DELINEATION OF THE BOUNDARIES OF PUTATIVE FATHERS' RIGHTS: A PSYCHOLOGICAL PARENTHOOD PERSPECTIVE

I. INTRODUCTION

In a series of decisions rendered over the course of slightly more than a decade, the United States Supreme Court first recognized and later sought to delineate the boundaries of putative fathers'[1] rights[2] with respect to custody and adoption proceedings involving their illegitimate[3] children.[4] Those decisions reflect the Court's conclusion that constitutional rights should not be denied to a biological father merely because of his nonmarital status, where he has manifested a substantial interest in his offspring.[5] In contrast, where a biological father has failed to establish an ongoing interest in his illegitimate child, the Supreme Court has been unwilling to extend similar constitutional protec-

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[1] A putative father is defined as "[t]he alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979). Putative father status is, therefore, accorded a biological father of a child born out of wedlock. The term may be used to refer both to biological fathers whose identities are known and to those who have acknowledged paternity. Comment, *Protecting the Putative Father's Rights After* Stanley v. Illinois: *Problems in Implementation*, 13 J. FAM. L. 115, 119 n.26 (1973-1974) [hereinafter cited as Comment, *Protecting the Putative Father's Rights*]. Such a usage, although generally accepted, has been criticized because of the failure of the label to distinguish between disinterested biological fathers and those who have shown an active interest in their children. Comment, *Male Parent versus Female Parent: Separate and Unequal Rights*, 43 UMKC L. REV. 392, 404 (1975).

[2] Responding to the majority's recognition of a putative father's rights in *Stanley v. Illinois*, Chief Justice Burger, in his dissent, noted that the majority had embarked on "a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible." Stanley v. Illinois, 405 U.S. 645, 668 (1972) (Burger, C.J., dissenting).

[3] The word "illegitimate" will be used in this Comment to refer to any child born of unmarried parents. It has been suggested, however, that this term is disparaging and should be replaced with the word "nonmarital" in all references to a child born out of wedlock. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 53 n.228 (1975). This alternative terminology has not been adopted in this Comment in order to be consistent with the Supreme Court's usage of the word "illegitimate."

[4] *See* Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 103 S. Ct. 2985 (1983).

[5] *See* Caban v. Mohammed, 441 U.S. 380 (1979) (according constitutional protection to putative father who had sustained relationship with his children); Stanley v. Illinois, 405 U.S. 645 (1972) (same).

tion.[6] Thus, in assessing constitutional safeguards for the putative father, the Court has determined that both biological and psychological ties must be considered.[7] In this respect, the Court appears to have embraced the tenets of psychological parenthood[8] in its decisions involving unwed fathers, although it has failed to identify the concept explicitly.[9]

Psychological parenthood may arise from the biological tie between a putative father and his child.[10] It may also exist, how-

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6 *See* Lehr v. Robertson, 103 S. Ct. 2985 (1983) (denying constitutional protection to putative father who had manifested only limited interest in his children); Quilloin v. Walcott, 434 U.S. 246 (1978) (same).

7 *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) ("Parental rights do not spring full-blown from the biological connection [but] require relationships more enduring."). It has been suggested that biological relationships should not be totally overlooked because blood ties may serve to encourage the development of psychological relationships that foster a sense of continuity and heritage from the child's perspective. Strauss & Strauss, Book Review, 74 COLUM. L. REV. 996, 999 (1974) (reviewing J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973)).

8 The concept of psychological parenthood has been largely promulgated by law professor Joseph Goldstein, child psychoanalyst Anna Freud, and psychiatrist Albert Solnit in their book, BEYOND THE BEST INTERESTS OF THE CHILD (new ed. 1979) [hereinafter cited as BEYOND THE BEST INTERESTS]. The book focuses on the development of children and the importance of the character and continuity of children's relationships with the adult they perceive as their parent. This perception, rather than any biological tie, is viewed as the basis of the parent-child relationship. Strauss & Strauss, *supra* note 7, at 997. Goldstein, Freud, and Solnit believe that courts should recognize that psychological parent-child relationships develop independently of biology and the law. Muench & Levy, *Psychological Parentage: A Natural Right*, 13 FAM. L.Q. 129, 153 (1979).

9 The concept of psychological parenthood was expressly presented to the Supreme Court for consideration with respect to the rights of foster families in Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) (*OFFER*). The majority in *OFFER* acknowledged that "biological relationships are not [the] exclusive determination of the existence of a family." *OFFER*, 431 U.S. at 843. The Court, however, refused to either accept or reject this particular psychological theory. *Id.* at 844 n.52. Writing for the majority, Justice Brennan asserted that the case turned "not on the disputed validity of any particular psychological theory, but on the legal consequences of the undisputed fact that the emotional ties between foster parent and foster child [were] in many cases quite close, and undoubtedly in some as close as those existing in biological families." *Id.* at 845 n.52. Therefore, despite the *OFFER* Court's reluctance to apply psychological parenthood principles, the decision clearly embraced the rationale underlying this concept. Specifically, it was recognized that the importance of the family relationship "stem[med] from the emotional attachments that derive from the intimacy of daily association . . . as well as from the fact of blood relationship." *Id.* at 844.

10 A caring unwed father can fulfill the essential role of a psychological parent. Note, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 106 (1980) [hereinafter cited as Note, *Unwed Fathers*]. The role of psychological parent cannot, however, be filled "by an absent, inactive adult, whatever his biological . . . relationship to the child may be." BEYOND THE BEST INTERESTS, *supra* note 8, at 19. A biological father's potential to become a psychological parent diminishes the

ever, within the context of a nonbiological adult-child relationship.[11] Although it has been recognized that the biological link between parent and child can create a mutual family interest,[12] the psychological parenthood rationale recognizes that this does not always occur.[13] Instances of infanticide, infant battering, and child neglect, abuse, and abandonment belie the popular belief that biological parents have an invariable and instinctive positive tie to their children.[14]

In evaluating a putative father's relationship with his child from a psychological parenthood standpoint, emphasis must be placed on both the needs of the child[15] and the actions of the putative father in meeting those needs.[16] Because a child has no understanding of biological ties until later in his development,[17] biological parentage is far less important to a maturing child than

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longer his child is in the care and custody of a third party. When this occurs, a prior relationship with a biological parent may deteriorate to the point where it is supplanted by the later relationship. Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 158 (1963) [hereinafter cited as Note, *Alternatives in Child Custody Disputes*].

11 A male who has no biological tie to a child may develop a psychological parent-child relationship by participating in a de facto family unit with the child and the child's mother. *See* Lehr v. Robertson, 103 S. Ct. 2985, 2994 n.19 (1983) (recognizing existence of a de facto family in denying constitutional protection to the putative father); Quilloin v. Walcott, 454 U.S. 246, 255 (1978) (same).

12 Note, *Unwed Fathers*, *supra* note 10, at 132.

13 In the optimal situation, a biological parent will also be a psychological parent. Leonard & Provence, *The Development of Parent-Child Relationships and the Psychological Parent*, 53 CONN. B.J. 320, 326 (1979). This is not always the case because, although most males "can, in a biological sense, father children, . . . not all, within or without wedlock, can or are willing to assume the cultural role of a father in a family relationship." Comment, *Protecting the Putative Father's Rights*, *supra* note 1, at 119 n.26 (citing D. SCHNEIDER, AMERICAN KINSHIP—A CULTURAL ACCOUNT 42 (1968)). The capacity of a putative father to become a psychological parent is influenced by the individual's personality, state of physical and mental well-being, relationship with his partner, manner in which parenthood fits into his plans, and other aspects of his current life situation. Leonard & Provence, *supra*, at 320.

14 BEYOND THE BEST INTERESTS, *supra* note 8, at 17.

15 Children need someone who regularly gives tenderness, assertiveness, care, and guidance and who affords them opportunities to learn, play, and assume responsibility. Clatworthy, *The Non-Traditional Family and the Child*, 12 CAP. U.L. REV. 345, 350-51 (1983).

16 Only a father who regularly provides for his child's needs will become a psychological parent. BEYOND THE BEST INTERESTS, *supra* note 8, at 17. A putative father can best care for and guide his child when the bonds of love are strong and when he is viewed by his child as protective and trustworthy. Leonard & Provence, *supra* note 13, at 321. In order to assume the status of a psychological parent, a putative father must strive to establish a close, continuous, and affectionate relationship with his child. *Id.* at 322.

17 BEYOND THE BEST INTERESTS, *supra* note 8, at 12; Leonard & Provence, *supra* note 13, at 326. To a child, a "parent" is his psychological parent, rather than a

psychological parentage.[18] Of paramount importance to the child, therefore, are his day-to-day interchanges with those adults who provide care and who become his parental figures.[19]

An absent biological parent will remain or become a stranger to the child.[20] Accordingly, the continuity of the adult-child relationship in terms of proximity and duration, the adult's love for the child, and the affection and trust of the child toward the adult[21] are factors which must be considered in determining whether a putative father has attained the status of a psychological parent. In effect, a putative father who has provided close and intimate care for his child, and with whom the child has formed a strong and specific attachment, is both the child's biological and psychological father.[22]

This Comment will trace the historical development of putative fathers' rights and will review the four decisions rendered by the Supreme Court in the last thirteen years that have specifically considered these rights.[23] Emphasis will be placed on the psychological parentage principles set forth above in order to demonstrate that those concepts offer a viable framework for determining putative fathers' rights. This Comment will further suggest that the Supreme Court has carefully circumscribed the boundaries of putative fathers' constitutional rights and has set forth adequate guidelines to protect interested fathers of older illegitimate children.[24] Finally, the Comment will propose that

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stranger whose sole claim is asserted through a legal or biological connection. Note, *Unwed Fathers*, *supra* note 10, at 106.

18 Martire & McCandless, *Psychological Aspects of the Adoption Process*, 40 IOWA L. REV. 350, 356 (1955). Psychological parentage is an integral ingredient in a child's mental and emotional development. Note, *Unwed Fathers*, *supra* note 10, at 106 n.118.

19 BEYOND THE BEST INTERESTS, *supra* note 8, at 13.

20 *Id.* at 17. A child's emotional attachments are not the result of the physical realities of conception or birth but are based, instead, on the source of nurturing care. Leonard & Provence, *supra* note 13, at 326.

21 Note, *Alternatives in Child Custody Disputes*, *supra* note 10, at 162. While continuity, stability, and love from an adult may be viewed as prerequisites to the formation of an affection-relationship, the love and trust of a child toward the adult is indicative of the quality of the relationship. *Id.* Therefore, while an unbroken adult-child relationship would suggest a developing emotional tie, "intermittent interactions between the child and adult would suggest poorly formed affection ties." Note, *Psychological v. Biological Parenthood in Determining the Best Interests of the Child*, 3 SETON HALL L. REV. 130, 141 (1971).

