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# Michael H. v. Gerald D.: The Constitutional Rights of Putative Fathers and a Proposal for Reform

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# NOTES

## *MICHAEL H. v. GERALD D.*: THE CONSTITUTIONAL RIGHTS OF PUTATIVE FATHERS AND A PROPOSAL FOR REFORM

Presently, if a putative father[1] has developed a substantial parental relationship with his child, and the mother of the child is unmarried at the time of birth, it is a violation of the due process clause of the fourteenth amendment to terminate the putative father's parental rights without a judicial hearing.[2] If, however, the child's mother is married to another man at the time of birth the putative father's constitutional rights are radically altered, and he is no longer entitled to a judicial hearing prior to the termination of his parental rights.[3] Prior to the 1972 case of *Stanley v. Illinois*,[4] the rights and obligations of a putative father with regard to his children were controlled almost exclusively by legislative enactments.[5] The *Stanley* case created a new area of common law that dealt specifically with the rights of putative fathers.[6] *Michael H. v. Gerald D.* is the most recent Supreme Court case dealing with the putative father's right to prevent the termination of his parental relationship with his child.[7]

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[1] This note uses the term "putative father" to refer to any man who is biologically, or potentially biologically, a child's father, and who attempts to be named that child's father, but has not yet been adjudicated the father.

[2] Stanley v. Illinois, 405 U.S. 645, 657–58 (1972).

[3] Michael H. v. Gerald D., 109 S. Ct. 2333, 2346 (1989).

[4] 405 U.S. 645 (1972).

[5] At common law, the putative father had virtually no rights with regard to his children. Comment, *Delineation of the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290, 294 (1985) [hereinafter Comment, *Boundaries of Putative Fathers' Rights*]; *see also* Tabler, *Parental Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 231–32 (1971). (Tabler states that in the United States, the general rule in 1971 was that a putative father had almost no legal rights in his illegitimate children). With the advent of adoption, a proceeding that did not exist at common law, many states enacted legislation that defined the rights of the putative father in these proceedings. Comment, *Boundaries of Putative Fathers' Rights*, *supra*, at 296.

[6] Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 298 n.57, 303.

[7] 109 S. Ct. 2333 (1989).

Because this is a relatively new and unsettled area of law, there is an acute need for guidance concerning the potential constitutional rights of the putative father who wishes to assert his paternity.[8] *Michael H.*, however, was resolved by a plurality, which limits the precedential value of the opinion and weakens the Court's ability to resolve these uncertainties.[9] Thus, without a complete and thorough analysis of the opinions of the Court, this case will serve only to confuse, rather than clarify, the law regarding the rights of putative fathers.[10]

In *Michael H. v. Gerald D.*, a putative father initiated an action for filiation[11] over a child who had been born to a married woman.[12] The California Superior Court dismissed the action and held that because the child had been born to a married woman, California law conclusively presumed her husband to be the child's father.[13] The California Court of Appeal affirmed the lower court.[14] The United States Supreme Court also affirmed, reasoning that it is

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[8] UNIF. PUTATIVE AND UNKNOWN FATHERS ACT (UPUFA), Prefatory Note, 9B U.L.A. 22 (Supp. 1990).

[9] 109 S. Ct. at 2336. *See* Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 756, 759 (1980) [hereinafter Note, *Precedential Value*] ("[B]ecause they [plurality decisions] do not provide any single line of reasoning supported by a clear majority of the Court, these decisions pose substantial difficulties for lower courts attempting to ascertain their precedential value. . . .").

[10] Note, *Precedential Value*, *supra* note 9, at 756, 759.

[11] Filiation is "a judicial determination of paternity" or "[t]he relation of the child to the father." BLACK'S LAW DICTIONARY 566 (5th ed. 1979).

[12] 109 S. Ct. at 2337. Victoria D., the child, joined with Michael H. in this action, because her guardian *ad litem* had determined that it was in Victoria's best interests for Michael to have visitation privileges. *Id.* Because this note focuses on putative fathers, it will not discuss Victoria's involvement in the case.

[13] *Id.* at 2338. The Superior Court made its decision on the basis of section 621 of the California Evidence Code, which states in pertinent part:

> (a) Except as otherwise provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
>
> (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband will be resolved accordingly.
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> (c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.
>
> (d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

CALIF. EVID. CODE § 621 (West Supp. 1990).

[14] 109 S. Ct. at 2338.

constitutionally permissible for a state to terminate a putative father's parental rights without a judicial hearing if the child's mother is married to another man at the time of birth.[15] Justice Scalia wrote the main opinion for the plurality and was joined by Justice Rehnquist.[16] Justice O'Connor filed an opinion concurring in part, in which Justice Kennedy joined.[17] Justice Stevens concurred in the judgment.[18]

Prior to *Michael H. v. Gerald D.*, the Supreme Court had ruled on four cases, collectively known as the *Stanley* line of cases, dealing with the rights of putative fathers.[19] In the 1972 case of *Stanley v. Illinois*, the Court held that an Illinois statute containing the conclusive presumption that all putative fathers were unfit parents was unconstitutional.[20] Six years later, in 1978, the Court held that a putative father could be denied the right to veto an adoption proceeding because he had neither taken an active role in raising his child nor attempted to legitimate the child during the first eleven years of the child's life.[21] In 1979, the Court determined that when a father takes an active role in the raising and support of the child and admits his paternity, the equal protection clause does not allow the state to deny the father a veto power over adoptions while simultaneously granting the mother the right to veto adoptions.[22] Finally, in 1983, the Court held that a putative father who had not developed any substantial parental relationship with his child, and had failed to provide proper notice of his paternity claim to the state, was not entitled to notice prior to a proceeding to adopt his child.[23]

Prior to 1972, putative fathers did not have a constitutionally protected right to maintain a parental relationship with their children.[24] The Uniform Putative and Unknown Fathers Act ("UP-

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[15] *Id.* at 2346.

[16] *Id.* at 2336. *Michael H.* is a plurality decision because no single opinion received the support of a majority of Justices. I refer to Justice Scalia's opinion as the main opinion, because it received more support than Justice Stevens's opinion, and the dissent focused on criticizing Justice Scalia's opinion.

[17] *Id.* at 2346.

[18] *Id.* at 2347.

[19] Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

[20] 405 U.S. at 658.

[21] *Quilloin*, 434 U.S. at 256.

[22] *Caban*, 441 U.S. at 394.

[23] *Lehr*, 463 U.S. at 263–65, 267–68.

[24] *See* Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 296.

UFA"), approved by the National Conference of Commissioners on Uniform State Laws in 1988, codifies the *Stanley* line of cases, thereby providing state courts and legislatures with a standard interpretation of this case law.[25] If a majority of state legislatures enacts the UPUFA, it will have a stabilizing effect on this unsettled area of law and insure that the state fully protects the constitutional rights of putative fathers.[26]

This note analyzes the current state of the law surrounding putative fathers' rights. Section I of this note presents a general discussion of the present state of putative fathers' rights, including a brief historical overview of paternity and recent Supreme Court cases.[27] Section II analyzes the meaning and precedential value of *Michael H. v. Gerald D.*[28] Section II also evaluates the beneficial effects of adopting the UPUFA and concludes that only by adopting the UPUFA can putative fathers' constitutional rights be protected.[29]

## I. Putative Fathers' Rights

### A. *Early Common Law Principles, State Statutes, and the Uniform Parentage Act*

English common law burdened an illegitimate child with a legal status that deprived the child of most of the legal rights accorded to a legitimate child.[30] According to Blackstone, illegitimate children could either be classified as *fillius nullius*, "the son of no one," or as *fillius populi*, "the son of the people."[31] Some scholars interpret the doctrine of *fillius nullius* as depriving the putative father of both custody rights and support obligations, but there is not universal agreement on this interpretation.[32] *Fillius nullius*, however, should

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[25] Unif. Putative and Unknown Fathers Act, Prefatory Note, 9B U.L.A. 22 (Supp. 1990).

[26] See *infra* notes 215–245 and 328–350 and accompanying text for a discussion of UPUFA.

[27] See *infra* notes 30–290 and accompanying text.

[28] See *infra* notes 291–326 and accompanying text.

[29] See *infra* notes 327–350 and accompanying text.

[30] *See* Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 294–95.

[31] 1 W. Blackstone, Commentaries *458.

[32] Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 27 (citing Note, *Protecting the Putative Father's Rights After* Stanley v. Illinois: *Problems in Implementation*, 13 J. Fam. L. 115, 119 n.26 (1973–74)).

be distinguished from *fillius populi*, which is a custodial principle.[33] Under the doctrine of *fillius populi*, neither the mother nor the father was recognized as the legal parent, and, therefore, the local church or parish received custody of the child.[34] Later, however, the English equity courts altered the principle of *fillius populi* and granted the mother custody of the child while depriving the father of all custodial rights.[35] A separate legal principle, referred to as the conclusive marital presumption, dealt with an illegitimate child born to a married woman.[36] According to this principle, any child born to a married woman was presumed to be a legitimate child of the marriage.[37]

American common law adopted many of the English common law principles with regard to the rights of putative fathers.[38] Some state courts modified these general principles and granted the putative father custody rights superior to all but the child's mother.[39] According to some commentators, however, most state laws denied putative fathers the right to have a role in the raising of their children.[40]

Prior to the enactment of the Uniform Parentage Act ("UPA"),[41] there was no uniform American law of illegitimacy.[42] Instead, two major types of legislation developed in response to the common law principles of illegitimacy.[43] One approach was "definitional" and sought to limit the scope of the problem by narrowly defining illegitimacy.[44] Statutes that codify the conclusive marital presumption are examples of such definitional statutes.[45] Legiti-

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[33] R.A.W. Howe, Proposed Uniform Rights of Putative Fathers Act Draft Six—Due Process and Equal Protection Issues 1 (Aug. 1987) (unpublished report on the sixth draft of the Uniform Putative and Unknown Fathers Act, previously titled the Uniform Rights of Putative Fathers Act, available from Boston College Law School).

