, however, concluded that the statute violated the equal protection clause, not because there were no compelling state interests, but because there were less burdensome alternatives for achieving these objectives. *Id.* at 586, 331 N.E.2d at 499, 370 N.Y.S.2d at 528 (Jones, J., dissenting). Here the statute categorically denied all unmarried fathers the right to consent to the adoption of their children, and therefore the defect, according to the dissent, was that the statute excluded loving, attentive, and faithful fathers. *Id.* at 586-87, 331 N.E.2d at 499, 370 N.Y.S.2d at 529-30 (Jones, J., dissenting).

66. *Quilloin v. Walcott*, 434 U.S. 246 (1978).

67. *Id.* at 247. The child was eleven years old at the time the adoption petition was filed. *Id.*

68. *Id.* In objecting to the adoption, the unwed father also attempted to secure visitation rights. *Id.* He did not, however, attempt to seek custody of the child nor did he object to the child continuing to live with his mother and her husband. *Id.*

69. *Id.* The Court noted at the outset that this was not a case in which the sufficiency of the unwed father's notice of the adoption proceeding was being challenged. *Id.* at 253. Here, the natural father had been afforded a full hearing on the legitimation petition, at which time he was given every opportunity to offer evidence on relevant matters including his fitness as a parent. *Id.*

70. *Id.* Section 74-403(3) of the then-applicable Georgia Code provided: "If the child be illegitimate, the consent of the mother alone shall suffice." GA. CODE ANN. § 74-403(3) (1973) (current version at GA. CODE ANN. § 74-403(a) (Supp. 1979)). The Court noted that under this statute, even when a child's parents had been divorced or separated at the time of the adoption proceedings, either parent had the right to veto the adoption. 434 U.S. at 248. This statute has subsequently been changed to provide that "no adoption of a child with a living parent(s) . . . shall be permitted except where (1) the parent(s) . . . of the child has voluntarily and in writing surrendered all of his rights to the child . . . or the parent(s) . . . of the child has had his rights terminated by order of a court . . ." GA. CODE ANN. § 74-403(a) (Supp. 1979).

71. GA. CODE ANN. § 74-101 (1973).

72. *Id.* § 74-103. See 434 U.S. at 248-49. Under the applicable Georgia law, unless the father legitimated the child, the mother remained the only recognized parent and had exclusive authority to exercise parental prerogatives, which included consent to the child's adoption. GA. CODE ANN. § 74-203 (1973) (current version at GA. CODE ANN. § 74-203 (Supp. 1979)).

73. 434 U.S. at 250.

The United States Supreme Court first considered whether the rights of the unwed father in *Quilloin* were adequately protected by a "best interests of the child" standard.⁷⁴ Noting that this was not a situation where the unwed father had at any time sought actual custody of the child, and that the child would be placed with his existing family unit, the Court concluded that the due process clause of the fourteenth amendment was satisfied in this case by the best interests test.⁷⁵

Since a married or divorced father had the right to veto the adoption of his child, while an unwed father did not have this right,⁷⁶ the *Quilloin* Court next considered whether such a classification scheme violated the equal protection clause.⁷⁷ While recognizing that the unwed father is subject to essentially the same support obligations as a married or divorced father,⁷⁸ the Court noted that, here, the unwed father had never exercised actual or legal custody of the child, nor had he accepted any significant responsibility with respect to the daily supervision, education, protection, or care of his offspring.⁷⁹ The Court therefore concluded that since there was a difference between the unwed father in *Quilloin* and a married or divorced father, the state could justifiably grant the married or divorced father the power to veto the adoption of his child while, at the same time, deny that right to the unwed father.⁸⁰

C. *The Caban v. Mohammed Decision*

Shortly after its decision in *Quilloin*, the Supreme Court in *Caban* heard an unwed father's challenge to the constitutionality of section 111 of the New York Domestic Relations Law,⁸¹ which allowed illegitimate children

74. *Id.* at 254. The "best interests of the child" test began to gain prominence in the case of *Chapsky v. Wood*, 26 Kan. 650 (1881). Adoption of J.S.R., 374 A.2d 860, 863 (D.C. 1977). This is a flexible test which permits consideration of the peculiar facts of each case. *Id.* The test does, however, require the judge, "recognizing human frailty and man's limitations with respect to forecasting the future course of human events, to make an informed and rational judgment, free of bias and favor, as to the least detrimental of the available alternatives." *Id.*

75. 434 U.S. at 255. The Court stated that the due process clause would be offended "if a State were to attempt to force the break-up of a natural family, over the objection of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Id.*, quoting *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring).

76. See GA. CODE ANN. § 74-403(3) (1973) (current version at GA. CODE ANN. § 74-403(a) (Supp. 1979)).

77. 434 U.S. at 255-56. For the text of the equal protection clause, see note 22 *supra*. The Court noted that it was not required to consider the constitutionality of the gender-based discrimination implicit in the statute because the unwed father had failed to present that issue in his jurisdictional statement. 434 U.S. at 253 n.13.