22 *See* Leonard & Provence, *supra* note 13, at 326. A psychological parent need not exhibit excellence in personality or parenting ability. Instead, he must manifest an unbroken closeness and mutuality of feeling with the child. *Id.*

23 See cases cited *supra* note 4.

24 The four Supreme Court cases highlighted in this Comment involved custody

adoption and custody statutes should be drafted to protect only those putative fathers entitled to constitutional safeguards by virtue of their psychological parenthood status.

II. BACKGROUND: DEVELOPMENT OF PUTATIVE FATHERS' RIGHTS

Although biologically the putative father of an illegitimate child is a parent,[25] at common law there was no legally recognized relationship between a putative father and his illegitimate child.[26] The English common law viewed an illegitimate child as *filius nullius*, or "the son of no one."[27] A bastard, thus, could be neither heir nor kin to anyone because he had no ancestor from whom "inheritable blood" could be derived.[28]

A. Custody Rights

The ancient common law doctrine of *filius nullius*, which concerns matters of inheritance,[29] must be distinguished from the custodial concept of *filius populi*, or "son of the people."[30] Under the *filius populi* doctrine, illegitimate children were placed in the

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or adoption proceedings with respect to children who were no longer infants. Accordingly, in each case the putative fathers had been presented with adequate time during which to develop psychological parent-child relationships, had they chosen to do so. Different considerations are raised when an illegitimate child is still an infant when custody or adoption proceedings are initiated. Such situations will not be considered in this Comment. For discussions of how a putative father could manifest paternal interest in a child before its birth, see Note, *Adoption: The Constitutional Rights of Unwed Fathers*, 40 LA. L. REV. 923, 932 n.59 (1980); Comment, *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*, 25 VILL. L. REV. 317, 334 (1979-1980).

25 A parent is "[o]ne who procreates, begets, or brings forth offspring." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

26 1 W. BLACKSTONE, COMMENTARIES *458. This lack of recognition has been described as an effort on the part of the common law to "shut[ ] its eyes to the facts of life." Galloway v. Galloway, [1955] 3 All E.R. 429, 431. *See generally* Note, *The Putative Father's Parental Rights: A Focus on "Family"*, 58 NEB. L. REV. 610, 610 (1979) (discussing rights of putative father at common law).

27 1 W. BLACKSTONE, COMMENTARIES *459. The actual application of this doctrine in English law was limited to questions of inheritance and was not related to parental rights or child custody. Comment, *Protecting the Putative Father's Rights*, *supra* note 1, at 116 n.5 (suggesting that modern observers have misapplied doctrine of *filius nullius* by citing it as common law rule denying custody to putative fathers).

28 1 W. BLACKSTONE, COMMENTARIES *459.

29 *See supra* note 27 and accompanying text.

30 1 W. BLACKSTONE, COMMENTARIES *459. This doctrine operated to exclude putative fathers from consideration regarding custody rights. Horner v. Horner, 161 Eng. Rep. 573, 578 (K.B. 1799).

custody of the parish or church.[31] Custodial rights of neither mother nor father were contemplated under this rule.[32] When equity jurisdiction eventually was exercised in custody disputes, the doctrine of *filius populi* was modified to exclude the putative father from custodial rights[33] and to place the exclusive right to custody in the mother.[34]

This common law recognition of a mother's exclusive, primary right to the custody of her illegitimate child arose from the presumption that the mother was a better custodian than the putative father.[35] The presumption was based upon the ease with which the mother could be identified and located, the obligation normally placed by society on the mother to care for and raise her children, and the strength of the bonds of love and affection assumed to exist between mother and child.[36] As a result, English courts restored custody of illegitimate children to their mothers in situations where, for example, there had been a fraudulent taking by the putative father,[37] and where third parties had secured temporary custody either through forceful[38] or lawful

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31 1 W. BLACKSTONE, COMMENTARIES *459. *See generally* Adams, *Nullius Filius: A Study of the Exception of Bastardy in the Law Courts of Medieval England*, 6 U. TORONTO L.J. 361 (1946) (discussing doctrines of *filius nullius* and *filius populi*).

32 *See* Comment, *Custody Rights of Unwed Fathers*, 4 PAC. L.J. 922, 923 (1973) (stating that custodial rights were not recognized in unmarried parents due to lack of legal relationship between such parents and their child).

33 The common law's reluctance to accord a putative father custodial rights may have been due to prevalent attitudes that his identity was often uncertain and his nature was irresponsible and unconcerned. Note, *supra* note 26, at 610-11.

34 *See* The Queen v. Brighton, 121 Eng. Rep. 782, 783 (Q.B. 1861) (father of illegitimate child not recognized for civil purposes). The failure of the common law of England to recognize rights in the putative father of an illegitimate child continued into modern times. For example, as recently as 1955, an English court refused to recognize the father of an illegitimate child as a parent within the meaning of the Adoption Act, 1950, 13 Geo. 6 § 2(4)(a). He was, therefore, unable to object to the child's adoption, despite the fact that he had lived with the mother and child for 11 years. *Re* M, [1955] 2 All E.R. 911, 912.

35 Comment, *supra* note 32, at 923.

36 *Id.*; *see* Wall v. Hardee, 240 N.C. 465, 466, 82 S.E.2d 370, 372 (1954) (setting forth rationale for presumption of mother's right to custody).

37 The King v. Soper, 101 Eng. Rep. 156, 157 (K.B. 1793). *But cf.* The King v. DeManneville, 102 Eng. Rep. 1054, 1055 (K.B. 1804) (custody of legitimate child given to father as matter of law, despite fraudulent taking of infant child from mother).

38 The King v. Hopkins, 103 Eng. Rep. 224, 225 (K.B. 1806) (illegitimate child restored to custody of mother from whom possession was taken by fraud and force). Although at common law a mother was accorded a "natural" right to custody, she was still not considered a parent for purposes of inheritance or guardianship. Comment, *Protecting the Putative Father's Rights*, *supra* note 1, at 117.

means.[39]

As case law developed in the United States, some courts afforded the putative father a special status with respect to his illegitimate children. These courts recognized the unwed father's custodial rights as superior to all but those of the mother.[40] Decisions granting custody to putative fathers were commonly obtained in cases where the mother was either dead[41] or disinterested.[42] Not all jurisdictions were willing, however, to erode longstanding common law views by granting favorable custodial rights to putative fathers.[43]

B. Adoption Rights

Because adoption was unknown at common law,[44] a putative father's rights and obligations with respect to the adoption of his child were delineated entirely by legislative enactments.[45] Prior to 1972, several states granted a putative father the right to be heard in custody and adoption matters,[46] while a few states spe-

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39 The Queen v. Nash, 10 Q.B. 454, 456 (C.A. 1883) (mother of illegitimate child regained custody from couple to whom she had given child six years earlier, in order to place child with her sister).

40 *E.g.*, *In re* Guardianship of Smith, 42 Cal.2d 91, 265 P.2d 888 (1954); *In re* Mark T., 8 Mich. App. 122, 154 N.W.2d 27 (1967); *In re* Zink, 269 Minn. 535, 132 N.W.2d 795 (1964); *In re* Shady, 264 Minn. 222, 118 N.W.2d 449 (1962); *In re* R.D.H.S., 370 S.W.2d 661 (Mo. Ct. App. 1963). *See generally* Lippert, *The Need for a Clarification of the Putative Father's Legal Rights*, 8 J. FAM. L. 398, 403 (1968) (comparing custody rights of putative father and natural mother); Schwartz, *Rights of a Father with Regard to His Illegitimate Child*, 36 OHIO ST. L.J. 1, 8 (1975) (same).

41 *See, e.g.*, *In re* Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888 (1954) (putative father shown to be fit parent was entitled to custody of his illegitimate children on mother's death).

42 *See, e.g.*, *In re* Zink, 269 Minn. 535, 540, 132 N.W.2d 795, 798 (1964) (enunciating general rule that award of custody of illegitimate child may be granted to admitted father, against claims of relatives and welfare agencies, in situations where mother has rejected child and putative father is found competent to care and take charge); *In re* R.D.H.S., 370 S.W.2d 661, 668 (Mo. Ct. App. 1963) (same).

43 *E.g.*, Thomas v. Children's Aid Soc'y, 12 Utah 2d 235, 239, 364 P.2d 1029, 1031 (1961) ("The putative father of an illegitimate child occupies no recognized paternal status at common law or under [Utah] statutes. The law does not recognize him at all, except that it will make him pay for the child's maintenance if it can find out who he is.") (footnotes omitted).

44 E. COKE, INSTITUTES OF LAWS OF ENGLAND 97 (1628).

45 *See, e.g.*, *In re* Goshkarian, 110 Conn. 463, 465, 148 A. 379, 380 (1930); Ekendahl v. Svolos, 388 Ill. 412, 414, 58 N.E.2d 585, 586 (1944); Barwin v. Reidy, 62 N.M. 183, 190, 307 P.2d 175, 180 (1957).

46 Note, *Father of an Illegitimate Child—His Right to Be Heard*, 50 MINN. L. REV. 1071, 1075 & n.28 (1966) (citing pre-1972 statutes of Alabama, Arizona, Arkansas, California, North Dakota, and Washington).

cifically excluded him from such proceedings.[47] Still other jurisdictions chose to ignore the putative father in their statutory language altogether.[48] Even those statutory schemes that recognized a putative father, however, often imposed upon him obligations and duties of support and maintenance without according him any reciprocal rights.[49]

The prevailing view, therefore, was that a putative father should not be afforded an opportunity to be heard in matters pertaining to his child's adoption.[50] The majority of adoption statutes required only consent of the mother as a prerequisite to the adoption of an illegitimate child.[51] Various rationales have been offered to explain the statutory treatment of putative fathers. For example, it has been suggested that the statutes sought to punish putative fathers for their sins in order to deter promiscuity and illegitimacy, while encouraging marriage and promoting legitimate family units.[52] Another proffered explanation has been that such statutes furthered the welfare of illegitimate children, because putative fathers presumptively were unfit to serve as parents.[53]

Prior to 1972, state courts generally upheld statutes that denied to all putative fathers parental rights to notice and hearing with respect to the adoption of their illegitimate children.[54] In 1965, however, the Supreme Court of Minnesota, in a holding which was to be the harbinger of future United States Supreme Court decisions, determined that a putative father asserting a

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47 *Id.* at 1075-76 & n.29 (citing pre-1972 statutes of Georgia, Illinois, Mississippi, New Jersey, and Texas).

48 *Id.* at 1076 & n.30 (citing pre-1972 statutes of New Mexico, New York, and Pennsylvania).

49 Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 478 (1967); Note, *supra* note 46, at 1072-73.

50 H. CLARK, LAW OF DOMESTIC RELATIONS §§ 18.1, .4 (1968).

51 *Id.* at §§ 18.4, .5; Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 245 (1971).

