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# Putative Fathers and Parental Interests: A Search for Protection

STACY LYNN HILL\*

The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.<sup>1</sup>

## INTRODUCTION

For the first time in five years, the United States Supreme Court, in the 1988 term, heard a case which challenged the constitutionality of the statutory treatment of putative fathers<sup>2</sup> and the grounds upon which their parental rights may be terminated.<sup>3</sup> In *McNamara v. County of San Diego Department of Social Services*,<sup>4</sup> Edward McNamara challenged a California statute<sup>5</sup> which permitted a trial court to terminate his parental rights despite the court's findings that he would be a fit parent, and that he had manifested significant interest in obtaining custody upon learning of his child's birth.<sup>6</sup> Although he tried everything in his power to obtain custody, and by all accounts would have been a good parent, Edward only saw his daughter once before she was placed in an adoptive home in accordance with her mother's request.<sup>7</sup> While the Supreme Court eventually dismissed *McNamara* for want of a properly presented federal question,<sup>8</sup> the case provides an

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1. *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). The United States Supreme Court did not abandon its position on gender roles when it entered the twentieth century. As late as the 1960s the Court articulated a view of woman as sole keeper of the familial flame and caretaker of both children and home: "Despite the enlightened emancipation of wom[a]n . . . [she] is still regarded as the center of home and family life." *Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961).

2. The term "putative father" refers to "[t]he alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979).

3. The *Supreme Court Preview* of the *American Bar Association Journal* stated that the case, "the first of its kind to be considered by the Court, hinge[d] on whether terminating the parental rights of an unwed father who is otherwise fit to be a parent violates his right to equal protection under the laws." Neal, *Supreme Court Preview*, A.B.A. J., Dec. 1, 1988, at 36.

4. 488 U.S. 152 (1988).

5. CAL. CIVIL CODE § 7017 (West 1983).

6. *In re Baby Girl M*, 37 Cal. 3d 65, 68, 688 P.2d 918, 920, 207 Cal. Rptr. 309, 311 (1984), cert. dismissed sub nom. *McNamara*, 488 U.S. at 152.

7. *Id.*

8. 488 U.S. at 152.

opportunity to evaluate the Court's stance on the parental rights of putative fathers.<sup>9</sup> In dismissing *McNamara*, the Court avoided what would have been the first examination of the constitutional protection of the relationship between a putative father and his newborn child.<sup>10</sup>

Beginning with *Stanley v. Illinois*<sup>11</sup> and ending most recently with *Lehr v. Robertson*,<sup>12</sup> the Supreme Court decided a series of cases which addresses the constitutional rights of putative fathers.<sup>13</sup> Whereas the parent-child relationship found in the context of marriage or divorce has long received constitutional protection, the scope of this protection has not been expanded to include putative fathers.<sup>14</sup> Instead, the Court has almost entirely subordinated the interests of putative fathers to those of mothers and legally recognized fathers.<sup>15</sup> While putative fathers have been given a threshold right to receive notice of legal proceedings, they are not guaranteed the same veto power over adoption held by the other "parents."<sup>16</sup> Their ability to prevent the adoption of their children and the loss of their parental rights directly corresponds to the strength of the parent-child relationship.<sup>17</sup> This poses a significant problem for putative fathers who were somehow deprived of all opportunities to establish meaningful relationships with their children.

One reason for the Court's reluctance to grant putative fathers equal footing with other "parents" is its perception of "parenthood" as a formalistic pattern of relations based in the traditional family unit rather than the biological bond between father and child.<sup>18</sup> This notion of "par-

9. This Note addresses situations in which the mother of an illegitimate child either relinquishes her parental rights for the child's adoption by a third party; or her parental rights are terminated by a court, and the putative father desires custody of the child; or the mother of an illegitimate child subsequently marries someone other than the putative father and wishes to terminate the putative father's rights so that her husband can adopt the child.

10. See *Caban v. Mohammed*, 441 U.S. 380, 392 & n.11 (1979).

11. 405 U.S. 645 (1972).

12. 463 U.S. 248 (1983).

13. The Court in *Lehr* identified the relevant cases as *Stanley*, 405 U.S. at 645, *Quilloin v. Walcott*, 434 U.S. 246 (1978) and *Caban*, 441 U.S. at 380. *Lehr*, 463 U.S. at 258.

14. See *May v. Anderson*, 345 U.S. 528 (1953); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *infra* note 44.

15. See *infra* notes 23-147 and accompanying text.

16. See *Caban*, 441 U.S. at 392 ("[N]othing in the Equal Protection Clause precludes the State from withholding from [the putative father] the privilege of vetoing the adoption of [his] child.").

17. See *Lehr*, 463 U.S. at 257, 261-62; *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2352 (1989) (Brennan, J., dissenting) ("[A]lthough 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.").

18. See *Lehr*, 463 U.S. at 256-57 ("The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society."). This perception continues despite the fact that statistics point to ever-increasing rates of illegitimate births, single-parent households and divorce. See

enthood" includes the recognition and acceptance of the duties and responsibilities found in traditional family units. Accordingly, the Court has granted constitutional protection only to those putative fathers who have established an actual relationship with their children.<sup>19</sup> This places an almost insurmountable burden on an interested putative father who never had an opportunity to develop a relationship with his child.

Because the Supreme Court is reluctant if not opposed to expanding the constitutional rights of putative fathers,<sup>20</sup> states must protect putative fathers' interests with statutory provisions. Under current Supreme Court doctrine, states have almost complete discretion to determine the amount of notice a putative father must receive of proceedings held to terminate his parental rights, and to decide whether a putative father's consent in an adoption proceeding will be necessary.<sup>21</sup> In the past, states have used this broad latitude to facilitate termination of the parental rights of putative fathers. States appear to have relied on the stereotypical perception of the putative father as irresponsible, uninterested and absent to justify retention of statutory classifications that give putative fathers few rights.<sup>22</sup> However, by revising their statutes to give more notice and consent rights, states can eliminate unjustifiable gender-based discrimination and effectively balance the interests of all parties. It is possible to strengthen the putative father's rights without jeopardizing either the state's or the mother's interests. In doing so, states can promote several beneficial goals: preserve, where

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D. BOGUE, THE POPULATION OF THE UNITED STATES—HISTORICAL TRENDS AND FUTURE PROJECTIONS 276 (1985) ("Since 1940 the out-of-wedlock birth ratio has risen fivefold" and "[a]s of 1981 one child in six in the United States was born out of wedlock."); *id.* at 184-88 ("The number of divorces in 1980 was 68 percent greater than in 1970, and the general divorce rate increased by 52 percent."). There has been a societal revolution in the past forty to fifty years which has not been reflected in the Court's decisions. While the Court has struck down statutes which penalize a child solely on the basis of his illegitimacy, *see, e.g.*, *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968), the Court has not incorporated changes in societal views vis-à-vis co-habitation, extra-marital relationships and single parent-by-choice households to remove legal barriers faced by the father of such a child. It can no longer be said with certainty that a putative father obtains such a position by choice. As society evolves and acceptance of single parenthood grows, it becomes less acceptable to penalize putative fathers for situations they may be unable to change.

19. *See infra* notes 98-130 and accompanying text.

20. *See Michael H.*, 109 S. Ct. at 2341-42 (The Court "attempt[s] to limit and guide interpretation" of the due process clause in areas which include the constitutional protection of parental rights, by requiring that "the asserted liberty interest be rooted in history and tradition."); *see also* Raab, *Lehr v. Robertson: Unwed Fathers and Adoption—How Much Process is Due?*, 7 HARV. WOMEN'S L.J. 265, 272 (1984) (the result in *Lehr* "generated an inequitable result which was not dictated by earlier decisions on unwed fathers' rights.").

21. *See infra* notes 98-130 and accompanying text.

22. *See Bartlett, Re-Expressing Parenthood*, 98 YALE L.J. 293, 316-17 & nn.97-100 (1988) (a putative father faces statutes which are "rigorous, facilitating the ability of the unmarried mother to place her child for adoption."); *Lehr*, 463 U.S. at 257 ("[S]tate laws almost universally express an appropriate preference for the formal family.").

possible, the integrity of the biological parent-child relationship, avoid challenges to adoption decrees by putative fathers who have been denied notice and avoid cases such as *McNamara*.

