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## Unwed Fathers and the Adoption Process

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# NOTES

## UNWED FATHERS AND THE ADOPTION PROCESS

The rights of unwed fathers in the adoption of children born out of wedlock have undergone rapid and fundamental change in recent years.<sup>1</sup> Only eight years ago, the prevailing view in most states was that the unwed father had no such rights: courts ignored him<sup>2</sup> and accorded the unwed mother full authority to place the child for adoption. This practice of granting the unwed father little or no input before terminating his parental rights<sup>3</sup> came to an abrupt halt in 1972 when the United States Supreme Court decided *Stanley v. Illinois*.<sup>4</sup> The Court in *Stanley* announced that an unwed

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1. Several law review articles discuss the nature and extent of these changes. See generally Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois*, 9 FAM. L.Q. 527 (1975); Schwartz, *Rights of a Father with Regard to His Illegitimate Child*, 36 OHIO ST. L.J. 1 (1975); Tabler, *Parental Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231 (1971); Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115 (1973-74) [hereinafter cited as Comment, 13 J. FAM. L.]; Comment, *Illegitimacy and the Rights of Unwed Fathers in Adoption Proceedings After Quillion v. Walcott*, 12 J. MAR. J. PRAC. & PROC. 383 (1979); Note, *Father of an Illegitimate Child—His Right To Be Heard*, 50 MINN. L. REV. 1071 (1966) [hereinafter cited as Note, 50 MINN. L. REV.]; Note, *The Putative Father's Parental Rights: A Focus on "Family,"* 58 NEB. L. REV. 610 (1979) [hereinafter cited as Note, 58 NEB. L. REV.]; Note, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517 (1973) [hereinafter cited as Note, 59 VA. L. REV.]; 40 ALB. L. REV. 543 (1976); 18 HOW. L.J. 843 (1975); 1968 U. ILL. L.F. 232; 18 WASHBURN L.J. 174 (1978).

2. See, e.g., Comment, 13 J. FAM. L., *supra* note 1, at 115. Before *Stanley v. Illinois*, 405 U.S. 645 (1972), even if the unwed father had acknowledged paternity of, supported, and established a family relationship with his child, the state did not recognize his interests. Comment, 13 J. FAM. L., *supra* note 1, at 115 (citing *Clements v. Banks*, 159 So. 2d 892 (Fla. Dist. Ct. App. 1964), and *Toole v. Gallion*, 221 Ga. 294, 144 S.E.2d 360 (1965)).

Initially, most states granted an unwed father no connection with his child born out of wedlock other than the moral obligation of support. See Note, 50 MINN. L. REV., *supra* note 1, at 1072.

3. Adoption terminates all legal relationships and rights between the child and his natural parents and establishes those rights in the adoptive parents. See, e.g., *In re Fox*, 567 P.2d 985 (Okla. 1977).

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

father's relationship with his nonmarital children was protected by the due process and equal protection clauses of the fourteenth amendment, and that before a court could terminate the father's parental rights, it was required to provide him a hearing to determine his fitness<sup>5</sup> as a parent.<sup>6</sup> No longer could the state sever his rights on the basis of an absolute statutory presumption of unfitness.

Six years after *Stanley*, the Court suggested in *Quilloin v. Walcott*<sup>7</sup> that it might expand the rights of the unwed father to include the right to veto the adoption of his children absent a finding that he was unfit, but declined to do so on the basis of the parental relationship at issue in that case. Most recently, in *Caban v. Mohammed*,<sup>8</sup> the Court gave substance to its suggestions in *Quilloin* and, employing an equal protection analysis, reserved for certain unwed fathers a role in the adoption process identical to that of the unwed mother.<sup>9</sup>

The rapid evolution of the law through these three cases introduced a considerable amount of uncertainty into the adoption process. These developments invalidated many state adoption statutes, and legislatures still are uncertain how to provide for the unwed father's expanding role in adoption proceedings. The dissenting Justices in *Caban* addressed many of the more pressing concerns over enfranchising the unwed father.<sup>10</sup> They feared that unwed fathers exercising their new rights would delay and complicate adoptions<sup>11</sup> and thus interfere with the primary means of providing for the welfare of children born out of wedlock. They also were apprehensive that the procedural due process requirement of locating and notifying unwed fathers of proceedings affecting their

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5. The traditional grounds for unfitness are abandonment or neglect. The Uniform Adoption Act has suggested that withholding consent unreasonably should be a third determinant of unfitness. UNIFORM ADOPTION ACT § 19 (amended 1971).

6. 405 U.S. at 649, 658.

7. 434 U.S. 246 (1978).

8. 441 U.S. 380 (1979).

9. The Court held the contested statute unconstitutional because the distinction it made between the rights of unwed mothers and unwed fathers was not substantially related to the state's interest in promoting the welfare of children. *Id.* at 382.

10. Justice Stewart penned one dissent, and Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, wrote the other.

11. 441 U.S. at 408 (Stevens, J., dissenting).

parental rights would invade unreasonably the mother's privacy<sup>12</sup> and cause prospective adoptive parents to doubt the reliability of the new relationship.<sup>13</sup> Because they believed most unwed fathers in fact abandon the mother, forcing her to assume all the responsibilities of carrying, bearing, rearing, and supporting the child, the Justices reasoned that mothers should have full authority to place the child for adoption without any veto power in the unwed father.<sup>14</sup> Furthermore, the dissenters posited that the Court should limit its holding in *Caban* to its facts and not accord all unwed fathers rights coextensive with those of unwed mothers.<sup>15</sup>

The effect of *Caban* on state adoption statutes is unclear. This Note will reassess the role of the unwed father in adoption proceedings and suggest appropriate changes in current adoption policies. In reconsidering the father's role, the Note evaluates the part adoption has played in society and its adaptation to social changes, the modifications of adoption law by the Supreme Court, and the competing interests present in an adoption proceeding.

### BACKGROUND

Adoption is a statutory creation<sup>16</sup> of fairly recent vintage. The common law did not recognize adoption, and states did not begin to enact adoption statutes until the middle of the nineteenth century.<sup>17</sup> Previously, unwanted or destitute children generally were placed with relatives who would accept them. If no relatives were willing or available, indigent children were put into indenture, apprenticeship, or service.<sup>18</sup> As a rule, "direct care of destitute children by American municipalities prior to 1875 was . . . a pitiful

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12. *Id.* at 408-09.

13. *Id.*

14. *Id.* at 406-07.

15. *Id.* at 409.

16. *In re Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 570, 331 N.E.2d 486, 487, 370 N.Y.S.2d 511, 513 (1975), *appeal dismissed sub nom. Orsini v. Blas*, 423 U.S. 1042 (1976). See generally Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743 (1956); Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443 (1972).

17. The first adoption statute was enacted in Massachusetts in 1851. Presser, *supra* note 16, at 474.

18. *Id.* at 456-61.

failure."<sup>19</sup>

About 1875 public attention began to focus on the welfare of the growing number of unwanted children, and private agencies emerged to fill the gap left by the state's indifference. Although older children remained a source of cheap labor, these agencies sought to place young children in suitable homes where they could benefit from a family atmosphere. Because an unindentured child could not be bound to a family, reformers pressed for statutes that would recognize legally the new relationships. Gradually, interest centered on using adoption as a means of providing for the welfare of the child.<sup>20</sup>

Today, adoption is the legal process by which the state severs a child's relationship with his natural parents and establishes a new relationship between him and the adoptive parents.<sup>21</sup> This severance and reestablishment normally embraces all the rights, duties, and privileges that inhere in the parent-child relationship,<sup>22</sup> although some state statutes provide for special consequences regarding inheritance rights.<sup>23</sup> Adoption, however, is not the sole means by which a court may terminate parental rights. Parents who fail to provide for the proper care or support of their children may lose custody and all parental rights through a neglect hearing.<sup>24</sup> Similarly, parents who leave their children and fail to communicate with them for a statutorily prescribed period may have their rights terminated through an abandonment hearing.<sup>25</sup> In ei-

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19. H. FOLKS, *THE CARE OF DESTITUTE, NEGLECTED AND DELINQUENT CHILDREN* 33 (1902), cited in Presser, *supra* note 16, at 473 (citation omitted).

20. Presser, *supra* note 16, at 472-74.

21. See, e.g., *Bikos v. Nobliski*, 88 Mich. App. 157, 276 N.W.2d 541 (1979); *In re Fox*, 567 P.2d 985 (Okla. 1977); S. KATZ, *WHEN PARENTS FAIL—THE LAW'S RESPONSE TO FAMILY BREAKDOWN* 131, 132 (1971).

22. These factors are determined by statute, but normally include the parents' rights to custody, control, and services of the child, and the child's rights to support and instruction from the parents.

23. H. CLARK, *LAW OF DOMESTIC RELATIONS* 658 (1968).

24. See, e.g., N.M. STAT. ANN. § 40-7-4(B)(3) (Supp. 1979). This statute provides for termination of parental rights when the child has been neglected or abused and when the court finds that the conditions and causes of the neglect or abuse are unlikely to change despite reasonable efforts by state welfare agencies to assist the parent.

25. See, e.g., *In re Ellick*, 69 Misc. 2d 175, 328 N.Y.S.2d 587 (Fam. Ct. 1972); N.Y. Soc. SERV. LAW § 384-b(4)(b) (McKinney Supp. 1979-80) (requiring a period of six months in which the parent did not visit or communicate with the child).

ther case, the state frees the child from parental control and places him either in a foster home<sup>26</sup> or an adoptive home where he can receive necessary care.

In contrast to such permanent separations is the process by which a neglectful parent loses only custody rights. Although a court will appoint someone other than the parent as the child's guardian with right to custody, it will allow the parent to visit and maintain contact with his child.<sup>27</sup> If the parent is able to overcome the deficiency, he then will regain custody of the child. This distinction is important because courts tend to require a significantly stronger showing of unfitness to terminate parental rights than to shift custody to a nonparent.

Despite the growing recognition that the focus in adoption proceedings should be on the child's welfare, many adoption statutes before the landmark holding in *Stanley* regarded the child as little more than a chattel of the parents. Courts generally applied a strict parental rights doctrine that prevented termination of parental rights except in extreme cases of neglect or abandonment. The state, though, respected only the parental rights of married parents and unwed mothers. Unless they were unfit, their consent to the adoption was a necessary prerequisite. The opposite was true of unwed fathers; even when they had acknowledged paternity, provided support, and established a parental relationship with the child, their consent was unnecessary.<sup>28</sup>

Courts considered this distinction both necessary and acceptable because it facilitated the adoption process. Because most unwed fathers had no interest in or relationship with their children, a requirement of locating and obtaining the consent of unwed fathers would have impeded greatly the entire process.

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26. The purpose of a foster home is to provide temporary care for the child pending location of a more permanent home. All too often, though, children spend many years in foster care. See, e.g., *In re Heidi T.*, 87 Cal. App. 3d 864, 151 Cal. Rptr. 263 (1978) (ten years); *Coffey v. Department of Social Servs.*, 41 Md. App. 340, 397 A.2d 233 (1979) (nine years).

27. The state encourages such visitation and contact in order to promote the reestablishment of a viable parent-child relationship. New York requires that social service agencies exercise diligent efforts to encourage and strengthen the parent-child relationship before a court may order termination of parental rights. See *In re Thomas TT*, 67 A.D.2d 788, 412 N.Y.S.2d 482 (1979).

28. See note 2 *supra*.

To require the consent of fathers of children born out of wedlock would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessing of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations. At the very least, the worthy process of adoption would be severely impeded.<sup>29</sup>

Although this presumption of unfitness may have been true in most instances, its irrebuttable nature caused individual unwed fathers who had close, beneficial relationships with their children to be severed from their children, often to the detriment and anguish of both. Disturbed by the severe consequences of this presumption, the Court in *Stanley* altered the course of adoption law.

### THE SUPREME COURT AND ADOPTION LAW

*Stanley v. Illinois* was the first of three major Supreme Court decisions declaring that unwed fathers could have constitutionally protected relationships with their children born out of wedlock. Joan Stanley and Peter Stanley, though never married, had lived together intermittently for eighteen years and had raised three children. After Joan died, Illinois transferred legal custody of Peter's children to court-appointed guardians.<sup>30</sup> At that time, an Illinois dependency statute<sup>31</sup> provided that children without "parents" were to be declared dependent and made wards of the state. The statute defined "parents" to include married mothers and fathers, adoptive mothers and fathers, and unwed mothers, but excluded unwed fathers.<sup>32</sup> Although the statute required a hearing to determine fitness in the case of "parents," it contained the presumption that unwed fathers were unfit and denied them a fitness hearing. The only evidence necessary to take the children from their natural unwed father therefore was proof that the child's mother had died. Thus, when the state showed that Joan Stanley had died, the court terminated Peter Stanley's parental rights and his children became wards of the state.

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29. *In re Adoption of Malpica-Orsini*, 36 N.Y.2d 568, 572, 331 N.E.2d 486, 489, 370 N.Y.S.2d 511, 516 (1975), *appeal dismissed sub nom. Orsini v. Blas*, 423 U.S. 1042 (1976).

30. 405 U.S. at 646.

31. ILL. ANN. STAT. ch. 37, §§ 702-1, 702-5 (Smith-Hurd 1972).

32. *Id.* § 701-14 (amended 1973).

The State of Illinois argued before the Supreme Court that the statutory distinction between unwed mothers and unwed fathers was permissible as a means of furthering the state's policy of providing for the welfare of children.<sup>33</sup> The state further argued that its presumption of unfitness of unwed fathers was reasonable because the great majority of unwed fathers in fact were unfit.<sup>34</sup> The Court, however, rejected this rationale.<sup>35</sup>

Decrying such "procedure by presumption,"<sup>36</sup> Justice White's majority opinion announced, on equal protection and due process grounds,<sup>37</sup> that Stanley had a substantial interest<sup>38</sup> in the children he "sired and raised"<sup>39</sup> and was entitled to a hearing on his fitness as a parent before the state could terminate his parental rights. Although notice to the unwed father of legal action affecting his parental rights was not at issue in *Stanley*, the Court noted that the Illinois statute providing for notice by publication to "All whom it may concern" was sufficient if the unwed father's identity and location were unknown.<sup>40</sup>

Six years after *Stanley*, the Court decided *Quilloin v. Walcott*.

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33. The precise aim of the Illinois Juvenile Court Act was to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community" and to "strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal." *Id.* § 701-2 (amended 1973).

34. 405 U.S. at 653 & n.5, 654 & n.6.

35. *Id.* at 654-55, 654 n.7. Assuming Illinois' presumption of unfitness of unwed fathers to be true in the majority of cases, the Court noted that it was not true of Peter Stanley. Thus, because the state's presumption was applied to unwed fathers like Peter Stanley, it did not serve to advance the state's interest in the welfare of children. *Id.* at 654-55.

36. *Id.* at 656-57. The Court, though respecting the state's interest in protecting "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community," *id.* at 652 (quoting ILL. ANN. STAT. ch. 37, § 701-2 (Smith-Hurd 1972) (amended 1973)), reminded Illinois that efficacious procedures used to realize legitimate state ends did not always comport with the fourteenth amendment's requirement of due process. *Id.* at 656-57. In addition, the Court felt the state's additional burden of holding fitness hearings for interested unwed fathers would be minimal. *Id.* at 657 n.9.

37. As a matter of due process, Stanley was entitled to a hearing on his parental fitness before his children could be taken from him. By denying him a hearing and according one to all other parents, the state denied him equal protection of the laws. *Id.* at 649.