78. 434 U.S. at 256.

79. *Id.*

80. *Id.*

81. 441 U.S. at 381. This section of the New York Adoption Act was the same section that was disputed in both *Malpica-Orsini* and *Doe*, except that the statutory numbering had been changed. See N.Y. DOM. REL. LAW § 111.1(c) (McKinney 1977). For a discussion of *Malpica-Orsini* and *Doe*, see notes 59-65 and accompanying text *supra*. Section 111 of the Adoption Act provided that "consent to adoption shall be required as follows: . . . (c) Of the mother, whether

to be adopted by their natural mother and stepfather without the natural father's consent.⁸² The unwed father in *Caban*, unlike the father in *Quilloin*, had maintained substantial contacts with his illegitimate children.⁸³ For example, besides having lived with the natural mother for several years, the unwed father in *Caban* had participated in the care and support of the children.⁸⁴ Thus, the *Caban* Court held that section 111 of the New York statute⁸⁵ was "another example of overbroad generalizations in gender-based classifications" because the distinction drawn between unmarried fathers and unmarried mothers bore no substantial relationship to the state's interest in providing adoptive homes to illegitimate children.⁸⁶

In reaching its conclusion, the Court rejected the same contention which had been raised in *Malpica-Orsini*⁸⁷ that, since it is often impossible to locate the unwed father, requiring his consent to the adoption would hinder and discourage adoptions of illegitimate children.⁸⁸ The Court stated

adult or infant, of a child born out of wedlock. . . ." N.Y. DOM. REL. LAW § 111.1 (c) (McKinney 1977).

The unwed father's challenge in *Caban* included two claims: 1) that the distinction drawn by the statute between unwed fathers and other parents violated the equal protection clause; and 2) that *Quilloin* recognized the due process right of natural fathers to maintain their parental relationship with their children absent a determination of unfitness. 441 U.S. at 385. In *Caban*, as in *Quilloin*, the unwed father had received due notice and had participated in the adoption proceedings; thus, he did not argue that due process as required by *Stanley* had been denied. *Id.* at n.3.

82. See N.Y. DOM. REL. LAW § 111.1(c) (McKinney 1977).

83. Compare 441 U.S. at 393 with 434 U.S. at 256. See notes 75-80 and accompanying text *supra*.

84. 441 U.S. at 382. The unwed parents had lived together from 1968 to 1973 and, throughout this period, they had represented themselves as being husband and wife. The appellant appeared as the father on the birth certificates of each of their two children, and he lived with and contributed to the support of these children as their father until 1973. *Id.* Between 1973 and 1976, the children were for a period of time in the custody of the appellant, but the mother was subsequently given temporary custody through the court order. *Id.* at 383.

85. This issue arose in the New York courts after the natural mother and her husband had filed a petition for adoption of her children. *Id.* The unwed father then cross-petitioned for adoption, and a hearing before the surrogate was held concerning both of these petitions. *Id.* The surrogate granted the petition of the mother and her husband, effectively cutting off all of the unwed father's parental rights. *Id.* This decision was affirmed by the New York Supreme Court, Appellate Division, which stated that the constitutional challenge to § 111 of the Adoption Act was precluded by the earlier New York decision in *Malpica-Orsini*. *In re David*, A.C., 56 A.D.2d 627, 391 N.Y.S.2d 846, 847 (1976). See notes 61-65 and accompanying text *supra*. The New York Court of Appeals similarly affirmed. *In re David*, A.C., 43 N.Y.2d 708, 709, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977).

86. 441 U.S. at 394. In reaching its decision, the Court addressed the question of whether the distinction between unmarried mothers and unmarried fathers bears a substantial relationship to an important state interest. *Id.* at 388. The mother argued that the underlying rationale for the statute was that the maternal role in child raising is almost always more important than the paternal role. *Id.* Although the court found that mothers as a class were generally closer to newborns, it stated that this generalization becomes a less acceptable basis for legislative distinction as the child's age increases. *Id.* at 389. The Court therefore concluded that a broad gender-based distinction is not justified by any universal difference between maternal and paternal relations with the child at every phase of development. *Id.*

87. See N.Y.2d at 572, 331 N.E.2d at 489, 370 N.Y.S.2d at 516.

88. 441 U.S. at 390-91.

that "[i]n those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."⁸⁹ The Court noted, however, that in cases such as *Caban*, "where the father has established a substantial relationship with the child and has admitted his paternity, a state should have no difficulty in identifying the father even of children born out of wedlock."⁹⁰ As a result, the Court found that there was no showing here that the different treatment given unmarried mothers and unmarried fathers under section 111 had a substantial relationship to the state's interest in promoting the adoption of illegitimate children.⁹¹ Thus, the Court concluded that the effect of the New York statute was "to [unconstitutionally] discriminate against unwed fathers . . . when their identity is known and they have manifested a significant parental interest in the child."⁹²