52 H.D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 73-78 (1971). *But see* Comment, *Right of Unwed Father to a Fitness Hearing Prior to State Imposition of Wardship Over His Illegitimate Children*, 7 SUFFOLK U.L. REV. 159, 173-74 (1972) (stating that punitive or moralistic statutory treatment of putative father did little to alleviate problems of illegitimacy, and rarity of putative father-illegitimate child relationships is indicative of failure of statutory schemes to achieve their purpose of fostering closer family ties).

53 Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1586 (1972).

54 *E.g.*, State *ex rel.* Lewis v. Lutheran Social Servs., 47 Wis. 2d 420, 434, 178 N.W.2d 56, 63 (1970), *vacated and remanded sub nom.* Rothstein v. Lutheran Social Servs., 405 U.S. 1051 (1972).

"sincere interest in and concern for his child" should be given an opportunity to manifest that interest and to be heard where the mother had relinquished the child for adoption.[55]

III. *STANLEY V. ILLINOIS*:[56] RECOGNITION OF RIGHTS OF PUTATIVE FATHERS

Stanley v. Illinois was the first Supreme Court case to address the issue of the constitutional rights of a putative father with respect to the custody of his illegitimate offspring.[57] Pursuant to an Illinois statutory scheme which failed to consider his parental fitness,[58] Peter Stanley, a putative father,[59] was denied custody of his two youngest children in a dependency proceeding[60] insti-

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55 *In re* Brennan, 270 Minn. 455, 463, 134 N.W.2d 126, 131-32 (1965).

56 405 U.S. 645 (1972).

57 The Supreme Court had previously extended constitutional protection to the family relationship. *See* May v. Anderson, 345 U.S. 528, 533 (1953) (right to care, custody, management, and companionship of children held more precious than property rights); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (primary parental right to custody, care, and nurture of children); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (basic civil rights to marry and procreate); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (right of parents to direct upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right to marry, establish home, and bring up children).

The Court had also previously accorded constitutional protection to interests arising out of mother-illegitimate child relationships. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding unconstitutional statute prohibiting filing of wrongful death actions by illegitimate children for death of their mother); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968) (declaring unconstitutional statute denying unwed mother right to bring wrongful death action upon the loss of her illegitimate child). Accordingly, the Court's consideration of the rights of a putative father in *Stanley* has been viewed as an extension of the constitutional protection historically accorded the family. 29 EMORY L.J. 833, 835 n.15 (1980). *But see* Note, *Stanley v. Illinois: Expanding the Rights of the Unwed Father*, 34 U. PITT. L. REV. 303, 307-08 (1972) (questioning whether *Stanley* actually extends interest which has already been constitutionally recognized or, rather, recognizes new interest in class of individuals not previously accorded such constitutional protection).

58 *See infra* notes 62 & 63 and accompanying text (discussing effect of ILL. REV. STAT. ch. 37, § 701-14 (1967)).

59 Stanley had fathered three children during 18 years of intermittent cohabitation with Joan Stanley, who had assumed his surname. *Stanley*, 405 U.S. at 646. The couple was never legally married, *id.* at 646-47, and common law marriage was not recognized in Illinois. *See* ILL. REV. STAT. ch. 89, § 4 (1966).

60 *Stanley*, 405 U.S. at 646. Pursuant to the Illinois Juvenile Court Act, ILL. REV. STAT. ch. 37, §§ 701-1 to 708-4 (1967), the custody of non-delinquent minors could be transferred to the state after the institution of either a neglect or dependency proceeding. In a neglect proceeding instituted pursuant to sections 702-1 and 702-4, a showing that the parent or parents in custody had failed to provide adequate care was required before a child could be adjudged a ward of the state. Stanley's eldest child, Karen, had been the subject of a neglect proceeding due to errors on the part of juvenile court officials in assuming that Peter and Joan Stanley were

tuted by the state following the death of their mother.[61] Under that statute, an unwed father was not included within the definition of "parent."[62] Therefore, upon the mere showing at a dependency proceeding that a father was not married to the mother of his children, the children could be pronounced wards of the state, and the father deprived of all rights to custody, without consideration of his parental fitness.[63]

The dependency proceeding determination that Stanley had no right to the custody of his illegitimate children was particularly significant in light of the Illinois Paternity Act,[64] which imposed upon a putative father the obligation to support his illegitimate children,[65] yet afforded him no right to their custody and control, except as granted pursuant to a full adoption proceeding.[66] The Paternity Act, therefore, imposed upon a father of an illegitimate child "duties . . . equal to the duties of a father

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married and that the father, therefore, fell within the statutory definition of "parent." *Stanley*, 405 U.S. at 667 n.5 (Burger, C.J., dissenting). However, despite the hearing granted at the neglect proceeding, Stanley failed to retain custody and Karen became a ward of the state. Comment, *supra* note 52, at 160 n.11.

Through the institution of a dependency proceeding a child could become a state ward merely upon proof that he or she had no surviving "parent." ILL. REV. STAT. ch. 37, §§ 702-1, 702-5. The institution of a dependency proceeding, therefore, was most probably a prelude to the adoption of Stanley's children. Once the children were wards, consent for their adoption needed only to be obtained from the state. *Id.* ch. 4, § 9.1-8(d); Comment, *The Unwed Father's Rights in Adoption Proceedings: A Case Study and Legislative Critique*, 40 ALB. L. REV. 543, 551 (1976).

61 At the time of her mother's death, the oldest child, Karen, had already been adjudged a ward of the court pursuant to a prior judicial proceeding. 1 HOFSTRA L. REV. 315, 315 n.7 (1973); *see supra* note 60. Therefore, the subject litigation involved Stanley's custody rights only with respect to his two youngest children. *Stanley*, 405 U.S. at 646 n.2.

62 ILL. REV. STAT. ch. 37, § 701-14 (1967). The Illinois Juvenile Court Act defined "parent" as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child." *Id.*

63 *Stanley*, 405 U.S. at 650. The presumption that a putative father was unfit to assume custody of his illegitimate children may be traced to the common law. *See supra* text accompanying note 34.

64 ILL. REV. STAT. ch. 106 3/4, §§ 51-64 (1969).

65 The father of an illegitimate child was liable for the "support, maintenance, education and welfare of the child until the child [was] 18 years old, or until adoption, to the same extent and in the same manner as the father of a child born in lawful wedlock." *Id.* § 52, *cited in* Note, *Stanley v. Illinois: New Rights for Putative Fathers*, 21 DEPAUL L. REV. 1036, 1038 (1972). It has been suggested that this type of support obligation was not discriminatory against the putative father because his duties were made more equal to those of legitimate parents. Comment, *supra* note 53, at 1581 n.5. *See generally* H. CLARK, *supra* note 50, § 5.3.

66 *See In re* Stanley, 45 Ill. 2d 132, 135, 256 N.E.2d 814, 815 (1970), *rev'd sub nom.* Stanley v. Illinois, 405 U.S. 645 (1972) (citing ILL. REV. STAT. ch. 106 3/4, § 62 (1967)).

of a legitimate child" while granting him "none of the rights enjoyed by a father of a child born in wedlock."[67]

In appealing the adjudged dependency of his children,[68] Stanley alleged that the presumption raised under the Illinois statute—that all unwed fathers were unfit to be parents—denied him rights to the custody and control of his children, which both married fathers and unwed mothers enjoyed.[69] Accepting Stanley's assertion that the Illinois law deprived him of equal protection of the law as guaranteed by the fourteenth amendment,[70] the Supreme Court struck down the statutory scheme with its irrebuttable presumption[71] and held that he was entitled to a hearing on his parental fitness before his children could be removed from his custody.[72]

Although the Court's decision clearly granted constitutional protection to Peter Stanley, Justice White, in his majority opin-

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67 Wallace v. Wallace, 60 Ill. App. 2d 300, 303, 210 N.E.2d 4, 5 (1965). Since societal attitudes are often shaped and reinforced by existing laws, it is possible that the Illinois statutory scheme actually may have served to inhibit attempts by putative fathers to establish normal father-child relationships. Comment, *supra* note 52, at 168. Despite the fact that the extensive liability of a putative father under Illinois law seemed inconsistent with the rights granted, another commentator has noted that the situation may not have been as extreme as described in *Wallace*, since there existed numerous statutory provisions limiting the liability of a putative father due to his non-parental statutory status. Note, *supra* note 65, at 1038 & n.15.

68 Stanley's motives in filing this appeal to block the designation of court-appointed legal custodians may have been questionable. A dependency proceeding never would have occurred had he maintained custody and support of his children after Joan Stanley's death. Schwartz, *supra* note 40, at 2. Instead of retaining custody, however, Stanley voluntarily placed his children in the care of a Mr. and Mrs. Ness. *Stanley*, 405 U.S. at 663 n.2 (Burger, C.J., dissenting). He only became involved in a legal dispute when the State of Illinois intervened to have court-appointed guardians designated. Stanley never attempted to seek legal custody of the children. *Id.* Therefore, Stanley's appeal may have been motivated by economic rather than emotional factors, since he would have lost welfare payments upon the designation of the court-appointed guardians. *Id.* at 667 (Burger, C.J., dissenting). This uncertainty as to Stanley's motives intensified the need for a fitness hearing, at which time such inquiries could have been properly addressed. Comment, *supra* note 52, at 162 n.21.

69 *Stanley*, 405 U.S. at 646.

70 U.S. CONST. amend. XIV, § 1 provides in pertinent part that "[n]o State shall. . .deny to any person within its jurisdiction the equal protection of the laws."

71 *Stanley*, 405 U.S. at 657. Justice White emphasized that, even if "most unmarried fathers are unsuitable and neglectful parents," this did not justify a statute which burdened all unmarried fathers with a presumption of unfitness. *Id.* at 654-55. Moreover, the Court cited with approval the Michigan Court of Appeals observation that no sociological data justified the assumption that an illegitimate child who was raised by his putative father would not receive a proper upbringing. *Id.* at 654 n.7 (citing *In re* Mark T., 8 Mich. App. 122, 146, 154 N.W.2d 27, 39 (1967)).

72 *Id.* at 658.

ion, did not specify whether this protection arose from the due process clause[73] or the equal protection clause[74] of the Constitution.[75] In formulating its opinion, the majority was faced with a dilemma, since the due process issue had not been decided by the lower courts.[76] In order not to exceed its jurisdictional limits by grounding its decision on the due process issue alone, the Court "grafted its due process line of reasoning onto the petitioner's equal protection theory."[77]

Examining the Illinois statutory scheme in light of the due process clause, the Court recognized that Stanley's "cognizable and substantial" interest[78] in retaining custody of the children he had "sired and raised" was entitled to constitutional protection.[79] Justice White described this parental interest as one involving "companionship, care, custody and management" of one's children.[80] The Court, however, did not delineate the

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73 U.S. CONST. amend. XIV, § 1 provides in pertinent part that no state shall "deprive any person of life, liberty or property without due process of law."