38. The majority acknowledged the interest of parents in the companionship, care, custody, and management of their children, and in the integrity of the family. The Court considered these rights vitally important regardless of the parents' marital status. *Id.* at 651-52.

39. *Id.* at 651.

40. *Id.* at 657 n.9.



The factual record presented in *Quilloin* regarding the degree of the unwed father's interest in and responsibility for his child, however, was far different from that presented in *Stanley*. After fathering the child and consenting to being named on the child's birth certificate,<sup>41</sup> Leon Quilloin left all child-raising responsibilities to the child's mother, Ardell Walcott, and Randall Walcott, whom she later married.<sup>42</sup> In contrast to Peter Stanley, Leon Quilloin never lived with the child or sought his custody and never objected to Ardell and Randall's raising him.<sup>43</sup> What little support he provided was given on an irregular basis.<sup>44</sup> The only interest Leon manifested in the child was to visit<sup>45</sup> and occasionally bring him presents. When Leon received notice<sup>46</sup> from the state's Department of Human Resources that Randall and Ardell, with whom the child had been living for seven years, had petitioned for the child's adoption, he objected.

Under the Georgia statute in effect at the time, the consent of both parents of a child born in wedlock was required for an adoption, even if they were separated or divorced at the time of the adoption proceedings.<sup>47</sup> For the adoption of a nonmarital child, however, only the unwed mother's consent was necessary.<sup>48</sup> Unwed fathers had no right to prevent the adoption unless they had legitimated the child.<sup>49</sup> Considering all the circumstances,<sup>50</sup> the state

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41. 434 U.S. at 249 n.6.

42. *Id.* at 247.

43. *Id.*

44. Although Quilloin had a duty to support the child under the Georgia statute, GA. CODE ANN. § 74-202 (1973) (amended 1979), Ardell Walcott never brought an action to enforce this duty. Because he never had been under a court order to provide support, his rights could not be terminated under the part of the statute that dealt with willful failure to comply with a support order. *See id.* § 74-403(2) (1973) (amended 1977).

45. 434 U.S. at 251. Apparently, the disruptive effects these visits were having on the child and the rest of the Walcott family prompted Randall Walcott to petition for the child's adoption. *Id.*

46. As in *Stanley*, sufficiency of notice was not at issue.

47. GA. CODE ANN. § 74-403(1) (1973) (amended 1977). This general rule had several exceptions: if the parent had surrendered his parental rights to a child-placing agency or an adoption court; if he had abandoned the child or willfully failed to pay court-ordered support for more than a year; if his parental rights had been terminated by court order; if he was incapacitated from giving consent; or if he could not be located after a diligent search. *Id.* § 74-403(2) (1973) (amended 1977).

48. *Id.* § 74-403(3) (1973) (amended 1977).

49. Legitimation could be accomplished two ways: by marrying the mother and acknowl-

court refused to grant Leon's petition for legitimation and visitation rights as not in the child's best interests, even though it did not find him to be unfit. The court then granted the Walcott adoption petition because Ardell Walcott consented and Leon Quilloin had no further standing to object.<sup>51</sup>

Leon's appeal to the Georgia Supreme Court<sup>52</sup> included an equal protection and due process attack on the constitutionality of the Georgia statute,<sup>53</sup> but the Georgia Supreme Court rejected the challenge on the ground that the state's strong interest in raising children in a family setting would be impeded unnecessarily if unwed fathers could veto adoptions. The court found this particularly true under the facts of this case, noting that the effect of the statute was to maintain the child in an existing family unit and to prevent interference by a marginally interested biological father who never had been part of the child's family and had not taken any steps to support or legitimate him for eleven years.<sup>54</sup>

Quilloin appealed to the United States Supreme Court, continuing to challenge the constitutionality of the Georgia statute and claiming the absolute right to veto adoption of his child because the lower court had not found him unfit.<sup>55</sup> The Court unanimously dismissed the due process challenge on the basis that any protected interest Quilloin may have had in his child never ripened because he never had a familial relationship with him. The Court agreed with the state that under the circumstances presented in this case, termination of Leon Quilloin's parental rights<sup>56</sup> required

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edging the child as his own, *id.* § 74-101 (1973), or by obtaining a court order declaring the child legitimate, *id.* § 74-103 (1973).

50. The important factors in this determination were as follows: the irregular support; the disruptive effect of Leon Quilloin's visits on the child and the rest of the Walcott family; the child's desire to be adopted by Randall Walcott and take on his name; Randall Walcott's fitness as a parent; the marital relationship of Randall and Ardell Walcott; and Ardell Walcott's custody of the child. 434 U.S. at 251.

51. *Id.* at 251-52.

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

53. *Id.* at 231, 232 S.E.2d at 247.

54. *Id.* at 233, 232 S.E.2d at 248.

55. 434 U.S. at 253.

56. Had the state attempted to break up a natural family unit over the objection of the parents and children, without a showing of unfitness, and solely because such action appeared to be in the best interests of the children, the Court indicated that such state action would be an unconstitutional abridgment of the due process clause. 434 U.S. at 255 (dictum)

no more than a finding that this course of action was in the child's best interests.<sup>57</sup>

Furthermore, the Court rejected Quilloin's equal protection argument, which challenged the distinction in the Georgia statute between separated or divorced fathers and unwed fathers.<sup>58</sup> Noting that separated or divorced fathers had borne full responsibility for the raising of their children while they were married, the Court concluded that Quilloin's lack of commitment to his child justified the differential treatment.<sup>59</sup>

While Quilloin argued his case before the Supreme Court, another unwed father was fighting in the New York courts to prevent termination of his parental rights. The Supreme Court ultimately would decide this father's claim in *Caban v. Mohammed*. Abdiel Caban and Maria Mohammed had lived together out of wedlock and had two children.<sup>60</sup> After they had lived together as a family unit for about five years, Maria took the children and left Abdiel to move in with Kazim Mohammed, whom she married two months later. For the next nine months, the children spent weekdays living with Kazim and Maria and weekends at their maternal grandmother's apartment, where Abdiel visited them.<sup>61</sup> With the Mohammeds' encouragement, the maternal grandmother took the children to Puerto Rico for more than a year.<sup>62</sup> Subsequently, Abdiel went to Puerto Rico and brought them back to New York. The Mohammeds, after filing for and receiving custody, then petitioned

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(quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)). The Court, however, emphasized that it was deciding only this particular case. *Id.* at 256.

57. *Id.* at 254-55.

58. Quilloin's equal protection challenge concerned only the statute's differential treatment of married and unwed fathers. The Court ruled that it would not consider Quilloin's gender discrimination challenge concerning differential treatment of unwed mothers and unwed fathers, which he had argued before the Georgia courts, because the claim was not presented in Quilloin's jurisdictional statement. *Id.* at 253 & n.13.

59. *Id.* at 256.

60. "Abdiel Caban was identified as the father on each child's birth certificate." 441 U.S. at 382.

61. Because Caban was on good terms with the maternal grandmother, he was able to visit the children each week while they stayed with her. *Id.*

62. While the children were in Puerto Rico, Maria Mohammed wrote them letters and Abdiel Caban communicated with them through his parents, who also lived in Puerto Rico. *Id.* at 382-83.

for adoption of the children, and Abdiel cross-petitioned for adoption on behalf of himself and his new wife.<sup>63</sup>

Under the New York Domestic Relations statute in effect at the time, unwed mothers had the right to veto the adoption of their natural children by withholding their consent.<sup>64</sup> The unwed father had no such right and only could appear at the hearing to try to show that the proposed adoption would not be in the child's best interests.<sup>65</sup> In effect, this provision allowed Maria to veto Abdiel's petition, whereas Abdiel, lacking a corresponding veto power, only could attempt to establish that the Mohammeds were unfit parents. Abdiel failed. Consequently, although he had acknowledged his paternity and given the children his name, supported the family, established a substantial relationship with his children, and was found not to be unfit, the court granted the Mohammeds' petition and terminated his parental rights.<sup>66</sup> He appealed, claiming the New York Domestic Relations Act unconstitutionally denied him equal protection and due process contrary to the guarantees of the fourteenth amendment.<sup>67</sup> The Appellate Division of the New York Supreme Court<sup>68</sup> and the New York Court of Appeals<sup>69</sup> rejected his appeals, but he finally prevailed before the United States Supreme Court.

Although recognizing that the state's interest in facilitating adoptions of children born out of wedlock was substantial, Justice Powell's majority opinion nevertheless maintained that the statute violated Abdiel's rights under the equal protection clause because it drew a gender-based distinction<sup>70</sup> bearing no substantial rela-

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63. *Id.* at 383.

64. Section 111(1) of the New York Domestic Relations Law provided that "consent to adoption shall be required [o]f the parents or surviving parent of a child born in wedlock [or] [o]f the mother of a child born out of wedlock." N.Y. DOM. REL. LAW § 111(1) (McKinney 1977).

65. 441 U.S. at 385-87.

66. *Id.* at 383-84.

67. *Id.* at 384.

68. *In re David Andrew C.*, 56 A.D.2d 627, 391 N.Y.S.2d 846 (mem.), *aff'd mem.*, 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977), *rev'd sub nom.* *Caban v. Mohammed*, 441 U.S. 380 (1979).

69. *In re David A.C.*, 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977) (mem.), *rev'd sub nom.* *Caban v. Mohammed*, 441 U.S. 380 (1979).

70. The Court did not decide whether the state legitimately could distinguish between unwed fathers and married or divorced fathers. 441 U.S. at 394 n.16. Although this was held

tionship to the state's interest in furthering the adoption of children born out of wedlock.<sup>71</sup> Because this case was resolved by equal protection analysis alone, the majority did not discuss whether Abdiel Caban also presented a cognizable due process argument.<sup>72</sup>

The two dissenting opinions took vigorous exception to the majority's analysis. Justice Stewart emphasized the importance of the state's interest in facilitating adoptions. He argued that because adoption was the most available means of overcoming the social and developmental handicaps faced by children born out of wedlock, unwed fathers who predominantly were unknown, unavailable, and uninterested, should not be allowed to place obstacles in the path of adoption procedures. He favored allowing interested unwed fathers to oppose adoptions only by showing that the proposed adoption would not be in the child's best interests<sup>73</sup> and insisted that full parental rights required more than a mere biological relationship between father and child.<sup>74</sup>

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permissible in *Quilloin*, the thrust of the discussion in *Caban* counsels that such differential treatment would not always be acceptable. *Caban* dealt at length with the impropriety of foreclosing parental interests on the basis of absolute presumptions or generalizations not always substantially related to the achievement of legitimate state interests. Clearly, differential treatment in the case of an individual unwed father with as poor a parental record as Leon Quilloin is justified. After *Caban*, however, a statute allowing discrimination against all unwed fathers as compared to all married or divorced fathers probably would not withstand constitutional scrutiny. See *In re Mark T*, 8 Mich. App. 122, 146, 154 N.W.2d 27, 39 (1967) (observing that the court was "not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother).

71. 441 U.S. at 391. Although assuming that some generalizations concerning differences in the relative importance of maternal and paternal roles at the time the child was a young infant were appropriate, the majority maintained that as the child aged such generalizations did not serve as a valid basis for terminating parental rights. *Id.* at 389.

At the time the adoption petitions were filed in *Caban*, Davis was four and Denise was six years old. *Id.*

72. *Id.* at 394 n.16.

73. *Id.* at 396 (Stewart, J., dissenting).

74. *Id.* at 397. Several Justices took this position in other cases. In *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), involving the status and rights of foster parents and foster children under the due process and equal protection clauses, the Court noted that "[b]iological relationships are not exclusive determination of the existence of a family." *Id.* at 843 (footnote omitted). In another context, the majority suggested that "at least where the substantive protection of the Due Process Clause is involved, biological relationship alone is not sufficient to create a constitutionally protected 'family.'" *Id.* at 843 n.50 (citing

Justice Stevens, joined in his separate dissent by Chief Justice Burger and Justice Rehnquist, also emphasized the compelling importance of the state's interest in facilitating adoptions.<sup>76</sup> Enumerating the many differences between maternal and paternal roles during the child's infancy,<sup>76</sup> Justice Stevens maintained that the New York statute's discrimination against unwed fathers was justified. He felt that requiring the consent of both unwed parents in each case would lead to numerous problems, including complications and delays in the adoption process, invasion of the mother's privacy by attempts to identify and locate the unwed father, and discouragement of prospective adoptive parents.<sup>77</sup> He asserted that because the majority of adoptions involved infants<sup>78</sup> and because the discrimination was especially justified in infant adoptions, the law should be presumed valid and unwed fathers attacking the statute should be required to prove the classification faulty so often that its invalidation would be justified.<sup>79</sup> Agreeing that once developed, a father's relationship with his child was constitutionally protected against arbitrary state action, Justice Stevens concluded that he would expand the grounds justifying termination of parental rights from abandonment and abuse to include cases in which the father had taken no steps to legitimate his child, the natural family unit already had been destroyed, and the child's best interests required that no further obstacles should deprive him and the state of the benefits of adoption and legitimation.<sup>80</sup>

In its opinions in *Stanley*, *Quilloin*, and *Caban*, the Supreme Court explicated the constitutional principles relative to certain as-

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Moore v. East Cleveland, 431 U.S. 494, 536-40 (1977) (Stewart, J., dissenting); *id.* at 549 (White, J., dissenting)).

75. Justice Stevens stopped short of finding that the state's interest in facilitating adoption was "compelling" in the sense of compelling the conclusion that any statute intended to foster that interest was automatically constitutional. Instead, the level of scrutiny he suggested was one of "thoughtful attention" to the legislative judgment that the law served the state interest in facilitating adoption. 441 U.S. at 402 n.3 (Stevens, J., dissenting).

76. *Id.* at 404-07.

77. *Id.* at 408-09.

78. Justice Stevens cited HEW statistics for the years 1974 and 1975, which indicated that approximately 64% of the children adopted were less than one year old and 89% were less than six years old. *Id.* at 404 n.7.

79. *Id.* at 409-10.

80. These factors resemble those operative in *Quilloin*. See text accompanying notes 41-46 *supra*.

pects of the adoption process. The most fundamental of these is that constitutional protection extends to de facto families. Although biological relationships alone do not make a family, the mere absence of legal ties does not mean that the family unit merits no constitutional recognition.

A second principle that the Court clearly enunciated was that nothing in the Constitution prohibits states from terminating parental rights upon proof of unfitness.<sup>81</sup> Indeed, the Court affirmed that the state has a duty to separate children from parents who have abandoned or neglected<sup>82</sup> them in a way seriously detrimental to their physical and emotional well-being. At the other extreme, the state lacks the authority to separate families without proof of unfitness merely on the basis that it considers such a solution in the best interests of the child.<sup>83</sup> This protection extends to all de facto families and is not solely dependent on a marital relationship between the mother and father.

Another concern addressed in all three cases, though not at issue in any of them, was provision of notice to all parents whose parental rights were to be terminated. The Court indicated that a court should provide such notice to all natural parents, even those whose identity or whereabouts are unknown. Notice to interested unwed fathers should present no difficulty because a state easily could ascertain both their identity and whereabouts. If neither were ascertainable, then publication of notice to "All Whom it May Concern" would be sufficient to comply with the notice requirement,<sup>84</sup> even though the likelihood of actual notice to the unknown father would be remote.