In order to understand why the Court has subordinated the putative father's role, it is necessary to examine the Court's perception of "parenthood." Part I of this Note will examine those cases which form the foundation of the Court's position and indicate how this position fails to protect the interests of putative fathers. Part II of this Note will offer recommendations for statutory provisions which will better serve the interests of all parties involved. States cannot justify statutory schemes that, instead of creating a balance between conflicting interests, rely on gender stereotypes to deny the putative father a role in his child's life.

### I. "PARENTHOOD," PUTATIVE FATHERS AND THE SUPREME COURT

Throughout history putative fathers have been relegated to an inferior parental status which has received little, if any, legal recognition. At common law, a putative father's biological relationship with his child provided him with virtually no legal rights.<sup>23</sup> At the beginning of the 1990s little has changed for putative fathers. To date, the Supreme Court has firmly established that the mere existence of a biological link between a putative father and his child does not, by itself, warrant strenuous constitutional protection.<sup>24</sup> While a putative father has a threshold due process right to receive notice of legal proceedings before his parental rights are terminated, this does not require actual notice but only a reasonable attempt in light of the circumstances.<sup>25</sup> Once notice is given, the putative father may be given the opportunity to argue against the termination of his rights. However, there is no requirement that he be given the same veto power as the mother and legally recognized father.<sup>26</sup>

The cases which have defined the Court's position in this area are *Stanley v. Illinois*,<sup>27</sup> *Quilloin v. Walcott*,<sup>28</sup> *Caban v. Mohammed*<sup>29</sup> and *Lehr v. Robertson*.<sup>30</sup> By examining these cases, analyzing both the language of the opinions and the legal conclusions, this Note will show that the Supreme

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23. See Comment, *Delineation of the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290, 294-98 (1985); Note, *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 4 WASH. U.L.Q. 1029, 1029 n.1 (1979) [hereinafter Note, *Analytic Survey*].

24. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) ("[T]he mere existence of a biological link does not merit equivalent . . . constitutional protection.").

25. *Id.* at 265.

26. See *supra* note 16 and accompanying text.

27. 405 U.S. 645 (1972).

28. 434 U.S. 246 (1978).

29. 441 U.S. 380 (1979).

30. 463 U.S. at 248.

Court's doctrine rests on a stereotypical perception of putative fathers and as such fails to protect their legitimate interests. The Court has chosen to base its philosophy of "parenthood" on traits found in traditional family-based units instead of in the biological ties between a parent and child.<sup>31</sup> The Court has determined that gender-based classifications in statutory schemes concerned with the adoption of illegitimate children do not violate equal protection principles when the classifications bear a substantial relation to the state's articulated interests.<sup>32</sup> Thus, a statute which does not require a putative father's consent to the adoption of his child, but which requires the consent of other categories of "parents," will withstand constitutional scrutiny if the classification is based on real differences between the various "parents" which are important to the state's interests.<sup>33</sup>

### A. Stanley v. Illinois

The Supreme Court first addressed the due process and equal protection rights of putative fathers in *Stanley v. Illinois*<sup>34</sup> where the Court held that putative fathers do enjoy at least minimal parental rights. Some commentators viewed certain dicta in *Stanley* as a sign that the Court "might be adopting a major change in attitude toward informal marriages and that all unwed fathers might thereafter have all the rights of married fathers."<sup>35</sup> While this interpretation of *Stanley* proved to be far too expansive in light of later decisions, the Court did recognize the existence of some rights held by a putative father.<sup>36</sup>

Joan and Peter Stanley, while not legally married, lived together as husband and wife "intermittently" for eighteen years and had three children

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31. See *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2342 (1989) (the Court characterizes the rationale of *Stanley*, *Quilloin*, *Caban* and *Lehr* as "rest[ing] . . . upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." The "unitary family" is "typified, of course, by the marital family, but also includes the household of unmarried parents and their children." *Id.* at 2342 n.3).

32. See *infra* notes 123-29 and accompanying text. For a discussion of the state's interests, see *In re Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975).

33. See *Lehr*, 463 U.S. at 265-68.

34. 405 U.S. at 645.

35. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 497 (1983) (quoting dicta, "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony." *Stanley*, 405 U.S. at 651).

36. We conclude that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.

*Stanley*, 405 U.S. at 649.

during their relationship.<sup>37</sup> When Joan Stanley died, the children were declared wards of the state, removed from their father's care, and placed with court-appointed guardians.<sup>38</sup> Stanley argued that he had never been found to be an unfit parent, and because married fathers and unwed mothers could not lose their parental rights absent such a finding, he had been deprived of the equal protection of the law.<sup>39</sup>

The Supreme Court confronted the question of whether "a presumption that distinguishes and burdens all unwed fathers [is] constitutionally repugnant."<sup>40</sup> It held that Stanley was "entitled to a hearing on his fitness as a parent before his children were taken from him"<sup>41</sup> as a matter of due process. The Court also held that as a result of its decision requiring that all parents be afforded a hearing before the termination of their parental rights, it was a violation of equal protection laws to deny Stanley a "fitness" hearing while extending such a right to other classes of parents.<sup>42</sup>

In considering the due process argument, the Court did not challenge the parties' legitimate interests, only the method used to achieve them. The Court recognized Stanley's interest in his children as "cognizable and substantial,"<sup>43</sup> and noted that constitutional protection of the family had been extended to "relationships unlegitimized by a marriage ceremony."<sup>44</sup> It also recognized the legitimacy of the state's interest in protecting "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community [and in] strengthen[ing] the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety" require it.<sup>45</sup> While the Court agreed with the state

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37. *Id.* at 646.

38. Under Illinois law, illegitimate children became wards of the State upon the death of the mother. *Id.*

39. *Id.* The definition attributed to the term "parent" by the state did not include putative fathers. It did, however, include both parents of a legitimate child, adoptive parents, and the natural mother of an illegitimate child. *Id.* at 650. While that statutorily-defined group of persons could not be deprived of their children without proof of unfitness, "an unwed father [was] uniquely subject to the more simplistic dependency proceeding . . . [and] the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it [was] presumed at law." *Id.*

40. *Id.* at 649.

41. *Id.*

42. *Id.* The Court noted that if Stanley were a fit parent it would be contrary to the state's self-articulated interests to remove his children from his custody. Thus, it would be in the state's own "best interests" to grant Stanley a neglect proceeding to determine his fitness as a parent. *Id.* at 652-53.

43. *Id.* at 652.

44. *Id.* at 651. See *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968); *Glonn v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 75-76 (1968). The family unit has found protection in the due process clause, see *Meyer v. Nebraska*, 262 U.S. 390 (1923), the equal protection clause of the fourteenth amendment, see *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and the ninth amendment, see generally *Griswold v. Connecticut*, 381 U.S. 479 (1965).

45. *Stanley*, 405 U.S. at 652 (quoting 1965 Ill. Laws 2585 (repealed)).

that some putative fathers may be unfit parents, it rejected the state's presumption of unfitness and noted that "some [putative fathers] are wholly suited to have custody of their children."<sup>46</sup> If Stanley had been given the opportunity to demonstrate his fitness as a parent, the state's interests would have been furthered by allowing the children to stay with him. The Court concluded that "[t]he State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father,"<sup>47</sup> and therefore Stanley should have been granted a hearing to determine his fitness in order to preserve his due process rights.

Although the Court found some parental interests for putative fathers, it did not recognize an independent interest based solely on the biological relationship between a putative father and his children. Instead, the Court merely recognized the existence of a *de facto* family unit and extended some measure of due process protection to a previously established relationship.<sup>48</sup> The Court emphasized its reliance on parental duty and responsibility by characterizing Stanley's interest as keeping "the children he has sired and raised,"<sup>49</sup> and preventing the "dismemberment of his family."<sup>50</sup> Noting that the integrity of the family unit has found constitutional protection even without the legitimization of marriage, the Court explained that "familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit."<sup>51</sup> Regrettably, however, the Court ignored Stanley's interest in preserving the biological relationship with his children.<sup>52</sup>

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46. *Id.* at 654.

47. *Id.* at 657-58.

