UNWED FATHERS: AN ANALYTICAL SURVEY OF THEIR PARENTAL RIGHTS AND OBLIGATIONS

At common law the natural parents of illegitimate children had no significant legal relationship to their children.[1] Over time, however, the law vested exclusive right to custody in the unwed mother and charged her with complete responsibility for the support of her illegitimate children.[2] The law later provided the unwed father a right to custody, subject to the paramount right of the mother, and accordingly imposed on him a support obligation.[3] Today, as a result of recent constitutional interpretation,[4] the legal rights and obligations of natural fathers of illegitimate children more closely coincide with those of not only natural mothers, but fathers of legitimate children as well.

This Note surveys the present legal role of unwed fathers by noting changes in traditional law, comparing the legal role of fathers of illegitimate children with that of both unwed mothers and fathers of legitimate children, and emphasizing unresolved or potential developments in the law. Sections I and II examine the legal role and obligations of unwed fathers. Sections III, IV, and V analyze the unwed fathers' rights to adoption, custody, and visitation of their illegitimate children.

I. LEGAL RECOGNITION OF THE UNWED FATHER'S PARENTAL ROLE

A. *Constitutional Recognition of Parental Role:* Stanley v. Illinois

The most significant case in this decade to recognize, protect, and extend the unwed father's parental role in the lives of his illegitimate children is *Stanley v. Illinois*.[5] In *Stanley* the unwed father had lived intermittently for eighteen years with his illegitimate children's unwed mother and assumed parental responsibility for the children. Upon the

1. *See* Harkins, *Putative Father's Visitation Rights*, 19 CLEV. ST. L. REV. 549, 550 (1970); Reeves, *Protecting the Putative Father's Rights After* Stanley v. Illinois: *Problems in Implementation*, 13 J. FAM. L. 115, 116-17 (1973-74).

2. *See* Harkins, *supra* note 1; Reeves, *supra* note 1.

3. *See* Harkins, *supra* note 1; Reeves, *supra* note 1.

4. *See* Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972); *cf.* Quilloin v. Walcott, 434 U.S. 246 (1978) (due process and equal protection rights of unwed father, who never had nor sought custody of illegitimate child, not violated by state statute denying all unwed fathers the right to veto application to adopt child).

5. 405 U.S. 645 (1972).

mother's death the State of Illinois removed the children from their father's custody and, pursuant to the Illinois dependency statutes,[6] declared them wards of the state without affording the father a hearing on parental fitness and without proof of neglect, although all other parents received such protections.[7] Stanley, the unwed father, challenged the statutes' constitutionality under the equal protection clause of the fourteenth amendment, but the Illinois Supreme Court rejected his claim.[8]

The United States Supreme Court, however, acknowledged Stanley's "cognizable and substantial interest" in retaining custody of his children,[9] and reversed the Illinois court's judgment on two grounds.[10] First, the Court held that the statutory presumption[11] that unmarried fathers make unsuitable parents violated Stanley's due process right to a prior hearing on his fitness as a parent.[12] Second, the Court ruled that the Illinois provisions denied Stanley equal protection of the law by depriving him of the hearing afforded other parents on their suitability to retain custody of their children.[13]

Stanley clearly extended constitutional protection to the natural father's relationship with his illegitimate children. The decision imposed due process procedural safeguards in state actions challenging an unwed father's custody of his illegitimate children.[14] Furthermore, *Stanley* suggested that due process substantively restricts states from terminating an unwed father's custody without first finding him unfit.[15] Subsequent cases have extended and applied *Stanley*'s due process

6. ILL. ANN. STAT. ch. 37, §§ 701-14, 702-1, -5 (Smith-Hurd 1972).

7. The children of married parents, divorced parents, and unmarried mothers were declared neglected children only after a hearing and proof of neglect. 405 U.S. at 658.

8. *In re* Stanley, 45 Ill. 2d 132, 256 N.E.2d 814 (1970).

9. 405 U.S. at 652.

10. *Id.* at 659.

11. Although the majority spoke of a statutory presumption throughout its due process discussion, the dissent argued that the statute did not raise this presumption. *Id.* at 662 (Burger, C.J., dissenting).

12. *Id.* at 649.

13. *Id.* at 658.

14. *See generally id.* at 649, 658. Although the precise issue confronting the Court concerned the state's right to omit unwed fathers from the definition of "parents"—in reality, an equal protection question, *id.* at 659, 664 (Burger, C.J., dissenting)—the Court began its analysis with a due process inquiry. The Court concluded that the administrative convenience of presuming rather than proving Stanley's unfitness was "insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.* at 658. The Court justified its "preliminary" due process inquiry by noting that it could dispose of the case on the constitutional premise raised below by a method of analysis available to the lower court. *Id.* at 658 n.10.

15. *See generally* Caban v. Mohammed, 441 U.S. 380, 394 n.16 (1979); Quilloin v. Walcott,

principles to other proceedings that affect an unwed father's parental interests,[16] including actions for adoption,[17] legitimation,[18] paternity,[19] visitation,[20] and termination of parental rights.[21]

The *Stanley* Court, however, did not clearly enunciate the specific procedural and substantive due process protections to be afforded unwed fathers in the numerous actions affecting their parental interests,[22] nor did it define those factors which courts should consider in determining what due process requires.[23] More importantly, the Court failed to identify carefully the unwed fathers who merit procedural and, perhaps, substantive due process protection. At one point in its

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434 U.S. 246, 247-48, 254-55 (1978); Stanley v. Illinois, 405 U.S. at 651-52, 657-58; *In re* Adoption of Mullenix, 359 So. 2d 65, 67 (Fla. Ct. App. 1978).

16. According to one commentator, "[a]n unwed father is entitled to notice of any proceeding which affects the parent-child relationship." 8 ST. MARY'S L.J. 392, 392 (1976). Broad language in *Stanley* seems to endorse the extension of its principles to other proceedings: "If [unwed fathers] do care . . . Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or *adoption* proceeding." 405 U.S. at 657 n.9 (emphasis added).

17. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 385 n.3 (1979); *id.* at 414-17 (Stevens, J., dissenting); *In re* Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (1977); Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972).

18. *See generally* Quilloin v. Walcott, 434 U.S. 246 (1978).

19. *See, e.g., In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975); Johannesen v. Pfeiffer, 387 A.2d 1113 (Me. 1978); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

20. *See, e.g.*, Wingard v. Sill, 223 Kan. 661, 576 P.2d 620 (1978); Peterson v. Hayes, 252 Pa. Super. Ct. 487, 381 A.2d 1311 (1977); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

21. *See, e.g.*, J.D.S. v. Edwards, 574 S.W.2d 405 (Mo. 1978); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

22. Because *Stanley* involved only a dependency proceeding in which an unwed father's continued custody was at issue, the Court did not discuss those procedures which may suffice in other proceedings. The Court emphasized, however, that "due process of law does not require a hearing 'in every conceivable case of government impairment of private interest.' . . . '[T]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation . . . .'" 405 U.S. at 650 (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894-95 (1961)).

Stanley also did not address the kinds of substantive restraints required in other actions. The Court left unclear whether a mere opportunity to offer proof on fitness or a "best interests of the child" standard would adequately protect an unwed father against arbitrary state action in other proceedings.