III. ANALYSIS OF THE LAW AFTER *CABAN V. MOHAMMED*

A. *The Consistency of Caban, Quilloin, and Stanley*

In order to analyze what rights the unwed father may have under this trilogy of Supreme Court decisions, it is suggested that initially the consistency of the holdings must be analyzed. A superficial reading of the *Caban* and *Quilloin* opinions suggests that the cases are contradictory.⁹³ In *Quilloin*, the Supreme Court upheld the application of a statute which required that only the mother must consent to the adoption of her illegitimate child,⁹⁴ while in *Caban* a similar statute was held to violate the equal protection

89. *Id.* at 392. While the Court recognized that the state's interest in providing for the best interests of illegitimate children is important, it nevertheless found that New York's statute violated the equal protection clause because the statute's gender-based discrimination did not bear a fair and substantial relationship to this interest. *Id.* at 390-92, 394.

Justices Stewart and Stevens dissented from the majority's equal protection analysis. 441 U.S. at 398-400 (Stewart, J., dissenting); 441 U.S. at 409-14 (Stevens, J., dissenting). Justice Stewart contended that the statute did not violate the equal protection clause because the discriminatory classification was not between similarly situated persons. *Id.* at 398-99 (Stewart, J., dissenting). The mother's position differs from the father's, according to Justice Stewart, in that it is the mother who carries and bears the child, as compared to the father, who in the vast majority of cases, is uninterested, unavailable, or unknown. *Id.* at 399 (Stewart, J., dissenting).

This argument was also the basis for Justice Stevens' dissent. *See id.* at 409 (Stevens, J., dissenting). His interpretation of the majority opinion was that because the reasons for the classification rule were not as strong for a small part of the disadvantaged class of unwed fathers as they were for the vast majority of the class, the statute was held to be invalid under the equal protection clause. *Id.* Justice Stevens argued that an otherwise valid classification should not be ruled invalid merely because such a classification leads to an arbitrary decision in an isolated case. *Id.* at 411-12 (Stevens, J., dissenting).

90. *Id.* at 393. *Cf. Quilloin v. Walcott*, 434 U.S. at 256 (Court refused to recognize father's right to veto adoption when he lacked established relationship with his child).

91. 441 U.S. at 393.

92. *Id.* at 394.

93. *See* notes 70, 75, 80 & 85-86 and accompanying text *supra*.

94. *See* notes 66-80 and accompanying text *supra*.

clause.⁹⁵ There are, however, critical distinctions between the facts of *Quilloin* and *Caban*.

The factual situation in *Quilloin* presented none of the substantial contacts between the unwed father and his child which the *Caban* Court considered essential to its holding.⁹⁶ In *Quilloin* the unwed father had taken no action to legitimize the child during eleven years of the child's life, and had never accepted any significant responsibility with respect to the daily care or supervision of the child.⁹⁷ From the Court's analysis of these facts, it can be concluded that only when a substantial relationship has been established between the unwed father and his illegitimate child, and only when the father has admitted paternity, will the application of a statute denying him the right to veto adoption be held unconstitutional.⁹⁸ Accordingly, it is suggested that if such substantial contacts between the unwed father and his child had existed in *Quilloin*, the application of that statute would have paralleled the application of the statute in *Caban*.⁹⁹

It is additionally suggested that *Quilloin* and *Caban* are consistent with *Stanley*, although these cases are more difficult to reconcile because the relevant holding in *Stanley* was narrow, determining only that an unwed father had the right to a fitness hearing prior to the removal of his children from his custody.¹⁰⁰ Since the *Stanley* decision did not deal with the consent issue in adoption proceedings, it is suggested that it should not be read as requiring consent in all adoption situations.¹⁰¹ Consequently, the Court's decisions in *Quilloin* and *Caban*, which grant the right to veto the adoption only to those unwed fathers who have established a relationship with their children, are not inconsistent with the holding of *Stanley*.

Moreover, it is submitted that *Quilloin* and *Caban* followed the dictum in *Stanley* which suggested that unwed fathers who claim competency and who desire to care for their children are entitled to notice¹⁰² and a hearing prior to the termination of their parental rights.¹⁰³ Since adoption proceed-

95. See notes 81-92 and accompanying text *supra*.

96. See notes 78-80 & 83-92 and accompanying text *supra*. Another factual distinction between *Quilloin* and *Caban*, was that in *Quilloin* the natural father was merely trying to block the adoption, while in *Caban*, the father actually petitioned to adopt the child himself. Compare 434 U.S. at 247 with 441 U.S. at 383.

97. 434 U.S. at 254 n.14, 256. See notes 75 & 79 and accompanying text *supra*.

98. See text accompanying note 92 *supra*.

99. See notes 89-92 and accompanying text *supra*.

100. 405 U.S. at 658. See note 21 and accompanying text *supra*.