[34] Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 294–95 n.32.

[35] *Id.* at 295.

[36] Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 371 (1988) [hereinafter Note, *Rebutting the Marital Presumption*].

[37] *Id.*

[38] *See*, Krause, *A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 831 (1966).

[39] Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 296.

[40] Tabler, *supra* note 5, at 231.

[41] The UPA was the second attempt by the National Conference of Commissioners on Uniform State Laws to create a uniform statute dealing with the rights of illegitimate children. UNIF. PARENTAGE ACT, Prefatory Note, 9B U.L.A. 287 (1987). An earlier uniform law, entitled the Uniform Paternity Act, never gained widespread acceptance. *Id.*

[42] Krause, *supra* note 38, at 830.

[43] *Id.* at 841.

[44] *Id.*

[45] *Id.* at 844–45. Currently, about one third of the states have conclusive marital pre-

mation statutes allowed the father to legitimate his child by voluntarily accepting paternity.[46] Most legitimation statutes, however, were vague and gave little guidance concerning the proper procedure for legitimation, and even less explanation as to what rights legitimation conferred upon the putative father.[47] The second approach to the problem of illegitimacy sought to limit the burdens of illegitimacy.[48] The state, through legislative enactment, typically accomplished this by creating a cause of action for paternity that allowed the mother or the state to place a legal obligation on the putative father to support his child.[49]

In 1973, in response to this lack of consistency, the National Conference of Commissioners on Uniform State Laws approved the UPA.[50] The major purpose of the UPA was to remove the legal and social stigmas that traditional state laws attached to illegitimate children.[51] The UPA also reflected the growing realization that many state illegitimacy laws violated the equal protection clause of the Constitution.[52]

To promote the equality and rights of illegitimate children, the UPA defines the parent-child relationship[53] and states that "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."[54] To facilitate determinations of paternity,[55] the UPA includes a codification of the conclusive marital presumption.[56] Commentators have

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sumption statutes. *See* Note, *Rebutting the Marital Presumption*, *supra* note 36, at 373–74. For examples of state statutes that have retained conclusive marital presumptions, see ALA. CODE §§ 26-17-1 to 26-17-21 (1986); MINN. STAT. ANN. §§ 257.51–.74 (West 1982 & Supp. 1987); N.D. CENT. CODE §§ 14-17-01 to 14-17-26 (1981 & Supp. 1987); OHIO REV. CODE ANN. §§ 3111.01–.19 (Baldwin 1986); and WYO. STAT. §§ 14-2-101 to 14-2-120 (1987). Note, *Rebutting the Marital Presumption*, *supra* note 36, at 374 n.47.

[46] Krause, *supra* note 38, at 845.

[47] Tabler, *supra* note 5, at 236.

[48] Krause, *supra* note 38, at 841.

[49] *Id.* at 848.

[50] UNIF. PARENTAGE ACT, Prefatory Note, 9B U.L.A. 287 (1987). In 1960, the Conference had adopted the Uniform Paternity Act, but by 1973 only four states had enacted the Act.

[51] *Id.* at 289.

[52] *Id.* at 288–89.

[53] Section 1 of the Uniform Parentage Act states:

> [a]s used in this Act, 'parent and child relationship' means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

*Id.*, § 1, at 296.

[54] *Id.*

[55] *Id.* at 289.

[56] *Id.*, §§ 4–6, at 298–303 (1987).

characterized this presumption as "exclusive" because it does not give a putative father any right of rebuttal.[57]

Although the UPA does not specifically address the rights of putative fathers, it does attempt to deal with the rights of presumed or legal fathers[58] as they relate to the adoption of their illegitimate children.[59] Specifically, the UPA provides for the father's right to notice of judicial proceedings that affect his parental relationship and the procedure that such notice must follow.[60] These sections, however, only discuss the rights of a man who has been judicially determined to be the child's father or is presumed to be a child's father under the UPA.[61] The UPA is silent concerning the rights of putative fathers who have been prevented from asserting their paternity.[62] Thus, in the early 1970s, the American law of illegitimacy was a mix of English common law principles, non-uniform statutory schemes, and the UPA.[63] At this juncture, the United States Supreme Court added a new constitutional dimension to the rights of putative fathers when it decided the case of *Stanley v. Illinois*.[64]

### B. *The* Stanley *Line of Cases*

In 1972, one year before the UPA was adopted, the United States Supreme Court, in *Stanley v. Illinois*, recognized that the Constitution protects putative fathers' parental relationships.[65] Prior to *Stanley*, the general rule was that the child's mother exclusively determined a father's visitation rights.[66] If the mother denied the putative father the right to visit his child, then the putative father had no visitation rights.[67] The mother's actions also largely deter-

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[57] Note, *Rebutting the Marital Presumption*, *supra* note 36, at 374.

[58] For the purposes of this note, a "presumed" father is a man presumed to be a child's father under the UPA, whereas a "legal" father is any man who has been adjudicated to be a child's father.

[59] *See* UNIF. PARENTAGE ACT, §§ 24–25, 9B U.L.A. 336–43 (1987).

[60] *Id.*

[61] *Id.*

[62] For example, section 25 [Proceeding to Terminate Parental Rights] discusses only the disinterested father, but does not give guidance as to how the court should protect the rights of a putative father who has been actively prevented from developing a parental relationship. *Id.*, § 25, 9B U.L.A. 340–43 (1987).

[63] *See, e.g.*, Krause, *supra* note 38, at 829–31.

[64] 405 U.S. 645, 658 (1972).

[65] *Id.*

[66] Tabler, *supra* note 5, at 231.

[67] *Id.*

mined the putative father's custody rights.[68] Similarly, most state laws provided that a putative father could not block the adoption of his child,[69] nor was he entitled to notice that an adoption proceeding had been initiated.[70]

The *Stanley* Court specifically held that the state of Illinois could not constitutionally deprive Peter Stanley, a putative father who had developed a parental relationship with his children, of custody of his children without a judicial proceeding.[71] Peter Stanley and Joan Stanley lived together intermittently for nearly twenty years prior to Joan's death, and during this time they raised three children.[72] Although Joan and Peter had a common last name, they never were married.[73] After Joan Stanley died, the state of Illinois instituted a dependency proceeding under the Illinois custody statutes, declared the children wards of the state and placed them with court-appointed guardians.[74] Illinois based its actions on a statute that conclusively presumed that all unwed fathers were unfit parents.[75] Peter argued that, because Illinois law did not make a similar presumption about married fathers or unwed mothers, the Illinois law violated the equal protection clause.[76]

Although Peter never advanced a due process argument, Justice White, writing for the majority, analyzed Peter's claim in terms of the due process clause.[77] The Court determined that it was permissible to engage in a due process analysis because this method of analysis was available to the Illinois state courts.[78] Justice White, relying on past precedent, reasoned that the integrity of the family unit and an individual's right to maintain familial relationships are basic liberty interests that are protected by the Constitution, regardless of marital status.[79] Because of these liberty interests, Justice White held that, absent a compelling state interest, Peter's interest in maintaining his parental relationship, which had developed over a period of eighteen years, deserved constitutional protection.[80]

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[68] *Id.* at 244.
[69] *Id.* at 245.
[70] *Id.* at 247–48.
[71] 405 U.S. 645, 658 (1972).
[72] *Id.* at 646.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 648–49.
[76] *Id.* at 646.
[77] *Id.* at 650–51.
[78] *Id.* at 658, n.10.
[79] *Id.* at 650–51.
[80] *Id.* at 657–59.

In footnote nine of his opinion, Justice White suggested that putative fathers have a general right to be heard prior to a termination of their parental rights.[81] Although the Court emphasized the substantiality of Peter's relationship as a crucial element of his liberty interest,[82] footnote nine seemed to indicate that any level of involvement by a putative father is sufficient to create a liberty interest.[83] Justice White reasoned that, because there was not a judicial finding that Peter was an unfit parent, the state did not have a valid interest in terminating Peter's parental relationship.[84] Justice White concluded that, because the state required judicial determinations of unfitness to terminate the parental rights of married parents, divorced parents and unwed mothers, Illinois's conclusive marital presumption violated the equal protection clause of the Constitution.[85]

Numerous commentators have discussed the effect of the *Stanley* decision on the rights of putative fathers.[86] Commentators have argued that the greatest source of confusion in the Court's opinion is footnote nine.[87] This confusion resulted because footnote nine

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[81] *Id.* at 657 n.9.

[82] *Id.* at 651.

[83] *See* R.A.W. Howe, *supra* note 33, at 23–24.

[84] *Stanley*, 405 U.S. at 657–58.

[85] *Id.*

[86] *See, e.g.*, K. REDDEN, FEDERAL REGULATION OF FAMILY LAW 71–74 (1982); Note, *The Grudging and Crabbed Approach to Due Process for the Unwed Father*: Lehr v. Robertson, 16 CONN. L. REV. 571, 574–76 (1983) [hereinafter Note, *The Grudging and Crabbed Approach*]; Comment, *Domestic Relations—Parental Rights of the Putative Father: Equal Protection and Due Process Considerations*, 14 MEM. ST. U.L. REV. 259, 261–63 (1984) [hereinafter Comment, *Domestic Relations*]; Note, *Adoption: The Rights of the Putative Father*, 37 OKLA. L. REV. 583, 584–85 (1984); Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 298–304.

[87] R.A.W. Howe, *supra* note 33, at 4. In footnote 9 of *Stanley*, the Court stated:

> 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.
>
> Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined. The Illinois law governing procedure in juvenile cases, Ill. Rev. Stat., c. 37 § 704–1 *et seq.*, provides for personal service, notice by certified mail, or for notice by publication when personal or certified mail service cannot be had or when notice is directed to unknown respondents under the style of "All whom it may Concern." Unwed fathers who do not promptly respond cannot complain if their children are declared wards of the State. Those who do respond retain the burden of proving their fatherhood.