48. This recognition of a procedural due process right was articulated in the oft-cited, infamous "Footnote 9." The footnote reads, in pertinent part: "Extending opportunity for hearing to unwed fathers who *desire and claim competence to care* for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined." *Id.* at 657 n.9 (emphasis added); see Barron, *Notice to the Unwed Fathers and Termination of Parental Rights: Implementing Stanley v. Illinois*, 9 *FAM. L.Q.* 527, 528 (1975).

49. *Stanley*, 405 U.S. at 651.

50. *Id.* at 658.

51. *Id.* at 652.

52. The dissent did not recognize the importance of the biological bond and, additionally, Chief Justice Burger largely discounted the *de facto* family relationship enjoyed by Stanley and his children. He noted that Stanley had turned his children over to another couple shortly after their mother's death and took no action to become their legal guardian. Instead, he asked only that "legal responsibility [for his children] be given to no one else." *Id.* at 667 (Burger, C.J., dissenting). Stanley "seemed . . . to be concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children." *Id.* In addition, Stanley failed to avail himself of the legal means of securing custody of his children and more specifically, Joan and Peter Stanley had not been legally married. *Id.* at 666-67.

The Chief Justice noted that marriage is a relationship of roles and responsibilities, and that "it is in law an essentially *contractual* relationship, the parties to which have *legally enforceable rights and duties*, with respect to both each other and to any children born to them." *Id.* at



### B. Quilloin v. Walcott

When the Court decided *Quilloin v. Walcott*<sup>53</sup> six years later, it addressed the question left unanswered in *Stanley*: “[T]he degree of protection a State must afford to the rights of an unwed father in a situation, such as presented here, in which the countervailing interests are more substantial.”<sup>54</sup> The Court in *Stanley* had balanced Stanley’s interests with those of the state finding support for his claim in the long-term relationship enjoyed with his child.<sup>55</sup> Quilloin, however, did not enjoy the same type of relationship and this arguably diminished the strength of his claim for the Court.

Ardell Walcott and Leon Quilloin were never married nor did they live together as husband and wife.<sup>56</sup> The couple’s child remained in Walcott’s care his entire life.<sup>57</sup> Eventually, Walcott married another man and consented to her husband’s adoption of her son.<sup>58</sup> Quilloin attempted to prevent the adoption and secure visitation rights, although he did not seek custody of his son nor did he object to his son living with Walcott and her husband.<sup>59</sup> The trial court granted the adoption petition over Quilloin’s objections and without finding Quilloin to be an unfit parent.<sup>60</sup> Quilloin appealed and argued that the application of the “best interests of the child” standard violated his due process rights.<sup>61</sup> He also argued that as a matter of equal protection, he should have the same veto power over the adoption of his

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663 (emphasis added). Absent a marital relationship, the Chief Justice characterized the differences between parents as the fact that unwed mothers are easily identifiable whereas putative fathers “are not traditionally quite so easy to identify and locate,” *id.* at 665, they are either disinterested or unaware of their status as such, and “the biological role of the mother in carrying and nursing an infant creates stronger bonds . . . than the bonds resulting from the male’s often casual encounter.” *Id.* Support for this position was taken from “[c]enturies of human experience.” *Id.* at 666.

Thus, the Chief Justice believed that a distinction between putative fathers and other “parents” is justified in light of the innate differences between the two types of parents. This position presupposes that only persons within a legally recognized relationship possess the requisite commitment and dedication to partner and child to warrant full constitutional protection. He generalized putative fathers as being men who “either deny all responsibility or exhibit no interest in the child or its welfare.” *Id.* at 665. This characterization of the male’s interest or participation in the conception of his child is an additional indication of the value judgment members of the Court have made in the comparison of the parental roles.

53. 434 U.S. 246 (1978).

54. *Id.* at 248. “[U]nlike the father in *Stanley*, appellant had never been a *de facto* member of the child’s family unit.” *Id.* at 253.

55. *Stanley*, 405 U.S. at 652-53, 657-58.

56. *Quilloin*, 434 U.S. at 247.

57. *Id.* Although Quilloin never took steps to legitimate his son, he was listed as the father on the child’s birth certificate. *Id.* at 249 n.6.

58. *Id.* at 247.

59. *Id.*

60. *Id.*

61. *Id.* at 250-51.

child as unwed mothers, married parents and divorced parents.<sup>62</sup> The Georgia Supreme Court, however, upheld the petition relying generally on the state policy of encouraging the raising of children in a family setting—an interest which, the state argued, might be substantially hindered if adoptions could not be granted absent the putative father's consent.<sup>63</sup>

The due process issue in *Quilloin* was whether the putative father's interests were adequately protected by a statutory scheme which allowed his interests to be terminated by employing a "best interests of the child" standard.<sup>64</sup> The Court held that the application of the standard did not constitute a violation of Quilloin's due process rights in this case and under these circumstances.<sup>65</sup> The Court admitted that a violation would occur if the statutory scheme attempted to "force the breakup of a natural family, over the objections 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."<sup>66</sup> Quilloin, however, was not in that position. He had never "had, or sought, actual or legal custody of his child,"<sup>67</sup> nor was his son being placed with an unrelated third party. The adoption decree simply gave legal recognition to a de facto family unit which had existed for almost ten years.<sup>68</sup>

The Court also examined and rejected Quilloin's equal protection argument. Quilloin contended that "his authority to veto an adoption [should] be measured by the same standard that would have been applied to a married father."<sup>69</sup> The Court, however, found that as a putative father, his interests were "readily distinguishable" from those of a wed father and the state was within its power to provide Quilloin with a lesser veto power.<sup>70</sup> The Court compared a wed father and a putative father and noted the

62. Under Georgia law, for a putative father to obtain the same veto power over the adoption of his children as other types of parents, he first had to legitimate his children by either marrying the mother and legitimating the children or by obtaining a court order. *Id.* at 249.

63. *Id.* at 252. The court emphasized that the state's policy interest had added weight because Walcott sought the adoption in order to give legal recognition to a de facto family unit which had never included the putative father. *Id.* The court reasoned that had the adoption been blocked, the child would have been removed from a traditional family setting, thus acting in opposition to the state's own interests. *Id.*

64. *Id.* at 254. For a discussion of the "best interests of the child" standard and its application in these cases, see Weston, *Putative Fathers' Rights to Custody—A Rocky Road at Best*, 10 WHITTIER L. REV. 683, 697-700 (1989).

65. *Quilloin*, 434 U.S. at 254.

66. *Id.* at 255 (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment)).

67. *Id.* (emphasis added).

68. However, the Court left unanswered the question of what might be required in a third party placement, stating only that in Quilloin's situation the "best interests of the child" standard was constitutionally applied. *Id.*

69. *Id.* at 255-56.

70. *Id.* at 256.

differences between the two. The Court found that the marital relationship itself endowed the wed father with those qualities and responsibilities which set him apart from the putative father.<sup>71</sup> In particular, the Court noted that unlike a wed father, Quilloin had "never exercised *actual or legal custody* over his child, and thus ha[d] never shouldered any significant *responsibility* with respect to the *daily supervision, education, protection, or care of the child*."<sup>72</sup> Thus, for the Court, the threshold question is whether a substantial relational connection exists between a parent and a child rather than whether there is a biological relationship.<sup>73</sup>

While the Court believes putative fathers deserve some procedural due process protection, it does not believe that the biological relationship between putative fathers and their illegitimate children independently merits more than threshold equal protection and due process protection. In fact, *Quilloin* limits the seemingly broad and expansive paternal rights recognized in *Stanley*.<sup>74</sup> This limitation stems from the Court's understanding of those parental roles and rights which were first articulated in *Stanley*.<sup>75</sup> In both *Stanley* and *Quilloin*, the Court has shown great deference to the de facto family unit and inter-personal relationships established over time through a lasting and substantial affiliation.<sup>76</sup> While the putative father in *Stanley* received protection based on his eighteen-year familial association with his children and their mother, the Court in *Quilloin* gave that same protection to a de facto family unit of nine years which included a stepfather as well as the natural mother.<sup>77</sup> The Court's insistence upon a familial relationship demonstrates that it is not inclined to give constitutional protection to a

71. *Id.*

72. *Id.* (emphasis added). The only interest shared by Quilloin and a wed father was financial. Quilloin was subject to a child-support obligation prior to these proceedings. *Id.*

73. See Note, *The Putative Father's Parental Rights: A Focus on "Family,"* 58 NEB. L. REV. 610, 618-22 (1979) [hereinafter Note, *Focus*] for a discussion of the concept of psychological parenthood and its place in these types of cases. A "psychological parent" has been defined as "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." *Id.* at 618 (quoting J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (1973)). The Court refused to adopt the psychological parenthood theory in the context of the foster parent-child relationship in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). However, it seems to have embraced the concept in the context of determining the constitutional protection due the biological parent-child relationship. See Note, *Focus*, *supra* at 618. Cf. *Lehr*, 463 U.S. at 262 n.18 ("[W]e [the Court] need not take sides in the ongoing debate among family psychologists over the relative weight to be accorded biological ties and psychological ties.").