The Court also provided some guidance for determining when a particular parent's relationship with his child was of sufficient character to warrant due process and equal protection safeguards. In *Quilloin*, the Court held that the following factors, taken together, were insufficient to create a constitutionally protected parental relationship: acknowledgment of paternity; irregular financial support; occasional visits with and gifts for the child; ab-

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81. *Caban v. Mohammed*, 441 U.S. at 392 n.13; *Stanley v. Illinois*, 405 U.S. at 649, 652.

82. *Stanley v. Illinois*, 405 U.S. at 649.

83. *Quilloin v. Walcott*, 434 U.S. at 255 (citing *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

84. *Stanley v. Illinois*, 405 U.S. at 657 n.9 (dictum).

sence of a finding of unfitness; and desire to continue visitations in the future. At best, these attributes characterize an uncle-nephew relationship; thus, Leon Quilloin was accorded no parental rights. A biological connection with a child in itself was insufficient to overcome a failure to assume the responsibilities of parenthood.

On the other hand, *Stanley* and *Caban* outlined those factors that, in conjunction with biological fatherhood, were sufficient to clothe the unwed father with full parental rights: living with the child in a de facto family unit; providing for the child's care, supervision, support, and education; and establishing a familial relationship with the child. These indicia of parenthood, when combined with the biological relationship, served to establish a constitutionally protected parental relationship. This relationship ensured protection against termination of parental rights absent proof of unfitness and guaranteed protection against gender-based discrimination in the adoption process.

The Court also established guidelines to which the states must adhere when devising statutory procedures for adoptions. The Court clearly disapproved of the use of absolute presumptions regarding fitness as a parent. This was emphasized in *Stanley*, in which the court denounced the practice of "view[ing] people one-dimensionally when a finer perception could readily have been achieved."<sup>85</sup> Rather than make "overbroad generalizations"<sup>86</sup> and "undifferentiated distinctions,"<sup>87</sup> the states must design their statutory procedures "so that all persons similarly circumstanced shall be treated alike."<sup>88</sup> The majority rejected the position taken by several dissenting Justices that presumptions could serve as a basis for differential treatment provided they were true in most cases.<sup>89</sup> When such fundamental rights as those of parents to the companionship, care, custody, and management of their children were involved, the state must make these determinations on an individual basis.

Despite the statements concerning constitutional requirements in the adoption process, certain issues remain unresolved. One

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85. *Id.* at 655.

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

87. *Id.*

88. *Id.* at 391 (citing *Reed v. Reed*, 404 U.S. 71, 76 (1971)).

89. 441 U.S. at 398-99 (Stewart, J., dissenting); *id.* at 404-14.



shortcoming of this line of cases is that the disputes involved older children. In this regard, these cases failed to represent the typical adoption, which involves newborn children or young infants. The Court addressed this problem in dictum in *Caban*, suggesting that "the special difficulties attendant upon locating and identifying unwed fathers at birth [might] justify a legislative distinction between mothers and fathers of newborns."<sup>90</sup> Despite this implication, however, the majority specifically "express[ed] no view" on this issue.<sup>91</sup> If the Court ultimately were to adopt such a position, states might be able to draft statutes that would assure smooth functioning of the adoption machinery in these cases, where it is most needed.

Another matter unaddressed by the Justices is the conflict between a mother's right to privacy and disclosure of information regarding the identity and whereabouts of the unwed father necessary to make notice meaningful. Proper resolution of this conflict, as well as other issues not reached in *Stanley*, *Quilloin*, or *Caban*, depends on a careful balancing of the competing interests involved in an adoption. Once state legislatures assess the nature and strength of these interests, they will be better equipped to enact provisions that meet the needs of those involved in the adoption process and that will withstand future legal attack.

### THE NONMARITAL CHILD'S INTERESTS

#### *Historical Background*

In a society whose fundamental organizational unit is the family, disparate treatment of children born outside the family might be expected. This has been true of western society, although the degree of differential treatment has varied. At common law during the time of Blackstone, the principal difference between children born of married parents and those born out of wedlock was that the latter could neither be heir to anyone nor have any heirs except those of their own bodies.<sup>92</sup> "[A]ny other distinction would, with regard to the innocent offspring of his parents' crimes,

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90. *Id.* at 392 (dictum).

91. *Id.* at 392 n.11.

92. H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 5 (1971).

be odious, unjust, and cruel to the last degree."<sup>93</sup>

As the law developed, however, it incorporated other distinctions between the rights of nonmarital children and children born in wedlock, resulting in real discrimination against the nonmarital child.<sup>94</sup> One reason may have been the growing tendency to associate being born out of wedlock with moral disgrace. The common view was that "[t]he bastard, like the prostitute, thief, and beggar, belong[ed] to that motley crowd of disreputable social types which society has generally resented, always endured."<sup>95</sup> Society intended many of the early legal disabilities of nonmarital children to be indirect punishment of the child's biological parents for their sin. Another rationale for discriminating against nonmarital children was that it advanced the state's interest in preserving the integrity of the legally constituted family. For whatever reasons, the stigma of "illegitimacy" hampered the child born out of wedlock in his pursuit of a normal life.

Accordingly, the nonmarital child fared poorly in the adoption process and often was treated as little more than a chattel belonging to his natural parents. Because courts generally viewed the child as being able to adapt easily to custodial and environmental changes,<sup>96</sup> they applied a rather strict parental rights doctrine<sup>97</sup> to contests over custody of the child between natural parents and prospective adoptive parents. The effect of this doctrine was to allow the natural parent to regain custody of the child from those adults with whom he had been living, regardless of whether the natural parent had any relationship with the child<sup>98</sup> and regardless

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93. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 485-86 (Kerr 1857), cited in H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 4-5 (1971). See generally R. MNOOKIN, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 169-72 (1978).

94. See H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 5 (1971) (citing W. HOOPER, THE LAW OF ILLEGITIMACY IV (1911)). This was especially true on the Continent where children born out of wedlock faced severe legal disabilities.

95. Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 215 (1939).

96. See Note, *Natural vs. Adoptive Parents: Divided Children and the Wisdom of Solomon*, 57 IOWA L. REV. 171, 174 & nn.17 & 18 (1971).

97. This doctrine maintained that unless a natural parent was proved to be unfit or to have abandoned his child, he had an absolute right to the custody of his child.

98. [E]ven if the child is required to make some sacrifice to be with his natural parent or adjust to a new environment, it does not necessarily follow that his welfare will be correspondingly impaired. It may not be to the best interest of

of the emotional ties<sup>99</sup> the child may have had with the family from which he was being removed. The entire process focused on the rights and interests of the adults involved; only infrequently did courts acknowledge the interests of the child in deciding his fate.

### *Modern Approach*

The nature of American society and its attitude toward nonmarital children have changed extensively in recent years. Gone are the days of saddling the child born out of wedlock with numerous disabilities. Echoing Blackstone, the United States Supreme Court has expressed strong disapproval of the earlier practice of discriminating against nonmarital children.

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.<sup>100</sup>

This attitude represents the current approach in dealing with the rights of nonmarital children vis-à-vis those of children born in wedlock. The Court continued, "Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discrimina-

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the child to have every advantage. He may derive benefits by subordinating his immediate interests to the development of a new family relationship with his own parent, by giving as well as receiving. Thus, although a change in custody from an outsider to a parent may involve the disruption of a satisfactory status quo, it may lead to a more desirable relationship in the long run.

Guardianship of Smith, 42 Cal. 2d 91, 96, 265 P.2d 888, 891-92 (1954) (Traynor, J., concurring).

99. Nor can it be said that a child of such tender years—even now less than two years old—may have formed such affectionate ties in its present home that it would be difficult for it to adjust itself to a new environment; an infant at that age easily forms new attachments.

Adoption of Harvey, 375 Pa. 1, 10, 99 A.2d 276, 280 (1953).

100. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (citation omitted).

tory laws relating to status of birth where the classification is justified by no legitimate state interest, compelling or otherwise."<sup>101</sup> The Uniform Parentage Act goes even further and, as indicated in the comments, establishes the principle that "regardless of the marital status of the parents, all children and all parents have equal rights with respect to each other."<sup>102</sup>

The stigma once associated with being born out of wedlock likewise is waning for several reasons. Each year, a greater percentage of all children born are born out of wedlock.<sup>103</sup> This increase is due in part to the diminishing role of marriage<sup>104</sup> in personal relationships and the growing acceptance of nonmarital sex. Because contraception and abortion make prevention of unwanted children easier, a greater percentage of the children born truly are wanted. In addition, state social service and welfare agencies can assist the single mother if she wishes to keep and raise her children and a greater number of women are doing so.<sup>105</sup> Also, the current emphasis on individualism and individual responsibility operates to free the child of accountability for his parents' actions in conceiving him out of wedlock. The cumulative effect of these circumstances has been to reduce greatly the stigma associated with birth out of wedlock.<sup>106</sup>

In recent years, the nonmarital child also has received more attention in the adoption process.<sup>107</sup> States now envision adoption as a means of providing for the child's needs. The courts' exclusive

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101. *Id.* at 175-76 (citation omitted).

102. UNIFORM PARENTAGE ACT, 9A UNIFORM LAWS ANN. 588 (master ed. 1979) (Commissioners' Comments). The UPA has been adopted in whole or substantial part in the following states: California, Colorado, Hawaii, Montana, North Dakota, Washington, and Wyoming. 9A UNIFORM LAWS ANN. 579.

103. Statistics show that 5.3% of all births in 1960 were of children born out of wedlock. This figure rose to 10.7% in 1970 and to 14.8% in 1976. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 65 (1978).

104. Figures indicate that while the marriage rate in the United States has remained steady at approximately 10 per 1,000 persons per year, the divorce rate has more than doubled since 1960 to a rate of about 5 per 1,000 persons per year. *Id.* at 59.

105. The percentage of families headed by women has climbed from approximately 10% in 1960 to almost 14% in 1977. *Id.* at 43.

106. Interview with Carolyn Byers, Social Worker, Unwed Mothers Specialist, Hampton Department of Social Services, in Hampton, Virginia (Oct. 4, 1979).

107. These developments, of course, have improved the lot of all children involved in the adoption process.

emphasis on parental rights has been replaced with a heightened awareness of the physical and emotional needs of the children involved.

The traditional barometer of a child's welfare has been the degree to which his physical necessities have been accommodated. Courts usually have little difficulty in assessing whether a child's parents are providing sufficient economic support to meet his basic requirements for food, clothing, shelter, and medical treatment. Some single parents may be unable to provide for a child's basic needs even with the support provided by state welfare agencies; in such instances, adoption by a two-parent family may be a practical means of alleviating the child's support problems. If the unwed parent is able to maintain at least a minimal level of support, however, no compelling reasons support removing the child from a caring mother or father and placing him for adoption in a two-parent home: even the best physical care, in itself, is not sufficient to assure a child's healthy development.<sup>108</sup> Also under mounting attack is the notion that two-parent homes are inherently preferable to one-parent homes because the child receives more love and attention from two parents and because he has two role models. Despite strong arguments on each side,<sup>109</sup> the emerging consensus is that

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108. Recent social research indicates that a child needs more than excellent physical care. Children raised in institutions, some of whom received excellent physical care, tended to be behaviorally retarded in comparison to children reared in families. See the extensive citations in J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 115 n.4 (1973) [hereinafter cited as *BEYOND THE BEST INTERESTS*]. See also the results of a recently completed seven year study of children in institutions in B. TIZARD, *ADOPTION, A SECOND CHANCE* (1979).

The Pennsylvania Adoption Act recognizes that the parental obligation is more than financial. Failure to establish a personal relationship with the child within six months justifies termination of parental rights. *In re Adoption of David C.*, 479 Pa. 1, 7, 387 A.2d 804, 807 (1978).

109. Those who advocate a preference for two-parent homes point to the results of a Yale study indicating that the prolonged absence or death of one parent is highly detrimental to children. In that study, 29% of the children under psychiatric care at the Yale Clinic were from one-parent families. *BEYOND THE BEST INTERESTS*, *supra* note 108, at 16 & 114 n.2. Proponents of two-parent homes also claim that for optimal development a child needs both a male and a female role model in the home.

Advocates of the adequacy of single parent homes have challenged the above findings and assert instead that one caring parent can fulfill the child's needs. Contrary to the role model thesis, some child psychiatrists say that a child needs "mothering," not necessarily a mother. "Mothering" is the nurturing of the infant's potential to trust and bind himself to a

one-parent homes can be perfectly suitable for raising children. Consequently, adoption agencies are turning to them as a valuable adoption resource, particularly for older or disabled children who are difficult to place.<sup>110</sup>

Although a child's physical needs have been the traditional concern of courts, recent research and study has centered on the emotional needs of young children. Backed by extensive psychological and psychiatric research, advocates of the welfare of children have emphasized increasingly the necessity of assuring that adoption proceedings address the emotional and psychological needs of children. Far from the malleable, adaptable creatures they were assumed to be, children are more psychologically delicate than adults and more likely to suffer serious or permanent trauma if their emotional needs are ignored.<sup>111</sup> The most basic requirement is the child's need to be an integral part of a secure family in which he can develop deep emotional attachments with his parents and siblings.<sup>112</sup> Crucial to the child is the sense of being wanted,<sup>113</sup> loved, and cared for. If these primal needs are not met, the child has great difficulty in maturing emotionally. If he has shifted from family to family and severed his emotional bonds repeatedly he never may be able to recover from the trauma. He may lack self-confidence and self-esteem, and be unable to form trusting rela-

human partnership. This essential capacity develops when the child is given affection, acceptance, approval, protection, care, control, and guidance, and is not dependent on the parent's gender. S. FRAIBERG, *EVERY CHILD'S BIRTHRIGHT: IN DEFENSE OF MOTHERING* xii (1977).

Acceptance of an unwed father as a proper parent is greater today than in the past:

[T]he development of a significant, loving relationship between the father and the child is far different from that of the relationship between a child and putative father as envisaged in the past, when putative fathers were generally assumed to be birds of passage in the lives of children born out of wedlock.

Stone v. Chip, 68 Misc. 2d 134, 137, 326 N.Y.S.2d 520, 523-24 (Fam. Ct. 1971).

110. Interview with Mary Hutchens, Senior Social Worker, Adoptive Home Developer, and Sharon Downes, Senior Social Worker, Foster Care Intake Worker, Newport News Department of Social Services, in Newport News, Virginia (Oct. 4, 1979).

111. See note 99 *supra*.

112. See generally Marcus, *Equal Protection: The Custody of the Illegitimate Child*, 11 J. FAM. L. 1 (1971).

113. True "wanting" and the resulting psychological benefits are absent when the adult claims to "want" the child for reasons such as financial advantage, forcing a reluctant sexual partner into marriage, or an ill-motivated desire to thwart the wishes of the other parent. See *BEYOND THE BEST INTERESTS*, *supra* note 108, at 21.

tionships as an adult.<sup>114</sup> In addition, he may treat his children the same way his parents treated him as a child, unknowingly refusing them the sense of belonging and security they crave and perpetuating a vicious cycle of unsatisfactory parent-child relationships.<sup>115</sup>

The central figures in a young child's life are his "psychological" parents.<sup>116</sup> Psychological parents are those adults who care for and interact with the child on a daily basis. Any caring adult, including unwed fathers, can fill this essential role. The biological relationship is irrelevant; a young child has no sense of biological or legal ties.<sup>117</sup> His sole concern is for the reality of the situation as he perceives it. His "parent" thus is the psychological parent, not a stranger whose sole claim to him is a legal or biological connection.<sup>118</sup> From the child's perspective, removal from his psychologi-

114. Virtually all courts profess to act in the child's best interests; however, "while zealously safeguarding the fundamental right of the parent, courts may ignore the equally fundamental right of the child to grow up in a stable and secure environment." Comment, *Termination of Parental Rights in Adoption Cases: Focusing on the Child*, 14 J. FAM. L. 547, 550 (1975-76).