405 U.S. at 657 n.9.

failed to state whether the constitutional protection accorded to Peter Stanley should be extended to all putative fathers or only to those who have had a substantial level of involvement in raising their children.[88] Commentators also have noted that the Court's opinion does not clearly define what form notice must take or what procedural requirements are constitutionally necessary.[89] Another aspect of the Court's opinion that commentators have criticized is that the Court ultimately based its decision on equal protection grounds but analyzed the case in terms of due process.[90] Critics have stated that this has led to confusion with regard to the constitutional source of putative fathers' rights.[91]

The Supreme Court attempted to answer many of these questions and refine the *Stanley* holding[92] in the 1978 case of *Quilloin v. Walcott*.[93] In *Quilloin*, the Court held that Leon Quilloin, the putative father, had no constitutional right to veto the adoption of his children because, unlike the putative father in *Stanley*, he had not established a substantial parental relationship with his children.[94] Leon Quilloin and Ardell Walcott conceived a child who was born in 1964.[95] Ardell maintained exclusive custody and control of the child.[96] During this time, Leon did not provide child support, nor did he spend time with his child or object to Ardell's exclusive custody of the child.[97] In April 1967, Ardell married Randall Walcott, and in 1976, Randall, with the consent of Ardell, petitioned to adopt the child.[98] Subsequent to the filing of the petition, however, Leon sought to block the adoption.[99] Under Georgia statutory law, Leon was not allowed to veto the adoption.[100] Leon argued that the Georgia statute violated the equal protection and due process clauses of the Constitution, because it denied parental rights without a particularized hearing.[101] The state responded that, because Leon

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[88] Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 302–03.
[89] K. REDDEN, *supra* note 86, at 73.
[90] R.A.W. Howe, *supra* note 33, at 24–25.
[91] Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 300–01.
[92] R.A.W. Howe, *supra* note 33, at 27.
[93] 434 U.S. 246 (1978).
[94] *Id.* at 256.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* at 247.
[100] *Id.* at 247–48.
[101] *Id.* at 252.

had made no attempt to legitimate the child during the eleven years preceding the adoption petition, he did not have a constitutional right to a hearing regarding his fitness as a parent.[102]

Justice Marshall, writing for a unanimous Court, rejected Leon's claim that the Georgia law was unconstitutional.[103] The Court reasoned that Leon had not developed a substantial parental relationship like the one that existed in *Stanley*.[104] Because Leon had not developed a substantial parental relationship, he had no protectable liberty interest.[105] The state, therefore, was only required to determine that the termination of Leon's parental relationship was in the best interests of the child.[106] The *Quilloin* Court further stated that, because Leon did not have custody of the child and had not carried the burden of parental obligations at any time during the child's life, the equal protection clause did not require that Leon be granted the same parental rights as a married or divorced father.[107]

Commentators have interpreted the Court's decision in *Quilloin* as limiting the breadth of the *Stanley* decision.[108] Legal analysts have reasoned that the Court limited *Stanley* by stating that only some putative fathers, specifically those substantially involved in their child's life, were to be accorded constitutional protection.[109] Other commentators point out that the *Quilloin* decision did not specifically state what minimum level of involvement is necessary to create an interest that merits constitutional protection.[110] Furthermore, legal analysts have reasoned that the *Quilloin* decision seemed to imply, but did not expressly state, that unless the putative father exhausts all statutory procedures available for asserting his paternity, he will be barred from asserting that he was not accorded sufficient due process.[111]

In 1979, one year after the *Quilloin* decision, the Supreme Court decided the case of *Caban v. Mohammed*.[112] In *Caban*, the Court

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[102] *Id.* at 254.
[103] *Id.* at 255–56.
[104] *Id.*
[105] *Id.* at 254.
[106] *Id.*
[107] *Id.* at 256.
[108] R.A.W. Howe, *supra* note 33, at 32.
[109] *See* Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 307–08.
[110] K. REDDEN, *supra* note 86, at 76.
[111] R.A.W. Howe, *supra* note 33 at 32; *see also*, Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 307–08.
[112] 441 U.S. 380 (1979).

held that a New York statute that made a gender-based distinction between the custody rights of the mother, Maria Mohammed, and the putative father, Abdiel Caban, violated the equal protection clause because the distinction was not substantially related to an important state policy.[113] Although Abdiel raised a due process claim concerning the state's failure to provide him with a particularized hearing, the Court did not reach this question.[114]

The parties in *Caban* lived together for five years.[115] During that time they held themselves out as married and had two children.[116] Abdiel was listed as the father on both of the children's birth certificates.[117] During this five-year period, Abdiel and Maria both contributed to raising and supporting the children.[118] In 1973, Maria left Abdiel and moved in with Kazim Mohammed, whom she married shortly thereafter.[119] For the next nine months, Abdiel visited the children on a weekly basis.[120] In 1974, while the children were visiting Maria's mother in Puerto Rico, Abdiel gained possession of the children from Maria's mother.[121]

To regain custody of the children, Maria and her husband instituted a custody proceeding against Abdiel and his new wife.[122] The family court placed the children in the temporary custody of Maria and granted Abdiel visitation rights.[123] Subsequently, Maria and her husband petitioned to adopt the children, and Abdiel and his wife initiated a cross-petition for adoption.[124] The Surrogate in Kings County, New York denied Abdiel's petition because New York statutory law granted Maria the right to veto the adoption of her children.[125] Because the New York statute did not grant the putative father a similar right to veto the adoption, Maria and her husband were allowed to adopt the children.[126]

Abdiel appealed this decision and the decision of the Appellate Division of the New York Supreme Court, which had affirmed the

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[113] *Id.* at 394.
[114] *Id.*
[115] *Id.* at 382.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.* at 382–83.
[122] *Id.* at 383.
[123] *Id.*
[124] *Id.*
[125] *Id.* at 383–84.
[126] *Id.*

findings of the Surrogate, to the United States Supreme Court.[127] Abdiel argued that New York's domestic relations law violated the equal protection clause and denied him his parental relationship without due process of law.[128] Maria contended that the adoption was in the child's best interest and, therefore, that the lower court's ruling should be upheld.[129]

Justice Powell, writing for the majority, viewed the equal protection issue as arising from the distinction that New York law made between unmarried fathers and unmarried mothers.[130] Justice Powell determined that such a distinction could be constitutionally permissible only if it were substantially related to achieving an important state interest.[131] Justice Powell reasoned that the state's determination that the unwed mother's parental relationship was always stronger and closer than the putative father's was a broad and impermissible generalization.[132] Finally, Justice Powell concluded that, although the state did have an interest in promoting the adoption of illegitimate children, this interest was not sufficiently compelling to justify the gender distinction present in the New York law.[133]

Although the Court's decision in *Caban* provided some guidance with regard to the scope of the rights of putative fathers,[134] the case was not without critics.[135] According to commentators, the *Caban* decision left three areas of confusion in its wake. First, critics state that the *Caban* decision did not clarify the amount of parental involvement required for the putative fathers' rights to merit constitutional protection.[136] Second, the Court failed to clarify whether the natural mother is under any obligation to allow such a relationship to develop.[137] Third, critics claim that *Caban* failed to define clearly the exact scope of the notice requirement when a putative father's rights are subject to termination.[138]

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[127] *Id.* at 384–85.

[128] *Id.* at 385.

[129] *Id.* at 387.

[130] *Id.* at 388–89.

[131] *Id.*

[132] *Id.* at 389.

[133] *Id.* at 391–92.

[134] Comment, *Domestic Relations*, *supra* note 86, at 263.

[135] *See, e.g.*, H. KRAUSE, FAMILY LAW: CASES, COMMENTS AND QUESTIONS 830 (2d ed. 1983); K. REDDEN, *supra* note 86, at 79.

[136] Note, Lehr v. Robertson: *Procedural Due Process and Putative Fathers' Rights*, 33 DE PAUL L. REV. 393, 401 (1984) [hereinafter Note, *Procedural Due Process*].

[137] Note, *The Grudging and Crabbed Approach*, *supra* note 86, at 582–83.

[138] R.A.W. Howe, *supra* note 33, at 42.

In 1983, the Supreme Court decided *Lehr v. Robertson* and restricted the putative father's right to notice of the adoption proceedings.[139] In *Lehr*, the Court held that a New York statute that only provided notice of adoption proceedings to putative fathers who registered with the "putative father registry" did not violate the due process or equal protection clauses of the Constitution.[140] Because Jonathan Lehr, the putative father, had not registered with the putative father registry, the Court held it was permissible for New York to deny him notice of a hearing to adopt his child.[141]

The parties in *Lehr*, Jonathan Lehr and Lorraine Martz, stopped cohabiting shortly after the birth of their daughter, Jessica, in 1976.[142] Eight months after the birth of the child, Lorraine remarried, and she and her new husband petitioned to adopt Jessica in 1978.[143] During those two years, Jonathan neither provided support nor spent substantial time with Jessica.[144] Jonathan claimed that his absence for those two years was due to the fact that Lorraine had hidden Jessica from him.[145] In March, 1979, the family court granted the Robertsons' adoption petition.[146] Jonathan contended that the adoption was invalid because he had a constitutional right to receive notice of the proceeding, and he never received such notice.[147]

New York law requires that notice of an adoption proceeding be given to any man who informs the putative father registry that he may be a child's biological father.[148] To register with the putative father registry, the putative father must notify the registry and identify the child or children whom he claims to have fathered.[149] The family court rejected Jonathan's claim that he had a constitutional right to receive notice.[150] The Appellate Division of the New York Supreme Court affirmed, holding that because Jonathan did

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[139] 463 U.S. 248, 261 (1983).

[140] *Id.* at 263–65, 267–68.