101. 405 U.S. at 646-59. See notes 21-25 and accompanying text *supra*.

102. The extent of the *Stanley* notice requirement was not addressed by either the *Caban* or *Quilloin* Courts. See 441 U.S. at 385 n.3, 434 U.S. at 253. In *Quilloin*, the Court observed that the unwed father had not challenged the sufficiency of his notice with respect to the adoption hearings. 434 U.S. at 253. Notice was also not an issue in *Caban* because the unwed father had actually received due notice and had been a party to the adoption proceedings. 441 U.S. at 385 n.3.

103. 405 U.S. at 657 n.9. See note 25 and accompanying text *supra*. Although, technically, this is dictum in the *Stanley* opinion, there is an indication that the United States Supreme Court relied on this dictum in remanding *Rothstein v. Lutheran Social Servs.*, 405 U.S. 1051 (1972). In that case, the unwed mother had had custody of the child prior to the termination of

ings include the termination of parental rights with respect to the adopted child,¹⁰⁴ it would appear that the *Stanley* dictum would apply to such proceedings.¹⁰⁵ In circumstances such as those presented in *Quilloin*, where the unwed father had not established substantial contacts, the Court held that the adoption would be controlled by the "best interests of the child" test.¹⁰⁶ The Court, by holding that this test should apply, contemplated that a hearing would be held in order to make the "best interests" determination, and that the father could participate in this hearing. Furthermore, in *Quilloin* the unwed father's actions seeking to legitimate the child, to obtain visitation rights, and to block the adoption, were indicative of the unwed father's desire to care for the child.¹⁰⁷ Thus, it is suggested that the *Quilloin* Court followed the *Stanley* dictum by requiring a "best interests" hearing prior to the termination of the unwed father's parental rights.

Similarly, in *Caban*, where substantial contacts did exist, the unwed father was entitled to an absolute veto of the adoption, which necessarily implies that the unwed father will be notified of the adoption proceedings.¹⁰⁸ Indeed, the *Caban* facts indicate that the unwed father was *competent* to care for his children, and his efforts to care for and adopt his children are indicative of his *desire* to care for them.¹⁰⁹ It is submitted, therefore, that the hearing requirements raised by the *Stanley* dictum were also complied with in *Caban*.

B. *The Rights of the Unwed Father in Adoption Proceedings*

In dealing with the issue of whether unwed fathers have the right to veto the adoption of their children, the critical factor is whether the father has established contacts with the child.¹¹⁰ If sufficient contacts have not been established, the consent of the unwed father is not required and the controlling test will be the court's determination of what is in the best interests of the child.¹¹¹ In those situations, however, where the unwed father has es-

her parental rights and before the child was given to the adoptive parents. See note 41 *supra*. The unwed father's parental rights were also terminated, but he was given no notice of this termination nor had he consented to such a termination. See note 41 *supra*. The Supreme Court, in remanding *Rothstein*, stated that this case should be further considered in light of *Stanley*, 405 U.S. at 1051. Because *Stanley's* narrow holding was that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody," it is suggested that the Supreme Court must have relied on this dictum in deciding to remand *Rothstein*. See 405 U.S. at 658.

104. See *Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 5-6, 207 N.W.2d 826, 829 (1973) (custody of child in divorce proceeding can be granted without terminating parental rights; in adoption proceedings, granting custody requires termination of parental rights).

105. See note 25 and accompanying text *supra*.

106. See notes 74-80 and accompanying text *supra*.

107. 434 U.S. at 247, 250.

108. See notes 83-92 and accompanying text *supra*.

109. 441 U.S. at 382-83.

110. See notes 83-92 and accompanying text *supra*.

111. See notes 75-80 & 106 and accompanying text *supra*. For a discussion of the "best interests" test, see note 74 *supra*.

tablished substantial contacts with the child, the best interests test is not enough to protect the father's rights;¹¹² he and the child's mother must both consent to the adoption of their child.¹¹³

Therefore, it is suggested that those states which enacted legislation in the belief that *Stanley* required every unwed father to have the right to veto the adoption of his illegitimate child, regardless of the contacts existing between the father and the child, were too liberal in their interpretation of *Stanley*.¹¹⁴ While granting such expansive rights to unwed fathers is probably not constitutionally infirm, it is suggested that the practical result of this approach is to seriously impede state adoption procedures.¹¹⁵ It is further suggested that this impediment to the state's compelling interest of fostering an efficient adoption procedure, while not sufficient to outweigh the unwed father's rights when substantial contacts are established, is sufficient when such substantial contacts are not present.¹¹⁶

The dictum in *Stanley* suggests that unwed fathers who claim competency and a desire to care for their children are entitled to notice and a hearing prior to the termination of their parental rights.¹¹⁷ The *Stanley* Court, in setting forth this dictum, approved the Illinois notice procedures then in effect.¹¹⁸ These procedures provided for personal service when the father was known, and for service by publication when the father was unknown.¹¹⁹ Therefore, based on the Court's approval of these procedures in *Stanley*, it is submitted that those states which did not assume any affirmative obligation to notify the unwed father, unless the unwed father satisfied certain criteria, may not have extended *Stanley* far enough.¹²⁰ On the other hand, it is also submitted that statutes such as Wisconsin's and the Uniform