"Studies have shown that constant shifting from home to home endangers the growth—the mental and the emotional health—of the child." J. POLIER, *THE RULE OF LAW AND THE ROLE OF PSYCHIATRY* 117 (1968). Research conducted by the senior research fellow at the Thomas Coram Research Unit at the University of London revealed that two-thirds of children displaced from de facto families and restored to their natural parents required treatment for emotional and behavioral problems. These results, in combination with others uncovered in the research, led to the conclusion that the critical element in the placement of children is permanency. B. TIZARD, *supra* note 108.

This knowledge was applied in *In re Lynna B.*, 92 Cal. App. 3d 682, 155 Cal. Rptr. 256 (1979), in which the court affirmed the termination of a rehabilitated mother's parental rights. Her child had been placed with foster parents at the age of six months and lived with them to the age of eight. At trial, a child psychiatrist testified that separation of the child from her foster parents to return her to her mother, a virtual stranger, "would lead to grief and a withdrawal of love and trust [which] would interfere with her capacity to form relationships in the future." *Id.* at 697, 155 Cal. Rptr. at 263.

115. Interview with Richard Carter, Director, Catholic Home Bureau, in Newport News, Virginia (Sept. 27, 1979). For reference to the growing body of psychological literature on this point, see the authorities listed in *BEYOND THE BEST INTERESTS*, *supra* note 108, at 34, 127 n.3.

116. For a thorough discussion of this concept and its implications for child welfare services, see *BEYOND THE BEST INTERESTS*, *supra* note 108.

117. Because young children have no concept of blood ties until late in their development, they see as their "parents" those people who take care of and interact with them daily. *Id.* at 12-13.

118. "It has been recognized that the psychological aspect of parenthood is more important in terms of the development of the child and its mental and emotional health than the coincidence of biological or natural parenthood." *Sees v. Baber*, 74 N.J. 201, 222, 377 A.2d

cal parent is traumatic in the extreme. Courts and legislatures, in undertaking to rearrange families to accomodate the "best interests of the child,"<sup>119</sup> should consider carefully the child-psychological parent relationship.

### RECOMMENDATIONS FOR THE ADOPTION PROCESS

Unfortunate circumstances such as neglect, abuse, or abandonment of the child dictate that the state alter certain familial relationships. In making these rearrangements, courts strive to accomplish the objective in the manner least detrimental to the child. Under *Caban v. Mohammed*, however, states now must accord certain unwed fathers consideration in the adoption process. The nascent issue in this area of the law is the extent to which states may protect the child's interests without infringing the newly recognized rights of the unwed father.

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628, 639 (1977) (citing 1 BOWLBY, ATTACHMENT AND LOSS (1969); 2 BOWLBY, ATTACHMENT AND LOSS (1973); BEYOND THE BEST INTERESTS, *supra* note 108; Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963); 26 RUTGERS L. REV. 693 (1973); 3 SETON HALL L. REV. 130, 140 (1971)).

One extraordinarily farsighted court noted the following in 1881:

[W]hen reclamation [of the child by its biological parent] is not sought until a lapse of years, when new ties have been formed and a certain current given to the child's life and thought, much attention should be paid to the probabilities of a benefit to the child from the change. It is an obvious fact, that ties of blood weaken, and ties of companionship strengthen, by lapse of time; and the prosperity and welfare of the child depend on the number and strength of these ties, as well as on the ability to do all which the prompting of these ties compel.

[T]hey who have for years filled the place of the parent, have discharged all the obligations of care and support, and especially when they have discharged these duties during those years of infancy when the burden is especially heavy should be respected. Above all things, the paramount consideration is, what will promote the welfare of the child?

*Chapsky v. Wood*, 26 Kan. 650, 653-54 (1881).

119. The phrase, "best interests of the child," means all things to all people: it means one thing to a juvenile judge, another thing to adoptive parents, something else to natural parents, and still something different to disinterested observers. If judges were endowed with omniscience, the problem would not be difficult; but the tendency in man is to apply intuition in deciding that a child would be "better" with one set of parents than with another, and then to express this intuitive feeling in terms of the legal standard of being "in the best interests of the child."

*State ex rel. Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 9, 207 N.W.2d 826, 831 (1973).



*Devote Greater Attention to the Child and His Needs*

The first requirement is to focus on the realities of the adoption process from the child's point of view.<sup>120</sup> Of all those involved, the child is most sensitive, most easily damaged, and most intimately and directly affected by the adoption.<sup>121</sup> Adoption proceedings therefore should devote more attention and concern to the child and his welfare to assure that he is the beneficiary, rather than the victim, of the adoption process.<sup>122</sup>

The exclusive concern for legal or biological claims to the child as practiced through use of the parental rights doctrine<sup>123</sup> must be subordinate to the child's need for maintaining the truly familial, psychological relationships that are so essential to his emotional health. Although he may have greater interest in his biological roots as he nears adulthood, he has no such interest as a young child. Indeed, the Supreme Court in *Quilloin* endorsed a substan-

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120. Ultimately then, when the competing interests of parent and child require a decision that one must yield, that decision will inevitably be the result of a value judgment. As society has evolved and its values have shifted, so too has the judicial approach in this area of the law evolved from the limited consideration of only parental rights to an expanded approach that takes into account the rights of children as well. The justification for child placement decisions can no longer be limited to the categorical assumption that being with the biological parent will most adequately serve the needs of the child.

Comment, *supra* note 114, at 558 (citation omitted).

121. See E. ERICKSON, *CHILDHOOD AND SOCIETY* 247-51 (2d ed. 1963); A. WATSON, *PSYCHIATRY FOR LAWYERS* 159, 197 (1968); Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 *LAW & CONTEMP. PROB.* 807 (1944), cited in Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 *S. CAL. L. REV.* 10, 20 (1975).

122. See *BEYOND THE BEST INTERESTS*, *supra* note 108, at 31-34; Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 *SYRACUSE L. REV.* 55, 64, 71 (1969).

123. Many courts still adhere quite strictly to the parental rights doctrine. See, e.g., *Adoption of R.A.B. v. R.A.B.*, 562 S.W.2d 356, 360 (Mo. 1978) (holding that adoption statutes should be construed strictly in favor of natural parents).

This attitude may be due in part to the hesitancy of some courts to deviate from statutory provisions. See, e.g., *In re Green*, 5 *FAM. L. REP. (BNA)* 2173, 2175 (N.Y. Fam. Ct. 1978) (stating that "the court is not free to disregard statutory standards or requirements as a basis for decision in favor of sociological principles that lack the discipline and restraints of law. These must yield to the primacy of law in any case of apparent conflict."). But see, e.g., *In re Adoption of Murray*, 86 Cal. App. 3d 222, 150 Cal. Rptr. 58 (1978) (holding that statutory requirements of consent of natural parents should not be construed strictly in favor of the rights of natural parents, but rather to promote the statute's objective of promoting the welfare of children).

tial relaxation of the parental rights doctrine when it upheld the termination of Leon Quilloin's parental rights by application of a best-interests-of-the-child standard. With the advent of artificial insemination and fertilized egg implants, the social significance of mere biological connections is diminishing.<sup>124</sup> Just as a man who donates sperm used to artificially inseminate the wife of a sterile husband has no rights in the child that results, an unwed father who does no more should have no parental rights in the resulting child.

### *Uphold De Facto Families*

A fundamental principle derived from *Stanley*, *Quilloin*, and *Caban* is that constitutional protection extends to de facto families as well as traditional families. The importance of familial relationships, both to the state and the individual family members, stems not so much from the fact of blood relationship as from the "emotional attachments that derive from the intimacy of daily association"<sup>125</sup> and the role the family plays in "'promot[ing] a way of life' through the instruction of children . . ."<sup>126</sup> Safeguarding the integrity of de facto families is especially important for the children involved<sup>127</sup> because maintenance of secure, stable relation-

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124. See *Strnad v. Strnad*, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948) (holding that a sperm donor is not a parent in any legal sense), cited in J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* 501 (1965). The same is true of a substitute mother who bears a child for an infertile woman whose husband donated the sperm. See *Girl Says She Had Baby for Mother*, N.Y. Times, Apr. 30, 1964, at 30, col. 1, cited in J. GOLDSTEIN & J. KATZ, *supra* at 496.

A typical contemporary statute provides that when the husband and wife request and consent to the use of artificial insemination the status of a child born thereby is the same as that of a naturally conceived legitimate child of the couple. N.C. GEN. STAT. § 49A-1 (Repl. Vol. 1976).

125. *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977).

126. *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)) (citation omitted).

127. Nowhere are the rights of children specifically enumerated, but they are implied in neglect statutes and rules defining the duties and obligations owed by parents. One right easily inferred is the right of a child to preservation of the de facto family in which he lives. This right is necessary for the child to develop properly and gain a sense of belonging and place in society. Whether such a right might reside in the "liberty" protected by the due process clause was posed to the Supreme Court in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). The Court seemed hesitant to find such a right in the foster family context, but avoided a definite statement by deciding the case on other grounds. *Id.* at 847. One commentator advocates that such an interest should fall within the ambit of the due

ships is critical to their emotional and mental development.<sup>128</sup>

Although upholding de facto families may seem desirable in the abstract, application of this principle is often difficult, particularly when it conflicts with parental interests. Courts are extremely reluctant, for example, to terminate the parental rights of an absent biological father when his absence was due to some impediment beyond his control. Courts that focus primarily on the rights and interests of the parent tend to require proof of the absent parent's intent to abandon or neglect the child and therefore pardon extended failures to exercise parental responsibilities if the parent cites some colorable excuse.<sup>129</sup> Other courts, viewing the matter

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process clause. Comment, 13 J. FAM. L., *supra* note 1, at 121 n.34 (citing V DeFRANCIS, TERMINATION OF PARENTAL RIGHTS—BALANCING THE EQUITIES 8-10 (1971)).

Any liberty interest recognized in psychological relationships would have to be limited, subject to the rights of biological parents who fulfilled their parental role. *Bennett v. Jeffreys*, 40 N.Y.2d 543, 552 n.2, 356 N.E.2d 277, 285 n.2, 387 N.Y.S.2d 821, 829 n.2 (1976). At least one state has enacted legislation providing that foster parents are preferred in adoption of their foster children. Ch. 107, § 1, 1979 Tenn. Pub. Acts 11 (Bobbs-Merrill).

128. See BEYOND THE BEST INTERESTS, *supra* note 108, at 31-34. See also *In re Adoption of a Child by I.T.*, 164 N.J. Super. 476, 397 A.2d 341 (1978) (stating that for purposes of adoption, the polestar for protection of the child's best interests is maintaining an existing relationship in a stable home).

A report by the Urban Institute of Washington, D.C., claims that federal funding policies favor foster care over adoption and thus indirectly encourage states to create the temporary relationships characteristic of foster care rather than the permanent ones of adoption. THE URBAN INSTITUTE, PUBLIC POLICIES TOWARD ADOPTION (1979). To remedy this problem, both Houses of Congress passed the Adoption Assistance and Child Welfare Act of 1979, which is currently in conference. This bill provides for a new subsidized adoption program with federal matching funds and requires that states attempt to prevent the removal of a child from his de facto family. H.R. 3434, 96th Cong., 1st Sess. (1979).

129. The following are examples of cases in which courts have required proof of intent to abandon or have excused failure to establish a relationship with the child when the parent was not at "fault". *In re Carson*, 1978 Mass. App. Ct. Adv. Sh. 1080, —, 382 N.E.2d 1116, 1118-19 (1978) (denying stepparent adoption when the biological father's lengthy absence was due to the mother's intransigence; strong dissent in favor of termination of the biological father's parental rights in cases of lengthy absence); *In re Linehan*, — Minn. —, —, 280 N.W.2d 29, 33 (1979) (denying stepfather adoption when the natural father had not supported or visited the child for four years because he was frustrated by the natural mother and experienced financial and emotional problems); *In re Thomas T.T.*, 67 A.D.2d 788, 412 N.Y.S.2d 482 (1979) (denying termination of parental rights when the father's failure to visit the child was due to his incarceration and later to his inability to afford an automobile); *In re Anita PP*, 65 A.D.2d 18, 410 N.Y.S.2d 916 (1978) (refusing to terminate the natural father's parental rights when neglect of the children was excused because of unusual circumstances of his employment and failure of the social service agency effort to strengthen parental ties); *In re Green*, 5 FAM. L. REP. (BNA) 2173, 2173 (N.Y. Fam. Ct. 1978) (refusing

from the child's vantage, conclude that fault is irrelevant to questions of parental absence.<sup>130</sup> If the child has formed close, emotional attachments to his psychological parents, he will suffer grievously from being torn from his de facto family and placed in the custody of the biologically related stranger, regardless of the reason for the stranger's absence. Under these circumstances, the better view is to prefer the child's immediate needs over the absent parent's dormant parental interests. For this reason, abandonment and neglect statutes providing for termination of parental rights of parents who have no personal, familial relationship with their children should not require a finding of intent to abandon or fault in failing to maintain contact. As was the case in *Quilloun*, courts should terminate the parental rights of absent or neglectful parents who have had no substantial relationship with their children if the best interests of the child would be served, especially when this serves to strengthen the child's de facto family.

Another difficult area in which some courts decline to uphold de facto families is the illegal placement of a child with a family through the gray market<sup>131</sup> or black market.<sup>132</sup> Even when the infant has lived with his new parents a year or more, some courts will remove him from their custody on the rationale that to allow the adoptive parents to keep him would be to encourage violation of the law.<sup>133</sup> The result is that the child who had no control over

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to terminate the natural mother's parental rights when the court required proof of intent "to repudiate or renounce all rights and responsibilities of parenthood and a settled purpose to be rid of them").

130. The following are examples of cases in which intent and fault were irrelevant to the issue of abandonment: *Lapinsky v. Shonk*, 5 FAM. L. REP. (BNA) 2361 (Ky. Ct. App. 1979) (terminating parental rights when the father's failure to communicate with the child was due to the father's incarceration); *In re W.M.*, III, 482 Pa. 123, 393 A.2d 410 (1978) (affirming termination of parental rights for failure to perform parental duties for over seven years; not necessary to show intent to relinquish parental claims).

131. A gray market adoption is one in which an intermediary, usually a doctor, lawyer, or clergyman, places the child with the adoptive family for the mother without charge.

132. A black market adoption is one in which the intermediary who places the child for the mother does so for a fee, usually paid by the adoptive parents. See generally N. BAKER, *BABY SELLING: THE SCANDAL OF THE BLACKMARKET ADOPTION* (1978).

133. A New Jersey court recently heard a case illustrating this point. A couple had paid \$5,000 to an Arizona attorney for an infant, in violation of a strict New Jersey statute. Although the adoptive parents had custody of the child for more than a year by the time of the hearing, the court refused to allow them to adopt the child and ordered that he be removed from their custody, primarily to uphold the integrity of the law. *In re Adoption by*

his placement and already has suffered one traumatic dislocation is punished by another painful separation. The inhumanity of this approach has been declaimed by courts more sympathetic to the child's needs.<sup>134</sup> These courts have pointed out that penalties for violation of statutes should be imposed on those responsible and not those innocent of any wrongful conduct. When the method of placement already has created an undesirable situation because of its illegality, compounding the harm is equally undesirable. The least detrimental alternative is to allow the child to remain in his familial setting, provided it is not deleterious to his physical or emotional health.<sup>135</sup>

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I.T. and K.T., 162 N.J. Super. 587, 394 A.2d 120 (Hudson County Ct.), *rev'd*, 164 N.J. Super. 476, 397 A.2d 341 (App. Div. 1978). *See* note 134 *infra*.