[141] *Id.* at 256, 267–68.

[142] *Id.* at 249–50.

[143] *Id.* at 250.

[144] *Id.* at 249–50.

[145] *Id.* at 269 (White, J., dissenting).

[146] *Id.* at 250.

[147] *Id.*

[148] N.Y. SOC. SERV. LAW § 372-c (McKinney 1983) establishes a putative father registry to record the names of men who wish to express their intent to claim paternity. Registering entitles the putative father to receive notice of any adoption proceedings regarding their child. *Id.* § 384-c.

[149] *Id.* § 372-c.

[150] *Lehr*, 463 U.S. at 253.

not file with the registry he was not entitled to notice of the adoption proceeding.[151] The New York Court of Appeals also affirmed, reasoning that Lorraine and her husband had not obtained the adoption order fraudulently and that the trial court had not abused its discretion.[152] On appeal to the United States Supreme Court, Jonathan argued that the due process and the equal protection clauses of the Constitution invalidated the New York statutory scheme.[153]

Justice Stevens wrote the majority opinion for the *Lehr* Court.[154] In denying Jonathan's due process claim, the Court reasoned that because Jonathan's parental relationship with his child was not as substantial as the parental relationship established in *Stanley* and *Caban*, it did not merit the same amount of procedural protection.[155] The Court concisely stated that a biological link alone does not create a liberty interest.[156] The Court used similar reasoning to refute Jonathan's equal protection arguments.[157] The Court determined that, because Jonathan had failed to develop a substantial parental relationship, his situation was not akin to the child's mother's situation.[158] Because Jonathan and Lorraine, the child's mother, were not similarly situated, the Court held that the equal protection clause permitted the state to make a gender-based distinction in this case.[159] Furthermore, the Court held that this gender-based distinction was substantially related to the important state policy of maintaining a workable adoption system.[160]

Justice White argued in dissent that the majority analyzed Jonathan's parental interest incorrectly.[161] Justice White reasoned that the Court should have examined the *nature* of Jonathan's interest and not the *weight* of that interest.[162] Justice White determined that, because Jonathan's interest was parental in nature, it was a fundamental liberty interest that required constitutional protection.[163]

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[151] *In re* Adoption of Jessica "XX," 77 A.D.2d 381, 383–84, 434 N.Y.S.2d 772, 773–74 (1980).

[152] *In re* Adoption of Jessica "XX," 54 N.Y.2d 417, 430, 430 N.E.2d 896, 902, 446 N.Y.S.2d 20, 26 (1981).

[153] *Lehr*, 463 U.S. at 255.

[154] *Id.* at 249.

[155] *Id.* at 261.

[156] *Id.*

[157] *Id.* at 266–67.

[158] *Id.* at 267–68.

[159] *Id.* at 268.

[160] *See id.* at 266 n.25.

[161] *Id.* at 269–70 (White, J., dissenting).

[162] *Id.* at 270 (White, J., dissenting) (emphasis added).

[163] *See id.*

Justice White further reasoned that, even if one assumed that the majority used the proper analysis, the Court ignored the crucial fact that Lorraine, the child's mother, had prevented Jonathan from developing a more substantial parental relationship.[164] The dissent concluded that the state's interest in the finality of adoption proceedings did not justify denying Jonathan notice of the adoption proceeding.[165]

Several commentators have attacked the Court's opinion in *Lehr*.[166] For example, one commentator argued that the *Lehr* decision further clouded the question of exactly how substantial a relationship must exist between the putative father and the child to merit constitutional protection.[167] This same commentator also criticized the *Lehr* decision for overemphasizing technical formalities and thereby ignoring the value of a putative father's liberty interest and the amount of protection that interest deserves.[168] The *Lehr* majority has also been criticized for interpreting the *Caban* decision as relevant to due process issues, when the *Caban* Court specifically focused on equal protection issues.[169]

Another critic attacked *Lehr* as a major regression by the Court because the *Lehr* decision gave renewed legal force to the presumption that all unwed fathers who have not had a substantial role in the development of their children are unfit parents.[170] A further flaw in the Court's reasoning, according to the same commentator, is that the Court failed to acknowledge that a constitutional challenge to statutes that adversely affect the putative father's rights may take many years.[171] Thus, the child's interest in a "stable" family environment will always override the liberty interest of a putative father who was in the process of developing a parental relationship prior to litigation.[172] Based on these circumstances, a putative father

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[164] *Id.* at 271 (White, J., dissenting).

[165] *Id.* at 275–76 (White, J., dissenting).

[166] R.A.W. Howe, *supra* note 33, at 49; *see, e.g.*, Note, *The Grudging and Crabbed Approach*, *supra* note 86, at 594–607; Note, *Procedural Due Process*, *supra* note 136, at 395, 407–40. *But cf.* Note, *Rebutting the Marital Presumption*, *supra* note 36, at 387–89 (this commentator states that the *Lehr* case was properly decided, and that the Court's opinion correctly balanced the rights of putative fathers against the state's interest in preserving marital integrity).

[167] Note, *Procedural Due Process*, *supra* note 136, at 407.

[168] *See id.* at 408.

[169] *Id.* at 408 n.113.

[170] Note, *The Grudging and Crabbed Approach*, *supra* note 86, at 594.

[171] *Id.* at 603–04.

[172] *See id.*

would never have an incentive to challenge an unconstitutional law.[173]

In 1973, the UPA codified the law of illegitimacy, as it applies to the rights and legal status of illegitimate children, into a uniform body of law.[174] The year before the UPA was officially adopted, the *Stanley* case effected a major development in the law of illegitimacy regarding the custody rights of putative fathers.[175] As the *Stanley* line of reasoning evolved, the divergence became more distinct.[176] Whereas the UPA had a stabilizing effect on the law of illegitimacy,[177] the *Stanley* line of cases generated more questions than answers regarding the rights of putative fathers.[178] Specifically, the *Stanley* line of cases had a destabilizing impact on the ability of states to terminate the rights of putative fathers.[179]

### C. *The Effect of the* Stanley *Line of Cases on the State's Ability to Terminate Putative Fathers' Rights*[180]

In the view of several family law scholars, the *Stanley* decision sounded a death knell for the traditional state policy of ignoring the parental rights of putative fathers.[181] The implication of the *Stanley* line of cases for state legislators was that putative fathers could not be treated as a homogeneous class without regard to the quality of their relationship with their children.[182] In response to the *Stanley* decision, some state legislatures have altered the statutory procedures for terminating putative fathers' parental rights.[183] Sim-

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[173] *Id.*

[174] UNIF. PARENTAGE ACT, Prefatory Note, 9B U.L.A. 287–88 (1987).

[175] *Id.* at 289.

[176] UNIF. PUTATIVE AND UNKNOWN FATHERS ACT, Prefatory Note, 9B U.L.A. 22 (Supp. 1990).

[177] *See* Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 1 (1974); Note, *The Uniform Parentage Act: An Opportunity to Extend Equal Protection to All Kansas Children*, 19 WASHBURN L.J. 110, 115 (1979).

[178] UPUFA, Prefatory Note, 9B U.L.A. 22 (Supp. 1990).

[179] *See* K. REDDEN, *supra* note 86, at 73; Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing* Stanley v. Illinois, 9 FAM. L.Q. 527, 527 (1975).

[180] Because *Michael H.* relates to the constitutionality of California's conclusive marital presumption statute, CALIF. EVID. CODE § 621 (West 1990), this section will focus on recent California cases that have construed section 621.

[181] K. REDDEN, *supra* note 86, at 73; Barron, *supra* note 179, at 527.

[182] Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 318.

[183] After the *Stanley* decision, the following states amended their adoption statutes: Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, New Mexico, New York,

ilarly, some state courts have begun to interpret statutes that act to terminate putative fathers' parental rights in light of *Stanley*.[184] For example, in California, several cases raised the question of how the *Stanley* line of cases affected the application of section 621 of the California Evidence Code.[185] Section 621 states that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."[186] Section 621 is a codification of the common law principle that unless a man is impotent, sterile or in a foreign land at the time of conception, any child born to his wife is his legitimate heir.[187] Section 621 does not grant a right to rebut the marital presumption unless the mother consents to such rebuttal.[188]

In the 1975 case of In re *Lisa R.*,[189] the California Supreme Court held that section 621[190] did not deprive Victor R., the putative father, of standing to assert his paternity at the annual review of his alleged child's support status.[191] The child, Lisa R., had been declared a ward of the state upon a finding that the child's natural mother and her husband were unfit parents.[192] Victor R., Lisa's putative father, attempted to assert his paternity at Lisa's annual support review.[193] The lower court determined that it did not have jurisdiction to determine paternity and, therefore, ordered Victor to leave the courtroom.[194] In reversing the lower court's ruling, the California Supreme Court reasoned that Victor had developed a substantial parental relationship of the type that existed in *Stanley*

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North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Note, *Adoption: The Rights of the Putative Father*, *supra* note 86, at 598 n.105.

[184] *See* Barron, *supra* note 179, at 527.

[185] *See, e.g.*, Michelle W. v. Ronald W., 39 Cal. 3d 354, 360, 703 P.2d 88, 91, 216 Cal. Rptr. 748, 751 (1985); *In re* Lisa R., 13 Cal. 3d 636, 640, 532 P.2d 123, 125, 119 Cal. Rptr. 475, 477 (1975); *In re* Melissa G., 213 Cal. App. 3d 1082, 1091, 261 Cal. Rptr. 894, 898 (1989); Roe v. California Superior Court, 14 Fam. L. Rep. (BNA) 1450, 1450 (Cal. Ct. App. June 17, 1988); Vincent B. v. Joan R., 126 Cal. App. 3d 619, 624, 179 Cal. Rptr. 9, 11 (Cal. Ct. App. 1982).

[186] CAL. EVID. CODE ANN. § 621 (West Supp. 1990).