112. See notes 83-92 & 108 and accompanying text *supra*.

113. See notes 83-88 & 90-92 and accompanying text *supra*.

114. See notes 30-38 & 43-44 and accompanying text *supra*.

115. See *Caban v. Mohammed*, 441 U.S. at 389-91; *Adoption of Malpica-Orsini*, 36 N.Y.2d at 572-74, 331 N.E.2d at 489-91, 370 N.Y.S.2d at 516-17; *Lewis v. Lutheran Social Servs.*, 47 Wis. 2d 420, 433, 178 N.W.2d 56, 63 (1970).

116. See *Caban v. Mohammed*, 441 U.S. at 389-91.

117. See notes 25 & 102-07 and accompanying text *supra*.

118. 405 U.S. at 657 n.9. See ILL. ANN. STAT. ch. 37 §§ 704--3, -4 (Smith-Hurd 1972)(current version at ILL. ANN. STAT. ch. 37, § 704-4 (Smith-Hurd Supp. 1979)). Based on these notice procedures, the Court stated that those unwed fathers who were entitled to notice could not complain if, due to the lack of a prompt response on their part, their children were declared wards of the state. 405 U.S. at 657 n.9.

119. ILL. ANN. STAT. ch. 37, § 704-4 (Smith-Hurd 1972) (current version at ILL. ANN. STAT. ch. 37, § 704-4 (Smith-Hurd Supp. 1979)). The constructive notice procedure required that the announcement be directed to "[a]ll whom it may concern" and there was no provision to include the mother's name in the announcement. *Id.* This notice procedure is very similar to the notice required by the Illinois statute for adoption proceedings. See ILL. ANN. STAT. ch. 4, § 9.1-7 (Smith-Hurd 1975).

120. See notes 53-55 and accompanying text *supra*. It is submitted that the unwed father can do less than is required by these state statutes and still be afforded the right to notice under the *Stanley* dictum. For example, while the Minnesota statute requires substantial support of the child before the unwed father will be entitled to notice, the *Stanley* criteria of "desire to care" and "claiming competency" may be satisfied by a petition for visitation or a petition to block the adoption. Therefore, it is suggested that the *Stanley* dictum requires less affirmative action by the unwed father for his right of notice to ripen than do these particular state statutes.

Parentage Act, which provide for extraordinary notice procedures,¹²¹ are not required by the holdings of the Supreme Court. Such extensive notice procedures, it is suggested, unnecessarily delay the adoption process, thereby discouraging prospective adoptive parents.¹²² Moreover, it is suggested that compelling the mother to disclose the identity of the child's father may unconstitutionally infringe upon the mother's right to privacy.¹²³

C. *The Newborn Adoptee*

An issue specifically not addressed by the Supreme Court in *Caban* was the extent of the unwed parent's rights when the adopted child is a newborn.¹²⁴ In both *Quilloin* and *Caban*, the children involved were older children with whom an unwed parent had had the opportunity to establish sufficient contacts.¹²⁵ In the newborn situation, however, the opportunities to establish these substantial contacts are minimal.¹²⁶ Furthermore, because newborn children are the easiest to place,¹²⁷ the interests of the parents vis-à-vis those of the state may weigh differently.¹²⁸ Here the mother is readily identifiable, and, having carried the child through the pregnancy, she has established emotional and psychological ties to the newborn.¹²⁹ The father, if unknown, has not established these ties, and because any attempt to notify him would probably be ineffective,¹³⁰ a notice requirement would unnecessarily delay the placement of these children at a time when their opportunities for adoption are the greatest.¹³¹ Thus, it has been suggested

121. See notes 43-47 and accompanying text *supra*.

122. See cases cited note 115 *supra*.

123. At least one federal district court has suggested that the unwed mother may be compelled to disclose the identity of the father when receiving welfare funds. *Doe v. Norton*, 365 F. Supp. 65, 69, 77-78, 84 (D. Conn. 1973), *vacated sub nom. Roe v. Norton*, 422 U.S. 391 (1975) (*vacated and remanded for consideration with respect to new social security requirements*). However, because the district court opinion was vacated without any Supreme Court illumination on the privacy issue, the resolution of this issue may still be in doubt. See *Roe v. Norton*, 422 U.S. 391, 392-93 (1975). One commentator, in discussing *Norton*, has suggested that compelling the mother to identify the father in the context of whether the mother should be deprived of government funds, is different from the situation where the mother's refusal to identify the father may harm the child's opportunities for adoption. See Barron, *supra* note 7, at 541. Thus, it is suggested that, in the adoption situation, the mother's right to privacy may militate against compelling her to identify the father. See *id.* at 542.