74. Note, *Adoption: The Rights of the Putative Father*, 37 OKLA. L. REV. 583, 586 (1984) [hereinafter Note, *Adoption*]. But cf. Note, *Focus*, *supra* note 73, at 617-18 (posing the question whether the result in *Quilloin* is a reflection of the unusual fact pattern or if the policies articulated are central to all such cases).

75. See *supra* notes 34-52 and accompanying text.

76. See *supra* notes 48-52, 66-68 and accompanying text.

77. The strength of the de facto family unit was such that the child wished to be adopted by his stepfather and take the name "Walcott." *Quilloin*, 434 U.S. at 251.

claim based solely on an independent biological relationship between a putative father and his child. Absent some affirmative action by the putative father to acknowledge and accept his responsibilities, he will receive minimal Constitutional protection.<sup>78</sup>

### C. Caban v. Mohammed

The Court next addressed the rights of putative fathers in *Caban v. Mohammed*.<sup>79</sup> In *Caban*, the Court reiterated its position that putative fathers' rights are dependent upon the steps they take to establish a relationship with their children.<sup>80</sup> Abdiel Caban and Maria Mohammed lived together for five years and "represented themselves as being husband and wife, although they never legally married."<sup>81</sup> The couple had two children and Caban was listed as the father on both birth certificates. Caban lived with the children as their father and supported them until his relationship with Mohammed ended, at which time Mohammed moved in with the man whom she later married.<sup>82</sup> Caban continued to pursue his relationship with his children as best he could.<sup>83</sup>

In 1976, Mohammed and her husband filed a petition to adopt the children, while Caban and his wife cross-petitioned. The trial court granted Mohammed's petition and terminated Caban's parental rights.<sup>84</sup> On appeal to the United States Supreme Court, Caban made an equal protection argument challenging the distinction drawn by the New York statute between a putative father and other types of parents.<sup>85</sup>

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78. See *supra* notes 48-52, 64-73 and accompanying text; see *infra* notes 94-97, 108-31 and accompanying text.

79. 441 U.S. 380 (1979).

80. *Id.* at 389 & n.7.

81. *Id.* at 382.

82. *Id.*

83. He was able to see them each weekend when they visited their maternal grandmother; when the children moved to Puerto Rico, he communicated with them through his parents, who also lived in Puerto Rico. *Id.*

84. *Id.* at 383-84.

85. *Id.* at 385. The statute at issue, § 111 of the New York Domestic Relations Law, as amended by 1975 N.Y. Laws, chs. 246 & 704, provided, in part, that "consent to adoption shall be required as follows . . . Of the parents or surviving parent, whether adult or infant, of a child conceived or born in wedlock . . . Of the mother . . . of a child born out of wedlock," but not the consent of the putative father. In addition, Caban argued that *Quilloin*, 434 U.S. at 246, "recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents." *Caban*, 441 U.S. at 385. Caban did not argue that he was denied due process as required by *Stanley*, 405 U.S. at 645, since he was given notice and allowed to participate at the hearing as a party in the adoption proceeding. The Court did not decide the case on the basis of the substantive due process argument. *Caban*, 441 U.S. at 394 n.16 ("[W]e similarly express no view as to whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit.").

The Court found that the statutory scheme treated unwed parents differently solely on the basis of gender.<sup>86</sup> The statutory scheme involved in *Caban* required the consent of both parents of a child born in wedlock and vested absolute veto power in the unwed mother, subject to a few express exceptions.<sup>87</sup> The putative father, however, had no such power even if he had established a substantial relationship with his child, as had Caban. A putative father's only chance to prevent the adoption was to show that it was not in the child's best interests.<sup>88</sup>

In order for a gender-based distinction to withstand an equal protection challenge, the distinction "must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>89</sup> The appellees argued that the distinction between unwed mothers and unwed fathers was justified by the fundamental differences between maternal and paternal relations.<sup>90</sup> The Court rejected this argument noting that "[e]ven if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization . . . would become less acceptable . . . as the age of the child increased."<sup>91</sup> Using *Caban* as an example, the Court noted that Caban, Mohammed, and their children lived as a family for several years and that both parents took part in the *care, support and supervision* of the children.<sup>92</sup> Thus, Caban's relationship with his children "demonstrate[d] that an unwed father may have a relationship with his children fully comparable to that of the mother."<sup>93</sup>

While the Court struck down the statute for drawing an impermissible distinction between unwed mothers and unwed fathers, it did not hold unconstitutional statutes which would withhold veto power over adoptions from unwed fathers who did not come forward and assert their rights as

86. *Caban*, 441 U.S. at 394.

87. *See id.* at 385-86 n.4. Section 111 provided:

The consent shall not be required of a parent who has abandoned the child or who has surrendered the child . . . or who has been deprived of civil rights or who is insane or who has been judicially declared incompetent or who is mentally retarded . . . or who has been adjudged to be an habitual drunkard.

N.Y. DOM. REL. LAW § 111 (McKinney 1977).

88. *Caban*, 441 U.S. at 387. The possibility of accomplishing this seems minimal. In fact, the trial court had found that:

There is absolutely no evidence, credible or otherwise, that the new marriage of the natural mother is other than solid or permanent; and no evidence whatsoever that the children are not well-cared for and healthy. Nothing therefore justifies a denial of the petition other than the putative father professes that he loves the children. . . . That is not enough no matter how sincerely motivated.

Note, *Adoption*, *supra* note 74, at 587-88 n.39.

89. *Caban*, 441 U.S. at 388 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

90. *Id.* (arguing that "a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does." *Id.* (quoting Tr. of Oral Arg. 41)).

91. *Id.* at 389.

92. *Id.*

93. *Id.*

fathers.<sup>94</sup> As it had in *Stanley* and *Quilloin*, the Court in *Caban* predicated the putative father's rights upon an existing and substantial relationship such as a de facto family unit.<sup>95</sup> A putative father's interest in his child, according to the Court, does not automatically come into force at the moment of the child's birth. Rather, the putative father's rights must be *triggered* by his commitment to a substantial relationship with his child.<sup>96</sup> This position leaves open the question of what notice must be given a putative father who is prevented from establishing a relationship with his child which relationship would preserve his parental interests.<sup>97</sup>

#### D. *Lehr v. Robertson*

It was in *Lehr v. Robertson*<sup>98</sup> that the Supreme Court addressed the questions left unanswered by *Caban*.<sup>99</sup> In *Lehr*, the Court determined the extent of a putative father's right to notice of an adoption proceeding when the putative father has not established a relationship with his child.<sup>100</sup> The

94. *Id.* at 392.

95. See *supra* notes 34-78 and accompanying text. While the majority gave putative fathers a certain degree of protection once they established a substantial relationship with their children, Justice Stewart, writing in dissent, did not even concede that a right to maintain a parental relationship exists. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting) ("Parental rights do not spring full-blown from the biological connection between parent and child."). The measure of the putative father's rights must be gauged by non-biological factors, the most traditional being the familial relationship created through marriage. Where the interests of the unwed mother and putative father are in conflict, he wrote that "the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children." *Id.* Justice Stevens, writing in dissent, echoed Justice Stewart when he argued that there are real differences between unwed mothers and putative fathers, and that fact alone justifies many of the distinctions made between the two. *Id.* at 404-07 (Stevens, J., dissenting). Unlike the identity of the unwed father, the identity of the mother is hardly ever in doubt and "it is virtually inevitable that from conception through infancy the mother will constantly be faced with decisions about how best to care for the child . . ." *Id.* at 406 (Stevens, J., dissenting). Cf. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 993 (1984) (the stereotype of the responsible mother not always accurate). That the distinction may appear arbitrary in some situations, such as *Caban's*, does not justify invalidation of the statute since "[w]e cannot test the conformance of rules to the principle of equality simply by reference to exceptional cases." *Caban*, 441 U.S. at 412 (Stevens, J., dissenting).