134. *See, e.g., In re Adoption by I.T. and K.T.*, 164 N.J. Super. 476, 397 A.2d 341 (App. Div. 1978). The court reversed a trial judge's order removing an infant from the home in which it had lived for over a year. The appellate court stated that, even though the adoptive parents had participated in an illegal placement through the black market, removal of the child from its home would be too traumatic to condone. "In the absence of a clear legislative mandate, the child's opportunity for a happy and productive life should not be frustrated solely as a means of penalizing the adoptive parents." *Id.* at 486, 397 A.2d at 345 (citing *In re Shaheen*, 127 N.J. Eq. 75, 11 A.2d 73 (1940); *In re Lang*, 9 A.D.2d 401, 193 N.Y.S.2d 763 (1959), *aff'd*, 7 N.Y.2d 1029, 166 N.E.2d 861, 200 N.Y.S.2d 71 (1960)).

135. For an example of a current statute intended to discourage unauthorized placements by recommending denial of adoption petitions, see the Virginia Code, which provides that

[i]n cases where the preliminary investigation reveals that the child was placed in an adoptive home in the Commonwealth by a person who is not authorized to make such placements . . . , the Commissioner shall so inform the court wherein the petition for adoption is filed and so state his disapproval thereof.

VA. CODE § 63.1-223(b)(3) (Supp. 1979). The Joint Subcommittee on the Placement of Children for Adoption drafted this section in 1978 out of a concern for the impact on the future well-being of children placed by intermediaries. The subcommittee identified numerous risks associated with intermediary placements such as the encouragement of black market operations, the possibility that go-betweens might reveal the identity of adoptive parents to natural parents, and the lack of permanency that a child would experience were he returned by adopters. In addition, the subcommittee noted that such extralegal placements might result in custody contests prior to finalization of an adoption, in the intermediary not informing the adoptive parents of critical information regarding the child's background, and in lack of counseling for the natural parents. JOINT SUBCOMM. ON THE PLACEMENT OF CHILDREN FOR ADOPTION, S. Doc. No. 18, General Assembly of Virginia 3, 6-8 (1978).

Despite the many disadvantages of using an unlicensed intermediary to place children for adoption, the joint subcommittee found that adoptive parents often preferred them over licensed child-placing agencies because of the long waiting lists at licensed agencies, the time-consuming procedures of such agencies, including the home study, investigation of the child's background, parental rights termination procedures, and their selective screening of adoptive parents. Other factors cited were the expense of licensed-agency adoptions, lack of

Another statutory provision that would be helpful in maintaining de facto families is one providing that final adoption decrees may not be attacked on any grounds after six months.<sup>136</sup> If a family fraudulently obtains an adoption or a court fails to follow proper procedures regarding consent and notice, the challenger nevertheless should be required to assert promptly such claims in his attempt to overturn the adoption. Time is most critical to the child. By the time the court enters the final order of adoption, a child already has begun to develop substantial ties to his new par-

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lack of public awareness of the intricacies of the adoption process, and the privacy that adoptive parents must surrender in the course of a home study. *Id.* at 8-9.

Not only did the subcommittee find that adoptive parents were discouraged from using licensed agencies, but it also discovered that natural parents preferred independent placements through intermediaries. Unlike many independent arrangements, licensed agencies are unable to give financial assistance to the mother to help cover medical and other expenses; therefore, she must undergo the trouble and embarrassment incident to applying for this aid at a welfare office. Many mothers are unwilling to become involved with all those who must be parties to adoptions through licensed agencies, such as the unwed father, the courts, and even the agency itself. In addition, parental pressure may encourage some unwed mothers to "hush up" the matters associated with the birth, and this is better accomplished through an independent placement. The joint subcommittee noted further that private placements often are preferred to those through licensed agencies because many unwed mothers trust the intermediary, who may be a clergyman, attorney, or doctor, more than they trust a licensed authority. Many natural parents also are unaware of the existence or importance of the services offered by licensed child-placing agencies and tend to perceive independent placements as much simpler and involving less red tape. *Id.* at 9-10.

In light of these findings, the subcommittee drafted recommendations that, while recognizing the child's right to a secure, permanent home, at the same time advocated that placements made by unauthorized persons not be allowed to ripen into adoptions. The subcommittee did not mention the possibility of great damage to young children who had lived with new families for a year or more before adoption was sought. Neither did they recommend that the Department of Welfare be granted discretion to approve of certain adoptions when the child already had become attached firmly to his new family. The subcommittee instead recommended that the State Department of Welfare, the Attorney General's Office, and the Commonwealth's Attorney diligently enforce the policy of disapproving child placements by unauthorized intermediaries. *Id.* at 11-12. In light of current knowledge that such a policy may have serious detrimental effects on the innocent children who are removed from families to which they already have become attached psychologically, the Commonwealth's policy should be revised to prescribe approval of adoptions resulting from unauthorized placements when the adoptive family is found to be suitable and the child has become attached emotionally to his new family. The Commonwealth's interest in deterring unauthorized placements can be realized more justly and more effectively by directing legal sanctions against those who procure the unauthorized placements, particularly the intermediaries.

136. Professor Bodenheimer recommended this provision to the California legislature for inclusion in revisions of the state's adoption laws. See Bodenheimer, *supra* note 121, at 75-76.

ents and siblings. The passage of another six months will see these relationships so firmly established that their termination would cause substantial harm to the child.

A fair balancing of the child's need for familial stability against an adult's desire to set aside an improperly executed adoption requires that no attempts to defeat the adoption be allowed after the passage of a reasonably short period of time. The state still would have the means to punish those who acted fraudulently or unlawfully if such conduct is discovered after the six month limitation period. The only remedy that should be excluded from such later actions is that of nullifying the adoption. To require severance of the child's new emotional bonds at such a late date would serve only to compound any harm already done. In this respect, this provision is similar to the one discussed earlier regarding nontermination of placements merely because they were made illegally through an intermediary. The function of both is the same: to uphold de facto families to assure the stability and security of the child's relationships.

### *Free Unwanted Children for Adoption Sooner*

The foregoing suggestions are relevant to situations in which the child has been living with a de facto family instead of his natural family and at least one absent parent or the state seeks to terminate that relationship. When an unwed mother desires to place her newborn child, however, the procedures that protect the child's interests are equally critical. Indeed, one of the primary reasons that the dissenting Justices in *Caban* objected to recognizing substantial parental rights in unwed fathers was the apprehension of greatly impeding the adoption process when newborn or infant children were involved. For newborn infants, time is a pressing matter. The child's dependency is greatest at birth and his need for a stable, secure relationship with some caring parent is urgent. A child's first months also are critical to his future development, and stress and insecurity at this time in his life are bound to have seriously detrimental aftereffects. The sooner he is placed in a permanent adoptive home, the better the chance that the adoptive parents will be able to form relationships with the child very simi-

lar to those of natural parents.<sup>137</sup>

Legislatures therefore should structure adoption statutes to provide the child with a greater measure of protection during this crucial period. A practical method of achieving this result would be to decrease the length of time that a parent may avoid assuming his responsibilities before he is declared to have abandoned or neglected his child.<sup>138</sup> Some authorities have suggested ninety days as an appropriate time limit consonant with both the immediate needs of the child for a secure home and the interests of parents who are unsure whether they are prepared to assume the roles and responsibilities of parents.<sup>139</sup> In *Caban*, the Supreme Court indicated that such provisions applicable in the case of newborn adoptions might be permissible if they were drawn precisely to achieve the state's interest in protecting the welfare of children and did not prevent unreasonably the interested biological parents from assuming their parental roles. If ninety days seems an extremely short length of time, two factors must be considered. First, this period is just half of that now used in several states as a basis for terminating parental rights to children of all ages.<sup>140</sup> Second, ninety days to the very young may seem an eternity. If the primary goal of an adoption is to secure the child's welfare, his sense of time should be considered as well as that of adults.

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137. See CHILD WELFARE LEAGUE OF AMERICA, INC., CHILD WELFARE LEAGUE OF AMERICA STANDARDS FOR ADOPTION SERVICE 6, 28 (1968) [hereinafter cited as CWLA STANDARDS].

138. Several social services adoption specialists have voiced this concern. Recognizing that an unwed mother or unwed parents may have great difficulty making such an important decision, they nevertheless agree that a timely decision must be made in order to safeguard the child's best interests. Interview with Carolyn Byers, Social Worker, Unwed Mothers Specialist, Hampton Department of Social Services, in Hampton, Virginia (Oct. 4, 1979); Interview with Mary Hutchens, Senior Social Worker, Adoptive Home Developer, and Sharon Downes, Senior Social Worker, Foster Care Intake Worker, Newport News Department of Social Services, in Newport News, Virginia (Oct. 4, 1979).

139. Interview with Carolyn Byers, Social Worker, Unwed Mothers Specialist, Hampton Department of Social Services, in Hampton, Virginia (Oct. 4, 1979); Interview with Mary Hutchens, Senior Social Worker, Adoptive Home Developer, and Sharon Downes, Senior Social Worker, Foster Care Intake Worker, Newport News Department of Social Services, in Newport News, Virginia (Oct. 4, 1979).

140. See, e.g., *In re Adoption of David C.*, 479 Pa. 1, 387 A.2d 804 (1978) (terminating parental rights under a Pennsylvania statute, after failure to establish a parental relationship with the child for six months).



*Avoid Multiple Placements*

If, despite all efforts to maintain the child's de facto family, the need arises to remove him from that family and place him in another, a state still can take certain measures to assure that the transition causes the least possible detriment. The foremost of these is to avoid multiple placements.<sup>141</sup> The more times a child is forced to break his psychological ties, the greater the chance his development will be retarded and his ability to form lasting attachments impaired.<sup>142</sup> For this reason, all placements should be as permanent as possible under the circumstances.

*Eliminate Unnecessary Delays*

To further minimize potential harm in placing children, states must reduce the time needed to finalize adoptions.<sup>143</sup> During the time in which the child's familial status is in limbo, both he and the adoptive parents are hesitant to form strong bonds that may be broken if the adoption is not approved. Alternatively, if the child spends this interim period in foster care, neither the child nor foster parents will be able to avoid establishing some emotional ties. The longer the process, the stronger these ties will become and the more difficult their severance if for any reason the adoption is denied.

Many states have specific requirements relating to giving notice of the adoption and locating and terminating the rights of absent

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141. "Studies have shown that constant shifting from home to home endangers the growth—the mental and the emotional health—of the child." J. POLIER, *supra* note 114, at 117.

142. "The consensus of expert opinion holds that it is most important to avoid multiple placements for children between six months and three years of age. Each additional placement may retard the development and may impair their ability to form lasting attachments." *In re David B.*, 91 Cal. App. 3d 184, 196, 154 Cal. Rptr. 63, 71 (1979) (quoting Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625, 695 (1976)). The court continued, stating that "[t]he avoidance of lasting psychological harm is the compelling state interest behind prompt severance of the parental relationship." *Id.* at 196, 154 Cal. Rptr. at 71.

143. "Speed [in adoptions] is essential because of the need to place the child as soon as possible. Prompt placement serves both the child's need for early parental care and the natural desire of adoptive parents to begin caring for their child soon after birth." Note, 59 VA. L. REV. 517, *supra* note 1, at 523 (citing CWLA STANDARDS, *supra* note 137, at 6, 28).

biological parents, particularly unwed fathers. These procedures are by far the worst offenders of expediency. Indeed, one of the prime concerns of the dissenters in *Caban* was that delays would occur in the adoption process if the state were required to give notice and opportunity for a hearing to all unwed fathers. Yet the Court has held that even if the identity or whereabouts of a biological parent are unknown, an honest attempt to notify him still must be made. The Court also has indicated that notice by publication is sufficient to fulfill this requirement. To avoid unnecessary delays, the length of time of such publication should be related to several factors: the extent of the absent parent's relationship with the child; the age of the child; and the likelihood of such notice being effective. The more tenuous the relationship, the younger the child, and the lesser the likelihood that actual notice will be given, the more appropriate a short period of publication becomes. On the other hand, the more substantial the father's relationship, the older and more secure the child, and the greater the likelihood that actual notice may be effected, the more appropriate a longer period of publication will be. Because these factors vary from case to case, courts must have the authority to weigh the competing factors and set a period of time for publication that prevents unnecessary delay in the adoption process while assuring a genuine attempt to notify the absent parent.

Variations among courts in the length of time required for publication of notice could be minimized effectively if the legislature prescribed minimum and maximum time periods and set guidelines for determining the appropriate duration of publication. The time range suggested should vary from a minimum of fifteen days for newborn adoptions when the father's identity and whereabouts are unascertainable, to a maximum of thirty days for an older child whose absent parent's identity and general whereabouts are known. As endorsed by the Supreme Court in *Caban*, failure to respond to such notice is a sufficient basis upon which to order termination of the unwed father's parental rights and to allow the adoption to proceed.

### *Place Children Primarily Through Licensed Placement Agencies*

If a child is removed from one family and placed in another, the state should prescribe the process and conditions under which this

transition takes place. Authorities have debated the merits of placing children through a licensed child-placing agency as opposed to allowing the unwed mother herself, or with the assistance of some kind of intermediary, to make the placement. Studies have reached conflicting conclusions regarding the success of adoptions under each method.<sup>144</sup>

From the child's point of view, the scales tip toward requiring placements through professional agencies licensed and controlled by the state. These agencies provide many important services unavailable through intermediaries.<sup>145</sup> The first of these are counseling services. Many unwed mothers are extremely anxious and under great pressure when their child is born. Frequently, family members offer conflicting advice. No one benefits when such a fundamental question as whether to keep one's child is made under undue stress. Through counseling, an unwed mother may become aware of her alternatives, such as applying for financial assistance and other services that would make it possible for her to keep the child. Conversely, she may realize that she is not ready to assume the duties and responsibilities attendant to providing the care and attention the child will need. Either way, the mother makes a more informed decision, one that she is less likely to regret. This aspect is important for the child as well. If the mother realizes at an early date that she cannot accept parental responsibilities, the child may be available for adoption sooner. If, on the other hand, his mother realizes that with certain available assistance, she can raise the

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144. For articles asserting that independent placements are as good as or better than licensed-agency placements, see Grove, *Independent Adoption: The Case for the Gray Market*, 13 VILL. L. REV. 116 (1967), and Rosenstein, *Comparative Study of Role Conflict, Marital Adjustment and Personality Configurations of Private and Agency Adoptive Parents* (unpublished dissertation), a summary of which may be found in 20 DISSERTATION ABSTRACTS No. 10 at 4208-09 (1960), cited in Podolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L.Q. 547, 548 n.2 (1975).

For commentary asserting that placements made through licensed child-placing agencies are superior to those accomplished independently, see Citizens' Committee on the Adoption of Children (unpublished study), cited in Riti & Shapiro, *Evaluation of Agency Service to Families Who Adopt Privately*, 41 CHILD WELFARE 367, 369 (1962); Podolski, *supra*.