124. 441 U.S. at 392 n.11. Because the issue was not before it, the *Caban* Court expressed no view as to whether the distinction between newborn adoptees and older adoptees would justify more stringent statutory requirements for unwed fathers. *Id.*

125. See notes 67-68 & 84 and accompanying text *supra*.

126. See 441 U.S. at 392.

127. See *id.* at 404 & n.7 (Stevens, J., dissenting).

128. *Id.* at 403-08 (Stevens, J., dissenting).

129. *Id.* at 404-05 & n.10 (Stevens, J., dissenting).

130. See Barron, *supra* note 7, at 538.

131. *Id.* at 407 (Stevens, J., dissenting). See Barron, *supra* note 7, at 538.

that a different test should be established for the newborn adoptee situation.¹³²

It is submitted, however, that *Caban's* "substantial contacts" test can be successfully applied to many newborn adoptee situations in the same manner as it is applied in cases involving older children.¹³³ Accordingly, if the unwed father, upon learning of the unwed mother's pregnancy,¹³⁴ provides financial assistance to her during the pregnancy, then arguably the substantial contacts required by *Caban* are present.¹³⁵ In this situation, it is submitted that the father is identifiable and has established with the child the maximum possible ties which can be accomplished prior to birth.¹³⁶ Therefore, the unwed father's right to veto any adoption has vested.¹³⁷ Since *Caban* can be logically applied in this situation, it is suggested that the "substantial contacts" analysis may be used as the controlling test in such a case.¹³⁸

132. See 441 U.S. 392 & n.11. Justice Stevens, dissenting in *Caban*, spoke strongly on this issue of whether the unwed father's consent should be required for the adoption of a newborn. *Id.* at 403-10 (Stevens, J., dissenting). To indicate the substantial differences which exist between an unwed mother and an unwed father, Justice Stevens began by stating that since the mother carries the child, only she has the constitutional right to decide whether to bear it or not. *Id.* at 404-05 (Stevens, J., dissenting). The mother, according to Justice Stevens, may be the only person who knows who sired the child, and may even withhold this information from the father. *Id.* Moreover, from conception through infancy, it is the mother who will be faced with the day-to-day decisions on how to best care for the child, while the father may not even be known or locatable. *Id.* at 405. These natural differences between the unmarried father and unmarried mother make it most probable that it will be the mother who has custody of the child. *Id.* Justice Stevens therefore concluded that at birth and immediately thereafter, the differences between the unwed father and the unwed mother support different statutory treatment. *Id.* at 406-07 (Stevens, J., dissenting).

133. See notes 83-92 and accompanying text *supra*.

134. A Michigan statute attempts to ensure protection for the unwed father even before his illegitimate child is born. See MICH. COMP. LAWS ANN. § 710.34 (Supp. 1979). This section provides:

(1) In order to provide due notice at the earliest possible time to a putative father who may have an interest in the custody of an expected child or in the mother's intended release of an expected child for adoption of the expected child, and in order to facilitate early placement of a child for adoption, a woman pregnant out of wedlock may file . . . an *ex parte* petition which evidences her interest to release her expected child for adoption . . . which indicates the approximate date and location of conception and the expected date of her confinement, which alleges that a particular person is the putative father of her expected child, and which request the court to notify the putative father about his rights to file a notice of interest to claim paternity. . . .

(2) A notice of interest to release or consent shall:

(a) Indicate the approximate date and location of conception of the child and expected date of confinement of the mother.

(b) Inform the putative father of his rights . . . to file a notice of intent to claim paternity before the birth of the child.

Id. § 710.34(1)(2).

135. See notes 83-92 and accompanying text *supra*.

136. See notes 83-92 and accompanying text *supra*.

137. See notes 83-92 and accompanying text *supra*.

138. The fact that an unwed father may be able to establish substantial contacts, even though the child is adopted immediately after birth, is suggested in the Michigan Adoption Statute which provides:

Caban cannot, however, be extended to the more troublesome problem which exists when the unwed mother, who wishes to place her child for immediate adoption, cannot or will not identify the father of the child, but the father, if notified, would contribute to the costs incurred due to the pregnancy. It is submitted that a bifurcated statute, with provisions specifically granting the unwed mother greater rights than the unwed father in this type of situation, is required to sufficiently resolve the problem.¹³⁹

In analyzing the validity of such a statute, the court would first have to consider the fact that newborns are the easiest to place and that the state, therefore, has a greater interest in efficiently placing them.¹⁴⁰ Additionally, the court should recognize that the mother, who has carried the child, has established definite emotional and psychological ties with the newborn.¹⁴¹ The father, on the other hand, has not established any of these ties with the child, partly because he has made himself unavailable, and partly because of the innate biological differences between a mother and a father.¹⁴² Any attempt to establish pre-birth "substantial contacts"¹⁴³ by notifying the father would probably be ineffective because to use the mother's name in the published notice might infringe upon her constitutional right to privacy.¹⁴⁴ Therefore, in this situation, the mother's ties with the child, coupled with the compelling state interest in efficiently placing newborns, would justify drawing a distinction between unwed mothers and unwed fathers.¹⁴⁵ It is submitted that such a distinction will support the application of a bifurcated statute which would grant the unwed father fewer rights with respect to his child in this type of case.¹⁴⁶

If the putative father is one who has established a custodial relationship with the child, or has provided support or care for the mother during pregnancy or for either mother or child after the child's birth . . . the rights of the putative father shall not be terminated except by proceedings in accordance with section 2 of chapter 12a.