96. This leaves unanswered the question whether a gender-based distinction "might be justified in adoptions of newborns because of the special relationship between a mother and her newborn infant." Note, *Adoption, supra* note 74, at 589. Nor did the Court consider the constitutionality of a statute which grants a veto power to only unwed mothers when the putative father could not be easily identified or located. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 657 (3d ed. 1986).

97. Note, *Adoption, supra* note 74, at 589.

98. 463 U.S. 248 (1983).

99. See *supra* notes 96-97 and accompanying text.

100. A putative father may not establish a relationship with his child for a variety of reasons. A putative father may not be aware of his child's existence; a proceeding to terminate parental rights may be held while the child is a newborn when there has been no opportunity to establish a relationship; the mother may prevent contact with the child; or the putative father may be uninterested.

Court found that putative fathers do not have an absolute right to notice and standing in an adoption proceeding,<sup>101</sup> but only an "opportunity" interest in establishing a relationship with their children.<sup>102</sup>

Jonathan Lehr and Lorraine Robertson lived together before their daughter was born.<sup>103</sup> Although Lehr visited the child in the hospital, he did not live with Robertson after the child's birth, did not provide any financial support for the child, and was not listed on the birth certificate as the father.<sup>104</sup> Robertson later married and, along with her husband, filed a petition for adoption.<sup>105</sup> Lehr filed a "visitation and paternity petition," unaware of the adoption proceedings initiated by Robertson.<sup>106</sup> He did not learn of the proceedings until four days before the petition for adoption was granted.<sup>107</sup>

The Court confronted both due process and equal protection claims.<sup>108</sup> Justice Stevens, writing for the Court, first dealt with the due process claim. He noted that the interests of the parties must be evaluated to determine whether they are sufficiently substantial to warrant constitutional protection.<sup>109</sup> The most significant interest in these types of cases, argued Justice Stevens, is the welfare of the children.<sup>110</sup> He noted that "the rights of the parents are a *counterpart* of the responsibilities they have assumed."<sup>111</sup> This link between parental duty and parental rights can be traced through a long line of cases stating that "the *relationship of love and duty* in a recognized family unit is an interest in liberty entitled to constitutional protection."<sup>112</sup>

101. *Lehr*, 463 U.S. at 250.

102. *Id.* at 262.

103. *Id.* at 252.

104. *Id.*

105. *Id.* at 250.

106. *Id.* at 252.

107. *Id.* at 253. According to Lehr's attorney, "the judge stated that he was aware of the pending paternity petition but did not believe he was required to give notice to appellant prior to the entry of the order of adoption." *Id.* Lehr's paternity suit was later dismissed, and his petition to vacate the adoption on the grounds that it violated his constitutional rights was denied by the New York state courts. *Id.*

108. First, Lehr contended that "a putative father's actual or potential relationship with a child . . . is an interest in liberty which may not be destroyed without due process of law." *Id.* at 255. Therefore, he had a right to notice and an opportunity to be heard at the adoption proceeding before he was deprived of that liberty interest. Lehr's second argument was that the gender-based classification in the statute violated the equal protection clause by giving putative fathers fewer procedural rights than mothers. *Id.*

109. *Id.* at 256. Justice Stevens pointed out that "[t]he intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." *Id.*

110. *Id.* at 257.

111. *Id.* at 257 (emphasis added).

112. *Id.* at 258 (emphasis added). These cases include *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The Court has upheld the premise that parental rights and responsibilities are intertwined in each of the cases addressing the rights of putative fathers: *Stanley*,<sup>113</sup> *Quilloin*<sup>114</sup> and *Caban*.<sup>115</sup> The Court embraced the belief that "the mere existence of a biological link does not merit equivalent constitutional protection[] [since t]he actions of judges neither create nor sever genetic bonds."<sup>116</sup> According to the Court, it is only through the establishment of a continuous and substantial relationship that the parental relationship obtains a protected status.<sup>117</sup> The existence of a purely biological relationship simply "offers the natural father an *opportunity* that no other male possesses to develop a relationship with his offspring."<sup>118</sup> If the putative father fails to grasp the opportunity to establish that relationship, the "Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie."<sup>119</sup> Under this narrow view of putative fathers' due process rights, the only due process question the Court felt compelled to consider was whether the state had provided adequate protection for Lehr's opportunity to form a relationship with his child.<sup>120</sup>

The Court held that the New York statutory scheme offered Lehr adequate notice to protect his "opportunity" interest. The Court found the statute adequate because it automatically gave notice of legal proceedings to seven classes of putative fathers "likely to have assumed some responsibility for the care of their natural children."<sup>121</sup> In addition, the statute allowed putative fathers to send postcards to a putative father's registry in order to guarantee notice of any adoption proceedings involving their children.<sup>122</sup> The statute, therefore, made it possible for putative fathers to seize their opportunity to establish a relationship with their children and protect their interests. It did not matter that the trial court and the other parties involved knew Lehr's identity and location. Lehr's "opportunity" interest and due process rights were protected by the statute because it provided the means by which he could insure notice of any legal proceedings.

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113. See *supra* notes 34-52 and accompanying text.

114. See *supra* notes 53-78 and accompanying text.

115. See *supra* notes 79-97 and accompanying text.

116. *Lehr*, 463 U.S. at 261.

117. *Id.* at 267-68 ("If one parent has an established custodial relationship with the child and the other parent has . . . never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights.").

118. *Id.* at 262 (emphasis added).

119. *Id.*

120. *Id.* at 262-63.

121. *Id.* at 263.

122. The statute provided in part: "The department shall establish a putative father registry which shall record the names and addresses of . . . any person who has filed with the registry before or after the birth of a child out-of-wedlock, a notice of intent to claim paternity of the child . . ." N.Y. Soc. SERV. LAW § 372-c (McKinney Supp. 1982-83).



The Court briefly addressed and then dismissed Lehr's equal protection argument.<sup>123</sup> Justice Stevens found that the adoption procedures established by the statute<sup>124</sup> were designed to promote the best interests of the child, to facilitate the granting of a petition for adoption, and to assure its finality.<sup>125</sup> In order to achieve these goals, the statute gave only certain classes of parents authority to veto the adoption.<sup>126</sup> While Lehr argued that the distinction drawn by the statute between unwed mothers and unwed fathers was impermissible,<sup>127</sup> the Court rejected this contention noting that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child."<sup>128</sup> Lehr had not established a substantial relationship with his child and therefore was not deprived of equal protection under the laws. In the Court's opinion, therefore, Lehr differed significantly from the putative father in *Caban* because Lehr had never established a "custodial, personal, or financial relationship" with his child.<sup>129</sup>

The Court's decision in *Lehr*, constitutes a clear rejection of "the tacit assumption of *Stanley* and its progeny that a biological relationship in itself might warrant some constitutional protection."<sup>130</sup> By conditioning a putative father's right to notice of an adoption proceeding on the quality of the relationship between the putative father and his child, the Court ignores

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123. Justice Stevens stated that the theory of equal protection requires simply that the "sovereign . . . not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr*, 463 U.S. at 265 (citing *Reed v. Reed*, 404 U.S. 71, 76 (1971)); see also *Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

124. N.Y. DOM. REL. LAW §§ 111, 111-a (McKinney 1977 & Supp. 1982-83); N.Y. Soc. SERV. LAW § 372-c (McKinney Supp. 1982-83).

125. *Lehr*, 463 U.S. at 266.

126. *Id.* at 266 (unwed mothers always given veto power whereas only specific types of putative fathers receive such veto power).

127. *Id.* at 266.

128. *Id.* at 266-67. The dissent in *Lehr* shifted the focus of the analysis toward the biological ties between a putative father and his child. It took exception to the Court's characterization of a putative father's interest as being only in the *opportunity* to establish a relationship with his child. Justice White, wrote that "[a] 'mere biological relationship' is not as unimportant in determining the nature of liberty interests as the majority suggests," *id.* at 271 (White, J., dissenting), since the biological connection is a relationship which gives rise to a protected interest. He characterized the nature of the interest as that of a parent-child relationship and argued that "how well developed that relationship has become goes to its 'weight,' and not its 'nature.'" *Id.* at 272 (White, J., dissenting).