[187] Cindus v. Lewis, 93 Cal. App. 2d 90, 90, 208 P.2d 687, 688 (1949) (discussing the evolution of marital presumption from English common law to American common law to California Civil Code).

[188] Michael H. v. Gerald D., 109 S. Ct. 2333, 2340 (1989).

[189] 13 Cal. 3d 636, 651, 532 P.2d 123, 133, 119 Cal. Rptr. 475, 485 (1975).

[190] See *supra* note 13 for text of section 621.

[191] *Lisa R.*, 13 Cal. 3d at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485.

[192] *Id.* at 640, 532 P.2d at 125, 119 Cal. Rptr. at 477.

[193] *Id.* at 640 n.1, 532 P.2d at 125 n.1, 119 Cal. Rptr. at 477 n.1.

[194] *Id.*

and, therefore, the application of section 621 to this case was a violation of the due process clause of the Constitution.[195]

*Vincent B. v. Joan R.*, a 1982 case decided by the California Court of Appeal, is another example of how the California state courts have construed section 621.[196] The *Vincent B.* court held that section 621 precluded the putative father, Vincent B., from asserting his paternity because the mother's husband asserted that he was the child's father.[197] In this case, Vincent B. filed a paternity action four years after the child's mother and her husband were divorced.[198] The mother and her husband were cohabiting at the time of conception and the husband was neither sterile nor impotent during the relevant time period.[199] The court gave three reasons for its holding.[200] First, the court reasoned that, because Vincent B. had not developed a substantial parental relationship like the one in *Stanley*, he had no constitutionally protected right to assert his paternity.[201] Second, the court determined that the mother's interest in denying Vincent parental rights outweighed Vincent's rights because her relationship with the child was more substantial than his.[202] Finally, the court stated that it would be counter to the child's best interests to grant Vincent parental rights.[203] Thus, contrary to the *Lisa R.* court, the *Vincent B.* court held that section 621 denied putative fathers the right to assert paternity.[204]

Later California cases, however, have refrained from viewing section 621 as a completely conclusive presumption.[205] In the 1988 case of *Roe v. California Superior Court*,[206] the California Court of Appeal held that section 621 did not bar the natural mother, who

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[195] *Id.* at 651, 532 P.2d at 133, 119 Cal. Rptr. at 485.

[196] 126 Cal. App. 3d 619, 622, 179 Cal. Rptr. 9, 10 (1982).

[197] *Id.* at 627–28, 179 Cal. Rptr. at 13.

[198] *Id.* at 622, 179 Cal. Rptr. at 10.

[199] *Id.* at 623, 179 Cal. Rptr. at 10.

[200] *Id.* at 625–28, 179 Cal. Rptr. at 11–13.

[201] *Id.* at 626, 179 Cal. Rptr. at 12.

[202] *Id.* at 625–26, 179 Cal. Rptr. at 12.

[203] *Id.* at 627–28, 179 Cal. Rptr. at 13.

[204] *Id.* at 622, 179 Cal. Rptr. at 10.

[205] *In re* Melissa G., 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894 (1989); Roe v. California Superior Court, 14 Fam. L. Rep. (BNA) 1450 (Cal. Ct. App. June 17, 1988). In the case of *In re* Melissa G., which was decided after *Michael H.*, the California Court of Appeal determined that section 621 was unconstitutional where it would require the state to place one child, Melissa, with her putative father and place her sister, Shannon, in a foster home. 213 Cal. App. 3d 1082, 1091, 261 Cal. Rptr. 894, 898 (1989). The court determined that both Melissa and Shannon should be placed in a foster home together. *Id.*

[206] 14 Fam. L. Rep. (BNA) 1450 (Cal. Ct. App. June 17, 1988).

had been married at the time of the child's birth, from pursuing a support action against the child's putative father.[207] The court stated that, even though none of the statutory exceptions was relevant, the application of section 621 to this case would be a denial of the mother's right to due process.[208]

Commentators have indicated that the state courts have not interpreted the *Stanley* line of cases uniformly.[209] The divergent interpretations of the effect of the *Stanley* line of cases on the constitutionality of the conclusive presumption of section 621 in California reflects this lack of uniformity.[210] Nonetheless, the *Stanley* decision and its progeny have had a great impact on state adoption and custody statutes.[211] Statutory responses to *Stanley* have included paternal registration schemes[212] and efforts to expand the notice requirements of adoption statutes[213] but, like state court responses, there has been little uniformity among the states.[214]

### D. *The Uniform Putative and Unknown Fathers Act*[215]

In 1984, the National Conference of Commissioners on Uniform State Laws began to research and draft the Uniform Putative and Unknown Fathers Act (UPUFA).[216] A desire to eliminate the confusion among state legislatures about how to interpret footnote nine of the *Stanley* decision, as well as the *Stanley* line of cases generally, was the motivating factor behind the drafting of the UPUFA.[217] The UPUFA states that the child, the putative father

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[207] *Id.*

[208] *Id.*

[209] UNIF. PARENTAGE ACT, Prefatory Note, 9B U.L.A. 287, 289 (1973).

[210] *See* Michelle W. v. Ronald W., 39 Cal. 3d 354, 360, 703 P.2d 88, 91, 216 Cal. Rptr. 748, 751 (1985); *In re* Lisa R., 13 Cal. 3d 636, 640, 532 P.2d 123, 125, 119 Cal. Rptr. 475, 477 (1975). For example, in *In re* Lisa R., the Supreme Court of California held that section 621 did not deny the putative father of a ward of the state the right to offer evidence of his paternity. By contrast, in *Michelle W.*, the Supreme Court of California held that a putative father was foreclosed from asserting his paternity where the child was not a ward of the state.

[211] K. REDDEN, *supra* note 86, at 73; Note, *The Strange Boundaries of* Stanley: *Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 518 (1973) [hereinafter Note, *The Strange Boundaries of* Stanley].

[212] Note, *The Strange Boundaries of* Stanley, *supra* note 211, at 527–31.

[213] See *supra* note 183 for a list of states that altered their adoption statutes after *Stanley*.

[214] *See* Barron, *supra* note 179, at 532.

[215] UPUFA, 9B U.L.A. 22 (Supp. 1990). An earlier draft of this uniform law was entitled "The Uniform Rights of Putative Fathers Act." *Id.*, Prefatory Note, at 22.

[216] *Id.*

[217] *Id.*

and the state are the parties whose rights and interests are most directly affected by the *Stanley* line of cases.[218] The UPUFA, therefore, is structured to protect and advance these rights and interests.[219] Accordingly, the UPUFA's "fundamental objective" is to protect the best interests of the child.[220] The UPUFA's intent is to codify the common law developments of putative fathers' parental rights.[221] Finally, the UPUFA seeks to protect the interests of the state.[222]

The UPUFA allows the court to protect the right of the child to be free from a detrimental parent-child relationship with the putative father.[223] The UPUFA accomplishes this objective by directing the court to separate the issue of the putative father's paternity from the issue of granting custody or visitation rights.[224] The first issue is resolved by determining the validity of the putative father's paternity claim; the second is resolved by determining whether it would be in the child's best interest to allow the putative father to assert his parental rights once he is adjudicated to have such rights.[225]

The UPUFA codifies putative fathers' parental rights in four major ways.[226] First, the UPUFA provides a detailed definition of the term "putative father."[227] Second, the UPUFA thoroughly defines the scope of notice that putative fathers are entitled to receive whenever a proceeding commences that could potentially terminate or substantially alter their parental rights.[228] Third, the UPUFA sets forth a detailed list of the factors relevant to the determination of the scope and extent of putative fathers' rights.[229] Among other factors, the UPUFA recommends that courts consider:

> [T]he nature and quality of any relationship between the man and the child; the reasons for any lack of a relation-

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[218] *Id.* at 22–24.

[219] *Id.*

[220] *Id.* at 24.

[221] *Id.* at 22–23. The UPUFA Prefatory Note also cites U.S. Census Bureau statistics indicating that illegitimate births, as a percentage of all births, rose from 5.3% in 1960 to 22% in 1985, as a motivating force behind the Act.

[222] *Id.*

[223] *Id.* at 24.

[224] *Id.* § 6(d) and accompanying comments, at 33–35.

[225] *Id.*

[226] *See id.* §§ 1–5, at 24–32.

[227] *Id.* § 1, at 24–25.

[228] *Id.* §§ 3–4, at 27–30.

[229] *Id.* § 5, at 31–32.

> ship between the man and the child. . . . whether the man visits the child, has shown any interest in visitation, or, desiring visitation, has been effectively denied an opportunity to visit the child. . . . the circumstances of the child's conception, including whether the child was conceived as a result of incest or forcible rape; whether the man has formally or informally acknowledged or declared his possible paternity of the child. . . .[230]

Finally, the UPUFA provides the putative father with the right to bring an action to determine his paternity.[231]

Commentators conclude that the state has two primary interests to protect when a putative father seeks to assert his parental rights.[232] First, the state has an interest in protecting the child's best interests.[233] The UPUFA embodies this primary interest, because the UPUFA's fundamental objective is to protect the best interests of the child.[234] Second, the state is interested in protecting the integrity of familial relationships.[235] If, however, two different familial relationships conflict and one must be preserved at the expense of the other, the state cannot arbitrarily favor one relationship over the other.[236] The UPUFA avoids arbitrary determinations and promotes reasoned decision-making because it directs the reviewing court to consider specific factors relevant to an evaluation of putative fathers' parental rights.[237]

Commentators also observe that the state has a secondary interest in protecting marital relationships from frivolous paternity actions brought by putative fathers.[238] In states that have adopted the UPA,[239] the UPUFA does not alter the procedural safeguards in state paternity laws because the UPA already grants putative fathers the right to bring paternity actions on their own behalf.[240]

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[230] *Id.*

[231] *Id.* § 2, at 26.