74 See *supra* note 70 for the text of the equal protection clause.

75 Although Stanley's appeal to the Supreme Court was brought on equal protection grounds, *Stanley*, 405 U.S. at 647, the majority declared 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." *Id.* at 649. This due process language, however, was interwoven with an equal protection analysis recognizing that the denial of a fitness hearing to a putative father, while extending it to other parents challenging custody, "denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.* The ultimate ground for reversal was, similarly, that the denial of a hearing was "inescapably contrary to the Equal Protection Clause." *Id.* at 658.

76 *Id.* at 659 (Burger, C.J., dissenting). The dissent vehemently asserted that the majority's use of due process through equal protection analysis was improper. *Id.* at 660 (Burger, C.J., dissenting).

77 Comment, *A Dependency Hearing Which Would Deny an Unwed Father Custody of His Child on the Death of Its Mother Without Reference to the Father's Fitness as a Parent Is Violative of Due Process and Equal Protection*, 4 LOY. U.L.J. 176, 181 (1973). Justice White justified such a disposition by reasoning that the case had been decided on equal protection grounds raised below through a due process analysis that was "readily available to the state court." *Stanley*, 405 U.S. at 658 n.10. Both the strong dissent and equal protection stance of the case in the lower courts may have pressured the majority into acknowledging the equal protection issue. Note, *The Impact of* Stanley v. Illinois *on Custody Proceedings for Illegitimate Children: Procedural Parity for the Putative Father?*, 3 N.Y.U. REV. L. & SOC. CHANGE 31, 36 (1973).

78 *Stanley*, 405 U.S. at 652.

79 *Id.* at 651. In applying this language, the Court implicitly recognized Stanley's active, interested role as a putative father who had raised his children over a sustained and continuous period of time.

80 *Id.* Such a parental interest would be more difficult to find in a putative father who had made few, if any, efforts to establish a relationship with his child on a continuous and sustained basis.

scope of the constitutional protection to be afforded to putative fathers.

In the opinion's oft-cited footnote nine,[81] the Court extended its holding, with respect to the hearing requirement, to both custody and adoption proceedings, emphasizing the necessity of "offering unwed fathers an opportunity for individualized hearings on fitness."[82] Consequently, questions arose as to whether *Stanley* should be accorded a narrow or broad interpretation.[83] Under a broad reading, constitutional rights would arise merely from the biological fact of paternity[84] and, therefore, all putative fathers would be protected.[85] However, if the opinion is read from a narrow perspective, as contemplated by the *Stanley* Court,[86] the decision extends constitutional protection only to

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[81] The Court stated in pertinent part:

> We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.

Id. at 657 n.9; *see also* Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing* Stanley v. Illinois, 9 FAM. L.Q. 527, 528 (1975) (describing footnote nine as source of study and mystification to family law observers).

[82] *Stanley*, 405 U.S. at 657 n.9.

[83] Commentators who favored a broad reading of *Stanley* interpreted the language in footnote nine as a mandate that notice and hearing should be accorded to all putative fathers in adoption and custody matters involving their illegitimate children, regardless of their parental involvement. Although *Stanley* involved an unwed father who had played an important role in raising his children, a broad reading of this footnote would give the decision a much further reaching effect than was contemplated, affording due process rights "even [to] those who may not be aware of their fatherhood." Barron, *supra* note 81, at 528; *see* 61 ILL. B.J. 378, 379 & n.54 (1973) (expressing Illinois Attorney General's opinion that notice and opportunity to be heard must be given to all unwed fathers); *see also* Comment, Caban v. Mohammed: *Extending the Rights of Unwed Fathers*, 46 BROOKLYN L. REV. 95, 100 & nn.38, 39 (1979) [hereinafter cited as Comment, *Extending Rights*] (discussing broad and narrow interpretations of *Stanley*); Comment, *supra* note 77, at 186 (same); Comment, *Protecting the Putative Father's Rights*, *supra* note 1, at 125 & nn.52-54 (same).

[84] *See* Quilloin v. Walcott, 238 Ga. 230, 234, 232 S.E.2d 246, 249 (1977) (Undercofler, J., dissenting) (adopting broad reading of *Stanley*), *aff'd*, 434 U.S. 246 (1978); Comment, *supra* note 53, at 1606 (same); Note, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 522 (1973) (same).

[85] *See, e.g.*, 61 ILL. B.J. 378, 379 (1973) (indicating that Supreme Court "did not limit *Stanley* to its facts but held that all parents, married or unmarried, father or mother, have a right to custody of their children absent a showing of unfitness").

[86] The later decisions of the Supreme Court clearly indicate that the *Stanley* decision should not be interpreted as according constitutional protection to all putative fathers based solely on the biological fact of paternity, regardless of their interest in

those putative fathers evidencing an active, ongoing interest in their children.[87] By describing Stanley's protected liberty interest as "that of a man in the children he has sired and raised," Justice White sought to highlight the long-term, familial nature of the relationship.[88] The mere assertion of biological parentage by a putative father should, therefore, be an insufficient basis for constitutional protection.[89] This interpretation is entirely consistent with psychological parentage rationale.

Moreover, the Court's recognition of Stanley's interest as one of "companionship, care, custody and management" is also indicative of his status as both biological and psychological parent to the children, who had lived with him all their lives.[90] Thus, consistent with the psychological parenthood rationale[91] underlying the text of the opinion, footnote nine's reference to "unwed fathers"[92] could only have been intended to include those interested biological and psychological fathers who played an active part in their children's upbringing. Clearly, the decision was not intended to protect those putative fathers asserting a mere biological connection with their offspring.

By virtue of the positive, continued, and sustained nature of Stanley's de facto family relationship,[93] he became the male parental figure to whom the children had a specific attachment. These indicia of psychological parenthood, when combined with Stanley's biological status, served to establish a constitutionally

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their children. *See* Lehr v. Robertson, 103 S. Ct. 2985 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978).

87 For example, Stanley manifested his interest by living with his children and their mother throughout their lives and supporting them during this period. *Stanley*, 405 U.S. at 650 n.4; *see* Note, *supra* note 84, at 521 (describing this relationship as a de facto marriage).

88 *See Stanley*, 405 U.S. at 651; *see also* Note, *supra* note 84, at 521-22 (acknowledging, but not advocating, narrow view that putative father's interest is only protected when he exercises rights and obligations similar to those imposed by law on father of legitimate child). Stanley's parental rights may not have been protected had he lived apart from his family, rather than as part of the family unit. Comment, *supra* note 32, at 935.

89 *See* Schwartz, *supra* note 40, at 10-11 (when father's only involvement with his child has been participation in act of conception, he has insufficient basis upon which to assert right superior to other persons also seeking custody).

90 *See Stanley*, 405 U.S. at 651; *supra* note 80. Although Stanley never married his children's mother, he nevertheless availed himself of the opportunity to assume psychological parent status by loving, living with, caring for, and supporting his children from the time of their birth until the death of their mother.

91 See *supra* notes 8-22 and accompanying text for a discussion of psychological parenthood.

92 *Stanley*, 405 U.S. at 657 n.9.

93 *See supra* note 87.

protected parental relationship.[94] Therefore, Stanley's "cognizable and substantial" interest in retaining custody of his children after their mother's death[95] should be viewed as the interest of a psychological parent in the children for whom he had provided continuous care and support.[96] The Supreme Court's decision in *Stanley*, thus, was the first indication of its belief that custody and adoption statutes should be drafted to protect interested psychological fathers, like Peter Stanley.

IV. *QUILLOIN V. WALCOTT*:[97] LIMITING THE SCOPE OF PUTATIVE FATHERS' RIGHTS

Since the *Stanley* decision was not expressly limited to its facts, the scope of a putative father's rights with respect to his illegitimate children remained largely undetermined. The boundaries of such rights became more clearly delineated, however, in 1978, when the Supreme Court decided *Quilloin v. Walcott*. Leon Quilloin, a putative father in Georgia, sought to prevent the adoption of his illegitimate child.[98] He and the child's mother had never married and they had never lived together in a familial setting with their son.[99] The mother, who married another man when her son was two years old, maintained sole custody.[100] Quilloin provided financial support for the child only on an irregular basis[101] and visited with him sporadically.[102] Moreover, during the first eleven years of his son's life, Quillon had neither petitioned for legitimation of the child[103] nor sought to obtain custody.[104] When the child was

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94 Note, *Unwed Fathers*, *supra* note 10, at 99.

95 *See Stanley*, 405 U.S. at 652.

96 *See* Comment, *supra* note 52, at 167 (asserting that putative father who cares for and supports his children should be recognized as psychological parent).

97 434 U.S. 246 (1978).

98 *Id.* at 247.

99 *Id.*

100 *Id.* Although the child was continuously in his mother's custody, he lived for approximately two years with his maternal grandmother during the initial period of his mother's marriage. *Id.* at 247 n.1.

101 *Id.* at 251. Although Quilloin had a statutory duty to support his illegitimate son, the mother had never brought an action to enforce this duty. Therefore, whatever support Quilloin provided was voluntary. *Id.* at 251 n.9.

102 *Id.* at 251. The mother had voiced objections to Quilloin's infrequent visits, believing that these contacts had a negative effect on her son. *Id.* at 251 & n.10.

103 *Id.* at 249. Pursuant to Georgia law, Quillion could have legitimated his son by marrying the mother and acknowledging the child as his own, or by obtaining a court order stating that the child was legitimate and capable of inheriting through the father. *Id.* (citing GA. CODE §§ 74-101, -103 (1975)). The Supreme Court of Georgia viewed Quilloin's failure to legitimate his son as an indication of his lack of

eleven years old, his mother consented to his adoption by her husband.[105]

Because Quillon had never legitimated his son, Georgia law did not require his consent to the adoption.[106] Upon receipt of notice of adoption,[107] however, he filed suit to secure visitation rights, to petition for legitimation, and to object to the pending adoption.[108] Denying Quilloin's petition for legitimation, the trial court concluded that he lacked standing to object to the adoption.[109] The court further determined that the proposed adoption would be in the "best interests of [the] child"[110] without specifically finding the putative father to be unfit.[111] Affirming the lower court decision, the Georgia Supreme Court emphasized the strong public policy of rearing children in a family setting and indicated that such a policy would be frustrated if putative fathers were required to consent to the adoption of their illegitimate children.[112]

On appeal to the Supreme Court, Quilloin, relying on *Stanley*, claimed that he was entitled, as a matter of due process and equal protection, to an absolute veto with respect to the adoption

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interest in the child. Quilloin v. Walcott, 238 Ga. 230, 233, 232 S.E.2d 246, 248 (1977), *aff'd*, 434 U.S. 246 (1978). The United States Supreme Court, however, acknowledged that this inaction may have been due to Quilloin's ignorance of the legitimation procedure. *Quilloin*, 434 U.S. at 254 & n.14.