According to the dissent, Lehr's interest warranted constitutional protection if the parent-child relationship could be proved, i.e., that Lehr was the biological father, and did not hinge upon the *quality* of any other type of relationship which might have been established between the two. In addition, the dissent disputed the Court's due process analysis, which it characterized as being "a grudging and crabbed approach to due process." *Id.* at 275 (White, J., dissenting). Denying notice to an identifiable father, whose whereabouts were known, could not possibly serve any substantial state interest. *Id.*

129. *Id.* at 267 (emphasis added).

130. Raab, *supra* note 20, at 266. See generally Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313 (1984).

putative fathers' interests based on their biological relationship with their children.

### E. Conclusions

The analysis of *Stanley*, *Caban*, *Quilloin* and *Lehr* creates a normative understanding of the United States Supreme Court's conception of "parenthood" and the relative rights among different classes of "parents." Simply put, the relationship between a mother and child is created solely by the biological link between them.<sup>131</sup> The father-child relationship, however, is predicated on the legal context within which the relationship exists.<sup>132</sup> Whereas a wed father's parental rights (as well as those of an adoptive father) are given full constitutional protection because of his legal status, the putative father is set apart in a separate and distinct category of "parent."<sup>133</sup> He is only given the mantle of "parenthood" once he has proved his commitment to the relationship. If the putative father acts as though he were a wed father, espousing those traits the Court attributes to such men,<sup>134</sup> his interests are deemed worthy of protection.<sup>135</sup> Even then, the putative father is not guaranteed the same protection as other "parents." Gender-based classifications giving a putative father inferior or non-existent veto powers are justified by a finding that the various "parents" are not similarly situated. The Court has accepted the argument that differences between these "parents" are sufficient to deny a putative father constitutional protection in favor of the competing interests of the unwed mother and the state.<sup>136</sup>

In *Lehr*, the Court held that putative fathers have a right to an *opportunity* to establish a relationship with their children. However, it is only a right to an opportunity and this right can be lost if not acted upon.<sup>137</sup> Putative

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131. Justice Stevens wrote in *Caban* that while both parents are responsible for conception, the mother has the greatest impact on the child since she can terminate the pregnancy, decide whether to inform the father of the pregnancy, or marry a third party and thereby legitimize the child. It is she who must carry the child and necessarily be present at its birth, creating between the two a bond not shared by the father. *Caban*, 441 U.S. at 404-05; see also *Stanley*, 405 U.S. at 665 (Burger, C.J., dissenting) ("[T]he biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter.").

132. See, e.g., *Stanley*, 405 U.S. at 663 ("I agree with the State's argument that the Equal Protection Clause is not violated when Illinois gives full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage or from adoption proceedings." (Burger, C.J., dissenting)); see also *supra* note 14 and accompanying text.

133. See *Stanley*, 405 U.S. at 664-65 (Burger, C.J., dissenting).

134. See *id.* at 663 (Burger, C.J., dissenting) (marriage as a contractual relationship with enforceable rights and duties).

135. See *supra* notes 48-52, 76-80, 95-96, 117-120 and accompanying text.

136. See *Lehr*, 463 U.S. at 265-68; *Quilloin*, 434 U.S. at 255-56.

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

fathers can lose their rights without implicating due process considerations if they fail to act within the time or in the manner provided by the statute.<sup>138</sup>

The Court also appears to be very deferential toward statutes that would appear to infringe on putative fathers' equal protection interests.<sup>139</sup> If a relationship has not been established or is found to be lacking, the interests of the state override those of the putative fathers.<sup>140</sup> If the relationship is found to be substantial, and the putative fathers have taken steps to create bonds with their children by exhibiting the traditional qualities of "fathers," their interests will be given greater protection.<sup>141</sup> There is no requirement, however, that putative fathers be given veto power over an adoption even if a veto power is given to other "parents."<sup>142</sup> In addition, statutes can also require application of the "best interests of the child" standard even though this standard creates a sometimes insurmountable burden on putative fathers.<sup>143</sup>

The Court's position does not adequately protect putative fathers' legitimate interests in their children. The Court requires only that states provide some mechanism by which putative fathers can receive notice of legal proceedings.<sup>144</sup> However, states need not provide notice automatically. In fact, statutes may even require putative fathers to initiate the notice provision themselves.<sup>145</sup> This position ignores the problem created by imperfect knowledge. Putative fathers are not always aware of the existence of their children or of the need to act to secure notice of legal proceedings. In addition, unwed mothers are not required to inform putative fathers of the birth of their children absent special proceedings.<sup>146</sup> The absence of such an obligation can result in deception and fraudulent failure to inform the putative father of the situation. Unwed mothers can actively work to prevent putative fathers from acquiring knowledge of their children and, thereby, achieve

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138. *Id.* The Court has not addressed the implications of a situation in which putative fathers are fraudulently denied notice, or fail to receive notice through incomplete service.

139. The Court in *Lehr* explained the constitutional standard for gender-based classifications as prohibiting "disparate treatment when there is no substantial relation between the disparity and an important state purpose." *Id.* at 266. See generally *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. at 71. This is not a difficult standard to satisfy given the Court's recognition of the importance of the state's interest in its illegitimate children. See *supra* note 123-29 and accompanying text.

140. *Lehr*, 463 U.S. at 266-68.

141. *Id.* at 267.

142. See *Quilloin*, 434 U.S. at 255-56.

143. See *id.* at 254-55.

144. *Lehr*, 463 U.S. at 263-65.

145. A number of states have enacted putative father registry statutes in the years following the Court's decision in *Lehr*. See, e.g., UTAH CODE ANN. § 78-30-4 (1987); MO. REV. STAT. § 192.016 (1988); TENN. CODE ANN. § 36-2-209 (1989).

146. See, e.g., *Lehr*, 463 U.S. at 273 n.5 (White, J., dissenting). Unless unwed mothers are under an affirmative duty to inform putative fathers of the existence of the children, they can withhold such information indefinitely, thereby depriving putative fathers the opportunity to develop a relationship with their children.

termination of their parental rights without violating due process requirements.

Even if putative fathers receive notice of legal proceedings to terminate their parental rights, they may not be able to persuade a trial court to preserve those rights because they are not guaranteed an opportunity to develop a relationship which would strengthen their position. The Supreme Court has established that the strength of putative fathers' parental interests directly corresponds to the strength of the relationship between the putative fathers and their children. However, the Court has not granted a right to establish such a relationship.<sup>147</sup> This becomes problematic when considering the potential for interference from unwed mothers and the special problem presented by newborn children.

## II. ACHIEVING A BALANCE—COMPETING INTERESTS AND RECOMMENDATIONS FOR THE FUTURE

One way for the Supreme Court to deal with the problem of protecting putative fathers' interests would be to recognize the biological bond between the putative father and his children as an independent basis for parental rights. No longer would the putative father be limited to the quality of the relationship between himself and his children as a source of parental rights.<sup>148</sup> It is unlikely, however, that the Court will take such an approach.<sup>149</sup> In addition, a constitutional remedy to this problem is arguably not the best solution for resolving the competing interests in this area. Such a remedy would not only have unforeseen, and possibly damaging consequences to the states' ability to quickly and permanently place illegitimate children,<sup>150</sup> it would also limit the states' flexibility to create different types of statutes to deal with various types of issues.<sup>151</sup>

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147. See *supra* notes 137-38 and accompanying text.

148. See *supra* note 128 (the dissent in *Lehr* argues for the importance of the biological relationship).

149. The Court has shifted its position vis-à-vis the protection of putative fathers' interests from the liberal approach taken in *Stanley*, see *supra* notes 35-36 and accompanying text, to the restrictive approach espoused in *Lehr*. See *supra* note 101-02 and accompanying text. Even in *Stanley*, the Court did not recognize the biological relationship as creating a protected interest for putative fathers.