[232] Note, *Rebutting the Marital Presumption*, *supra* note 36, at 372.

[233] *Id.*

[234] UNIF. PUTATIVE AND UNKNOWN FATHERS ACT, Prefatory Note, 9B U.L.A. at 24.

[235] Note, *Rebutting the Marital Presumption*, *supra* note 36, at 372.

[236] Caban v. Mohammed, 441 U.S. 380, 394 (1979).

[237] See *supra* notes 229–230 and accompanying text for a discussion of factors relevant to an evaluation of putative fathers' rights.

[238] Note, *Rebutting the Marital Presumption*, *supra* note 57, at 372.

[239] States that have adopted the UPA are: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. UNIF. PARENTAGE ACT, Table of Jurisdictions, 9B U.L.A. 287 (1989).

[240] UNIF. PUTATIVE AND UNKNOWN FATHERS ACT § 2 and accompanying comment, 9B U.L.A. 22, 26–27 (Supp. 1990).

In states that have not adopted the UPA, however, the UPUFA creates a new cause of action that gives putative fathers the right to initiate a paternity suit, but leaves the state free to regulate the procedures for this cause of action.[241] States, therefore, may adopt procedures to protect marital relationships as long as these procedures do not arbitrarily destroy a putative father's opportunity to assert parental rights.[242]

Finally, the drafters of the UPUFA realized that the *Michael H. v. Gerald D.* case would have an impact on the rights of putative fathers.[243] The reason is that the primary issue in *Michael H.* was the constitutionality of a conclusive marital presumption, and the Court had not previously ruled on this issue.[244] Because this issue had not been resolved prior to the final draft, the commissioners opted to omit this issue from the UPUFA and instead await the Court's decision.[245]

## E. Michael H. v. Gerald D.

On October 11, 1988, the United States Supreme Court heard oral arguments in the case of *Michael H. v. Gerald D.*[246] *Michael H.* was decided on June 15, 1989.[247] The Court, through a main opinion written by Justice Scalia and joined by Chief Justice Rehnquist, affirmed the ruling of the California Court of Appeal and held that the termination of Michael H.'s parental relationship on the basis of the conclusive presumption in section 621 was constitutional.[248] Justice O'Connor filed an opinion concurring in part, in which Justice Kennedy joined,[249] and Justice Stevens concurred in the judgment.[250] Justice Brennan dissented from the main opinion, and was joined by Justices Marshall and Blackmun.[251] Justice White issued a separate dissent that Justice Brennan joined.[252]

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[241] *Id.*
[242] Caban v. Mohammed, 441 U.S. 380, 394 (1979).
[243] UPUFA § 2 and accompanying comment, at 26–27 (Supp. 1990).
[244] Michael H. v. Gerald D., 109 S. Ct. 2333, 2336, 2360 (1989) (White, J., dissenting).
[245] UPUFA § 2 comment, at 26–27 (Supp. 1990).
[246] 109 S. Ct. 2333, 2336 (1989).
[247] *Id.*
[248] *Id.* at 2341, 2345.
[249] *Id.* at 2346 (O'Connor and Kennedy, JJ., concurring in part).
[250] *Id.* at 2347 (Stevens, J., concurring in the judgment).
[251] *Id.* at 2349 (Brennan, J., dissenting).
[252] *Id.* at 2360 (White, J., dissenting).

In *Michael H. v. Gerald D.*, Carole D., the wife of Gerald D., had an affair with Michael H.[253] Nearly three years after the affair began, Carole gave birth to a baby girl named Victoria D.[254] Although Gerald D. was listed as the father on the birth certificate, Carole believed that Michael might be the child's true father.[255] Carole, Michael and Victoria subsequently underwent blood tests, and the results showed that there was a 98.07% probability that Michael was Victoria's father.[256]

Eventually, Carole ended her affair with Michael and reconciled with her husband.[257] Carole then denied Michael access to Victoria, and, in response, Michael initiated court proceedings to have his paternity of Victoria judicially established.[258] Gerald eventually intervened in the case, and moved to have the action dismissed pursuant to section 621, which conclusively presumed him to be Victoria's father because he was married to and cohabiting with Carole at the time of Victoria's birth.[259] Because Michael was not permitted to rebut the statutory presumption of Gerald's paternity, the California Superior Court dismissed his case on summary judgment.[260] The California Court of Appeal affirmed the decision of the lower court,[261] and Michael appealed to the United States Supreme Court, claiming that section 621 violated his due process rights under the fourteenth amendment.[262]

At the outset, Justice Scalia, writing the plurality's main opinion, stated his belief that the facts of this case were extraordinary.[263] Justice Scalia analyzed Michael's procedural due process claims and then his substantive due process claims.[264] In holding that the conclusive presumption in section 621 was constitutional, Justice Scalia reasoned that, although section 621 was facially a procedural rule, it was actually a substantive rule of law because it advanced the state's interest in preserving the integrity of the marital home.[265]

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253 *Id.*
254 *Id.*
255 *Id.*
256 *Id.*
257 *Id.*
258 *Id.*
259 *Id.* at 2337–38. See *supra* note 13 for the text of section 621.
260 *Michael H.*, 109 S. Ct. at 2338.
261 Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1013, 236 Cal. Rptr. 810, 821 (1987).
262 *Michael H.*, 109 S. Ct. at 2338.
263 *Id.* at 2337.
264 *Id.* at 2341.
265 *Id.* at 2340.

Justice Scalia, therefore, determined that Michael's procedural claims failed because he had improperly characterized the statute as procedural.[266]

In analyzing Michael's substantive due process claim, Justice Scalia reasoned that Michael had failed to establish that his relationship with Victoria was a liberty interest because putative fathers have never had a right to assert paternity over a child born to a married woman.[267] Michael's parental relationship, therefore, could not possibly rise to the level of a liberty interest.[268] Justice Scalia defended this conclusion in footnote six of his opinion by stating that an analysis of societal traditions is the proper way to evaluate substantive due process claims.[269] Using this societal tradition analysis, Justice Scalia determined that the rights of putative fathers have always been subordinate to the state's interest in preserving the integrity of the marital unit.[270] Although Justice O'Connor concurred with Justice Scalia in part, she refused to concur with footnote six of the opinion because she reasoned that it was inconsistent with the manner in which the Court analyzes due process claims.[271]

Justice Stevens, concurring in the result, wrote a separate opinion.[272] Justice Stevens reasoned that Justice Scalia's opinion was too restrictive because it precluded the possibility that the putative father could develop a parent-child relationship if the child's mother was married.[273] Justice Stevens stated that the *Stanley* line of cases stood for the proposition that in some instances, a putative father's relationship with his child could rise to the level of a liberty interest, even if the child's mother was married.[274] Furthermore, Justice Stevens assumed that Michael's parental relationship was sufficiently substantial to give him a constitutional right to a hearing.[275] Justice Stevens reasoned that, although Michael's parental relationship did not give him a right to be declared a parent, Michael's parental relationship could make him an interested third party.[276] Because

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[266] *Id.* at 2341.
[267] *Id.* at 2342–45.
[268] *Id.*
[269] *Id.* at 2344 n.6.
[270] *Id.* at 2342–45.
[271] *Id.* at 2346–47 (O'Connor, J., concurring in part).
[272] *Id.* at 2347 (Stevens, J., concurring in the judgment).
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.* at 2347–48 (Stevens, J., concurring in the judgment).

section 4601 of the California Civil Code[277] gives courts the discretion to grant reasonable visitation rights to any person who has an interest in the child's welfare, Michael, as an interested third party, could petition the court for visitation privileges.[278] Justice Stevens, therefore, concluded that Michael's parental rights had not been unconstitutionally abridged because section 4601 provided adequate protection of those rights.[279]

In his dissent, Justice Brennan attacked, as excessively fact-specific and unprincipled, Justice Scalia's conclusion that Michael did not have a liberty interest.[280] Justice Brennan supported this argument by emphasizing that although five Justices agreed that Michael could have a liberty interest, only the Chief Justice unconditionally endorsed Justice Scalia's conclusion that Michael never could have a liberty interest.[281] Justice Brennan also criticized Justice Stevens's conclusion that section 4601 adequately protected Michael's parental relationship.[282] Justice Brennan reasoned that Michael's parental relationship with Victoria was familial in nature and, therefore, was a constitutionally protected liberty interest that could not be adequately protected by the mere possibility of gaining visitation rights.[283]

Justice White also dissented and attacked Justice Scalia's due process analysis.[284] Justice White interpreted the *Stanley* line of cases as meaning that a putative father's parental relationship with his child acquired constitutional protection once he became substantially involved in rearing the child, regardless of the mother's marital status.[285] Therefore, Justice White stated that Michael had a constitutionally protected right to maintain his parental relationship with Victoria.[286]

Although the Court decided *Michael H.*, it did not develop a uniform line of reasoning.[287] In the main opinion, Justice Scalia

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[277] CAL. CIV. CODE § 4601 (West Supp. 1989).

[278] Section 4601 states in pertinent part: "[i]n the *discretion* of the court, reasonable visitation rights *may* be granted to any other person having an interest in the welfare of the child." *Id.* (emphasis added).

[279] *Michael H.*, 109 S. Ct. at 2348–49 (Stevens, J., concurring in the judgment).

[280] *Id.* at 2349–50 (Brennan, J., dissenting).

[281] *Id.*

[282] *Id.* at 2355–57 (Brennan, J., dissenting).

[283] *Id.* at 2351–60 (Brennan, J., dissenting).

[284] *Id.* at 2360–63 (White, J., dissenting).

[285] *Id.* at 2361 (White, J., dissenting).