23. The Court stated that " 'what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action.' " *Id.* at 650-51 (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)). The Court failed to discuss, however, what weight other factors, such as the child's best interests or the mother's conflicting interests, should receive in the determination. (The Court, of course, had no occasion to weigh the effect of an unwed mother's interests in her child because the mother in *Stanley* was dead). The Court also did not indicate whether and how these factors might affect any substantive restrictions on state action.

opinion, the Court stated that the father's protected interest is the "private interest . . . of a man in the children he has sired and raised";[24] yet, in a subsequent footnote it spoke in much broader language about "[e]xtending opportunity for hearing to unwed fathers who desire and claim competence to care for their children."[25] This ambiguity in the Court's language has led to two distinct interpretations of the scope of procedural due process in actions affecting unwed father's parental interests.[26] One approach extends *Stanley*'s procedural due process protection to all unwed fathers;[27] the other confines that protection to those unwed fathers who have exhibited some degree of interest in their children.[28]

The *Stanley* Court also left ambiguous the nature and scope of its equal protection holding. In contrast to its extensive treatment of the due process issue, the Court dealt only superficially with the equal protection question.[29] As a result, the Court failed to discuss whether or

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24. *Id.* at 651.

25. *Id.* at 657 n.9.

26. *See* 58 MARQ. L. REV. 175, 176-77 (1975).

27. *See, e.g., In re* Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (1977) (statutory requirement in adoption matter that an effort be made to identify natural father and give him notice and opportunity to be heard complies with *Stanley*); *In re* Adoption of Lathrop, 575 P.2d 894 (Kan. Ct. App. 1978) (due process requires that unwed father be given actual notice of pending adoption whenever possible or constructive notice whenever father's identity and whereabouts are unknown and unascertainable by due diligence); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974) (all natural fathers entitled to notice and opportunity to be heard before termination of their parental rights).

Courts following this approach require actual notice to the natural father if his identity and location are known, or constructive notice, if unknown. *See, e.g.,* Lewis v. Lutheran Social Servs., 59 Wis. 2d 1, 207 N.W.2d 826 (1973). These courts, however, must balance the parental interests of unknown or unlocated fathers against the privacy interests of the unwed mothers. To comply with the notice requirement of *Stanley*, therefore, unwed mothers might be required to identify the unwed fathers. *See, e.g.,* N.J. STAT. ANN. § 9:17-11 (West 1976); UNIFORM PARENTAGE ACT §§ 10(b), 25(b). Furthermore, inclusion of the mother's name in a constructive notice might be required to alert the unwed father. Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing* Stanley v. Illinois, 9 FAM. L.Q. 527, 545 (1975). Unfortunately, *Stanley* provides little guidance for courts on how to balance these conflicting interests.

28. *E.g.,* Department of Health & Rehabilitative Servs. v. Herzog, 317 So. 2d 865 (Fla. Dist. Ct. App. 1975) (alleged natural father who showed no interest in illegitimate child need not be given notice and opportunity to be heard before child is adopted).

Courts following this approach need not confront the conflicting interests problems discussed in note 27 *supra*. An unwed father who has shown some degree of interest in his child is likely to be known and visible in the community. Thus, the mother has no privacy interest in maintaining the secrecy of his identity.

29. The Court summarily disposed of the equal protection question in one short paragraph. "[A]ll Illinois parents are constitutionally entitled to a hearing on their fitness before their children

how unwed fathers, consistent with the demands of equal protection, could ever be classified apart from married parents, married fathers, divorced fathers, or unwed mothers.[30] The Court also provided no equal protection guidelines for other parent-child proceedings.[31]

B. *Constitutional Recognition After* Stanley: Quilloin v. Walcott *and* Caban v. Mohammed

The Court's first significant interpretation of the *Stanley* principles came in *Quilloin v. Walcott*.[32] In *Quilloin* the natural father of an illegitimate child never had exercised or sought actual or legal custody over his child. Nine years after the mother married, her husband sought to adopt the child under a Georgia statute that required only the consent of the mother for adoption of an illegitimate child unless the natural father had legitimated the child.[33] Georgia adoption law required the consent of both the legitimate child's living parents, including those divorced or separated, unless a parent had been adjudged unfit or had voluntarily surrendered his parental rights.[34] The natural father, upon notification of the adoption petition, filed an application for a writ of habeas corpus to obtain visitation rights, a petition for legitimation, and an objection to the adoption; subsequently, he amended his pleadings to challenge the constitutionality of the state statute under the due process and equal protection clauses of the fourteenth amendment.[35] After a full hearing at which the father had an opportunity to offer evidence of his fitness, the trial court, without making a particularized finding of unfitness, ruled that the constitutional claims were without merit, denied the legitimation and visitation petitions, and granted the adoption petition "in the best interests of the

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are removed from their custody. . . . [D]enying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." 405 U.S. at 658 (footnote omitted).

30. The Court did not examine whether the difficulties in locating and identifying unwed fathers or the absence of established parental relationships might, at least in some cases, justify distinctions between unwed fathers and other classes of parents.

31. The Court did not discuss what weight the factors observed in note 30 *supra* should receive in a proceeding in which a state arguably has a more significant interest. An unwed father's past relationship with his child may be of less significance in an adoption proceeding in which the state seeks to give full recognition to a de facto family unit already in existence.

32. 434 U.S. 246 (1978).

33. GA. CODE § 74-403(3) (1973).

34. *Id.* §§ 74-403(1), -403 (2).

35. 434 U.S. at 250.

child."[36] The Georgia Supreme Court affirmed the decision of the trial court, relying on both the strong state policy in favor of rearing children in a family setting and the failure of the natural father to take steps to support or legitimate his child over a period of more than eleven years.[37]

The United States Supreme Court unanimously affirmed the judgment of the Georgia Supreme Court.[38] The Court reasoned that, under the circumstances of this case, the due process clause did not require the state "to find anything more than that the adoption, and denial of legitimation, was in the 'best interests of the child.' "[39] Even though the father was not found to be an unfit parent, he neither had nor ever sought actual or legal custody over the child; further, the adoption would give "full recognition to a family unit already in existence."[40] In response to the natural father's equal protection claim, the Court held that the state could properly grant him less authority to veto the adoption of his child than it provided a married father, even one who was divorced or separated.[41] Because this unwed father, unlike a married, separated, or divorced father, never had shouldered any significant responsibility for the supervision, education, protection, or care of his child, the state could validly distinguish this unwed father from a married father.[42]

The Court's opinion in *Quilloin* provides some direction for applying the *Stanley* principles. The *Quilloin* Court expressly addressed a substantive due process question and purported to recognize substantive due process rights in unwed fathers.[43] Furthermore, the decision sug-

36. *Id.* at 251-52.

37. *Id.* at 252-53; 238 Ga. 230, 232 S.E.2d 246 (1977).

38. 434 U.S. 246 (1978).

39. *Id.* at 255.

40. *Id.*

41. *Id.* at 256.

42. *Id.* The Court expressly reserved the question of whether the Georgia statutes unconstitutionally distinguished unwed parents on the basis of gender. *Id.* at 253 n.13.