MICH. COMP. LAWS ANN. § 710.39 (Supp. 1979) (emphasis added). If the father in this situation fails to respond to the notice which the statute affords him, *see* note 134 *supra*, the adoption hearing could be held immediately at birth and his rights could be properly terminated. *See* MICH. COMP. LAWS ANN. § 710.34(2)(d).

139. For the policy reasons underlying this distinction, *see* notes 127-32 and accompanying text *supra*.

140. *See* notes 127-28 and accompanying text *supra*.

141. *See* note 129 and accompanying text *supra*.

142. *See* notes 130-31 and accompanying text *supra*.

143. For an explanation of how an unwed father can establish pre-birth "substantial contacts," *see* notes 133-38 and accompanying text *supra*.

144. *See* notes 123 & 130 and accompanying text *supra*.

145. 441 U.S. at 403-08 (Stevens, J., dissenting).

146. *See* note 132 and accompanying text *supra*. Although the dictum in *Stanley* would not require the unwed father to be notified in this situation, *see* note 25 and accompanying text *supra*, it is suggested that the bifurcated statute should provide the natural father with the right to be notified of the adoption of his newborn. The granting of such a right is justifiable in the context of his hypothetical situation because a minimum attempt should be made to involve the unwed father since his lack of contact with the mother may not be due entirely to his own neglect. This notice would be sufficient so long as it is in accordance with the appropriate notice statute, such that the unwed father, in this situation, will not be entitled to any extraordinary notice procedures. *See* notes 121-23 and accompanying text *supra*. If the notice is successful, the father may attend the proceedings and comment on what he thinks would be in the child's

IV. THE NEED FOR NEW LEGISLATION IN PENNSYLVANIA

In the 1976 case of *Adoption of Walker*,¹⁴⁷ the Supreme Court of Pennsylvania declared unconstitutional a portion of the Pennsylvania Adoption Act which provided that "[i]n the case of an illegitimate child, the consent of the mother only shall be necessary [for the child's adoption]." ¹⁴⁸ Since *Walker*, the Pennsylvania legislature has provided no additional statutory guidance concerning the unwed father's right to veto the adoption of his child. It is suggested that in light of the diverse state interpretations of the *Stanley* decision,¹⁴⁹ which until 1978 was the only United States Supreme Court guidance in this area, the Pennsylvania legislature may have been justified in its reluctance to enact a new statute. In the wake of the *Caban* and *Quilloin* decisions, however, it is submitted that the legislature now has sufficient guidelines with which to enact a statute that would be in accord with the Federal Constitution.¹⁵⁰

In redrafting this section of the Adoption Act, it is suggested that the following guidelines would satisfy the minimum requirements of the Federal Constitution¹⁵¹ relating to the unwed father's right to veto the adoption of his child: 1) when the unwed father has established substantial contacts with

best interests, but he will be given no right to veto the adoption of his child. Regardless of whether the notice is successful, it is submitted that the bifurcated statute may also include more stringent requirements dealing with the unwed father's acknowledgment of paternity and a stricter definition of abandonment such that efficient adoption of the newborn would be facilitated. See 441 U.S. at 392 n.11.

147. 468 Pa. 165, 360 A.2d 603 (1976).

148. *Id.* at 171, 360 A.2d at 606. See PA. STAT. ANN. tit. 1, § 411 (Purdon Supp. 1979). In *Walker*, the unwed parents were living together when their child was born. 468 Pa. at 167, 360 A.2d at 604. Subsequently, the parents separated and the mother married another man. *Id.* Her husband then filed a petition to adopt the child, and an adoption hearing was held without notifying the unwed father. *Id.* at 168, 360 A.2d at 604. The adoption was permitted by the court even though the natural father had not consented. *Id.* The unwed father then sought to have the adoption decree reopened. *Id.* In denying his petition, the Orphan's Court held that under Pennsylvania law, the unwed father was not entitled to notice of the adoption. *Id.* at 168-69 & n.1, 360 A.2d at 605 & n.1. See also PA. STAT. ANN. tit. 1, § 411 (Purdon Supp. 1979).