[286] *Id.*

[287] See *supra* notes 246–86 and accompanying text for discussion of the opinions presented.

determined that Michael's relationship with Victoria was not a liberty interest, and, therefore, did not require constitutional protection.[288] In his concurring opinion, Justice Stevens reasoned that, although Michael could have a constitutionally protected interest, the laws of California provided sufficient due process to protect that interest.[289] Thus, although the Court gave several distinct rationales for its holding, the final result was a determination that Michael's parental relationship could be terminated without an opportunity to rebut the marital presumption in a judicial hearing.[290]

## II. THE EFFECT OF *MICHAEL H.* ON THE RIGHTS OF PUTATIVE FATHERS

Early common law principles in both England and the United States denied the putative father of all custodial rights regarding his illegitimate children.[291] Prior to the UPA there was no uniform statutory law regarding illegitimacy.[292] The UPA was intended to make the law of illegitimacy more uniform and to remove the legal and social stigmas traditionally placed on the illegitimate child.[293] In 1972, in the case of *Stanley v. Illinois*, the United States Supreme Court recognized that the Constitution protects putative fathers' parental rights.[294] This case was the first in a line of cases that analyzed and discussed the constitutional rights of putative fathers.[295]

The most recent case in the *Stanley* line of cases is *Michael H. v. Gerald D.*, in which a plurality of the Court held that it was constitutionally permissible to terminate a putative father's parental rights without a judicial hearing if the child's mother was married at the time of birth.[296] Several months before the *Michael H.* case was decided, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform and Unknown Putative

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[288] *Michael H.*, 109 S. Ct. at 2343–44.

[289] *Id.* at 2347 (Stevens, J., concurring in the judgment).

[290] *Id.* at 2343–44, 2347.

[291] See *supra* notes 30–40 and accompanying text for a discussion of early common law principles.

[292] See *supra* notes 41–49 and accompanying text for a discussion of the state of the law prior to the enactment of the UPA.

[293] See *supra* notes 50–63 and accompanying text for a discussion of the UPA.

[294] See *supra* notes 65–91 and accompanying text for a discussion of the *Stanley* case.

[295] See *supra* notes 92–214 and accompanying text for a discussion of the *Stanley* line of cases.

[296] See *supra* notes 246–90 and accompanying text for a discussion of the *Michael H.* case.

Fathers Act.[297] The *Stanley* line of cases has generated a great deal of confusion regarding the extent and scope of the rights of the putative father.[298] The United States Supreme Court failed to clarify any of this confusion when it decided *Michael H.*[299] In sharp contrast to the inability of *Michael H.* to clarify the rights of the putative father, the UPUFA codifies, standardizes and protects the rights of the putative father.[300]

The main issue in *Michael H. v. Gerald D.* was the constitutionality of section 621 of the California Evidence Code, a statute that created a conclusive marital presumption.[301] This issue presented the Court with a convenient opportunity to delineate clearly the scope and meaning of the constitutional rights of putative fathers to maintain parental relationships with their children.[302] Instead, the Court issued a plurality decision in which the analyses of the dissenting Justices were more unified than the contradictory rationales propounded by Justices Scalia and Stevens.[303] As a result, the *Michael H.* decision represents a missed opportunity to bring order to this particular area of fathers' rights. Because lower courts have difficulties interpreting plurality opinions,[304] the *Michael H.* decision will almost certainly further confuse the scope of the rights of putative fathers.

Because the Court did not put forth one rationale in a plurality opinion, it is necessary to discern which opinion will ultimately be relied upon by lower courts. Because Justice Scalia based his holding on a restrictive interpretation of the extent of putative fathers' rights, Justices O'Connor, Kennedy and Stevens refused to join fully in Justice Scalia's opinion.[305] Moreover, the four dissenting Justices

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[297] UNIF. PUTATIVE AND UNKNOWN FATHERS ACT, 9B U.L.A. 22, 24 (Supp. 1990).

[298] See *supra* notes 209–214 and accompanying text for a discussion of the confusion created by the *Stanley* line of cases.

[299] See *infra* notes 301–326 and accompanying text for a discussion of the *Michael H.* case.

[300] See *supra* notes 216–45 and accompanying text for a discussion of UPUFA.

[301] Michael H. v. Gerald D., 109 S. Ct. 2333, 2338 (1989).

[302] See *supra* notes 174–78 and accompanying text for a discussion of the need for a clarification of the law of putative fathers' rights.

[303] The opinions of the Court are contradictory because, whereas Justice Scalia reasoned that Michael H. had failed to prove the existence of either a sufficiently developed parental relationship or a "liberty" interest, Justice Stevens assumed the existence of both of these circumstances, yet reasoned that Michael had received sufficient process. 109 S. Ct. at 2341–49.

[304] Note, *Precedential Value*, *supra* note 9, at 758. The note states: "Faced with ambivalent signals and discrete, often contradictory rationales, lower courts feel compelled to guess how a majority of Justices would resolve the particular legal issue presented. . . ." *Id.*

[305] See *supra* notes 264–79 and accompanying text for a discussion of the main and concurring opinions.

indicated that they agreed with Justice Stevens's interpretation of the scope of putative fathers' rights, but they disagreed with his reasoning that California law adequately protected Michael's parental relationship.[306] It is, therefore, unclear how much precedential weight Justice Scalia's opinion will actually have.

Justice Scalia's analysis seems inconsistent with the Court's reasoning in *Quilloin* and *Lehr*.[307] In those cases, the Court acknowledged that the putative father always has the potential to develop a relationship sufficient to merit constitutional protection.[308] Justice Scalia, on the other hand, reasoned that Michael H. had no potential to gain a "liberty interest" in his relationship with Victoria.[309] Justice Scalia viewed the legal issue as resting on determining the parental rights society has traditionally accorded putative fathers when their child was born to a married woman.[310] After an historical analysis of this issue, Justice Scalia determined that the parental rights of putative fathers in Michael's situation have traditionally been deemed subordinate to the state's interest in preserving marital integrity.[311] By reasoning that a putative father, in this situation, can *never* have a liberty interest in his child, Justice Scalia ignored the legal reasoning of the *Stanley* line of cases. The *Stanley* line of cases stands for the proposition that once a putative father has developed a parental relationship, that relationship deserves constitutional protection.[312] Thus, Justice Scalia's opinion is inconsistent with the Court's own precedent.

According to Justice Stevens, Justice Scalia's analysis rejected the Court's prior decisions in the *Stanley* and *Caban* cases, both of which held that in certain circumstances, a putative father's relationship with his children deserves constitutional protection.[313] In contrast to Justice Scalia's opinion, Justice Stevens reasoned that a putative father in Michael's position could have a constitutionally protected parental relationship.[314] Furthermore, Justice Stevens as-

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[306] *Michael H.*, 109 S. Ct. at 2349, 2355–58 (Brennan, J., dissenting); *id.* at 2360–63 (White, J., dissenting).

[307] See *supra* notes 93–111, notes 139–73 and accompanying text for a discussion of *Quilloin* and *Lehr*.

[308] *See id.*

[309] See *supra* notes 263–71 and accompanying text for a discussion of Justice Scalia's reasoning.

[310] *See id.*

[311] Michael H. v. Gerald D., 109 S. Ct. 2333, 2342–45 (1989).

[312] *See, e.g.*, K. REDDEN, *supra* note 86, at 73; Comment, *Boundaries of Putative Fathers' Rights*, *supra* note 5, at 290.

[313] See *supra* notes 65–91, notes 112–38 and accompanying text for a discussion of *Stanley* and *Caban*.

[314] *Michael H.*, 109 S. Ct. at 2347 (Stevens, J., concurring in the judgment).

sumed that Michael's parental interest was a constitutionally protected liberty interest.[315] Moreover, the four dissenters agreed with Justice Stevens's opinion that Michael's parental interest potentially deserved constitutional protection.[316] In this regard, Justice Stevens's opinion is fully consistent with the *Stanley* line of cases.[317]

Justice Stevens's conclusion that section 4601 of the California Civil Code adequately protected Michael's liberty interest is incorrect because under his analysis, Michael has a weaker right to visitation than a presumed or legal parent would have. The reason is that, without a determination of paternity, a court would only consider Michael to be an "interested third party" and, therefore, he would be forced to pursue his request for visitation privileges under part two of section 4601.[318] Part two of section 4601 gives the court complete discretion in determining the extent of the visitation rights of an "interested third party" like Michael.[319] By contrast, section 4601 mandates a parent's right to visitation absent a finding that visitation would not be in the child's best interest.[320] Thus, a parent has a greater right to visitation than an interested third party. By following Justice Stevens's reasoning, which assumed that Michael's parental relationship was sufficient to merit constitutional protection, it is permissible to pare away important aspects of a putative father's rights as long as they are not eliminated completely.[321] Once the Court allows states to erode the putative father's right to have a parent-child relationship, it becomes impossible for the putative father to secure the full value of this right. Under the Stevens analysis, the crucial issue is whether the state has provided a procedure that could preserve some aspect of the putative father's parental rights. If the state has provided such a procedure, then the Constitution does not bar a conclusive marital presumption that

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[315] *Id.*

[316] See *supra* note 281 and accompanying text for a discussion of Justice Brennan's dissent.

[317] See *supra* notes 272–75 and accompanying text for a discussion of Justice Stevens's reasoning.

[318] The second sentence of section 4601 states, "[i]n the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child." CAL. CIV. CODE § 4601 (West 1990). Thus, a court could accord Michael only the rights of an interested third party.

[319] *Id.* § 4601 (West 1990).

[320] The first sentence of § 4601 states: "the court shall order reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interests of the child." *Id.*

[321] See *supra* notes 276–79 and accompanying text for a discussion of Justice Stevens's opinion.

terminates the putative father's remaining parental rights without a judicial hearing.