43. Though the unwed father's substantive rights were not violated by application of a "best interests of the child" standard, the Court expressly recognized substantive due process rights in the father in *Quilloin*. *Id.* at 254. If an unwed father who has shown little or no interest in his child has substantive rights, then arguably, most if not all unwed fathers merit some substantive due process protection. The Court premised its due process discussion on the following observation:

> We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. . . . "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom

gests various interests that should be considered in determining the scope and potency of these rights, such as the child's best interests, the father's past and present responsibility over the child, and the existence or nonexistence of a de facto family unit. The Court left for future cases, however, how these interests should be weighed in other situations[44] and what other interests might be relevant to the determination.[45]

Despite the guidance offered by *Quilloin*, several questions remain. In analyzing the father's due process rights, the *Quilloin* Court acknowledged a distinction between custodial and noncustodial fathers, but left unclear the precise significance of this distinction. The Court expressly recognized that the trial court had afforded a hearing to the unwed father, but did not state whether a hearing was constitutionally required.[46] The Court specifically noted that the state had afforded the unwed father an opportunity to present proof of his fitness at a hearing, but did not assert that due process required the state to hear that proof. Whether the state would have been more severely restrained by the dictates of due process had the father been a custodial, responsible father remains an open question.[47] The Court held simply that the father's substantive due process rights in this case had not been impermissibly burdened by the state's application of the "best interests of the child" standard.

The Court's treatment of the equal protection issue also leaves open

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include preparation for obligations the state can neither supply nor hinder." . . . And it is now firmly established that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."

Id. at 255 (citations omitted).

44. Different results might obtain, for example, if the father had sought but was denied custody, if no de facto family existed at the time he petitioned for legitimation, or if the best interests of the child favored custody in the father.

45. Other relevant factors might include the past and present interest and involvement of the mother, the father, and the state.

46. *Id.* at 253-54 (suggesting that due process requires procedural protections for all fathers). *See* notes 26-28 *supra* and accompanying text.

47. The Court suggested that had the father been a custodial, responsible father, the state would have been required to prove the father unfit before permitting the adoption over his objection:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."

434 U.S. at 255 (citation omitted).

a significant question. The *Quilloin* Court recognized that unwed fathers could be distinguished from other classes of parents, or at least married fathers, in a manner consistent with equal protection, because the unwed father had not assumed responsibility for the child.[48] Whether this factor can justify classifications between fathers in other parental rights cases remains uncertain.

The most recent Supreme Court case to scrutinize the unwed father's parental relationship with his illegitimate child is *Caban v. Mohammed*.[49] In *Caban* the unwed father lived with his illegitimate children (and their mother) and contributed to their support for several years after their births. When the parents separated, the unwed mother took custody of the children and married. Sometime later the natural father, who had maintained contact with his children, by stealth took the children from their grandmother's temporary custody. The mother and her spouse then obtained a temporary custody order and filed a petition to adopt the children. The natural father and his new wife cross-petitioned for adoption, but a New York family court ruled that the best interests of the child would be served by severing all parental rights and obligations of the father and allowing the mother and her husband to adopt the children.[50] Under New York law, an unwed father, unlike an unwed mother, had no authority to block the adoption of his children by withholding his consent.[51] The unwed father could prevent his child's adoption only by showing that the adoption would not be in the child's best interests.[52]

After receiving unfavorable dispositions from the New York appellate courts,[53] the unwed father challenged the New York law before the Supreme Court on two grounds. First, he argued that the statutory distinction between the "adoption rights" of unwed fathers and those of other parents violated the equal protection clause of the fourteenth amendment.[54] Second, he contended that the statute denied his right

48. *See* notes 41-42 *supra* and accompanying text.

49. 441 U.S. 380 (1979).

50. *Id.* at 383-84.

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

52. 441 U.S. at 387.

53. *In re* David A.C., 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977); *In re* David Andrew C., 56 A.D.2d 627, 391 N.Y.S.2d 846 (1976).

54. 441 U.S. at 385. The Court reformulated the father's equal protection challenge, as reflected in its holding, to specifically address the validity of the gender-basis of the classification. *Id.* at 382, 388. *See also id.* at 389 n.7.

under the due process clause to maintain a parental relationship with his children absent a finding of his unfitness.[55] In reversing the New York courts, the Supreme Court addressed only the former ground,[56] holding that the inflexible distinction between the rights of unwed mothers and unwed fathers was an invalid gender-based distinction.[57] Because the gender-based distinction bore no substantial relationship to an important state interest—and, in particular, to the proclaimed state interest in promoting the adoption of illegitimate children—the classification deprived unwed fathers of equal protection of the laws.[58]

In reaching its conclusion, the Court discussed various gender-based classifications that might satisfy equal protection. The absence of past responsibility for the child,[59] for example, might justify a flexible gender-based classification.[60] Even an inflexible gender-based distinction, similar to that in the New York statute, might be valid if addressed specifically to newborn adoptions[61] because of the special difficulties attendant at birth upon locating and identifying unwed fathers and the

55. *Id.* at 385.

56. In a footnote, the Court specifically stated that it "express[ed] no view as to whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit." *Id.* at 394 n.16. This footnote suggests that the Court has yet to determine, to its satisfaction, the substantive due process rights of unwed fathers. In the dissent's view, "the relationship between a father and his natural child [if and when one develops] is entitled to protection against arbitrary state action as a matter of due process." *Id.* at 414 (Stevens, J., dissenting). The dissent also commented that a state adoption decree might be consistent with due process if supported by a finding that the adoption will serve the best interests of the child. *Id.* at 414-15.

57. *Id.* at 382.

58. *Id.* at 394.

59. *See* notes 41-42 *supra* and accompanying text.

60. "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the state from withholding from him the privilege of vetoing the adoption of that child." 441 U.S. at 392.

The Court found that the father in *Caban* had established a substantial relationship with his child. The father had supported the child, retained custody of the child, and maintained contact with the child when not in his custody. Furthermore, the father was seeking to adopt his child. Relying on *Quilloin*, the Court reiterated the importance of "the relationship that in fact exists between the parent and child." *Id.* at 393 n.14. The inflexible gender-based distinction made in the New York law improperly disregarded these important relationships.

61. *Id.* at 392-93. In a footnote, however, the Court specifically declined to address this issue. *Id.* at 392 n.11. All the Court purported to conclude was that the inflexible New York distinction could not be justified by "any universal difference between maternal and paternal relations at every phase of a child's development." *Id.* at 389. The dissent, on the other hand, read the Court's opinion to hold the New York distinction invalid only insofar as it applied to fathers of older children who had established a substantial relationship with their children and had admitted their paternity. *Id.* at 416 (Stevens, J., dissenting).

absence of a substantial relationship between fathers and their newborns.[62]

C. *Nonrecognition of Parental Rights by the States*

In apparent conflict with *Stanley*,[63] several states continue to exclude all unwed fathers from the classification of "parents."[64] Furthermore, many states do not recognize as parents, or as having specific legal incidents of parenthood, those unwed fathers who have not established or affirmatively asserted their parental roles.[65] These more refined distinctions may be justifiable, however, under *Quilloin* and *Caban*.[66]

In addition, most states rebuttably presume that a child born or conceived in wedlock is legitimate.[67] This presumption, which is normally

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62. *Id.* at 392-93.