One study found both methods equally defective. H. WITMER, E. HERZOG, E. WEINSTEIN, & M. SULLIVAN, *INDEPENDENT ADOPTIONS, A FOLLOW-UP STUDY* (1963). See generally W. MEEZAN, S. KATZ, & E. RUSSO, *ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS* (1978).

145. See note 135 *supra*.

child herself, she may opt to keep him and apply for the assistance rather than put him in foster care or place him with relatives who may be unwilling to be full-time parents.

Licensed child-placing agencies provide another important service by carefully investigating both the child's background and the adoptive parents' home. If the child has special medical needs or other problems not readily apparent, the agency's investigation may ascertain and disclose to the adoptive parents any conditions requiring special care or attention. Otherwise, the child may suffer from lack of needed treatment and the adoptive parents may change their minds when they discover that the child has special problems for which they were unprepared. The agency investigation of the adoptive home will help ensure that the adoptive parents are suitable and genuinely willing to raise the child. Independent placements, however, may put the child with parents who are incapable of providing for his welfare because of either mental or physical incompetence. Thus, preventive investigation may avoid many disappointments and difficulties.

A third advantage of agency placements is that the staff is acquainted professionally with the statutory procedures necessary to effect the adoption properly. Chances of errors or omissions are substantially reduced and adoptions processed through an agency are more likely to withstand future legal attack. This aspect is especially appealing because it minimizes the chance that the child will be removed from a secure relationship because an error was discovered in the procedure. As stated earlier, however, once an adoption is final, future attacks on all but constitutional grounds should be foreclosed in order to protect the new relationship.

### *Enact Preventive Statutes*

Also necessary for protection of the child's welfare when it conflicts with the interests of a biological parent are preventive rather than remedial statutes. Under many state statutes, a court cannot terminate a parent's parental rights until it has established that he has caused positive harm to the child.<sup>146</sup> When the parent is inca-

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146. Cf. *Ward v. Faw*, — Va. —, 253 S.E.2d 658 (1979) (refusing to terminate parental rights of the natural father, who had not visited his young son for over three years and was a complete stranger to him but refused to consent to adoption by the child's stepfather).

pable of supporting or controlling the child, harm probably will result if the parent is allowed custody, and if nothing indicates that the parent ever will be fit, courts should have the authority to terminate the parental relationship without a finding of actual harm.<sup>147</sup>

Because such a procedure could be used to terminate parental rights when the parent has a chance of rehabilitating himself, the evidence of the disability and its probable continuation should be clear and convincing, and the court should make detailed findings of fact based on expert opinions.<sup>148</sup> This provision would not permit easy termination of parental rights of those who are even marginally fit; therefore, it would not interfere with recognizing parental rights in deserving unwed fathers. Instead, it would enable courts to terminate parental rights in those situations involving an ongoing pattern of conduct indicating total disability or disinclina-

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Under the Virginia Code, approval of an adoption without the natural father's consent is allowed when it is withheld contrary to the child's best interests. VA. CODE § 63.1-225(4) (Cum. Supp. 1977). The Virginia Supreme Court in *Ward* refused to find that application of this section of the statute was justified by the evidence, stating that when "there is no question of the fitness of the nonconsenting parent and he has not by conduct or previous legal action lost his rights to the child, it must be shown that continuance of the relationship between the two would be detrimental to the child's welfare." — Va. at —, 253 S.E.2d at 661 (quoting *Malpass v. Morgan*, 213 Va. 393, 399, 192 S.E.2d 794, 799 (1972)).

147. See, e.g., *In re Custody of a Minor*, 1979 Mass. Adv. Sh. 1117, 389 N.E.2d 68 (1979). In this case, the court asserted that the state's interest in promoting the welfare of children could be preventive as well as remedial. If an ongoing pattern of conduct detrimental to the child's welfare was disclosed and was not rebutted by recent evidence of reform, termination of parental rights would be justified. *Id.* at —, 389 N.E.2d at 73.

148. *In re David B.*, 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (1979), involved a natural mother affected by a mental disease that caused her to behave violently. Because she never had lived with the child and because competent testimony indicated that the chances of improvement in her condition were slim, the court terminated her parental rights to free the child for adoption. She appealed, claiming a violation of her substantive due process rights because her parental rights had been terminated without any showing of actual neglect or mistreatment. The court indicated that the statute under which her rights were terminated was neither unreasonable nor arbitrary and emphasized the safeguards used to protect her rights: the need for testimony by two expert witnesses; a finding that harm probably would occur to the child if the natural parent were allowed to maintain custody; and the requirement that the evidence be clear and convincing. Citing *In re William L.*, 477 Pa. 322, 383 A.2d 1228, cert. denied, 439 U.S. 880 (1978), the court emphasized that actual harm to the child was not a necessary prerequisite to termination of parental rights for neglect. The court stressed the prophylactic nature of the neglect proceedings, stating that "[t]he avoidance of lasting psychological harm to the child is the compelling state interest behind prompt severance of the parental relationship." 91 Cal. App. 3d at 196, 154 Cal. Rptr. at 71.

tion to act as a parent. In this way, the child could be placed with a couple capable of serving as parents before any lasting harm were done him.

### *Accord Children Full Legal Representation*

A final recommendation necessary to help ensure faithful adherence to the foregoing suggestions is to provide full party status and representation through a guardian ad litem to any child involved directly or indirectly in proceedings that may affect his familial ties. Other parties to an action are not always the best advocates of the child's interests. Indeed, the current emphasis on protecting the parental rights of unwed fathers works to deemphasize the importance of the child's needs in the adoption process. Although parents usually are entrusted with important decisions concerning their child's future, their mere presence in court indicates that the family has broken down or failed.<sup>149</sup> Under such circumstances, emotions run high and the child needs an effective voice in the determination of his future.

Another measure that will ensure full and fair representation of the child's interests is a requirement of special training for judges who handle adoption and custody cases.<sup>150</sup> Psychological insight into the needs of children has progressed to a stage at which a layman's knowledge is insufficient.<sup>151</sup> Adoption proceedings should

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149. Apparently, in this context a child is unable to sue his parents for neglect even when he suffers emotional and psychological injuries. See, e.g., *Burnette v. Wahl*, 284 Or. 705, 588 P.2d 1105 (1978).

150. "In this country the idea that a judge who decides on the removal of a child from his family, on custody questions, or an adoption should have special training has hardly been considered." J. POLIER, *supra* note 114, at 100-01.

151. A number of judges have recognized advances in the knowledge of special needs and interests of children and have construed adoption statutes to include concern for the best interests of the child. See, e.g., *Lapinsky v. Shonk*, 5 FAM. L. REP. (BNA) 2361 (Ky. Ct. App. 1979). Other judges have continued to construe adoption statutes in accordance with past assumptions long discredited by modern research. See, e.g., *In re Green*, 5 FAM. L. REP. (BNA) 2173, 2175 (N.Y. Fam. Ct. 1978) (stating that "the court is not free to disregard statutory standards or requirements as a basis for decision in favor of sociological principles that lack the discipline and restraints of law. These must yield to the primacy of law in any case of apparent conflict.").

*Hoy v. Willis*, 165 N.J. Super. 265, 398 A.2d 109 (App. Div. 1978), is a particularly good example of the courts' reservations in applying current psychological learning. A natural mother on the verge of a nervous breakdown had placed her eighteen-month old child with a

make greater use of expert witnesses<sup>152</sup> in order to appraise more accurately the child's needs in light of his individual psychological and emotional makeup. Also relevant, but not necessarily controlling, should be the child's wishes.<sup>153</sup> Although most children are not mature enough to exercise full control over their fate, courts should accord some consideration to a child's own expression of his wants and needs.

### THE UNWED MOTHER'S INTERESTS

A mother always has played an undeniably central role in the life of her child, especially in his earliest years. This fact has been as true for unwed mothers as it has been for those whose children were born in wedlock. As the Supreme Court explained in *Caban*, however, fathers, including unwed fathers, may play an equally im-

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paternal aunt who then raised the child until he was over six years old. The natural mother recovered from her illness and demanded the child back even though she had visited him only three times in that four-year period. An expert witness testified that the aunt was the child's psychological parent and that to remove the child would cause a major upset in the continuity of the child's life with profound psychological complications, and that the child would require at least seven years to recover from the trauma and depression. The trial judge then posed the following hypothetical question to the psychiatrist:

If a couple kidnapped an infant, kept it for four years, and within that four years they became the psychological parents of the child and if both the parents and the kidnappers were equal in all respects, would it be in the best interests of the child to continue custody with the kidnappers?

*Id.* at 270, 398 A.2d at 111. When the psychiatrist replied affirmatively, the judge brushed aside this expert testimony and "preserved" the family unit by returning the child to his natural mother. *Id.* at 271, 398 A.2d at 112. The court of appeals reversed, commenting on the trial judge's failure to recognize the degree to which the theory of psychological parentage had been accepted as a basis for resolving these issues. *Id.* at 271-72, 276, 398 A.2d at 112-13, 115.

152. Expert testimony can play a key role in the resolution of disputes involving the custody of or parental rights in young children. *See, e.g., In re Lynna B.*, 92 Cal. App. 3d 682, 155 Cal. Rptr. 256 (1979); *In re David B.*, 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (1979); *Coffey v. Department of Social Servs.*, 41 Md. App. 340, 397 A.2d 233 (1979).

153. The concept of consulting the child to determine his desires is not new. In 1824, a federal court noted that

[w]hen the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes.

*United States v. Green*, 26 F. Cas. 30, 31-32 (C.C.D.R.I. 1824) (emphasis supplied), cited in *BEYOND THE BEST INTERESTS*, *supra* note 108, at 81.

portant role in the child's life, particularly as the child matures.<sup>154</sup> Legal recognition that "maternal and paternal roles are not invariably different in importance"<sup>155</sup> caused the dissenting Justices to voice several concerns. If all unwed fathers are to enjoy parental rights coextensive with those of unwed mothers, then even fathers who decline to assume the responsibilities of parenthood would have an equal voice in decisions regarding the child, and the adoption process would become unnecessarily delayed and complicated.<sup>156</sup> The requirements of notifying unwed fathers of actions affecting their parental rights and obtaining their consent to the adoption also might compromise seriously the privacy of unwed mothers.<sup>157</sup> The consequences of delayed adoptions and insistence that mothers reveal their past sexual habits and partners counsel careful reconsideration of the competing interests involved.

### *Historical Background*

Under the common law, the unwed mother was responsible for the nurture and rearing of her nonmarital children. Typically, the unwed father had no legal duty to provide support for the child and the few that offered financial help did so out of a sense of moral obligation. Many more had no desire to undertake the responsibilities of raising a child. Giving birth to a child out of wedlock was a serious moral transgression and the full blame and accountability rested solely with the mother. For men of higher social standing, the opprobrium associated with fathering a child out of wedlock forced them not to associate with the unwed mother. In most cases, therefore, the mother was responsible for raising the child and providing for his needs.

The law recognized this greater commitment of the mother by according her the presumption of greater fitness when the father contested the child's custody.<sup>158</sup> This trend continued after the ad-

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154. 441 U.S. at 389.

155. *Id.*

156. *Id.* at 408 (Stevens, J., dissenting).

157. *Id.* at 408-09.

158. Under the common law approach, fathers of legitimate children were entitled to custody of their children as a matter of right. Toward the end of the nineteenth century, that rule began to give way to the growing concern for the child's welfare. This change in attitude developed into a preference for the mother. *Bazemore v. Davis*, 394 A.2d 1377, 1380



vent of adoption statutes that typically gave the unwed mother full authority to decide whether to place the child for adoption. If she so decided, the unwed father could not block the adoption, regardless of the relationship he may have had with the child. This practice ended with the decisions in *Stanley* and *Caban*. No longer can adoption statutes favor the unwed mother because of the assumption that her children always are benefited when she has sole control over their destiny. Adoption statutes today must be based on individual considerations of real differences between the parents of children born out of wedlock. Assessing these differences requires closer examination of the role of an unwed mother in the life of the child.

### *Parental Responsibilities and Parental Rights*

The magnitude of the biological mother's interest in her child born out of wedlock, in terms of total involvement and direct and intimate physical and emotional concern, cannot be overstated. Her role, from before the moment of conception through the child's infancy, is protected by numerous constitutional and statutory safeguards. She has a constitutional right to use contraceptives<sup>159</sup> and a qualified constitutional right to abortion<sup>160</sup> that cannot be vetoed by the father.<sup>161</sup> In some cases, only she knows the identity of the father, and she may keep his paternity a secret from him. Because she carries the child, she must make considerable changes in her personal and career plans and daily activities. If the father is disinterested, she may face difficult financial decisions, compromising her future in order to meet medical expenses. Extensive sociological and anthropological studies indicate evidence of a special bond between mother and child formed through their intimate prenatal physical relationship and through the initial con-

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(D.C. 1978).

159. This right was guaranteed to married women in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and extended to unmarried women in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

160. *Roe v. Wade*, 410 U.S. 113 (1973).

161. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). The Court in *Danforth* also denied parental veto power except, by implication, in the case of incompetent or immature females: "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.* at 75.

tact following birth.<sup>162</sup> The mother is always the identifiable parent at birth and usually the child's first custodian with constant responsibility for his welfare.

If the unwed mother has not surrendered her child at birth, and many today do not, her responsibilities continue as the child begins his independent development, and she becomes responsible for the child's physical and emotional needs. Unless she receives help from the father, her family, or the state, hers is a full-time commitment.<sup>163</sup> Clearly, the extent of her parental relationship with the child guarantees the protection of her parental rights under the due process clause of the fourteenth amendment. Only if she has neglected or abandoned her child, or is unfit in some other manner to exercise a parental role, may a court terminate her parental rights without her consent.<sup>164</sup>

### *Recommendations Regarding Differential Treatment of Unwed Mothers and Unwed Fathers*

When the substantial extent of an unwed mother's relationship with her newborn child is compared to that of a disinterested un-

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162. See, e.g., 1 J. BOWLBY, ATTACHMENT AND LOSS (1969); 2 J. BOWLBY, ATTACHMENT AND LOSS (1973); M. MAHLER, THE PSYCHOLOGICAL DEVELOPMENT OF THE HUMAN INFANT (1976), cited in *Caban v. Mohammed*, 441 U.S. at 405 n.10 (Stevens, J., dissenting).

163. This was essentially Justice Stevens's argument in his *Caban* dissent. Citing HEW statistics showing that most adoptions involve infants or very young children, he found the differences in the roles and responsibilities of unwed fathers and unwed mothers of children in that age group substantial enough to justify differential treatment favoring the unwed mother without offending the equal protection clause. 441 U.S. at 404-05 (Stevens, J., dissenting).

Justice Stewart contended that gender-based distinctions properly could be made because unwed fathers and unwed mothers were not similarly situated. Buttressing this stance was his finding that the "vast majority" of unwed fathers are "unknown, unavailable, or simply uninterested." *Id.* at 398-99 (Stewart, J., dissenting) (citing H. CLARK, *supra* note 23, at 176-77; H. KRAUSE, *supra* note 94, at 29-32 (1971)).