150. It has been argued that providing the putative father a veto power equal to that of the unwed mother would "unnecessarily burden and complicate" the adoption process. Brief Amicus Curiae of the National Committee for Adoption in Support of Appellee at 8, *McNamara v. County of San Diego Department of Social Services*, cert. dismissed, 109 S. Ct. 546 (1988) (No. 87-5840), ("Unnecessary delay of the adoption undermines the entire statutory scheme by lessening the chances of adoption and depriving the child of early and uninterrupted bonding to its parents." *Id.* at 9).

151. An interest of the state recognized by the court as legitimate and substantial. See generally *In re Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975).

Since the Supreme Court is unlikely to, and arguably should not, recognize a right arising from the biological bond between putative fathers and their children, the best way to protect putative fathers' interests would be to revise state statutes. Statutes allow the flexibility necessary to balance competing interests.<sup>152</sup> While one of the strongest arguments made against giving putative fathers more rights is that to do so would compromise the interests of other parties, such a result is not inevitable. In fact, it is possible that by expanding putative fathers' rights, the interests of other parties would also be served. The following sections offer recommendations for drafting statutes which will result in a more balanced consideration of the interests at stake.<sup>153</sup>

### A. *Due Process Considerations: Notice*

It is essential that a putative father receive notice of any legal proceedings which might affect the relationship with his child so that he can take those steps necessary to protect the relationship. In order for this to occur, the identity of the putative father must be revealed. Therefore, statutes should require the unwed mother to inform the court of the identity of the putative father.<sup>154</sup> Some argue that such a requirement would infringe upon the unwed mother's right to privacy, exposing her to embarrassment by requiring disclosure of her sexual behavior.<sup>155</sup> However, the embarrassment an unwed mother might experience in providing the name of her child's father is

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152. Each party has his or her own interests to protect. The putative father wants to prevent the termination of his parental rights and enjoy a relationship with his child. The unwed mother has an interest in protecting the privacy of both herself and her child, as well as an undefined interest in maintaining control of her childrearing decision by asserting her wishes concerning the future of her child. See *infra* note 155. And finally, the state has an interest in the welfare of its illegitimate children. See *supra* note 125 and accompanying text. More specifically, the state's interest lies in speedy placements in adoptive homes and in securing adoption decrees which are final and not open to challenge by disgruntled parties.

153. Recently, there has been an attempt to draft model uniform legislation to codify the requirements of *Stanley*. In 1988, the National Conference of Commissions on Uniform State Laws approved the Uniform Putative and Unknown Fathers Act (UPUFA). UNIF. PUTATIVE AND UNKNOWN FATHERS ACT, 9B U.L.A. 16 (1988) [hereinafter UPUFA].

154. "Absent special circumstances, there is no bar to requiring the mother of an illegitimate child to divulge the name of the father when the proceedings at issue involve the permanent termination of the father's rights." *Lehr*, 463 U.S. at 273 n.5 (White, J., dissenting).

155. See *Caban v. Mohammed*, 441 U.S. 380, 408-09 & n.17 (1978) (Stevens, J., dissenting) ("[q]uestions relating to the adequacy of notice to absent fathers could invade the mother's privacy."); Barron, *supra* note 48, at 537-41; Note, *The Uniform Putative and Unknown Fathers Act: Should Putative Fathers Have an Absolute Right to Notice in Adoption Proceedings?*, 25 TULSA L.J. 315, 323-26 (1989); Note, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 127-29 (1980) [hereinafter Note, *Process*]. It has also been argued that the mother has a protected interest in determining her child's future. This interest is grounded in a privacy-based interest in childrearing decisions. See Erickson, *The Feminist Dilemma Over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority*, 2 LAW & INEQUALITY 447, 456 (1984).

outweighed by the putative father's interests in obtaining notice.<sup>156</sup> It is also outweighed by the child's interest in having an opportunity to enjoy a relationship with his or her biological father.<sup>157</sup> Disclosure also serves the state's interest in assuring a stable and final adoption decree. A putative father who is given notice and an opportunity to respond to an adoption petition will be less likely to appear after the fact to challenge the termination of his rights.

Identification of the putative father can be made by the courts with minimal invasion of the unwed mother's privacy. The court can restrict the scope of the questions asked of the mother to those most likely to reveal the putative father's name.<sup>158</sup> If the unwed mother refuses to provide the court with his name, the court should examine the circumstances surrounding her reluctance to cooperate. If she is unable to name him because she herself does not know his identity, she should not be penalized.<sup>159</sup> If, however, the court determines that she is simply refusing to name the putative father, then the court should consider taking steps that would either compel identification, or deny placement of the child.<sup>160</sup>

Once the name of the putative father is known, notice should be given to him in the manner most likely to result in actual notice. If an address is provided, this goal can be achieved with service by mail or personal service to the last known address. If the whereabouts of the putative father are unknown, then service by publication should be pursued.<sup>161</sup> While

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156. It is not clear that the stigma once associated with illegitimate births exists today as a strong behavioral inhibitor. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 852 & n.21 (2d ed. 1988); see also *infra* note 163 and accompanying text.

157. See Note, *Process, supra* note 155, at 127-29 ("Because the interests of a third party, the child, are at stake, the issue of disclosure is broader than individual privacy."). Absent the presence of factors which would result in foreseeable harm to the child, the child should be allowed to enjoy the biological ties responsible for his or her existence. These factors could include conviction for sexual abuse, molestation, incest or rape. See, e.g., IND. CODE ANN. § 31-3-1-6 (g)(2) (Burns 1989).

158. This inquiry could be expanded to those persons most likely to possess knowledge of the putative father's identity. The UPUFA takes this approach and requires the court to inquire whether the unwed mother was married or living with someone at the time of conception, whether she has received support payments in connection with the pregnancy, and whether she has named the father or any man has acknowledged himself as such. UPUFA §3 (e)(1)-(5), 9B U.L.A. 27-28 (Supp. 1988).

159. An unwed mother who has been raped or who engages in a promiscuous lifestyle may be unable to identify the putative father. If she is able to identify with some certainty a number of men who might be the biological father of the child, each should be afforded notice of the adoption proceedings. See, e.g., UNIF. PARENTAGE ACT §25(e), 9B U.L.A. 287 (1973) [hereinafter UPA].

160. See Note, *Process, supra* note 155, at 129 ("Failure to identify [the putative father] should be treated as contempt only if the evidence tends to show that her refusal is motivated by a desire to deprive the [putative] father of the opportunity to assert and defend his parental rights.").

161. See generally *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

publication may infringe somewhat on the mother's and child's privacy,<sup>162</sup> the interest of the putative father in obtaining notice outweighs these concerns.<sup>163</sup> In addition, the privacy infringement can be minimized by publishing notice in a discrete manner.<sup>164</sup>

Publication should be made in a manner most likely to reach the putative father. The notice needs to be published only long enough to reasonably reach the father. Thirty days should be sufficient to insure an interested father notice of the action.<sup>165</sup> The notice should include the names of the mother and the putative father, the date of the child's birth and the city in which the child was born.<sup>166</sup>

If, after a putative father's rights have been terminated and an adoption petition has been granted, the court learns that he was denied notice due to fraud on the part of the unwed mother, or some other bad faith motive, statutes should give trial courts the discretion to determine the best solution to an obviously inequitable situation. If it is brought to the court's attention shortly after placement, rescission of the petition may be the best solution. However, it is more likely that despite the fraud, the adoption should remain final given the state's interest in securing permanent placements and in protecting the emotional and psychological well-being of the child.<sup>167</sup> This decision should be based on an ad-hoc analysis of the facts surrounding each individual case so as to achieve the best balance between the competing interests.

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162. There are statutes which require publication in fairly embarrassing terms. See H. KRAUSE, FAMILY LAW 828 & n.79 (2d ed. 1983).

163. If the putative father does not receive notice, he will probably be unaware of the possibility of the termination of his parental interests and fail to take action to preserve those interests. Without a right to receive notice, the putative father's due process rights are illusory at best because the right to be heard is one of the fundamentals of that right, which "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314.

164. The notice should employ neutral language and include the unwed mother's name, the putative father's name, the date and place of the child's birth and the statutory requirements for the putative father to protect his interests.