63. *See* notes 11-12 *supra* and accompanying text. According to one commentator, the key principle in *Stanley* is that a natural father is entitled to full parental rights absent a finding of his unfitness. 25 BUFFALO L. REV. 787, 793 (1976).

64. Georgia, Mississippi, and New Jersey still maintain laws that exclude all unwed fathers from the classification of parents. GA. CODE ANN. § 74-403(3) (1973) (mother of illegitimate child is only "recognized" parent); MISS. CODE ANN. § 93-17-5 (1972) (father of illegitimate child is not parent for adoption purposes); N.J. STAT. ANN. § 9:3-18(f) (West 1976) (father of illegitimate child is not parent under adoption statute). *But cf.* B. v. E.B., 152 N.J. Super. 546, 378 A.2d 90 (Union County Ct. 1977) (questioned statute's constitutionality and denied adoption in absence of unwed father's consent).

The continued existence of these general exclusionary provisions may be more a product of legislative indolence than of a conscious effort to disregard the *Stanley* directive.

65. A few states totally deny parental rights and status to unwed fathers who have not asserted or established that role. In Idaho, for example, the father of an illegitimate child is not classified a "parent" unless he acknowledges his child and receives it into his family. *See* IDAHO CODE §§ 16-1510, -2002 (1979).

More commonly, states deny only specific incidents of parenthood to unwed fathers who have not established or asserted their parental roles. *See, e.g.,* ALASKA STAT. §§ 20.15.040(a)(2) (1975), 20.15.050(a)(3) (Supp. 1979) (unwed father's consent to adoption required only if father has legitimated the child); CONN. GEN. STAT. § 45-61d (1979) (notice of proceeding to terminate unwed father's parental rights need be given only to an acknowledged or adjudicated father); FLA. STAT. ANN. § 63.062 (West Supp. 1979) (unwed father's consent to adoption required if father is an adjudicated or acknowledged father); GA. CODE ANN. § 74-203 (1973) (unwed father is not entitled to custody of his child unless he legitimates the child).

66. *See* notes 40-42, 59-60 *supra* and accompanying text. It is likely that an unwed father who has not established or asserted his parental role is a father who has not assumed parental responsibility for his children. *Quilloin* and *Caban* indicate that in these circumstances a father may not merit the same constitutional protection as a custodial, responsible father or an unwed mother.

67. *See* Appendix A for a list of states that recognize presumptions of legitimacy. Most presumptions of legitimacy are rebuttable and generally arise when a child is conceived or born while a man and woman are married. *See, e.g.,* Knauer v. Barnett, 360 So. 2d 399 (Fla. 1978); Kuhns v. Olson, 258 Iowa 1274, 141 N.W.2d 925 (1966). A few states recognize a conclusive presumption of

given great weight,[68] may operate to deny natural fathers recognition of their parental roles in contravention of the *Stanley* principle that "a presumption that distinguishes and burdens all unwed fathers" is constitutionally repugnant.[69] If a state is able to show, however, that its presumption promotes significant state objectives,[70] it probably can tailor its presumption to comply with *Quilloin* and *Caban*.[71]

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legitimacy when, for example, a child is born or conceived in a marriage characterized by cohabitation of husband and wife. *See, e.g.*, Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960); OR. REV. STAT. § 41.350(b) (1977).

68. If the presumption is conclusive, it carries the weight of a rule of law. If the presumption is rebuttable, the presumed father, and perhaps the natural father, may rebut the presumed paternity. That rebuttal may be effectively denied, however, by imposing a stringent standard of proof on the rebutter. *See, e.g.*, Simpson v. Blackburn, 414 S.W.2d 795 (Mo. Ct. App. 1967) (presumption of legitimacy of child born in wedlock is strongest presumption known to the law); *In re* Scott's Estate, 61 S.D. 253, 248 N.W. 247 (1933) (same); IDAHO CODE § 7-1119 (1979) (presumption of legitimacy of child born during wedlock is overcome only if all experts show that husband is not the father); ILL. ANN. STAT. ch. 106 3/4, § 5 (Smith-Hurd Supp. 1978) (same).

Some states do not permit unwed fathers to rebut the presumption of legitimacy. *See, e.g.*, S.D. COMP. LAWS ANN. § 25-5-4 (1976) (only husband and wife can dispute presumption).

Although some unwed fathers may appreciate these presumptions as an opportunity to escape their moral responsibility to support their children (an opportunity not available to other fathers), others might desire to satisfy their parental obligations.

69. 405 U.S. at 649. A presumption that effectively denies unwed fathers the opportunity to rebut the presumed paternity of husbands and precludes these fathers from establishing their paternity is tantamount to a presumption that unwed fathers are not suitable parents. *See In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975) (presumption of legitimacy not rebuttable by alleged unwed father held to deny his due process right to offer proof of his paternity); notes 11-12 *supra* and accompanying text; note 73 *infra* and accompanying text. *But see* Smith v. Gummo, 1 Civ. No. 40863 (Cal. Ct. App. 1977) (conclusive presumption of legitimacy held not to deny alleged unwed father due process), *appeal dismissed*, 439 U.S. 802 (1978). *Cf.* Serafin v. Serafin, 67 Mich. App. 517, 241 N.W.2d 272 (1976) (exclusion of husband or wife's testimony in paternity dispute about access or nonaccess of husband to wife held to deny husband due process). *But cf.* County of San Diego v. Brown, 80 Cal. App. 3d 297, 145 Cal. Rptr. 483 (1978) (conclusive presumption of legitimacy held not to deny husband due process or equal protection).

70. In Murphy v. Houma Well Serv., 413 F.2d 509 (5th Cir. 1969), the court recognized that a presumption of legitimacy furthers a state interest in protecting the intimate family relationship from divisive and destructive attacks by those seeking to challenge the legitimacy of children born during wedlock. Similarly, the court in *In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975), suggested that the state's interests in relieving a child of the stigma of illegitimacy and in promoting marriage by not impugning the family unit might justify rebuttable presumptions of legitimacy.

71. *Quilloin* and *Caban* indicate that an unwed father who has not assumed parental responsibility for his children may not merit the same constitutional protection as a custodial, responsible father. *See* notes 40-42, 59-60, 66 *supra* and accompanying text. Thus, rebuttable presumptions of legitimacy might be validly applied if no other man purports to be the father of a presumably legitimate child, or if a man who purports to be the father of an illegitimate child has not evidenced a parental relationship.

D. *Methods to Obtain Affirmative Recognition of Parental Rights*

Unlike the married parent (and the unwed mother) whose legal parental role attaches at the birth of the child, the father of an illegitimate child must affirmatively assert or establish his role to receive full legal recognition of his parental rights.[72] The *Stanley* decision and subsequent cases suggest that at least some unwed fathers have a constitutional right to establish their paternity.[73] In fact, most states provide some affirmative device by which unwed fathers may obtain full legal recognition of their parental roles.[74] States that do not provide such mechanisms may unconstitutionally deny unwed fathers their parental interests.