104 *Quilloin*, 434 U.S. at 255. Even at the point in time when he attempted to block the adoption and finally legitimate the child, Quilloin did not seek custody or object to his son's continued cohabitation with the mother. *See id.*

105 *Id.* at 247.

106 *Id.* at 249 & n.3. The Georgia statute provided that, until a child was legitimated, the mother was the only recognized "parent" and was, therefore, granted exclusive parental power to consent to or veto an adoption. *Id.* at 248 (citing GA. CODE § 74-403(3) (1975)). In contrast, the statute permitted either parent of a legitimate child to veto an adoption, even if the parents were divorced or separated at the time of the adoption proceeding. *Id.* (citing GA. CODE § 74-403(1), (2) (1975)).

107 Quilloin did not assert any insufficiency of notice or deprivation of the right to a hearing. *Id.* at 253.

108 *Id.* at 250. These matters were consolidated with the petition for adoption and a trial was held. *Id.*

109 *Id.* at 251.

110 *Id.* The "best interests of the child" standard has often been applied in custody and adoption matters. For discussions of the factors used to determine what is in the "best interests of the child," see Comment, *Illegitimacy and the Rights of Unwed Fathers in Adoption Proceedings After* Quilloin v. Walcott, 12 J. MAR. J. PRAC. & PROC. 383, 393 (1979); Note, *supra* note 24, at 927 n.33.

111 *See Quilloin*, 434 U.S. at 252. On appeal to the Supreme Court, Quilloin alleged that, since the trial court had not made a finding of abandonment or other unfitness on his part, the adoption of his child should not have been allowed. *Id.*

112 Quilloin v. Walcott, 238 Ga. 230, 233, 232 S.E.2d 246, 248 (1977), *aff'd*, 434 U.S. 246 (1978).

of his child unless a finding of parental unfitness was made.[113] Justice Marshall, writing for a unanimous Court, asserted that Quilloin's due process interests were adequately protected by "the best interests of the child" standard employed by the trial court in granting the adoption petition.[114] Emphasizing the position of Quilloin in relation to the family unit,[115] Justice Marshall noted three factors which he considered to be decisive.[116] First, the putative father neither had nor sought custody of his son.[117] Second, the putative father had not participated in the upbringing of his child in a sustained fashion.[118] Finally, the proposed adoption would place the child with his de facto family and it would give full recognition to a family unit already in existence.[119]

The Court similarly refused to accept Quilloin's equal protection argument, which was based on the disparate statutory treatment with respect to veto rights of fathers of legitimate and illegitimate children.[120] Justice Marshall noted that Quilloin had exercised neither legal nor actual custody over his son and, furthermore, had never assumed any significant responsibility with respect to the child's daily supervision, education, protection, or care.[121] Therefore, in the Court's view, Quilloin's interests were readily distinguishable from those of separated or divorced fathers who were accorded veto authority.[122] The Court thus concluded that Georgia's statutory distinction based on parental commitment was valid.[123]

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113 *Quilloin*, 434 U.S. at 253.

114 *Id.* at 254.

115 Unlike the putative father in *Stanley*, Quilloin was never a member of his child's family. *Id.* at 253. Instead, Quilloin's son lived in a de facto family setting with his mother and her husband. Therefore, Georgia's state interest in promoting the child's welfare through protection of a de facto family unit already in existence was increased. 13 TULSA L.J. 363, 366 n.27 (1977).

116 *Quilloin*, 434 U.S. at 255-56.

117 *Id.* at 255. See *supra* note 104 and accompanying text.

118 *Quilloin*, 434 U.S. at 256. See *supra* notes 101-04 and accompanying text.

119 *Quilloin*, 434 U.S. at 255. This de facto family consisted of the child, his mother, and her husband of nine years. *See id.* at 247.

120 *Id.* at 255-56. See *supra* note 106 and accompanying text, which sets forth Georgia's statutory provisions regarding veto rights.

121 *Quilloin*, 434 U.S. at 256.

122 *Id.* The Court observed that even a separated or divorced father would have borne full responsibility for the rearing of his children during the period of the marriage. *Id.* *But see* Comment, *supra* note 110, at 391 n.41 (noting that in cases involving divorce before birth of child, this would not be true).

123 *See Quilloin*, 434 U.S. at 256. The *Quilloin* decision recognized that there can be no absolute parental rights for a putative father without parental responsibility. 13 TULSA L.J. 363, 369 (1977). Implicit in this recognition is the belief that a puta-

Quilloin neglected to capitalize on the opportunity to establish a psychological parent-child relationship[124] during the first eleven years of his son's life. By neither seeking custody nor shouldering any significant responsibilities with respect to the child's daily existence,[125] he failed to attain psychological parenthood status. The Supreme Court consequently refused to accord Quilloin the right to veto his son's adoption.[126]

Tenets of psychological parenthood were further applied by the *Quilloin* Court in its subordination of the rights of the biological father to those of a man with no biological tie to the child.[127] The *Quilloin* decision thus embodies a perfect example of how parental rights may be lost by a nonpsychological, biological father[128] and assumed by a nonbiological, yet psychological, father who is a participant in a de facto family with the biological mother and child.[129] The boundaries of a putative father's rights which were established in *Quilloin* were, therefore, limited by the putative father's commitment to the welfare of his child, as evidenced by the fulfillment of a familial role.[130] Quilloin's failure to

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tive father who does not accept the same responsibilities for his child as generally accepted by other parents, has no right to expect the same degree of constitutional protection. Comment, *Limiting the Boundaries of* Stanley v. Illinois: Caban v. Mohammed, 57 DEN. L.J. 671, 677 (1980).

124 See *supra* notes 11-13 and accompanying text for a discussion regarding a biological father's potential to assume a psychological parent role.

125 *See Quilloin*, 434 U.S. at 256.

126 *See id.*

127 Note, *supra* note 26, at 618. Quilloin's biological connection with his child, by itself, was insufficient to overcome his failure to assume the responsibilites of parenthood. Note, *Unwed Fathers*, *supra* note 10, at 99. In contrast, Randall Walcott, the adoptive father, evidenced a commitment to the child by fulfilling a familial role and by ultimately petitioning for adoption. *See supra* text accompanying note 19. Additionally, the child had expressed a desire to be adopted by Walcott. *Quilloin*, 434 U.S. at 251. This factor was indicative of an affection-relationship between psychological parent and child. See *supra* note 21 and accompanying text.

128 An absent, unsupportive adult will never be a psychological parent, regardless of his biological or legal relationship with a child. BEYOND THE BEST INTERESTS, *supra* note 8, at 19.

129 In granting the adoption petition of the psychological father, the Court gave "full recognition to a family unit already in existence." *Quilloin*, 434 U.S. at 255. This family unit uniquely combined the "biological parentage of the mother with psychological tie [of child] to her husband." Muench & Levy, *supra* note 8, at 168. Psychological parenthood proponents favor the recognition of a family unit already in existence, based on their belief that a child's interest lies in the preservation of a functioning family. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 5 (1979) [hereinafter cited as BEFORE THE BEST INTERESTS].

130 Note, *supra* note 24, at 928. The *Quilloin* decision has been viewed as a mandate that only rights of a biological father arising out of a de facto family relationship should be accorded constitutional protection. Comment, *supra* note 110, at

exhibit a substantial interest in his child's welfare during the first eleven years of his son's life, along with his failure to seek affirmatively to establish parental rights through legitimation, resulted in the Court's refusal to afford him a constitutionally protected right.[131]

V. *CABAN V. MOHAMMED*:[132] AFFIRMANCE OF CONSTITUTIONAL PROTECTION TO INTERESTED PUTATIVE FATHERS

One year after *Quilloin*, the Supreme Court, in *Caban v. Mohammed*, further delineated the boundaries of the newly emerging area of putative fathers' rights by implicitly applying the psychological parenthood rationale. The reasoning of the *Quilloin* Court—that the extent of commitment to and responsibility for the welfare of an illegitimate child should be of principal importance in determining the rights of a putative father[133]—was followed in *Caban*.[134] This rationale was presented in the context of a gender-based equal protection analysis,[135] which had been mentioned but not specifically addressed in *Quilloin*.[136]

Abdiel Caban, a putative father, challenged a New York statute that granted unwed mothers, but not putative fathers, the right to withhold consent to the adoption of their illegitimate children.[137] Caban and Maria Mohammed had lived together from 1968 through 1973, representing themselves as husband and wife, although they were not legally married.[138] During those years, two children were born to the couple and Caban was named as the father on both birth certificates.[139] The parents jointly contributed to the support of their children and partici-

384-85. This interpretation would not recognize the rights of an interested and supportive putative father who, although committed to his child, failed to join in a family relationship with the child and its mother.

131 Note, *supra* note 26, at 617.

132 441 U.S. 380 (1979).

133 *Quilloin*, 434 U.S. at 256; *see supra* text accompanying notes 130 & 131.

134 *Caban*, 441 U.S. at 389 n.7.

135 *Id.* at 389.

136 *See Quilloin*, 434 U.S. at 253 n.13 (noting that although Quillion raised an equal protection claim in his brief, his failure to present it in his jurisdictional statement precluded its consideration by Supreme Court).

137 *Caban*, 441 U.S. at 381. The statute provided in pertinent part that consent to the adoption was required only "[o]f the mother, whether adult or infant, of a child born out of wedlock." N.Y. DOM. REL. LAW § 111(1)(c) (McKinney 1977). Notably, the statute entirely fails to mention the putative father. *Cf.* GA. CODE § 74-403(3) (1975) (statute at issue in *Quilloin* was essentially the same).

138 *Caban*, 441 U.S. at 382. Caban was separated from, but still legally married to, another woman during this time. *Id.*

139 *Id.* A son was born to the couple in 1969 and a daughter in 1971. *Id.* The

pated in child rearing while they lived together as a family.[140]

In 1973, Caban and Mohammed separated, and thereafter the children lived with their mother and her new husband.[141] Although for nine months Caban visited his children on weekends,[142] this contact was discontinued when the children were sent to Puerto Rico to live with their maternal grandmother.[143] The separation did not, however, thwart the putative father's efforts to maintain contact with his children.[144] In 1975, while visiting them in Puerto Rico, Caban obtained possession of his son and daughter and brought them back to the United States with him.[145]

Caban's actions prompted Mohammed to institute custody proceedings.[146] Shortly thereafter, she and her husband filed a petition to adopt the children.[147] Caban and his new wife also petitioned for adoption.[148] Although a hearing was held on both adoption petitions,[149] the New York Domestic Relations Law[150] operated to prevent Caban from adopting his children so long as

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children were, therefore, no longer infants when this matter came before the Supreme Court.

140 *Id.* From all indications during this period, Caban's actions had created a de facto family relationship with a significance that went beyond the biological fact of natural fatherhood. 29 EMORY L.J. 833, 848 (1980).

141 *Caban*, 441 U.S. at 382.