165. If the name of the putative father is not known, notice through publication should occur. Cf. UPUFA § 3(g) (if the identity of the father is not known after inquiry, the court may order publication "only if, on the basis of all information available, the court determines that the publication or posting is likely to lead to actual notice."). It should be sufficient to publish a notice for sixty to ninety days in areas most likely to result in notice. Cf. IND. CODE ANN. § 31-3-1-6.1(b)(2) (Burns Supp. 1989) (requiring publication and response within thirty days). This would not hinder the state's interest in placing illegitimate children in adoptive homes as children do not lose their "appeal" for the purpose of adoption until they are over one year of age. *Caban*, 441 U.S. at 404 n.7.

166. Cf. IND. CODE ANN. § 31-3-1-6.1 (b)(1) (Burns Supp. 1989); Note, *Process*, *supra* note 155, at 130 (notice "must contain the mother's name but need not identify the child or adoptive parents.").

167. See U.P.A. § 25 (d) and comment, 9B U.L.A. 287 (1973). See generally ILL. ANN. STAT. ch. 40, para. 1513 (Smith-Hurd 1988).

### B. Equal Protection Considerations: Consent

Once notice has been given, the focus of the adoption proceeding shifts to obtaining consent from the relevant parties. While statutes routinely give unwed mothers, married parents and various state agencies an absolute veto power over the adoption of the child, the unwed father has no such power.<sup>168</sup> Most states have enacted adoption statutes that create classifications of parents whose consent is required for the adoption of a child.<sup>169</sup> A majority of states require the consent of only certain classes of putative fathers.<sup>170</sup> In addition, statutes typically distinguish between the putative father and the unwed mother on the basis of biological differences between the sexes and the belief that unwed mothers have a greater capacity or desire to care for their children.<sup>171</sup>

The Supreme Court has held that statutes which make such distinctions "may not constitutionally be applied . . . where the mother and father are in fact similarly situated with regard to their relationship with the child."<sup>172</sup> Thus, a putative father's right to veto the adoption of his child depends upon the analysis of the comparative strengths of the respective relationships. The problem with this "relationship" standard is that it places putative fathers in an almost no-win situation in cases involving newborn children.<sup>173</sup> Assuming that the putative father is told of the pregnancy, the putative father starts out with a clear disadvantage due to purely biological differences between men and women. In one sense, an unwed mother begins to develop a relationship with her child from the moment of conception. She

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168. See *supra* note 142 and accompanying text.

169. See e.g., *Lehr*, 463 U.S. at 248; *Caban*, 441 U.S. at 380; *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

170. See Note, *Analytical Survey*, *supra* note 23, at 1059-62 (in 1979 eight states required the consent of all putative fathers; twenty-nine states required the consent of some putative fathers; eight states did not require the consent of the putative father).

171. See Martin, *Fathers and Families: Expanding the Familial Rights of Men*, 36 SYRACUSE L. REV. 1265, 1267-68 (1986) ("nothing [could] be an adequate substitute for motherly love, for that constant ministrations required during the period of nurture that only a mother can give.').

172. *Lehr*, 463 U.S. at 267.

173. This problem stems from the fact that unwed mothers can easily frustrate putative fathers' attempts to establish relationships with their children. The unwed mother can refuse to marry the putative father and thereby deny him the legal status which would protect his interest. See, e.g., *Caban*, 441 U.S. at 407 n.14; *Lehr*, 463 U.S. at 263 ("The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences."). It can no longer be said with certainty that marriage is the first choice for unwed mothers. There is no longer the strong stigma attached to illegitimacy as there once was. See H. CLARK, *supra* note 156, at 852 & n.21. As a result, the Court's position can, in effect, penalize putative fathers for situations they are unable to change. It may be that putative fathers can unilaterally legitimize their children and achieve full parental status although this varies from state to state and is dependent upon the putative father learning of his child's existence. See e.g., *Quilloin*, 434 U.S. at 249 & n.4.



must carry the child during pregnancy and is necessarily present at its birth. The birth process can proceed quite easily without the participation of the father. Therefore, even if the putative father knows about the pregnancy, he is at a nine months disadvantage to the mother when a "relationship" standard is applied.

If, on the other hand, the putative father is never told about the pregnancy or the resulting child, he faces an even greater burden under the "relationship" standard. When a putative father is prevented by the mother from establishing ties with the child, he is deprived of all opportunity to create the relationship necessary to prevent termination of his rights under the standard established in *Lehr*.<sup>174</sup>

In order to redress the inequality established by the "relationship" standard, statutes should go beyond current Supreme Court doctrine and include provisions which strengthen the putative father's position in hearings held to terminate his parental rights. This could be accomplished by requiring a court to find that it would be to the child's *detriment* to be placed with the putative father.<sup>175</sup> The "detriment" standard would better serve the interests of putative fathers than the "best interests" standard. Under the "best interests" standard, if the court finds that it is in the child's best interests to be adopted, then the putative father's parental rights may be terminated.<sup>176</sup> In fact, the "best interests" standard can often lead to termination of the putative father's rights simply because the courts may prefer two-parent, marital homes.<sup>177</sup> The "detriment" standard would allow courts to give greater cognizance to the interests of putative fathers.

The burden placed on putative fathers to demonstrate the existence of relationships with their children is not as great in custody disputes involving older children. Because of their age, the putative father has had more opportunities to develop a relationship with these older children. If the putative father has remained disinterested throughout the life of an older child, the state can terminate his parental rights on the grounds of abandonment or neglect.<sup>178</sup> However, there remains the problem of the unwed mother who intentionally thwarts the putative father's attempts to establish a substantial relationship with his child. In recognition of this problem, any presumption concerning the parental fitness of a putative father should be rebuttable. The presumption could be rebutted by showing that the putative father made a concerted effort to establish a relationship with his child but

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174. *Lehr*, 463 U.S. at 267.

175. See UPUFA §6 (b) (if the court finds that a bond exists between the father and child, or that there is a justification for the lack of such a bond, it may terminate the father's rights only "if failure to do so would be detrimental to the child.").

176. See generally Weston, *supra* note 64, at 697-700.

177. See *supra* note 88 and accompanying text.

178. See, e.g., IND. CODE ANN. § 31-3-1-6 (g)(1) (Burns Supp. 1989).

was prevented from doing so by the actions of the mother or any other interested party.<sup>179</sup>

### CONCLUSION

The analysis of the United States Supreme Court's decisions in *Stanley*, *Quilloin*, *Caban* and *Lehr* proves that the Court does not recognize a putative father's biological relationship with his child as a full-fledged liberty interest. Instead, the Court believes that the unwed father is fundamentally distinguishable from unwed mothers, and wed fathers. These cases also reflect the Court's great deference toward statutory schemes aimed at promoting states' interests in encouraging the adoption of illegitimate children. With such deference, the Court upholds the statutes even though they provide a minimal amount of due process and equal protection for putative fathers.

The Court's position reflects the belief that the unwed mother will necessarily show a greater interest and commitment to her child than would the putative father. In contrast, the Court assumes that putative fathers will act in direct correlation to their legal status. This position finds its roots in the traditional view of "parenthood." It also derives from gender stereotypes which the Court, in other areas, has scrutinized for the presence of invidious classifications based on archaic and overbroad presuppositions about men and women.<sup>180</sup> However, the Court has not applied its Equal Protection doctrine to the rights of putative fathers with the same fervor.<sup>181</sup> As a result, the states have been free to enact statutes that give putative fathers only minimal protection.

Because putative fathers cannot rely upon their biological bonds as a defense to the termination of parental rights, there is no practical protection for putative fathers' interests in newborn children, or children from whom they have been kept apart. States should respond to this problem and enact statutes that will preserve the rights and interests of *all* parties involved. It is not disputed that the state has an important interest in the placement of illegitimate children in adoptive homes. However, no matter what the interest, the rights of putative fathers cannot be sacrificed in the interest of administrative convenience or in order to spare an unwed mother embarrassment over an event she herself played a role in bringing to fruition. A

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179. See Note, *Process*, *supra* note 155, at 136-37.

180. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982) ("archaic and stereotypic notions"); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) ("archaic and overbroad"); *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) ("gross, stereotyped distinctions between the sexes").

181. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 670 (3d ed. 1986) (the standard employed by the Court "appear[s] to be *ad hoc* judgments based upon justices' perceptions of the gender classification[s] at issue in each case.>").

balance must be sought, and ultimately achieved, which deals equitably with the many significant and life-changing interests at stake in this controversy.