One device available in most states is a statutorily conferred right of unwed fathers to legitimate their illegitimate children,[75] a process through which all reciprocal rights and duties between parent and child attach to the father and his legitimated child.[76] Although some states condition the father's right to legitimate his child upon the consent of the mother,[77] "it is doubtful, under the *Stanley* decision, that the

72. Most states require unwed fathers to assert or establish parental relationships with their illegitimate children to become recognized parents or to acquire certain incidents of parenthood. *See* notes 65-66 *supra* and accompanying text. As a practical matter, moreover, all incidents of parenthood cannot attach to a father until it is known who the father is. Thus, even states that recognize the parental interests of all natural fathers require claim and proof of paternity before they will vindicate a particular father's parental rights. *See, e.g.,* UNIFORM PARENTAGE ACT §§ 3(2), 25(d); Appendix A (listing the states that have adopted the Act).

73. *See In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975) (denial of due process to preclude unwed father who maintained contact with his child from establishing his paternity); Johannesen v. Pfeiffer, 387 A.2d 1113 (Me. 1978) (because unwed fathers have a right to establish their paternity, complaint seeking declaration of paternity should not have been dismissed).

74. *See* notes 75, 83-85 *infra* and accompanying text.

75. *See* Appendix B. One class of statutes legitimates an illegitimate child when the parents marry. Another class legitimates a child on the petition, declaration, or acknowledgment of its father. *See generally* Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 236-42 (1971).

76. *See, e.g.,* IDAHO CODE § 16-1510 (1979) (legitimated child deemed legitimate for all purposes); LA. CIV. CODE ANN. art. 199 (West 1952) (legitimated child has same rights as if child was born during marriage); UTAH CODE ANN. § 78-30-12 (1977) (legitimated child deemed legitimate for all purposes).

In some states, the father can legitimate his child only for particular enumerated purposes. *See, e.g.,* Hurst v. Wagner, 181 Wash. 498, 43 P.2d 964 (1935) (paternal acknowledgment conferred on illegitimate child only the right to inherit from father); C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 645 (2d ed. 1976).

77. *See, e.g.,* OHIO REV. CODE ANN. § 2105.18 (Page Supp. 1978) (consent of mother expressly required). According to one commentator, "For the most part, legitimation statutes are of

mother could bar absolutely the child's being declared legitimate in regard to the father," especially if the father demonstrates both an interest in and a willingness to support the child.[78] A number of states also require the unwed father to prove his fitness under the "best interests of the child" test to legitimate his child.[79] Although *Quilloin* upheld the use of this standard to deny the right of a noncustodial, irresponsible father to legitimate his child,[80] the Court emphasized that the father was attempting to use that device only to bar the adoption of his child into a de facto family unit.[81] Furthermore, the Court recognized that the father's attempt to legitimate his child, despite his motives, merited some substantive protection under the due process clause of the fourteenth amendment.[82] Thus, *Quilloin* implies that even if states can dilute the right of some unwed fathers to establish their parental roles by legitimation, the states cannot deny unwed fathers the right altogether.

Many states provide judicial forums through which unwed fathers can obtain legal recognition of their full parental roles. Some paternity statutes expressly grant unwed fathers standing to pursue a determina-

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little use to the father whose rights in his child are opposed by the mother. By law or practice, the mother has an absolute veto over legitimation." Tabler, *supra* note 75, at 241.

Clearly, an unwed mother controls legitimation by intermarriage, as marriage is possible only with the consent of the mother. In addition, however, many statutes permitting legitimation by acts of the father require notice to the mother and subject the legitimation petition to the "best interests of the child" test. *See, e.g.*, ALA. CODE tit. 26, § 26-11-2 (1975); GA. CODE ANN. § 74-103 (1973). Under these statutes the mother may effectively veto a legitimation by showing that it is not in the child's "best interests," or the child's "best interests" may be defined so narrowly as to preclude legitimation in most cases. *Cf.* Roe v. Conn, 417 F. Supp. 769 (D. Ala. 1976) (because legitimation might be adverse to interests of mother and her illegitimate child in the exercise of their family integrity, due process minimally requires that mother be given notice and opportunity to object before legitimation takes effect).

78. *Compare* Schwartz, *Rights of a Father With Regard to His Illegitimate Child*, 36 OHIO ST. L.J. 1, 7 (1975), *with* cases cited note 73 *supra*.

79. *See* note 77 *supra*. *See also* Roe v. Conn, 417 F. Supp. 769 (D. Ala. 1976) (probate court must determine upon notification of objection to legitimation whether legitimation is in best interests of child); Quilloin v. Walcott, 238 Ga. 230, 232 S.E.2d 246 (1977) (trial court can deny legitimation petition of unwed father who did not at any time have or seek custody of his child, if in "best interests of the child"), *aff'd*, 434 U.S. 246 (1978); *In re* K., 535 S.W.2d 168 (Tex.) (trial judge has discretion to deny petition of irresponsible, unwed father to legitimate his child, if best interests of child require that result), *cert. denied*, 429 U.S. 907 (1976).

80. 434 U.S. at 253-54.

81. *Id.* at 253-55. In a situation in which no de facto family unit exists, a state might not have a sufficient interest to deny legitimation on the basis of the child's best interests; *i.e.*, the state might have to find the father unfit to deny him legitimation.

82. *See* note 43 *supra* and accompanying text.

tion of paternity.[83] In those jurisdictions with statutes that do not provide standing, unwed fathers might be able to bring an action in equity[84] or obtain a judicial declaration of their parental status.[85]

II. PARENTAL OBLIGATIONS

Although the law once placed liability for support of illegitimate children solely on the unwed mother, all fifty states by statute currently charge the unwed father with an obligation to support his illegitimate children.[86] In fact, numerous statutes impose the primary obligation of support on the adjudicated natural father.[87] Since 1970, however, the majority of newly adopted state laws have imposed equal support obligations on parents of legitimate children.[88] The question thus arises

83. UNIFORM PARENTAGE ACT § 6(c) provides: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father . . . may be brought by . . . a man alleged or alleging himself to be the father." *See* Appendix A (listing the states that have adopted the Act). *But see* Ford v. Loeffler, 363 So. 2d 23 (Fla. Dist. Ct. App. 1978) (Florida paternity cause of action does not extend to putative father). *See also* ALA. CODE tit. 26, § 26-12-1 (1975); CONN. GEN. STAT. §§ 46b-160, -162 (1979); IDAHO CODE § 7-1115 (1979); ILL. ANN. STAT. ch. 106 3/4, § 54 (Smith-Hurd Supp. 1978).

84. *See generally* Felder v. Allsopp, 391 A.2d 243 (D.C. 1978) (visitation privileges may be acquired under equitable powers of court even though statute of limitations applicable to proceedings to establish parentage has run).

Many jurisdictions impose a statute of limitations on proceedings to establish parentage. *See, e.g.,* UNIFORM PARENTAGE ACT § 7; Appendix A (listing the states that have adopted the Act). In some situations, application of these statutes may operate to deny unwed fathers an opportunity to establish their paternity. *But cf.* Texas Dep't of Human Resources v. Chapman, 570 S.W.2d 46 (Tex. Civ. App. 1978) (one-year limitation on bringing paternity suit held reasonably related to legitimate state interest in precluding litigation of stale or fraudulent claims; no denial of illegitimate children's due process or equal protection rights).