This reasoning is inconsistent with the *Stanley* decision. Under *Stanley*, once a putative father establishes a sufficiently developed relationship with his child, he is entitled to parental rights that are equal to the rights of every other class of parent.[322] When analyzed under the due process clause, as applied by the *Stanley* line of cases, section 621 is unconstitutional because the *Lehr* decision stands for the proposition that, once a putative father willingly assumes the full burdens of parenthood, his parental relationship gains full constitutional protection.[323] Under a true *Stanley* analysis, a statute such as section 621 is unconstitutional because it denies all putative fathers the right to enjoy a full parental relationship, regardless of the level of the putative father's parent-child relationship. The opinions of the plurality in *Michael H.* are, therefore, inconsistent with precedent in this area.

Moreover, the Court's opinion ignores current domestic realities.[324] The view that the decision ignores reality is borne out by the statistical evidence stating that the number of "illegitimate" births, as a percentage of all births, increased from 5.3% in 1960 to 22% in 1985.[325] These statistics show that Justice Scalia's statement that the facts of *Michael H.* and the resulting domestic complications are unusual[326] is mere wishful thinking.

Because *Michael H.* was a plurality decision, the law of putative fathers' rights has been further confused and remains fraught with

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[322] See *supra* notes 65–91 and accompanying text for a discussion of *Stanley*.

[323] See *supra* notes 154–73 and accompanying text for a discussion of the *Lehr* case.

[324] Michael H. v. Gerald D., 109 S. Ct. 2333, 2359 (1989) (Brennan, J., dissenting). In *Michael H.*, Justice Brennan stated in dissent that:

> The atmosphere surrounding today's decision is one of make-believe. Beginning with the suggestion that the situation confronting us here does not repeat itself every day in every corner of the country, . . . moving on to the claim that it is tradition alone that supplies the details of the liberty that the Constitution protects, and passing finally to the notion that the Court has always recognized a cramped vision of 'the family,' today's decision lets stand California's pronouncement that Michael—whom blood tests show to a 98 percent probability to be Victoria's father—is not Victoria's father. When and if the Court awakes to reality, it will find a world very different from the one it expects.

*Id.*

[325] See *supra* note 221 for an explanation of how these statistics motivated the drafters of UPUFA.

[326] See *supra* note 263 and accompanying text for Justice Scalia's statements regarding the facts of *Michael H.*

numerous unanswered questions.[327] In *Michael H.*, the main opinion rejected the reasoning of five Justices that putative fathers could be accorded constitutional protection even if the child's mother is married.[328] Therefore, a pressing need exists for clarification of this area of the law. The Uniform Putative and Unknown Fathers Act provides the clarification and reform necessary to preserve the putative fathers' constitutional rights without abridging the rights of the mother and child and without ignoring important state policies.[329]

Because the UPUFA is a codification of state and Supreme Court case law dealing with the rights of the putative father, it will eliminate the confusion created by the numerous decisions in this area. The success of the UPA in clarifying the related issue of illegitimacy has shown how a comprehensive uniform set of laws can alleviate the problems and confusion created by jumbled common law decisions.[330] Prior to the enactment of the UPA, the law of illegitimacy was in a state of confusion similar to the present state of the law of putative fathers' rights.[331] Just as the UPA's clarification of the law helped to protect the rights of the illegitimate child, the UPUFA will protect the rights of the putative father.

The UPUFA codifies nearly every important aspect of putative fathers' rights.[332] Specifically, the UPUFA clearly delineates the scope of the notice to which a putative father is entitled whenever a judicial proceeding begins that could substantially alter his parental rights.[333] The UPUFA also codifies the factors that the Court has found relevant to determining whether the putative father has developed a relationship that merits constitutional protection.[334] By codifying the Court's holdings in relation to these particularly confusing issues, the UPUFA eliminates the uncertainty of interpreting the *Stanley* line of cases.

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[327] See *supra* notes 86–91, 108–11, 134–37, 166–78 and accompanying text for a discussion of the confusion created by the *Stanley* line of cases.

[328] See *supra* note 281 and accompanying text for Justice Brennan's conclusion that a liberty interest could exist.

[329] See *supra* notes 215–45 and accompanying text for a discussion of UPUFA.

[330] See *supra* note 177 and accompanying text for a discussion of the UPA.

[331] See *supra* notes 35–49, 52–55 and accompanying text for a discussion of the state of illegitimacy laws prior to the adoption of the UPA.

[332] See *supra* notes 221, 226–30 and accompanying text for a discussion of UPUFA.

[333] See *supra* note 228 and accompanying text for a discussion of the scope of the notice provided by UPUFA.

[334] See *supra* note 230 for a list of factors courts should use when analyzing putative fathers' rights.

Another reason that the UPUFA will have a stabilizing influence on this area of the law is that the UPUFA recognizes current domestic realities.[335] The title of the Act acknowledges the dramatic rise in the number of putative and unknown fathers in our society in the past two decades.[336] Justice Scalia's opinion in *Michael H.* is content to ignore statistics and assumes that illegitimate births are rare occurrences.[337] The UPUFA, on the other hand, is acutely aware of these statistics, and actually cites them as a motivating force behind the Act.[338]

The major area that the UPUFA still leaves open to confusion, however, is that it does not adequately protect the putative father from the conclusive marital presumption.[339] Whenever circumstances make the conclusive marital presumption applicable, a conclusive marital presumption statute such as section 621 allows the state to terminate the parental relationship of the putative father without a hearing.[340] This conclusive presumption violates the equal protection clause because it prefers one type of familial relationship over another.[341] The state does not have the authority to pick and choose arbitrarily among the many types of familial relationships and protect some relationships more than others.[342] The conclusive marital presumption also violates the due process clause because it arbitrarily abridges a constitutionally protected liberty interest.[343] The drafters acknowledged that the UPUFA is silent regarding conclusive marital presumptions because they specifically looked to the Court to resolve this question when it ruled on *Michael H.*[344] Because *Michael H.* was a plurality opinion, however, it did not conclusively resolve this question. Justice Scalia reasoned that section 621 standing alone would always be constitutional, but this opinion was only completely supported by Chief Justice Rehnqu-

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[335] See *supra* note 221 for a discussion of the motivational role of these statistics.

[336] *See id.*

[337] See *supra* note 263 and accompanying text for a discussion of Justice Scalia's opinion.

[338] See *supra* note 221 for a discussion of the motivational role of these statistics.

[339] See *supra* notes 243–45 and accompanying text for a discussion of UPUFA's position regarding the marital presumption.

[340] See *supra* notes 185–88 and accompanying text for a discussion of section 621.

[341] See *supra* notes 236–37 and accompanying text for a discussion of the constitutional protections accorded to familial relationships.

[342] *Id.*

[343] *Id.*

[344] See *supra* notes 243–45 and accompanying text for a discussion of UPUFA's position regarding the marital presumption.

ist.[345] Justice Stevens, in recognizing that a liberty interest existed in *Michael H.*, a view shared by the four dissenters, determined that section 621 would not be constitutional unless it was accompanied by a statute resembling section 4601, which provides the putative father with a minimum level of procedural protection for his visitation rights.[346] Conversely, the four dissenters were united in strongly arguing that section 621 would always be unconstitutional.[347]

Based on the various opinions in *Michael H.*, it seems that the bare constitutional minimum requires conclusive marital presumptions to be coupled with a statute, such as section 4601, which provides the putative father with a judicial means of acquiring visitation rights. In the past, however, the Court has observed that the bare constitutional minimum is not always the best way to promote public policy.[348] Thus, the best way for states to accord putative fathers the full value of their constitutional rights and, thereby, fulfill their obligation to protect parental relationships, is to repeal the conclusive marital presumption statutes prior to enacting the UPUFA. This will protect putative fathers from having their parental rights terminated without a judicial hearing. By adopting the UPUFA, state legislatures will be enacting a comprehensive body of law that is consistent with the constitutional mandates of the *Stanley* line of cases.[349] At the same time, the UPUFA provides state courts with a coherent framework to evaluate the existence and extent of putative fathers' parental rights.[350]

## III. Conclusion

Both statutory and common law regarding the rights of putative fathers are confused and unsettled at this time. Most statutory

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[345] See *supra* notes 280–81 and accompanying text for a discussion of which Justices joined, concurred, or dissented.

[346] See *supra* notes 275–79 and accompanying text for a discussion of Justice Stevens's opinion.

[347] See *supra* notes 280–86 and accompanying text for a discussion of the dissenting opinions.

[348] Lassiter v. Department of Social Servs., 452 U.S. 18, 34 (1981). In denying an indigent father whose parental rights had been terminated a right to state appointed counsel, the Court stated in dicta that the decision did not imply that state appointment of counsel was not a better public policy. *Id.*

[349] See *supra* notes 216–42 and accompanying text for a discussion of this aspect of UPUFA.

[350] See *supra* notes 229–30 and accompanying text for a discussion of this aspect of UPUFA.

law in this area is based on outmoded English common law principles as well as outdated "traditional" state policies and conceptions of domestic life. These statutes do not adequately protect the rights of putative fathers. Although the United States Supreme Court, in the 1972 *Stanley* decision, recognized that the right of putative fathers to have and maintain a parental relationship with their children is a constitutionally protected liberty interest, the line of cases that followed *Stanley* failed to define clearly the exact scope, nature and extent of this interest. State courts and legislatures have been unable to discern fully the meaning of these cases. The latest Supreme Court case in this area, *Michael H.*, failed to resolve the confusion created by these earlier cases and will most likely add to the confusion because it did not adequately define the constitutional limits of the conclusive marital presumption.

The Uniform Putative and Unknown Fathers Act represents a codification of the *Stanley* line of cases with an enhanced understanding and incorporation of current domestic reality. The UPUFA will clarify this area of law because it provides both state courts and legislatures with a standardized and coherent interpretation of the rights of putative fathers. Moreover, the UPUFA advances valuable state interests by protecting the best interests of the child and the integrity of familial relationships. By adopting the UPUFA, concurrently with repealing the conclusive marital presumption, states will be able to promote public policy, protect the best interests of children and preserve putative fathers' constitutional rights.

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