142 *Id.* While the maternal grandmother resided in New York, she was a neighbor and friend of Caban. Since Mohammed brought her children to visit with her mother each week, the putative father was able to maintain regular contact with his children. *Id.*

143 *Id.* Mohammed and her husband were to join the children when they saved enough money to begin a new business in Puerto Rico. *Id.*

144 Caban communicated with his children during their stay in Puerto Rico through his parents, who also resided there. *Id.* at 383.

145 *Id.* The maternal grandmother had surrendered the children to him on the understanding that the children would be returned in a few days. *Id.* Caban, therefore, apparently had no legal authority to remove the children from the custody of their grandmother. *See id.*

146 *Id.* Pursuant to the custody proceeding, the children were placed in the temporary custody of the Mohammeds, and Caban and his new wife were granted visitation privileges. *Id.*

147 *Id.*

148 *Id.* Pursuant to New York law, "[a]n adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock." N.Y. DOM. REL. LAW § 110 (McKinney 1977).

149 The lower court recognized the putative father's right to be heard in opposition to the proposed stepfather adoption. *Caban*, 441 U.S. at 384. This hearing, however, had limited significance since the court only considered evidence insofar as it reflected on the Mohammeds' qualifications as parents. *Id.*

150 N.Y. DOM. REL. LAW § 111(1)(c) (McKinney 1977). See *supra* note 137 for the text of the pertinent statutory provision.

the mother withheld her consent.[151] Accordingly, Mohammed's adoption petition was granted,[152] extinguishing all of Caban's parental rights and obligations.[153]

The Supreme Court addressed Caban's constitutional challenges to the New York statute in the context of a gender-based equal protection analysis.[154] The majority, in an opinion authored by Justice Powell, held that the differential statutory treatment accorded unwed mothers and putative fathers[155] did not bear a substantial relationship[156] to the acknowledged state interest in providing adoptive homes for illegitimate children and was, therefore, unconstitutional.[157] In the Court's view, the effect of the statute was to discriminate against all putative fathers even when, as in Caban's case, their identity was known and they had manifested a strong parental interest.[158] The majority's holding was clearly based on its belief that, at least in the case of older children,[159] maternal and paternal roles were not "invariably different in importance."[160] Because a putative father may have a relationship with his children comparable to that of a mother, the

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151 *Caban*, 441 U.S. at 384.

152 This adoption was granted without Caban's consent upon his failure to show that the "best interests of the child" would not permit adoption by the Mohammeds. *Id.* at 387.

153 *Id.* at 384. Pursuant to New York law, after an adoption order was entered, a natural parent was relieved of all parental duties and had no rights with respect to the child except as specifically provided by statute. N.Y. DOM. REL. LAW § 117 (McKinney 1977).

154 *Caban*, 441 U.S. at 388. The Court never reached appellant's further statutory challenge based on the distinction between married and unmarried fathers. Consideration of the additional challenge, the Court concluded, was unnecessary once it was found that the gender-based statutory distinction was violative of equal protection. *Id.* at 394 n.16.

155 See *supra* note 137 for the text of the relevent statutory provision.

156 The Supreme Court noted that "[g]ender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." *Caban*, 441 U.S. at 388 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)). The Court's application of this standard clearly illustrates its refusal to recognize a fundamental right of a putative father in his illegitimate children. *See* Comment, *supra* note 123, at 680 ("If the Court had wanted to declare that the putative father's interest in his child was fundamental, *Caban* provided an ideal opportunity to do so.").

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

158 *Id. But cf. id.* at 411-12 (Stevens, J., dissenting) (fact that classification appears arbitrary in isolated case is not sufficient reason for invalidating entire rule).

159 Although *Caban* concerned the adoption of four and six year old children, commentators have applied its rationale to the adoption of newborn children as well. *See* 18 DUQ. L. REV. 375, 384 n.74 (1980); 29 EMORY L.J. 833, 856 (1980).

160 *Caban*, 441 U.S. at 389.

Court concluded that the statutory distinction was unconstitutional.[161]

While the Supreme Court found the New York statutory scheme invalid, the *Caban* decision cannot be construed either as indicating that all putative fathers should be accorded the right to consent to the adoption of their illegitimate children, or as endorsing the abolition of all adoption consent statutes that differentiate between natural mothers and putative fathers.[162] The constitutional protection accorded Caban should be limited to putative fathers in similar factual situations.[163]

Although the *Caban* Court found a "substantial relationship" between putative father and child,[164] Justice Powell's opinion failed to enunciate specifically those factors essential to such a relationship.[165] It appears, however, from the Court's reasoning, that a constitutionally protected putative father-child relationship may be found where the father "come[s] forward to participate in the rearing of his child,"[166] has lived with the mother and child in a de facto family setting for a sustained period of time, has ac-

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161 *Id.* at 394.

162 The Court clearly asserted that, in cases where a putative father had never participated 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." *Id.* at 392. This emphasis on participation in child rearing is consistent with the rationale applied in *Quilloin*, wherein a putative father was denied the right to block the adoption of his illegitimate child. *See supra* text accompanying notes 124-26 & 131. Consequently, states could enact statutes denying adoption consent rights to uninterested putative fathers while still protecting the rights of unwed fathers demonstrating a tangible interest in, and responsibility for, the care and rearing of their children. Comment, *Extending Rights, supra* note 83, at 111; 29 EMORY L.J. 833, 851 (1980).

163 Even the dissent agreed that the *Caban* decision should be limited to similar factual situations "involving the adoption of an *older* child against the wishes of a natural father who previously ha[d] participated in the rearing of the child and who admit[ted] paternity." *Caban*, 441 U.S. at 409 (Stevens, J., dissenting) (emphasis in original). A proper reading of *Caban* must, therefore, focus on its rationale rather than its result. 29 EMORY L.J. 833, 854 (1980). The statute considered in *Caban* was found unconstitutional because it discriminated against the subject putative father despite his substantial and sustained relationship with his children. *But cf. Quilloin*, 434 U.S. at 156 (similar statute requiring only natural mother's consent to adoption of her illegitimate child was found not to deprive putative father of his constitutional rights because of his lack of significant responsibility for his son).

164 *Caban*, 441 U.S. at 393.

165 The Court's failure to give any guidance concerning the proper criteria that could be used to distinguish caring unwed fathers from uncaring ones has been criticized. *See* Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries Are Defined*, 19 J. FAM. L. 445, 460 (1980-1981) (indicating that *Caban* decision did not "explain what is expected of the unwed father in order to establish a . . . parental right").

166 *Caban*, 441 U.S. at 392.

knowledged the child as his own, and has contributed support.[167]

All of Caban's actions toward his children evidenced the existence of a mutual relationship involving love, affection, confidence, and trust.[168] As a biological father, Caban assumed the role of a psychological parent by becoming involved in the day-to-day care of his children.[169] The Court's recognition of Caban's rights as an unwed father is, therefore, consistent with the underlying rationale in both *Stanley* and *Quilloin*, that a putative father's rights should not be based merely on the biological link between father and child, but instead, they should be recognized only where a substantial relationship indicative of psychological parenthood is found to exist.

VI. *LEHR V. ROBERTSON*:[170] NON-RECOGNITION OF INCHOATE RIGHTS OF PUTATIVE FATHERS

While the Supreme Court decisions in *Stanley*, *Quilloin*, and *Caban* cumulatively delineated the outer boundaries of constitutional protection afforded putative fathers, lines within those boundaries still needed to be more narrowly defined.[171] In particular, questions relating to the lengths to which a state must go in seeking and notifying a putative father with respect to the adoption of his illegitimate child remained unanswered.[172] In *Lehr v. Robertson*, decided in 1983, the Court considered whether a putative father's inchoate relationship with a child whom he had rarely seen and never supported should be accorded consti-

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167 Note, *Unwed Father Has Equal Protection Right to Consent*, 1979 B.Y.U.L. REV. 987, 995.

168 *See* Note, *Alternatives in Child Custody Disputes*, *supra* note 10, at 158 (noting that these factors are basis of psychological parenthood). The existence of an affection-relationship, requisite to psychological parenthood, was clearly evident in the *Caban* case since the putative father had established a sustained and proximate relationship with his son and daughter during their early years when the fulfillment of childhood needs was so important to their mental and emotional health.

169 *See supra* notes 140-45 and accompanying text (highlighting Caban's commitment to his children).

170 103 S. Ct. 2985 (1983).

171 Comment, *supra* note 123, at 682-83.

172 Language in the *Caban* decision with respect to the ease of identifying and locating putative fathers who had established substantial relationships with their children implied that a state must give notice and hearing to such fathers. *See Caban*, 441 U.S. at 393; Note, *supra* note 167, at 1002. However, not all courts followed such a narrow reading of this case. *See In re* Cecilie Ann T., 101 Misc. 2d 472, 477, 421 N.Y.S.2d 167, 170-71 (Surr. Ct. 1979) (adopting broad view of *Caban* and requiring service of adoption notice on putative fathers, even if their location is unknown).

tutional protection.[173] The *Lehr* decision serves to illustrate the Supreme Court's continuing resolve to deny constitutional safeguards based upon the mere biological link between a putative father and his illegitimate child.[174]

Johnathan Lehr had lived with Lorraine Robertson, the mother of his child, for a period of time prior to his daughter's birth.[175] However, he neither cohabited with the mother and child after birth nor provided any financial support to them.[176] Lehr's name did not appear on the child's birth certificate[177] and there was little evidence of any effort on his part to see his daughter during the first two years of her life.[178] When the child was eight months old, the mother married her present husband.[179] Approximately two years later, the mother and her husband filed an adoption petition, which was ultimately granted.[180]

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173 *Lehr*, 103 S. Ct. at 2990. Lehr alleged that a potential relationship with a child born out of wedlock was a liberty interest which could not be destroyed without due process of law. *Id.*

174 The *Lehr* Court evidenced its hesitancy to adopt psychological parenthood theory per se, noting that it "need not take sides in the ongoing debate among family psychologists over the relative weight to be accorded biological ties and psychological ties." *Id.* at 2994 n.18. The Court did recognize, however, that a putative father who has played a substantial part in his child's upbringing should be accorded greater constitutional protection than a mere biological parent. *Id.*

175 *Id.* at 2988.

176 *Id.*

177 *Id.* If Lehr's name had been entered on the child's birth certificate, this alone would have entitled him to notice of the adoption. *See* N.Y. DOM. REL. LAW § 111-a(2)(d) (McKinney 1977). The omission of Lehr's name on the birth certificate may be attributable, in part, to the fact that Lorraine Robertson never conceded that Lehr was her child's father. *Lehr*, 103 S. Ct. at 2987 n.3.