85. Several courts permit an unwed father to establish his paternity through a declaratory judgment. *See* A.B. v. C.D., 150 Ind. App. 535, 277 N.E.2d 599 (1971); Johannesen v. Pfeiffer, 387 A.2d 1113 (Me. 1978); O.F.L. v. M.R.R., 518 S.W.2d 113 (Mo. Ct. App. 1974); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

86. *See* TEX. FAM. CODE ANN. tit. 2, § 13.09 (Vernon Supp. 1978); Reeves, *supra* note 1, at 145-47 (citing statutes in all states except Texas).

87. *See, e.g.,* Wingard v. Sill, 223 Kan. 661, 576 P.2d 620 (1978); CONN. GEN. STAT. § 46b-171 (1979); GA. CODE ANN. § 74-202 (1973).

Sexual disparity in relative support obligations may be permissible as benign discrimination. People v. Elliot, 186 Colo. 65, 525 P.2d 457 (1974) (father-only support statute upheld in reliance on Kahn v. Shevin, 416 U.S. 351 (1974)). *But cf.* Orr v. Orr, 440 U.S. 268 (1979) (Alabama alimony statutes providing that husbands, but not wives, may be required to pay alimony upon divorce held to create unconstitutional gender-based classification).

88. Foster & Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, 323 (1978). *See* Freed & Foster, 3 FAM. L. REP. (BNA) 4047, 4052 (1977). In addition, equality of support obligations probably is required in those states which have enacted an equal rights amendment. *See* C. FOOTE, R. LEVY & F. SANDER, *supra* note 76, at 830.

whether either the legislatures or the courts will extend these changes uniformly to parents of illegitimate children.[89]

Unlike the father of a legitimate child, whose legal duty to support arises at the child's birth, the unwed father generally becomes legally liable for support only after some further affirmative action.[90] The unwed father may never become legally obligated for support, in fact, if the unwed father cannot be identified or located or is excluded from the

89. Although states may be relying upon Kahn v. Shevin, 416 U.S. 351 (1974); *see* note 87 *supra*, to justify placing a heavier burden of support on fathers than on mothers, constitutional difficulties may arise if states place a heavier burden of support solely on unwed fathers. *Stanley* probably prohibits this categorical encumbrance. Wingard v. Sill, 223 Kan. 661, 576 P.2d 620 (1978), suggests, however, that under certain circumstances imposition of this burden may be justified. In *Sill* an unwed father challenged the constitutionality of the Kansas paternity act because it placed a greater burden of support and responsibility on him than on the unwed mother. The court upheld the statute on the ground that the mother supported the child long before the court ordered the father to assume support. Undoubtedly, the court felt that imposing a greater burden on the father compensated the mother for the financial burden she had carried in the past. The court also upheld the statute in its application to only *unwed* fathers, reasoning that married fathers were subject to similar support obligations. The court intimated, however, that even had the unwed fathers' obligations been greater, the disparity might be justified by the period of time that they were without obligation.

90. In some states, a statutorily defined duty to support attaches to the unwed father only when his paternity is established in a judicial proceeding. *See, e.g.,* Wingard v. Sill, 223 Kan. 661, 576 P.2d 620 (1978) (regardless of any moral obligation, legal responsibility does not arise until paternity is adjudicated); ILL. ANN. STAT. ch. 106 3/4, § 52 (Smith-Hurd Supp. 1978) (father whose paternity is established in paternity proceeding is liable for support). In other states, however, the unwed father is deemed legally obligated to support his child from birth, but an establishment of paternity and a court order of specific payments are still required before enforcement devices will be employed. *See, e.g.,* N.J. STAT. ANN. §§ 9:16-2, -3 (West 1976) (either parent can bring proceeding against the other to enforce support obligations); N.M. STAT. ANN. §§ 22-4-1, -3, -8 (Supp. 1975) (same); OKLA. STAT. ANN. tit. 10, §§ 71, 83 (West 1966) (any person can bring proceeding to enforce father's support obligation).

Nevertheless, courts may hold an adjudicated natural father liable retroactively for expenses that accrued before the attachment of any duty or order of support. Some statutes clearly contemplate retroactive extension of support liability by expressly limiting the number of years a court can hold an illegitimate father liable retroactively for support expenses. *E.g.,* N.M. STAT. ANN. § 22-4-3 (Supp. 1975) (absent a previous written demand, a parent cannot recover more than two years' support accruing before action); UTAH CODE ANN. § 78-45a-3 (1977) (liability for past support limited to four years before action).

A support obligation attaches to an unwed father who legitimates his child. The duties owed by a father to his legitimate child also arise when the father legitimates his child. *See generally* C. FOOTE, R. LEVY & F. SANDER, *supra* note 76, at 644; note 76 *supra* and accompanying text.

Some states allow the unwed father to legitimate his child for certain purposes, without acquiring a concommitant duty to support his child. *See* Hurst v. Wagner, 181 Wash. 498, 43 P.2d 964 (1935) (paternal acknowledgment, conferring on illegitimate child the right to inherit from the father, did not authorize recovery from father's estate for past support expenses of child); C. FOOTE, R. LEVY & F. SANDER, *supra* note 76, at 645.

definition of "parents,"[91] the husband of the child's mother is presumed the father,[92] or the unwed mother's husband consents to standing *in loco parentis* as the father of the child.[93]

In *Gomez v. Perez*[94] the Supreme Court nevertheless held that equal protection requires that illegitimate children receive the same enforceable right to support granted to legitimate children.[95] Arguably, therefore, if the support rights of illegitimate children against their natural fathers are the same as those of legitimate children against their fathers, then the support obligations of unwed fathers must be the same as those of other fathers.[96] In actual practice, however, this theory is not effectuated.[97]

In addition to imposing a duty of support, paternity statutes commonly place on the adjudicated natural father liability for the unwed mother's pregnancy expenses.[98] The express imposition of this liability on unwed fathers has been held not to distinguish unconstitutionally married and unmarried fathers.[99] Whether it impermissibly distin-

91. *See* notes 64-65 *supra* and accompanying text.

92. *See* notes 67-69 *supra* and accompanying text.

93. *See* Hall v. Rosen, 50 Ohio St. 2d 135, 363 N.E.2d 725 (1977).

94. 409 U.S. 535 (1973).

95. *Id.* at 538.

96. Theoretically, the child's right is the reciprocal of the father's duty. Thus, if the child's rights are equal, presumably the father's duties are equal. In Wingard v. Sill, 223 Kan. 661, 576 P.2d 620 (1978), the court upheld the Kansas paternity statute against an equal protection challenge that imposed a greater support obligation on the unwed father than on the married father. The court saw no difference in the responsibility statutorily imposed on an unwed father from that imposed on a married father by virtue of his status as a husband and the child's father. *See* note 89 *supra*. In fact, many statutes expressly impose the obligations of married fathers on unmarried fathers. *See, e.g.,* ALA. CODE § 26-12-4 (1975); ILL. ANN. STAT. ch. 106 3/4, § 52 (Smith-Hurd Supp. 1978); IND. CODE ANN. § 31-6-6-2 (Burns Supp. 1978); KY. REV. STAT. ANN. § 406.011 (Baldwin 1973); MISS. CODE ANN. § 93-9-7 (1972).