On appeal, the Pennsylvania Supreme Court stated that the effect of the Pennsylvania Adoption Act was that "Unwed fathers have no rights . . . , while unwed mothers have all the rights of married parents." 468 Pa. at 170-71, 360 A.2d at 605. Such a distinction, the court concluded, violated Pennsylvania's equal rights amendment because the only differences between unwed fathers and unwed mothers are those based upon sex. *Id.* For Pennsylvania's equal rights amendment, see PA. CONST. art. I, § 28. The court also concluded that the Federal Constitution would require the same result. *Id.* at 171 n.11, 360 A.2d at 606 n.11. Citing *Stanley*, the court stated that even though factual differences existed between that case and *Walker*, those distinctions would not compel a contrary result in the instant case. *Id.*

149. See notes 26-65 and accompanying text *supra*.

150. See notes 110-13 & 117-23 and accompanying text *supra*.

151. Because *Walker* was decided on the basis of the Pennsylvania Constitution's equal rights amendment, it must be emphasized that these proposed guidelines are considered to be the minimum requirements necessary to meet federal constitutional standards. See note 148 *supra*. It should be noted that the Pennsylvania Supreme Court remains free to establish stricter standards for compliance with the state equal rights amendment. For a discussion of the Pennsylvania equal rights amendment and its impact on domestic relations law, see 15 DUQ. L. REV. 757 (1977).

the child, and has admitted paternity, then his consent would be a prerequisite to the adoption;¹⁵² 2) when the unwed father has not established substantial contacts, then the state need only conduct a "best interests of the child" hearing in which the father may participate, but only to offer evidence as to what is in the child's best interests;¹⁵³ and 3) when the child is a newborn, a bifurcated statute may give the father fewer rights in those cases where the mother cannot or will not identify the father, whereas in those situations in which the father is identified and notified, the father's rights will be determined by the *Caban* and *Quilloin* standards.¹⁵⁴

Additionally, it is submitted that Pennsylvania's statutory provision regarding notice must be revised.¹⁵⁵ Section 421 of the Adoption Act provides that notice of an adoption proceeding need only be given to those persons whose consent to the adoption is required but not yet obtained.¹⁵⁶ Under the United States Supreme Court's analysis, this notice is probably insufficient to meet minimum federal constitutional standards.¹⁵⁷ Even if the consent of the unwed father is not necessary, he is still required to be notified of any proceeding for terminating his parental rights in order to give him the opportunity to offer evidence of what is in the best interests of his child.¹⁵⁸ If the unwed father is known, this notice should be personal.¹⁵⁹ If his identity is unknown, constructive notice by publication is satisfactory, and the publication need not reveal the mother's name or include any extraordinary provisions merely because it is constructive notice.¹⁶⁰ Thus, it is suggested that now, in light of *Stanley*, *Quilloin*, and *Caban*, the Pennsylvania legislature has sufficient judicial guidance to effectively draft an adoption statute recognizing the unwed father's federal constitutional right to notice and, when substantial contacts have been established between the unwed father and his child, the right to veto the adoption.¹⁶¹

152. See notes 83-92, 98 & 108 and accompanying text *supra*.

153. See note 106 and accompanying text *supra*.

154. See notes 124-46 and accompanying text *supra*.

155. See PA. STAT. ANN. tit. 1, § 421 (Purdon Supp. 1979).

156. *Id.*

157. See notes 117-20 and accompanying text *supra*.

158. See notes 106-07 and accompanying text *supra*.

159. See notes 117-20 and accompanying text *supra*.

160. See note 119 and accompanying text *supra*.

161. See notes 110-46 and accompanying text *supra*. It is suggested that the requirements established by the Supreme Court in these cases have been accurately addressed by the Michigan Adoption statute. See MICH. COMP. LAWS ANN. §§ 710.31-44 (Supp. 1979). For portions of this statute, see notes 134 & 138 *supra*. Additionally, the Michigan statute has provided adequate statutory language to deal with the peculiar problems that arise when the unwed father seeks to establish substantial contacts with his newborn child. See MICH. COMP. LAWS ANN. §§ 710.34, .36, .39 (Supp. 1979); note 138 *supra*. For a discussion of the newborn adoptee situation, see notes 124-46 and accompanying text *supra*.

V. CONCLUSION

This comment has analyzed the holdings of *Stanley*, *Quilloin*, and *Caban*, and has suggested that these cases have established specific rights for the unwed father in adoption proceedings.¹⁶² It has also been suggested that these rights, as they have developed from *Stanley* through *Caban*, are not as broad or as narrow as originally interpreted by some state legislatures.¹⁶³ Moreover, since *Quilloin* and *Caban* have enunciated specific rights for the unwed father,¹⁶⁴ it is submitted that it is now time for the Pennsylvania legislature to take definitive action and enact a new adoption statute within the guidelines of these Supreme Court decisions.¹⁶⁵

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162. See notes 110-46 and accompanying text *supra*.

163. See notes 114-23 and accompanying text *supra*.

164. See notes 66-92 & 110-46 and accompanying text *supra*.

165. See notes 151-61 and accompanying text *supra*.