178 *Lehr*, 103 S. Ct. at 2988. When Lehr's involvement with his child is compared with that of Stanley and Caban, it is obvious that a substantial relationship was lacking. See *supra* notes 87-96, 138-45 and accompanying text for a discussion of the relationships Stanley and Caban had with their children. Indeed, Lehr's contacts with his child were much less substantial than those found in *Quilloin*, where constitutional protection was similarly denied. See *supra* notes 99-104 and accompanying text for a description of the putative father-child relationship present in *Quilloin*. In *Lehr*, the Supreme Court distinguished between the actual parent-child relationships implicated in *Stanley* and *Caban* and the "potential relationship[s]" involved in *Quilloin* and the case at bar. *Lehr*, 103 S. Ct. at 2993. The dissent noted, however, that Lehr's failure to develop a relationship with his daughter may have been due, in part, to the fact that the child's location was concealed from him. *Id.* at 2997 (White, J., dissenting).

179 *Lehr*, 103 S. Ct. at 2987. As a result of her mother's marriage, the child lived in a de facto family relationship with her mother and stepfather for almost her entire life.

180 *Id.* At the time the adoption petition was filed and granted, only the consent of the mother was required for the adoption of her child. N.Y. DOM. REL. LAW § 111(1)(c) (McKinney 1977); *see supra* note 137. The *Caban* decision, rendered two months after the entry of the adoption order in *Lehr*, invalidated this statute. How-

Under the New York statutory scheme considered in *Lehr*, putative fathers were entitled to notice prior to the adoption of their illegitimate children only in seven specific situations.[181] Because he did not fall within any of the statutorily designated classes, Lehr received no notice or opportunity to be heard before his daughter was adopted.[182] Lehr sought to overturn the adoption order, alleging that, pursuant to both the due process and equal protection clauses, he was entitled to an absolute right to notice and hearing before the adoption petition was granted.[183]

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ever, this decision was found to be non-retroactive by the New York Court of Appeals. *In re* Jessica XX, 54 N.Y.2d 417, 421, 430 N.E.2d 896, 898, 446 N.Y.S.2d 20, 21 (1981), *aff'd sub nom.* Lehr v. Robertson, 103 S. Ct. 2985 (1983). A retroactive application was considered unwise by the dissenters in *Caban*. *Caban*, 441 U.S. at 416 (Stevens, J., dissenting); *id.* at 401 (Stewart, J., dissenting). The *Caban* majority, however, was silent with respect to the possibility of retroactive application of the decision. The failure of the *Caban* Court to object to the dissenters' statements concerning retroactivity led the New York Family Court, when considering the *Lehr* matter, to conclude that "at least tacitly, [the *Caban* majority] concurred." *In re* Jessica Martz, 102 Misc. 2d 102, 121, 423 N.Y.S.2d 378, 390 (Fam. Ct. 1979), *aff'd sub nom. In re* Jessica XX, 77 A.D.2d 381, 434 N.Y.S.2d 772 (1980), *aff'd*, 54 N.Y.2d 417, 430 N.E.2d 896, 446 N.Y.S.2d 20 (1981), *aff'd sub nom.* Lehr v. Robertson, 103 S. Ct. 2985 (1983).

181 N.Y. DOM. REL. LAW § 111-a(2)(a)-(g) (McKinney 1977 & Supp. 1980). Persons entitled to notice included: (a) any person adjudicated by a New York court to be the father of the child; (b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, providing a certified copy of such order was filed with the putative father registry; (c) any person who had timely filed an unrevoked notice of intent to claim paternity of the child; (d) any person who was recorded on the child's birth certificate as the child's father; (e) any person who was openly living with the child and the child's mother at the time the proceeding was initiated and who was holding himself out to be the child's father; (f) any person who had been identified as the child's father by the mother in a written, sworn statement; and (g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the initiation of the surrender instrument. *Id.*

This statutory scheme was enacted by the New York Legislature after the Supreme Court's decision in *Stanley* to automatically provide notice to seven classes of putative fathers who were likely to have assumed some responsibility for their children. *Lehr*, 103 S. Ct. at 2994. Pursuant to these provisions, a substantial relationship with the child was not always a prerequisite to notice, since a putative father's mere registration with the putative father registry, without any relationship with the child, would be sufficient to entitle him to notice. *See* N.Y. DOM. REL. LAW § 111-a(2)(c) (McKinney 1977); *see also infra* note 191 (description of New York's putative father registry system).

182 *Lehr*, 103 S. Ct. at 2987.

183 *Id.* Lehr relied on the Supreme Court's decisions in *Stanley* and *Caban* in support of his constitutional challenge, apparently disregarding the substantial and ongoing nature of the putative father-child relationships found therein. Instead, Lehr alleged that his inchoate relationship with his child was entitled to constitutional protection. *Id.* at 2990.

In considering Lehr's due process challenge, the Supreme Court adopted a rationale which closely mirrors psychological parenthood tenets.[184] Writing for the majority, Justice Stevens asserted that the "mere existence of a biological link does not merit . . . constitutional protection."[185] Although the Court acknowledged that the existence of a potential or inchoate parent-child relationship is inherent in the biological connection,[186] it refused to extend constitutional protection where the putative father had failed to grasp the opportunity to actualize such a relationship for over two years.[187] Because Lehr had made little attempt to become a psychological father to his child, the Court ruled that notice of adoption was unnecessary.[188]

If Lehr had been a psychological parent to his daughter, he probably would have fallen within one or more of the statutory classes of putative fathers entitled to notice of their children's adoption.[189] Even in the absence of any active involvement in his

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184 See *supra* notes 10-22 and accompanying text for a discussion of psychological parenthood.

185 *Lehr*, 103 S. Ct. at 2993. The *Lehr* majority noted that the importance of the familial relationship stemmed not merely from a blood relationship, but also from the emotional attachments that were derived from the intimacy of daily association. *Id.* (citing Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977)) (further citations omitted). The *Lehr* dissent maintained that the majority had incorrectly downplayed the significance of the biological connection between a putative father and his child. Justice White stated that a " 'mere biological relationship' is not as unimportant in determining the nature of liberty interests as the majority suggests." *Id.* at 2999 (White, J., dissenting). The dissenters believed that the biological connection itself was a relationship deserving of constitutional protection and, therefore, Lehr's interest in his child should have been entitled to constitutional protection regardless of the quality of the relationship. *Id.*

186 *Id.* at 2993. Lehr had contended that a putative father's interest in an actual or potential relationship with his out of wedlock child could not be destroyed without due process of law. *Id.* at 2990. The Court, however, rejected that contention and held that constitutional protection was not warranted where only a biological link existed. *Id.* at 2993.

187 *Id.* at 2994. Having no knowledge of the filing of the Robertson's adoption petition, Lehr filed a visitation and paternity petition in a neighboring county about a month later. *Id.* at 2988. The judge presiding over the adoption proceeding was aware of Lehr's petition. However, the judge did not believe that he was required by law to give Lehr notice of the adoption proceeding, since this putative father did not fall within any of the seven classes of individuals entitled to notice pursuant to N.Y. DOM. REL. LAW § 111-a(2)(a)-(g) (McKinney 1977 & Supp. 1980). *Lehr*, 103 S. Ct. at 2889. *But cf.* Note, Lehr v. Robertson: *A Constricted View of the Rights of Putative Fathers*, 4 PACE L. REV. 477, 492 (1984) (noting that court considering Robertson adoption had discretionary power, pursuant to N.Y. DOM. REL. LAW § 111(3), to notify Lehr even though he did not fit within any of seven statutory categories).

188 *See Lehr*, 103 S. Ct. at 2996-97.

189 The categories of putative fathers set forth by the statute presumably in-

child's life, however, Lehr's right to receive notice was still completely within his control,[190] due to the existence of New York's putative father registry.[191] Observing that putative fathers must avail themselves of statutorily provided means of securing notice, the Court concluded that the Constitution did not require that Lehr be given special notice, since New York's statutory scheme provided adequate protection for his inchoate interest in his child.[192]

Lehr's equal protection argument was similarly dismissed by the Court.[193] Observing that Lehr had "never established any custodial, personal, or financial relationship" with his daughter, the Court held that New York's statutory scheme, which required notice to only certain classes of putative fathers,[194] was not violative of the equal protection clause.[195] Therefore, Justice Stevens determined that Lehr had no absolute right to notice and an opportunity to be heard before his child could be adopted.[196]

The *Lehr* decision is yet another affirmance of the Supreme Court's belief that constitutional protection should be accorded

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cluded individuals who exhibited some interest in their children. *See supra* note 181. In order to fall within most of these designated classes, however, a putative father need not qualify as a psychological parent. *See infra* notes 215-20 and accompanying text.

190 *Lehr*, 103 S. Ct. at 2995. Since the means by which Lehr could have received notice were within his control, ignorance of the law could not be an excuse. *Id.*

191 The putative father registry was established to record the name and address of any person filing a notice of intent to claim paternity, either before or after the birth of a child out of wedlock. N.Y. SOC. SERV. LAW § 372-c(1) (McKinney 1977). By simply mailing a postcard to this registry, Lehr could have guaranteed that he would have received notice of any proceeding regarding the adoption of his child. *Lehr*, 103 S. Ct. at 2995. Before the order in the Robertson adoption was entered, the judge had the putative father registry examined. However, nothing was found which would have required Lehr to be notified. *Id.* at 2988.

192 *See Lehr*, 103 S. Ct. at 2995.

193 *Id.* at 2997.

194 *See supra* note 181 and accompanying text.

195 *Lehr*, 103 S. Ct. at 2996-97. Where the mother had an established custodial relationship and the father had abandoned or never established a relationship with his child, equal protection did not prohibit the state from according the parents different legal rights. *Id.* at 2997.

196 *Id.* at 2987. Even if Lehr had been given notice of the adoption proceedings, it probably would not have changed the final outcome. The sole purpose of notice was to enable the putative father "to present evidence to the court relevant to the best interests of the child." N.Y. DOM. REL. LAW § 111-a(3) (McKinney 1977). In this situation, the adoption would not have affected the child's relationship with her mother and would have legally recognized a de facto family relationship with the stepfather which had existed for 21 months. Since Lehr did not even know the adoptive father, it is questionable whether he would have been able to offer any evidence to indicate that the legal confirmation of such an established relationship would have been unwise. *Lehr*, 103 S. Ct. at 2995 n.22.

only to those putative fathers who have consistently demonstrated both a positive concern for and interest in their children.[197] In essence, the Court did not recognize Lehr as a psychological parent. The absence of a psychological parent-child relationship, coupled with Lehr's failure to avail himself of the statutory means to secure notice of his child's adoption,[198] led the Court to recognize a nonbiologically linked male as the child's legal father by adoption,[199] as it had in *Quilloin*.[200]

The Supreme Court's decision in *Lehr* should end exaggerated concern for uninterested putative fathers with respect to matters of notice, and it should put a stop to "futile, ritualistic hunts"[201] for such individuals before adoptions are granted.[202] Further significance may be found in the *Lehr* opinion's requirement that putative fathers avail themselves of constitutional, statutorily provided means of securing notice of matters pertaining to the disposition of their children, if they wish to retain parental rights.[203] A putative father must, therefore, take affirmative action in exhibiting an interest in his child since, pursuant to *Lehr*, a mere inchoate relationship between a putative father and his older illegitimate child will not be constitutionally protected.[204]

VII. ANALYSIS

In assessing the constitutionality of custody and adoption

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197 See *supra* notes 88-96, 163-69 and accompanying text for a discussion of the Supreme Court's extension of constitutional protection to interested unwed fathers in *Stanley* and *Caban*.