97. Some unwed fathers probably never become legally obligated for support. *See* text accompanying notes 91-93 *supra*. Moreover, support awards for legitimate children in divorce actions are often larger than those awarded to illegitimate children under paternity orders. *See* C. FOOTE, R. LEVY & F. SANDER, *supra* note 76, at 829. Furthermore, child support payments ordered pursuant to divorce statutes are almost invariably subject to modification, *id.* at 830, but a paternity statute that does not authorize alterations may be read to preclude a court from modifying a support order directed against unwed fathers. *See* Carter v. Clausen, 263 Ark. 344, 565 S.W.2d 17 (1978).

98. *See* Harkins, *supra* note 1, at 550.

99. Wingard v. Sill, 223 Kan. 661, 576 P.2d 620 (1978) (married father held jointly responsible for mother's medical expenses and thus subject to similar burden as unwed father under paternity statute).

guishes unwed mothers and unwed fathers is open to question.[100]

Paternity statutes generally stipulate the means by which a natural father's adjudicated obligations can be enforced. Although the means most typically specified are the ones frequently used to enforce a divorced father's support obligations,[101] an unwed father may be less subject to penal proceedings than a divorced father.[102] In *S. v. D.*,[103] the mother of an illegitimate child alleged that the district attorney declined to prosecute the unwed father for nonsupport because of the child's illegitimacy. The Supreme Court denied relief, holding that the mother had no standing to enjoin the district attorney to prosecute.[104] Because the prospect that prosecution would result in payment of support was only speculative, the mother's claim lacked the requisite direct relationship with the alleged injury.[105] The Court's reasoning thus effectively eliminates the standing of all parties to challenge discriminatory prosecution of criminal contempt[106] and thus permits states to subject unwed fathers to less stringent criminal sanctions than divorced fathers.[107]

III. ADOPTION RIGHTS

Before *Stanley*, the unwed father's rights in proceedings for the adoption of his illegitimate children were de minimis.[108] Most states

100. *See* notes 86-97 *supra* and accompanying text.

101. *See, e.g.*, ALA. CODE tit. 30, §§ 30-4-50, -81(7) (1975); ARIZ. REV. STAT. ANN. §§ 12-849, -851 (Supp. 1978); CAL. CIV. CODE § 7012(2) (Deering Supp. 1978); CONN. GEN. STAT. § 46b-178 (1979).

102. A state, for example, might want to enforce unwed fathers' support obligations less vigorously than it wishes to "punish" unwed mothers for their illicit activities. The party effectively punished, however, is the unsupported child of the illicit relationship.

103. 410 U.S. 614 (1973).

104. *Id.* at 619.

105. *Id.* at 618.

106. Because the Court characterized the alleged injury as "nonsupport," the relationship between the claim and the injury would not be made more direct by substituting the illegitimate child as the party who asserts the injury. Thus, no one has standing. If, however, the illegitimate child can persuade the court to recharacterize the injury as one to the child's status or integrity, the child may have standing, especially in light of the *S. v. D.* Court's reference to Gomez v. Perez, 409 U.S. 535 (1973).

107. The disparity in the availability of enforcement devices may be of little significance, however, because legal remedies for nonpayment of support are seldom invoked and are often ineffective when invoked. C. FOOTE, R. LEVY & F. SANDER, *supra* note 76, at 857.

108. Only a few appellate courts prior to *Stanley* permitted the unwed father to assert an interest in his illegitimate child even though the mother had consented to the adoption. *See In re* Doe, 52 Hawaii 448, 478 P.2d 844 (1970); *In re* Mark T., 8 Mich. App. 122, 154 N.W.2d 27 (1967);

did not afford the father either notice of or an opportunity to be heard on the prospective adoption.[109] The majority of adoption statutes required only the consent of the unwed mother; the unwed father's consent was not a prerequisite to adoption.[110]

Although *Stanley* did not focus on the unwed father's rights in adoption proceedings, language in the opinion suggests that reasonable efforts should be made to notify unwed fathers of a proposed adoption.[111] Conceivably, the state's interest in promoting the adoption of illegitimate children may render the procedural due process rights of unwed fathers in adoptions less substantial than in other proceedings. In any event, *Stanley* left unclear the precise scope of any procedural requirements in adoption actions.[112]

Rothstein v. Lutheran Social Services[113] further muddled the vague requirements of procedural due process in adoption proceedings. In *Rothstein* the Supreme Court vacated and remanded, in light of *Stanley v. Illinois*,[114] a Wisconsin case upholding the constitutionality of a state adoption law that denied the unwed father his substantive parental rights and his procedural right to notice of a preliminary hearing.[115] Although the Court's remand has been more broadly interpreted,[116] some courts read *Rothstein* merely to affirm the right of unwed fathers to be heard in adoption proceedings.[117] Some of those courts urge that

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In re Brennan, 270 Minn. 455, 134 N.W.2d 126 (1965); State *ex rel.* Baby Girl M., 25 Utah 2d 101, 476 P.2d 1013 (1970).

109. *See* H. CLARK, LAW OF DOMESTIC RELATIONS §§ 18.1, .4 (1968).

110. *See* H. CLARK, *supra* note 109, at §§ 18.4, .5; Tabler, *supra* note 75. According to one author, "The view was that the process of acquiring such consent would substantially hamper the work of welfare agencies concerned with adoption. Moreover, it could place all adoptions in a legally unstable position for extended periods of time." Schwartz, *supra* note 78, at 14.

111. The Court suggested that the incremental cost of affording unwed fathers an opportunity for a properly focused hearing in an adoption proceeding would be minimal. 405 U.S. at 657 n.9. The Court then spoke of "extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children" and cited the Illinois statute that extended notice to both known and unknown fathers. *Id.*

In a related discussion, a commentator maintains that "the constitutional duty of notice to the unwed father with respect to the termination of his parental rights requires a good faith effort by the state to notify him of a termination proceeding, even if such a father is unknown." Barron, *supra* note 27, at 546. *See generally* note 27 *supra* and accompanying text.

112. *See* notes 22-23, 26-31 *supra* and accompanying text.

113. 405 U.S. 1051 (1972).

114. *Id.*

115. Lewis v. Social Servs., 47 Wis. 2d 420, 428, 178 N.W.2d 56, 60 (1970).

116. *See* note 121 *infra*.

117. *See, e.g.*, Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972).

Rothstein establishes a constitutional right to notice and hearing for all unwed fathers.[118] The remaining courts restrict that right to custodial or responsible fathers.[119]

Although *Stanley* and *Rothstein* did not expound upon the substantive due process rights of unwed fathers in the adoption context,[120] both cases have been cited as recognizing the existence of such rights.[121] Few states, however, have granted *all* unwed fathers the authority to veto the adoption of their illegitimate children, even if similar authority is vested in all other parents.[122] Today, most adoption statutes require consent of only those unwed fathers who have asserted or established their parental role.[123]

Quilloin v. Walcott[124] indicates that the substantive due process rights of some unwed fathers in adoption proceedings may be limited. Although the unwed father was not found unfit, the *Quilloin* Court held that a paternal veto could be denied if in the child's best interests.[125] The Court suggested, however, that the father must have an opportu-

118. *See, e.g., id.* (all unwed fathers must be given notice and right to hearing in adoption proceedings); *cf. In re* Adoption of Lathrop, 575 P.2d 894 (Kan. Ct. App. 1978) (all unwed fathers must be given notice of proposed adoption).