164. See, e.g., *In re Adoption of a Child by I.T.*, 164 N.J. Super. 476, 397 A.2d 341 (App. Div. 1978) (allowing termination of the natural mother's rights when she abandoned her child and refused to assume parental duties); *Costello v. Denninger*, 5 FAM. L. REP. (BNA) 2883 (N.Y. Sup. Ct. 1979) (allowing termination of the natural mother's parental rights when the child who had cystic fibrosis got necessary special daily care from the adoptive parents that the natural mother was unable to give); *In re Adoption of Baby Boy P.*, 479 Pa. 138, 387 A.2d 873 (1978) (allowing termination of the natural mother's parental rights when she did nothing for her child in the first eighteen months of his life except demand \$3,000 to consent to his adoption).

wed father, common sense dictates a strong basis for differential treatment. Given that the majority of unwed fathers in fact is disinterested and that the majority of adoptions involve infants, the need to treat unwed fathers differently by presuming them unfit in order to prevent undue delay and complications in the adoption process is of great social importance. To be acceptable constitutionally, though, any such presumption must be rebuttable rather than conclusive. This approach enables those particular unwed fathers who have participated fully in the child's nurturing and support to obtain the full parental rights they have earned. At the same time, the presumption allows courts to dispense with the need for the unwed father's consent when he has not come forward with evidence rebutting the presumption and to terminate quickly the rights of the great majority of unwed fathers who have assumed no parental duties.

This presumption of unfitness should be coupled with a stricter definition of neglect in the case of newborn infants. If the court finds that the unwed father has not assumed his parental responsibilities within ninety days of the child's birth, his parental rights should be terminated in order to free the child for adoption before irreparable harm occurs to the child. Because this procedure does not foreclose interested unwed fathers from defending their parental rights, it probably is consistent with the Court's rulings in *Caban*, *Quilloin*, and *Stanley*. This procedure also accommodates the concerns of the *Caban* dissenters because it allows speedy termination of the parental rights of disinterested unwed fathers like Leon Quilloin who lack substantial relationships with their children when such termination is in the child's best interests. This expedition is critical to the newborn child's welfare.

The adoption of an older child may involve competing interests far different from those in a newborn adoption. Because maternal and paternal roles are more similar for older children, the factual basis for differential treatment is considerably weaker. In *Caban*, the Court underscored the necessity of evaluating maternal and paternal claims to the child on an individual basis. Also, an older child often is more secure psychologically than an infant and better able to understand and adapt to changes in the makeup of his family. Additionally, time is less critical for older children and they are better able to tolerate limited delays in the adoption process.

For these reasons, the presumption of unfitness of unwed fathers operative in newborn adoptions should not apply to adoptions involving older children. Instead, the court should determine from a preponderance of the evidence whether the particular unwed father has had a relationship with his child of sufficient character to guarantee it against termination on grounds other than unfitness. Courts are in a much better position to make this determination when an older child is involved because they are able to examine the unwed father's behavior toward his child over a number of years.

*Notice to the Unwed Father v. The Mother's Privacy*

One aspect of the adoption process that poses problems for the unwed mother is the need to identify the unwed father so he may be given notice that action is pending that may affect his parental rights. Some authorities assert that a woman's constitutional right of privacy protects her from forced disclosure of information regarding her sexual and childbearing activities.<sup>165</sup> Many mothers are embarrassed and suffer emotional stress when questioned regarding their sexual partners. Other mothers will avoid the questioning altogether by placing the child themselves or through an unlicensed intermediary.<sup>166</sup> Those mothers who may not object to confidential disclosure to a social worker may object when notice must be published in a newspaper or posted in a public place. Whatever degree of privacy they had retained in the private disclosure is lost when they are identified to the world as unwed mothers. Women question the need for notice by publication because the chances are so slim that the unwed father actually will receive notice. Also, notifying the father delays the adoption process to the child's detriment.

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165. See, e.g., Vermont Att'y Gen. Op. No. 997 (1972). The opinion states that [t]he father's parental rights and the mother's right of privacy are each recognized as fundamental human rights, and it would be cruel and unseemly for the Department to compel a woman to be subjected to possible personal trauma in order to give the father his right to appear as a parent, where the mother does not seek legal relief for herself.

*Id.* at 6. See also Barron, *supra* note 1, at 542.

166. W. MEEZAN, S. KATZ, & E. RUSSO, *supra* note 144; see Bodenheimer, *supra* note 121, at 62-63.

The Supreme Court, however, clearly has stated that unwed fathers must be notified of any legal action that may affect their parental rights.<sup>167</sup> When the unwed father has assumed significant parental responsibilities, his right to the control, custody, and companionship of his child is just as great as that of an unwed mother. Procedural due process requires at least notice and an opportunity to be heard<sup>168</sup> before parental rights can be terminated.<sup>169</sup> Although a majority of the Supreme Court never has addressed the conflict between the mother's privacy and the father's notice, they have referred consistently to the necessity for notice even to unwed fathers whose identity and whereabouts are unascertainable.

The Court recognized in *Mullane v. Central Hanover Bank & Trust Co.*<sup>170</sup> that chances of actual notice through publication alone are slim,<sup>171</sup> but stated that such notice may satisfy procedural due process requirements.<sup>172</sup> Although a great majority of unwed fathers would not respond even if they did receive actual notice, those who might respond have a substantial interest and

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167. Although some commentators have urged a much more restricted interpretation of Supreme Court statements regarding notice to unwed fathers, see, e.g., Bodenheimer, *supra* note 121, at 63, the Court may have intended to attach broader significance to their remarks. Notice to the unwed father was not at issue in *Stanley*, *Quilloin*, or *Caban*; nevertheless, the Court discussed its sufficiency in each case. Although in *Stanley* and *Caban* this construction might have been consonant with a narrow interpretation of the need for notice because those unwed fathers were determined to have constitutionally protected interests, its inclusion in *Quilloin*, in which the unwed father's interest was not of constitutional magnitude, undercuts the narrow interpretation. Just as *Caban* forbade the states to presume unwed fathers unfit, perhaps it also proscribed presumptions that notice to the unwed father was unnecessary if the possibility of actually notifying him was slim or if he might lack a constitutionally protected interest.

168. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

169. See, e.g., *Canaday v. Gresham*, 362 So. 2d 82 (Fla. Dist. Ct. App. 1978) (holding notice is a fundamental prerequisite to adoption).

170. 339 U.S. 306 (1950).

171. *Id.* at 315.

172. *Id.* at 317. "Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Id.* (citing *Jacob v. Roberts*, 223 U.S. 261 (1912); *Blinn v. Nelson*, 222 U.S. 1 (1911); *Cunnius v. Reading School Dist.*, 198 U.S. 458 (1905)).

deserve the opportunity to defend it.<sup>173</sup>

Requiring an unwed mother to name the father may not infringe her right to privacy impermissibly,<sup>174</sup> provided that the inquiry is limited to the identity of the unwed father.<sup>175</sup> Because the interests of a third party, the child, are at stake, the issue of disclosure is broader than individual privacy. The embarrassment that may result to certain unwed mothers from disclosing the father's name and whereabouts is outweighed by the interest of protecting the rights of genuinely concerned unwed fathers.

### *Recommendations Regarding Notice*

For the reasons stated above, the unwed mother should be required to identify the unwed father or possible unwed fathers if she knows who they are.<sup>176</sup> Failure to identify should be treated as contempt only if the evidence tends to show that her refusal is motivated by a desire to deprive the unwed father of the opportunity to assert and defend his parental rights. After an unsuccessful good

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173. Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314 (citing *Milliken v. Meyer*, 311 U.S. 457 (1940); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Priest v. Las Vegas*, 232 U.S. 604 (1914); *Roller v. Holly*, 176 U.S. 398 (1900)).

174. This was the view adopted in the Uniform Parentage Act. UNIFORM PARENTAGE ACT § 10(b), 9A UNIFORM LAWS ANN. 600 (master ed. 1979).

175. In *Doe v. Norton*, 365 F. Supp. 65 (D. Conn. 1973), *vacated*, *Roe v. Norton*, 422 U.S. 391 (1975), the court emphasized, in the context of compelling unwed mothers to identify the unwed father in order to hold him liable for support payments, that

the inquiry focuses on the identity of the father, not on the mother's misconduct. The question asked of the unwed mother is, "Who is the father of your child?" The object of the inquiry is to enforce a familial monetary obligation, not to interfere with personal privacy. There is no intrusion into the home nor any participation in interpersonal decisions among its occupants. The only restriction it imposes upon either the unwed mother or the biological father to do as they please or make any decisions they wish in whatever relationship they desire to maintain is that the father satisfy his legal obligation to support his own child and that the mother provide what information she possesses useful toward that end.

*Id.* at 77-78.

176. For example, a California statute requires a court to ask the unwed mother or other appropriate person whether the mother was married or cohabiting during or after conception, whether the mother has received any support or promises of support, and whether anyone has acknowledged or openly declared his possible paternity. CAL. CIV. CODE § 7017(c) (West Supp. 1979).

faith effort to identify, the court should order that notice be published.<sup>177</sup> Such notice, to be meaningful,<sup>178</sup> must contain the mother's name<sup>179</sup> but need not identify the child or adoptive parents.<sup>180</sup> The length of time required for its publication should depend on the circumstances of the particular case.<sup>181</sup> For newborn adoptions when the unwed father's identity and whereabouts are unknown and actual notification appears futile, publication for fifteen days should suffice.<sup>182</sup> If, however, the father's identity and general location are known and an older child is involved, publication for thirty days should be required. This approach would ensure a good faith effort to notify the unwed father but avoid unnecessary delay in the adoption process<sup>183</sup> and undue

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177. Some authorities suggest that courts dispense with the need for notice if it appears that it will be futile. See, e.g., Barron, *supra* note 1, at 545-46. California has such a provision in its adoption law that allows a court to dispense with notice when the father's identity and whereabouts are unknown. CAL. CIV. CODE § 7017(f) (West Supp. 1979). The constitutionality of such a statute is unclear. See note 167 *supra*.

Also proposed as a substitute for publication of notice if the unwed father's identity and location are unknown is a time limitation. "[T]he court must try to ascertain the identity of the father, but very speedy termination of his potential rights may be had if he shows no interest in the child or if a reasonable effort provides no clue to his identity" within a specified period of time. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 14 (1974) (emphasis original) (citing UNIFORM PARENTAGE ACT § 24(c), (d), (e)).

178. "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 315.

179. Any attempt to notify the unwed father without disclosing the unwed mother's name is little more than an empty gesture. See, e.g., Barron, *supra* note 1, at 544-45.

180. Exclusion of the name of the adoptive parents from the notice given the unwed father is advisable to forestall any possibility of interference or harassment. One court, however, has indicated that the notice should include enough general information about the adoptive parents that the unwed father may decide whether it is in his or the child's best interests for him to appear at the hearing. *In re "Male F,"* 97 Misc. 2d 505, 411 N.Y.S.2d 982 (Sur. Ct. 1978).

181. When a state has an interest in bringing issues to final settlement, "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 313-14.

182. Cf. *In re Adoption of Daft*, — W Va. —, 230 S.E.2d 475 (1976) (accepting fourteen days notice to the unwed father who was a fugitive from justice and whose whereabouts were unknown).

183. Because of the importance to the child of reducing the time needed to complete an adoption, courts should not hesitate to dispense with methods of giving notice, other than that of publication, that are obviously futile. For example, in *In re Minique J.*, 5 FAM. L. REP. (BNA) 2542 (N.Y. Sur. Ct. 1979), § 111(a) of the New York Domestic Relations Law

embarrassment.<sup>184</sup>

### THE BIOLOGICAL FATHER'S INTEREST

Historically, the law has been biased strongly against recognizing in the unwed father any rights to his children born out of wedlock. Although fathers of children born in wedlock had exclusive entitlement to the child's custody, often an unwed father was not even recognized as a parent of his nonmarital child.<sup>185</sup> Only the mother<sup>186</sup> was so recognized, probably because the father's identity was uncertain and because he was stereotyped as irresponsible and unconcerned<sup>187</sup> about his child. Initially, most states felt the unwed father had no connection with his child born out of wedlock other than the moral obligation of support.<sup>188</sup> Indeed, before *Stanley*, even if the unwed father had acknowledged paternity, supported the child, and established a family relationship with him, courts seldom recognized the father's interests.<sup>189</sup>

With the decision in *Stanley*, the practice of ignoring the unwed father ended,<sup>190</sup> thereby substantially altering the course of adop-

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required notice to the unwed father by registered or certified mail when personal service failed. The last known address of the unwed father was a vacant, boarded-up building. The court, realizing the waste of time and money that would ensue from attempting to effect personal service, dispensed with the requirement and directed that only notice by mail be sent.

184. "But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.'" *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 314-15 (quoting *American Land Co. v. Zeiss*, 219 U.S. 47, 67 (1911)).

185. *W. RODGERS, DOMESTIC RELATIONS* §§ 561, 569 (1899).

186. The child born out of wedlock was often viewed as the "child of nobody," that is, the child of no known body except its mother. See Note, 58 NEB. L. REV., *supra* note 1, at 610-11 (citing *Re M*, [1955] 2 All E.R. 911, 912).

187. See Tabler, *supra* note 1, at 231.

188. See Note, 50 MINN. L. REV., *supra* note 1, at 1072.

189. See Comment, 13 J. FAM. L., *supra* note 1, at 115 (citing *Clements v. Banks*, 159 So. 2d 892 (Fla. Dist. Ct. App. 1964); *Toole v. Gallion*, 221 Ga. 494, 144 S.E.2d 360 (1965)).

190. When asked to comment on this recent reversal in attitudes toward the unwed father, a social services specialist advanced two reasons for the change. The first was the growing tendency to judge people on their individual merits rather than on the basis of stereotypes. She described this as a natural outgrowth of the increased concern for the individual in today's society. The second reason was that a greater number of unwed fathers are willing to undertake parental responsibilities. She felt that this change was due to the recent exam-



tion law. The Court clearly held in *Stanley* and *Caban* that full parental rights must be extended to those unwed fathers who had substantial parental relationships with their children. The Court, however, also indicated in *Quilloin* that not all unwed fathers merited a role in the adoption process equal to that of the natural mother. The determination of an unwed father's rights involves several factors. All unwed fathers at least are entitled to notice and a chance to be heard before their parental rights can be terminated. Any additional substantive rights to which they may be entitled depends on the quality of their relationship with their children. The guidelines established in *Stanley*, *Quilloin*, and *Caban* address these issues but also raise others. These further questions concern the exact nature of the relationship that an unwed father must establish with his child in order to receive constitutional protection. Once a father establishes such a relationship, the issue then will focus on how to preserve the constitutional guarantees.

### *Establishing the Parental Relationship*

The unwed father's first connection with his child is established upon conception. Aside from the special questions raised by the use of artificial insemination and substitute mothers as means of conceiving children,<sup>191</sup> the biological link between parent and child always has been recognized as capable of creating a mutual family

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ination and redefinition of sex roles that have prompted men to feel capable of raising a child alone. Interview with Carolyn Byers, Social Worker, Unwed Mother Specialist, Hampton Department of Social Services, in Hampton, Virginia (Oct. 4, 1979).

This emerging sensitivity to the father's role in child rearing could undermine significantly many of the assumptions inherent in the adoption process. For instance, as indicated by two other social services specialists, placement agencies now are allowing single men to adopt children. Despite the still widespread belief that two-parent homes are inherently superior to one-parent homes, adoption agencies are finding that one-parent homes can be perfectly suitable and constitute a valuable adoption resource, especially for the older or physically or emotionally disabled children who have been the most difficult to place. Interview with Mary Hutchens, Senior Social Worker, Adoptive Home Developer, and Sharon Downes, Senior Social Worker, Foster Care Intake Worker, Newport News Department of Social Services, Newport News, Virginia (Oct. 4, 1979). See generally *FATHERS, HUSBANDS AND LOVERS* (S. Katz & Inker eds. 1979).