198 *See supra* notes 190 & 191 and accompanying text. It has been suggested that the legal recognition of parental rights is no guarantee that biological parents will exercise such rights or seek to establish significant psychological ties with their children. BEFORE THE BEST INTERESTS, *supra* note 129, at 10.

199 By upholding this adoption, the Court implicitly acknowledged Richard Robertson as the child's psychological father. When Lehr's daughter was eight months old, Robertson married her mother, and the child has lived in a de facto family setting with them continuously since that time. *Lehr*, 103 S. Ct. at 2987. Consequently, Robertson was the male parental figure who apparently satisfied the child's needs during her early development.

200 *See Quilloin*, 434 U.S. at 255 (result of adoption was to recognize family unit already in existence).

201 Dembitz, *Lehr Decision Helps Out-Of-Wedlock Newborns Find Homes*, 70 A.B.A. J. 126, 129 (Jan. 1984).

202 Prior to the *Lehr* decision, the adoptions of illegitimate children had been delayed in order to protect putative fathers' interests. Therefore, the elimination of notice to disinterested putative fathers, through appropriate statutory schemes, should expedite the adoption of illegitimate children and increase their adoptability. *See* Note, *supra* note 84, at 517-18, 523-27.

203 *See Lehr*, 103 S. Ct. at 2995.

204 *Id.* at 2993-94.

statutes, the Supreme Court's primary inquiry has been whether such laws have adequately protected those interested putative fathers who have developed sustained relationships with their illegitimate children. In order to pass constitutional scrutiny, custody and adoption statutes must not treat putative fathers as a class, but should provide criteria whereby distinctions may be drawn between putative fathers based on the qualitative aspects of their relationships with their offspring.

The Supreme Court has consistently applied indicia of psychological parenthood in considering the rights of putative fathers.[205] Statutory law should, therefore, clearly set forth psychological parentage criteria to be applied in determining which putative fathers are entitled to notice, hearing, or consent rights in custody and adoption matters.[206] Statutes that fail to set forth distinguishing criteria, and extend rights to all putative fathers, do not serve either the interests of the state or the child, since they only impede the adoption process. An examination of New Jersey and New York adoption statutes demonstrates the need for states to narrow the class of putative fathers who should be accorded constitutional protection.

A. New Jersey's Adoption Statute

The present New Jersey adoption statute's express purpose is to promote the best interests of children who are to be adopted.[207] Notwithstanding this purpose, the statute provides that notice of any adoption proceeding must be served on the putative or alleged father of any child born out of wedlock.[208] Thus, any known putative father is entitled to notice of his child's adoption. Once notice is received, a putative father has the right to object to the adoption of his child by personal appearance or

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205 *See supra* text accompanying notes 88-96, 124-31, 166-69, 184-87 & 197-200.

206 It has been suggested that statutes adopting psychological parentage criteria would necessitate careful case by case determinations of parental interest and involvement before rights to notice, hearing, or consent could be accorded. *See* Note, *supra* note 24, at 932 n.60 (noting that this approach might involve interpretive difficulties); Comment, *supra* note 53, at 1606 (same); *see also* Katkin, Bullington & Levine, *Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action*, 8 LAW AND SOC. REV. 670, 679 (1979) (questioning advisability of psychological parentage approach in light of necessity for increased discretionary power in hands of government officials).

207 N.J. STAT. ANN. § 9:3-37 (West Cum. Supp. 1984-1985).

208 *Id.* § 9:3-45(a)(2). It is only in cases where the identity of a parent cannot be determined, or where the known parent cannot or will not identify the other parent, and the court is unable to identify the other parent, that notice may be waived by the court. *Id.* § 9:3-45(d).

by letter.[209] However, if the court considering the proposed adoption finds that a putative father has substantially failed to regularly care for and support his child, including "maintenance of an emotional relationship with the child," his objection may be disregarded.[210]

This notice provision, drafted in general terms which fail to distinguish between psychological and biological putative fathers, requires that courts expend time, effort, and expense to notify individuals whose involvement in their children's lives may be limited or nonexistent. Such a notice requirement should be unnecessary, because an objection by a putative father who fails to meet psychological parenthood criteria will not be considered.[211] In an effort to serve the best interests of children who are to be adopted and to expedite the adoption process, New Jersey's notice statute should set forth specific classes of fathers, based on psychological parentage criteria, who have shown substantial relationships with their children as evidenced by an interest in their "companionship, care, custody and management"[212] over a sustained period of time. In adopting such a statute, needless notice to uninterested putative fathers, whose views have little relevance to the best interests of their children, would be eliminated.

B. New York's Adoption Statute

The New York statute considered in *Lehr*[213] was drafted in an attempt to distinguish between putative fathers in granting rights to notice of adoption.[214] In accordance with this goal, the current statute enumerates eight classes of putative fathers who are to be given notice of adoption.[215] Only one of those classes

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209 *Id.* § 9:3-46(a). The right to object to the adoption is accorded to any "parent" who has not executed a surrender of the child for adoption. *Id.* The natural father of a child born out of wedlock, who has acknowledged the child, is considered to be a "parent" and is, therefore, granted this right. *See id.* § 9:3-38(f).

210 *Id.* § 9:3-46(a).

211 The statute provides that a judgment of adoption shall not be entered over a parental objection that has been properly communicated to the court, unless such parent has failed to perform parental care and support functions for the child, including a failure to maintain an emotional relationship. *Id.* § 9:3-46(a).

212 *See Stanley*, 405 U.S. at 651.

213 N.Y. DOM. REL. LAW § 111-a (McKinney 1977 & Supp. 1980).

214 Following the *Caban* decision in 1979, one New York judge urged the Legislature to formulate an adoption notice statute that would distinguish interested putative fathers from "fleeting disinterested impregnators." *In re* Cecilie Ann T., 101 Misc. 2d 472, 478, 421 N.Y.S.2d 167, 171 (Surr. Ct. 1979).

215 *See supra* note 181 and accompanying text (setting forth provisions of N.Y.

would appear to exclude individuals with nonpsychological parenthood standing.[216] Although the New York statute represents a positive step, its provision of notice to putative fathers with no more than a biological tie to their children[217] frustrates its attempt to narrow considerably the class of putative fathers entitled to notice.

The statute notably provides that notice be given to those unwed fathers demonstrating an intent to claim paternity by filing a notice with the putative father registry.[218] The sole purpose of notice under the New York statute is to "enable the person served . . . to present evidence to the court relevant to the best interests of the child."[219] Therefore, providing notice to a putative father who has only entered his name and address in the registry provides little or no insight into what is best for the child. By extending the right to notice to a registered putative father with only a biological link to his child, New York courts may be compelled to waste their time in considering the point of view of an individual who has previously exhibited no constitutionally protected interest in his child and whose consent to the adoption is not required.[220]

DOM. REL. LAW § 111-a(2)(a)-(g) (McKinney 1977 & Supp. 1983) that were in effect at time *Lehr* adoption order was entered). The statute was amended in 1980 to include an eighth class of putative fathers who are entitled to notice. Pursuant to this amendment, notice of adoption must also be provided to any person who has filed with the putative father registry an instrument acknowledging paternity of the child as required by estates, powers, and trusts law. N.Y. DOM. REL. LAW § 111-a(2)(h) (McKinney Supp. 1983).

216 Notice is to be provided to "any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father." N.Y. DOM. REL. LAW § 111-a(2)(e) (McKinney Supp. 1983).

217 For example, notice is to be provided to any person who has filed with the putative father registry, any person whose name has been recorded on the child's birth certificate, any person identified as the child's father by the mother in a sworn, written statement, and any person who has filed with the putative father registry an instrument acknowledging paternity pursuant to estates, powers, and trust law. *Id.* § 111-a(2)(c), (d), (f), (h) (McKinney 1977 & Supp. 1983).

218 *Id.* § 111-a(2)(c) (McKinney 1977). The statutory provision concerning the putative father registry is set forth at *supra* note 191.

219 N.Y. DOM. REL. LAW § 111-a(3) (McKinney Supp. 1983).

220 With respect to children born out of wedlock and aged six months or older at time of adoption, a putative father's consent is only required "if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) the payment by the father toward support of the child of a fair and reasonable sum . . . and either (ii) the father's visiting the child at least monthly . . . or (iii) the father's regular communication with the child or with the person or agency having the care or custody of the child." *Id.* § 111(1)(d). Therefore, although a merely biologically linked father may be accorded notice due to the

The only interests of a putative father that the Supreme Court has deemed worthy of protection are those which the putative father himself has valued and has attempted to preserve.[221] A biological father who does not strive to become a psychological parent should not have his inchoate relationship protected by statute.[222] In order to serve best the interests of both the state and the child in adoption proceedings, statutes should be drafted utilizing psychological parenthood criteria so that only truly deserving putative fathers will have their interest in their illegitimate children protected.

VIII. CONCLUSION

Despite the concern voiced by Chief Justice Burger in his dissent in *Stanley*,[223] the boundaries of putative fathers' rights, which have become discernible through the *Quilloin*, *Caban*, and *Lehr* decisions, are not as wide as may have been feared. Constitutional protection has been accorded only to those putative fathers who have evidenced a substantial interest in the care and upbringing of their illegitimate children, while putative fathers with only a biological tie to their offspring have been denied constitutional protection. Although putative fathers may be granted rights to notice, hearing, and consent, such rights should be limited to only those fathers who have demonstrated both a biological and psychological link to their children.

While the Supreme Court appears reticent to espouse expressly the tenets of psychological parenthood,[224] its decisions have evidenced legal reasoning which is most definitely in line with that theory. Therefore, in attempting to draft custody and adoption statutes that distinguish between putative fathers who have shown a significant parental interest in their children and those who have not, states should be guided by psychological parenthood theory. The Supreme Court decisions considered herein have indicated that the boundaries of putative fathers' rights must be carefully circumscribed. Psychological

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entry of his name in the putative father registry, he will be unable to block an adoption if he has not supported his child and visited or communicated with the child regularly. *See id.*

221 *See Lehr*, 103 S. Ct. at 2993-94.

222 *See id.* at 2994 (where putative father fails to develop relationship with his offspring, state is not automatically compelled to listen to his opinion of where child's best interests lie).

223 *See supra* note 2.

224 *See supra* notes 8, 9 & 174.

parenthood principles should serve as convenient guideposts in defining these boundaries.

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