191. See note 124 *supra*. The Uniform Parentage Act provides that when a married couple has a child through the use of artificial insemination, the husband, not the sperm donor, is considered the natural father. UNIFORM PARENTAGE ACT § 2, 9A UNIFORM LAWS ANN. 558 (master ed. 1979).

interest of each in the other.<sup>192</sup> In the past, however, the biological connection alone was insufficient to accord full parental rights to the unwed father.<sup>193</sup> As Justice Stewart remarked in his *Caban* dissent, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."<sup>194</sup>

An unwed father takes a step toward a more enduring relationship when he either acknowledges his paternity and duty to support the child or "legitimizes" his child through the statutory process provided by the state.<sup>195</sup> Acknowledging paternity and supporting the child in certain instances has been sufficient to establish fully the unwed father's parental rights;<sup>196</sup> however, such conduct alone does not guarantee substantial rights in the child. Failure to provide support when legally owed has been enough to terminate some unwed fathers' parental rights.<sup>197</sup>

In addition to financial support, many courts require that before

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192. The Supreme Court, in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), noted that "the usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Id.* at 843 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923)). Although the father's interest in his biological child may be apparent from the beginning, the child does not begin to develop a corresponding interest in his biological father until he has aged beyond his early years.

193. In another context, several Justices asserted that a biological relationship alone was insufficient to create a constitutionally protected family. See *Moore v. East Cleveland*, 431 U.S. 494, 535-40 (1977) (Stewart, J., dissenting); *id.* at 549 (White, J., dissenting).

194. *Caban v. Mohammed*, 441 U.S. at 397 (Stewart, J., dissenting).

195. In *Quilloin*, the appellees argued that although parental rights were constitutionally protected, failure to use the statutory method of legitimation, in the case of disinterested unwed fathers like Leon Quilloin, could cause the unwed father's interest in the child to be subordinated to the unwed mother's parental rights. The Court indicated it would hesitate to consider this factor controlling because many unwed fathers were unaware that legitimation procedures are available. *Quilloin v. Walcott*, 434 U.S. at 254. The Kansas Supreme Court in *Aslin v. Seamon*, 225 Kan. 77, 587 P.2d 875 (1978), took this same view in stating that whether the father has legitimized his children is irrelevant to his right of notice and to custody in adoption proceedings.

196. *Cf. Aslin v. Seamon*, 225 Kan. at 81-82, 587 P.2d at 879 (holding the father's consent alone sufficient for adoption when the unwed mother may have abandoned the child and the father has acknowledged paternity).

197. See, e.g., *Young v. Foster*, 148 Ga. App. 737, 252 S.E.2d 680 (1979) (allowing adoption by the stepfather without the father's consent because he had abandoned his child by willful and wanton failure to pay court-ordered child support); *State ex rel. Haynes*, 368 So. 2d 783 (La. Ct. App. 1979) (permitting adoption without the father's consent because of his refusal to comply with the spirit of the support order).

the unwed father is accorded full paternal rights, he must establish a personal relationship with the child<sup>198</sup> and assume some of the personal duties of child raising such as actual or legal custody for a period of time, or responsibility for the daily supervision, education, care, and protection of the child.<sup>199</sup> Indeed, the establishment of such a relationship may be the critical ingredient in forming a constitutionally protected "family." The cases cited in *Stanley*, *Quilloin*, and *Caban* concerning the right to custody and control of one's children all incorporated the idea that recognition of parental rights depends on assumption of parental duties.

For example, the Court in *Quilloin* cited *Meyer v. Nebraska*<sup>200</sup> for the proposition that the "rights to conceive and to raise one's children" were "essential."<sup>201</sup> In *Stanley*, the Court observed further that the "interest of a parent in the companionship, care, custody, and management of his or her children" deserved great respect,<sup>202</sup> and in *Prince v. Massachusetts*,<sup>203</sup> the Court cited as a cardinal principle that the "custody, care and nurture" of the child resided primarily in the parents, "whose primary function and freedom" included preparing the child for life's obligations.<sup>204</sup> Also significant was the "integrity of the family unit."<sup>205</sup> Family units formed without a marital relationship between the parents still warranted constitutional recognition because "familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit."<sup>206</sup>

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198. See, e.g., *In re Adoption of David C.*, 479 Pa. 1, 387 A.2d 804 (1978). Under the Pennsylvania adoption act, parental obligations are more than financial; failure to establish a relationship with the child for six months terminates parental rights. *Id.* at —, 387 A.2d at 807.

199. Some states require at least communication between the unwed father and his child. See, e.g., *Rosell v. Dausman*, — Ind. App. —, 373 N.E.2d 185 (1978). The intent of the statute allowing the court to dispense with the consent of the noncustodial parent if that parent had failed to communicate with the child for one year was to encourage communication with children.

200. 262 U.S. 390 (1923).

201. *Id.* at 399-401 (emphasis supplied).

202. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

203. 321 U.S. 158 (1944).

204. *Id.* at 166, cited in *Stanley v. Illinois*, 405 U.S. at 651.

205. *Stanley v. Illinois*, 405 U.S. at 651 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

206. 405 U.S. at 652 (citing *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968)).

In a slightly different context, the Court in *Smith v. Organization of Foster Families*<sup>207</sup> stated that

the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, as well as from the fact of blood relationship.<sup>208</sup>

This familial relationship was an important factor in the Supreme Court's upholding of Abdiel Caban's and Peter Stanley's parental rights; the lack of such a relationship prompted the Court's rejection of Leon Quilloin's parental rights. Indeed, upholding his interests would have resulted in destroying an established "family" unit. The Court in *Caban* stated that nothing in the equal protection clause prevented a state from denying an unwed father who had never participated in the rearing of his child a veto power over the child's adoption.<sup>209</sup> When the unwed father had such a parental relationship with his child, however, the equal protection clause prohibited treating unwed fathers differently from unwed mothers.<sup>210</sup>

### *Recommendations for Recognizing a Constitutionally Sufficient Parental Relationship*

The criteria for judging the sufficiency of an unwed father's parental relationship with his older child were discussed in *Stanley*, *Quilloin*, and *Caban*. The relevant indicia of parenthood in those cases were living with the child in a de facto family unit and providing for his care, supervision, support, and education. Factors held to be insufficient in themselves were mere biological relationship, acknowledgment of paternity, irregular support, occasional visits, and interest only in future visitation privileges. Although these determinations may be relatively easy to make when an older child is concerned and the court can judge the unwed father's per-

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207. 431 U.S. 816 (1977).

208. *Id.* at 844 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972)).

209. *Caban v. Mohammed*, 441 U.S. at 392.

210. *Id.* at 393.

formance record over several years, the opposite is true when a young or newborn infant is concerned. Courts are not entirely without guidance, though, on how to approach this problem. The focus still is on whether the unwed father is concerned and interested, and his parental conduct is relevant in making that determination.

One factor that may tend to indicate the degree of interest and concern the father will have in the child is the interest he takes in the child's mother. Because the fetus's welfare is directly dependent on his mother's welfare, assuming the part of a responsible parent toward the child entails a willingness to aid the mother when she needs assistance. The degree of interest the unwed father has displayed will depend on whether he helped support the mother during her pregnancy, provided for her specific medical needs, contributed to the expenses of delivery, acknowledged his paternity and support obligations, gave the child his name, and entered his name as father on the child's birth certificate.

The above concerns are among those expected of a responsible father. Failure to participate during this phase of the child's life should create a rebuttable presumption that the unwed father is uninterested in his child's welfare and therefore has neglected him. The unwed father should be allowed to rebut this presumption by showing that he did all that any interested father would do to assure the newborn's welfare. Even though married fathers are presumed fit, the creation of this presumption of unfitness of the unwed father would be fair and reasonable on two grounds. First, the married father has assumed, by virtue of his marriage, many obligations in regard to his child's welfare, primarily the obligation to support the child. In the majority of cases, he also supports the mother and provides for her well-being while she carries the child. When the child is born, he is born "legitimate" and takes his father's name, thus avoiding the problems associated with birth out of wedlock. Second, the unwed father's interests often oppose both the interest of the child in having an active, caring father and the interest of the state in assuring the welfare of nonmarital children. Thus, the unwed father's interests are not absolute and must yield to the other interests involved when the father has refused to assume the parental responsibilities that are the obverse side of parental rights.

For these reasons, when an unwed mother desires to place her child for adoption at birth, failure of the unwed father to rebut the presumption of disinterest arising from his conduct before the child's birth should be sufficient to order termination of his parental rights if such termination is found to be in the child's best interests. If the arrangements for adoption are made before the child is born, the court should contact and advise the father that he must at least acknowledge paternity and his obligation to support the child or he will lose his rights for failure to rebut the presumption of disinterest and neglect. Of course, if he cannot be identified or located, his rights should be terminated after publication of notice for the minimum period. Both the mother and child greatly need the father's assistance during late pregnancy and immediately following birth. If he is unwilling to provide that assistance, he should not be legally recognized as a father.

Should the mother decide to place the child several months after birth, a court should apply a strict definition of neglect or abandonment to terminate the father's rights if he still has displayed no paternal interest. Conversely, should the father assume an active parental role, he should have full parental rights.

In determining whether the unwed father has had a significant parental relationship with the child, the court should examine the reality of the situation rather than base its decision on mere formalities. The focus should be on the degree to which the unwed father actually has undertaken to discharge his parental duties, not on whether he has made some token effort. The father sometimes may be frustrated in his attempts to assume an active parental role by the mother's behavior or by his incarceration. In such cases, the proper determination should be whether he has taken all those essential steps that a truly interested father would or could have taken to be a parent to his child, such as seeking custody, visiting or communicating with the child, assisting in the child's support, and planning for the child's future.

### *Recommendations for Protecting the Unwed Father's Parental Relationship*

When an unwed father has had a significant parental relationship with his child, the interest of all parties is promoted if the law fully protects that relationship. Even when the existence of this

relationship seems questionable, the fundamental nature of the interest dictates that the unwed father be able to defend his interests at a hearing. The Supreme Court has decided that, at a minimum, unwed fathers are entitled to the procedural protection of notice and an opportunity to be heard.

Giving actual notice to an absent or unknown unwed father may present great difficulties. When adoption is in the child's best interests and the father's absence and anonymity are due to his lack of concern for the mother and child, termination of his parental rights poses few difficulties if he fails to respond promptly to published notice. The father's absence, however, may have other causes. The mother may have refused to identify him as the father or may have claimed she did not know who he was or where he resided. Alternatively, she may have taken the child and deserted him, moving to a new area where she could place the child for adoption without any interference from the father. Whether the mother acted with good or bad motives, the unwed father deserves an opportunity to be heard before his parental rights are terminated. Balanced against his right to be heard, however, are the state's interest in proceeding with adoptions as quickly as is consonant with due process, and the child's interest in avoiding a lengthy period of legal and familial limbo.

One method of protecting unwed fathers who have been deserted that would not delay adoptions would be to allow them to preregister their parental interest with the state so that they would be assured of actual notice whenever any action comes before the state's courts affecting their interests. Through inclusion of this provision in interstate adoption compacts already in existence, this protection could be extended over a greater area. Although many unwed fathers might be unaware of this procedure, those interested enough to attempt to locate their children could be informed about it through inquiries to state agencies. Those unwed fathers unaware of these provisions would most likely be those who were least interested and did not even bother to make inquiries. Still, those unwed fathers who never are actually notified stand to lose parental rights they may have earned; however, this seemingly harsh result is justified by the child's need for establishing permanent relationships as soon as possible to prevent emotional trauma.

An unwed father who receives actual notice then must clear the

hurdle of proving he in fact is the child's biological father.<sup>211</sup> This requirement serves two purposes. First, it satisfies the state's legitimate interest in assuring that a parental veto is not given to one who is not in fact the child's father. Second, it comports with the interest of the child and the state in having the father acknowledge his support obligations. If the mother disputes his assertion, a paternity hearing may resolve the controversy. Once the unwed father has proved paternity, he can offer evidence on the existence and nature of his relationship with his child. The quality and extent of the evidence necessary to guarantee substantive protection of his parental rights should vary depending on the child's age, the extent to which the unwed father has had or sought custody, his relationship with the child, and the effect of termination of his parental rights on a de facto family unit. If the court determines that no substantial parental relationship exists, it should order termination of parental rights when termination is in the child's best interests. When a substantial parental relationship exists, however, the unwed father should be accorded full substantive protection of his rights. Termination should take effect only after proof of actual unfitness and when it is in the child's best interests.

Necessary to the protection of the indigent unwed father's parental rights is provision for court-appointed counsel. Although adoption proceedings are classified as civil actions, the unwed father may find the influence and power of the state opposing him,<sup>212</sup>

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211. The state has a legitimate interest in providing that an unwed father's right to veto an adoption is contingent upon his showing that the child is his. *Id.* at 393 n.15 (citing for comparison *Lalli v. Lalli*, 439 U.S. 259, 274 (1978)).

Although some statutes require that an unwed father be adjudged the child's natural father before the adoption petition is filed, the better practice is to allow unwed fathers to assert their claims any time before the petition is granted. *See, e.g., In re Adoption of Infant Male*, — Ind. App. —, 378 N.E.2d 885 (1978).

212. The unwed father also faces the power of the state in paternity hearings. Normally, an unwed mother who receives welfare from the state in order to support her child is compelled to assist the state in collecting an equivalent amount from the unwed father. The California Supreme Court recently declared that indigent unwed fathers sued for support by unwed mothers on behalf of the state were entitled to have court-appointed counsel because, unlike other civil actions, the "full power of the state is pitted against the indigent person in an adjudication of the existence of a fundamental biological relationship entailing serious financial, legal, and moral obligations." *Salas v. Cortez*, 24 Cal. 3d 22, 32, 593 P.2d 226, 233, 154 Cal. Rptr. 529, 536 (1979). Also at stake in such hearings is a liberty interest because the unwed father may be jailed for nonsupport. *Hepfel v. Bashaw*, — Minn. —, 279 N.W.2d 342 (1979).



for example, when the state's department of welfare actively supports the termination of his parental rights. This involvement of the state in terminating a fundamental interest of the unwed father alters the nature of the adoption proceeding, giving it certain aspects of a criminal proceeding. When this occurs, the indigent unwed father should be assured of competent counsel to defend his rights.

### CONCLUSION

An unwed father's relationship with his nonmarital children may be as close and compelling as that of any other parent. The Supreme Court recognized this principle by prescribing a greater degree of procedural and substantive protection for the parental rights of unwed fathers. The scope of this protection is determined principally by the extent to which the particular unwed father assumes the role and responsibilities of a concerned parent. No longer may unwed fathers conclusively be presumed unfit in order to expedite adoption proceedings; every father deserves an opportunity to defend his parental rights. This precept must be qualified, however, by the necessity of equitably accommodating the rights and interests of the other parties to an adoption. Thus, concern for effecting actual notice to the unwed father must be tempered by respect for the unwed mother's privacy and recognition of the necessity of minimal disruption of the child's psychological and emotional relationships. Because time is a critical factor in most adoptions, courts must be prepared to terminate an unwed father's parental rights when reasonable, good faith attempts to notify him of the action fail and such termination is in the child's best interests. Reasonableness, of course, will depend on the circumstances of each case. When actual notice is effected, recognition of enhanced substantive rights in unwed fathers depends on a delicate balancing of the various interests competing in the adoption process. Provided this determination is performed in a manner that guarantees consideration of the individual characteristics of the parties involved, the conclusion reached will be in the best interests of all concerned.

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