119. *See, e.g.,* Department of Health and Rehabilitative Servs. v. Herzog, 317 So. 2d 865 (Fla. Dist. Ct. App. 1975) (all unwed fathers need not be given notice and opportunity to be heard before child can be adopted; within judge's discretion not to seek out natural father); *In re* Kenneth M., 87 Misc. 2d 295, 383 N.Y.S.2d 1005 (Fam. Ct. 1976) (unwed father who never lived with child not entitled to notice and hearing in adoption proceedings).

120. For a discussion of *Stanley*'s ambiguity on the requirements of substantive due process in various proceedings, see note 22 *supra*. In *Rothstein* the Court simply remanded the case in light of *Stanley*; it did not state that the unwed father's consent was a prerequisite to a valid adoption.

121. Quilloin v. Walcott, 434 U.S. 246, 247-48, 254-55 (1978), and Caban v. Mohammed, 441 U.S. 380, 394 n.16, 414-15 (1979) (Stevens, J., dissenting), cited *Stanley* for this proposition. The Wisconsin court on remand of *Rothstein* held that the state adoption law unconstitutionally denied the rights of unwed fathers; the consent of both the father and the mother of an illegitimate child was thereafter necessary. 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

122. *See* Appendix C (table of adoption statutes). *But cf.* Adoption of Walker, 568 Pa. 165, 360 A.2d 603 (1976) (provision in state adoption act requiring the consent of only the mother for adoption of illegitimate child declared unconstitutional under Pennsylvania Equal Rights Amendment).

123. *See* Appendix C (table of adoption statutes); *In re* Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (1977) (natural father has right to veto adoption); *cf. In re* Johnson, 54 Ill. App. 3d 627, 370 N.E.2d 560 (1977) (natural father not declared unfit has right to veto adoption); *In re* Gerald G.G., 61 A.D.2d 521, 403 N.Y.S.2d 57 (1978) (devoted and concerned natural father has right to veto adoption in child's best interests).

124. 434 U.S. 246 (1978).

125. *Id.* at 255. *See* note 33 *supra* and accompanying text.

nity to offer evidence of his fitness.[126] Furthermore, the unwed father's failure to exercise or seek actual or legal custody over the child[127] and his attempt to break up a de facto family unit were crucial to the Court's decision.[128] Thus, all unwed fathers may have some protected substantive rights in adoption proceedings,[129] but the substantive rights of an unwed father in a *Quilloin*-type situation can be "restricted" by the "best interests" standard.[130]

Both *Quilloin* and *Caban v. Mohammed*[131] examined the equal protection rights of unwed fathers in adoption proceedings. *Quilloin* held that a noncustodial, irresponsible father could be given less veto authority than a married father.[132] Similarly, *Caban* suggested that classifications between unwed mothers and unwed fathers who had not established substantial relationships with their children might be per-

126. 434 U.S. at 253. *See* notes 47-48 *supra* and accompanying text.

127. 434 U.S. at 255. *See* text accompanying note 38 *supra*.

128. The Court emphasized that fully recognizing a de facto family unit was a substantial countervailing interest not present in *Stanley*. 434 U.S. at 248, 255. *See* note 38, *supra* and accompanying text.

129. *See* note 43 *supra* and accompanying text.

130. *Cf.* Berry v. Samuels, 145 Ga. App. 687, 244 S.E.2d 593 (1978) (unwed father who never sought to legitimate child and never shouldered any significant responsibility for child had no standing to object to adoption by maternal aunt who had custody of child for several years); *In re* Adoption of Lathrop, 575 P.2d 894 (Kan. Ct. App. 1978) (unwed father who does not appear and assert his desire to care for child after notified of pending adoption need not consent to adoption).

The extent that substantive rights may be restricted, however, remains unclear after *Quilloin*. *See* notes 44-45, 47 *supra* and accompanying text. The Court did not discuss other countervailing interests that might be deemed substantial or other permissible ways to distinguish among unwed fathers for the purpose of analyzing the substantive restraints of due process. *Compare* Adoption of Marie R., 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (1978) (putative father who had not maintained contact with child cannot object to adoption sought by unwed mother even though mother prevented him from contacting child), *with In re* Adoption of Lathrop, 575 P.2d 894 (Kan. Ct. App. 1978) (unwed father's parental rights cannot be lessened by virtue of his failure to perform his parental responsibilities if he has been prevented from doing so by outside agencies). *Compare also In re* Martin, 357 So. 2d 893 (La. Ct. App. 1978) (unwed father's consent to adoption not necessary if he did not formally acknowledge or legitimate child), *with* Aslin v. Seamon, 225 Kan. 77, 587 P.2d 875 (1978) (unwed father who notoriously and in writing recognized his paternity must consent to adoption even if he is not adjudicated the natural father); Caban v. Mohammed, 441 U.S. 380, 393 n.14 (1979) (Court emphasized significance of "the relationship that in fact exists between the parent and child"), *with* Parham v. Hughes, 441 U.S. 347 (1979) (Court upheld statute requiring formal legitimation of child as prerequisite for unwed father to sue for child's wrongful death).

131. 441 U.S. 380 (1979).

132. *Quilloin* did not purport to hold that unwed fathers who had assumed some parental responsibility for their children could be granted less veto authority than other fathers. In fact, *Caban* expressly reserved that question for future consideration. *Id.* at 394 n.16

missible.[133] As a general proposition, therefore, the interest of a state in promoting the adoption of illegitimate children may justify most classifications between noncustodial, irresponsible fathers and other classes of parents.

IV. CUSTODY RIGHTS

At common law the unwed mother had a "natural" right to the custody of her illegitimate child.[134] As case law developed, the unwed father acquired a right to custody superior to all persons except the mother.[135] In custody cases stemming from divorce, courts developed a judicial preference for the mother as custodian.[136] Courts applied a more-stringent preference, however, to cases in which an unwed mother asserted a right to custody of her illegitimate child.[137] Before *Stanley*, in fact, the unwed father had to prove maternal unfitness to obtain custody.[138]

Stanley provides little guidance for analyzing the conflicting interests of unmarried parents in a custody decision.[139] *Stanley* clearly prohibits states from summarily vesting in all unwed mothers the exclusive right to custody of their illegitimate child,[140] but whether *Stanley* absolutely

133. *See* notes 59-60 *supra* and accompanying text. *Caban* held only that an *inflexible* denial to all unwed fathers of the veto authority granted unwed mothers violated equal protection. *See* note 57 *supra* and accompanying text.

134. *See* Reeves, *supra* note 1, at 116-17 (citing Queen v. Nash, 10 Q.B.D. 454 (C.A. 1883); The King v. Hopkins, 103 Eng. Rep. 224 (K.B. 1806); The King v. Soper, 101 Eng. Rep. 156 (K.B. 1793)).

135. *See* Schwartz, *supra* note 78, at 8.

136. *See* C. FOOTE, R. LEVY & F. SANDER, *supra* note 76, at 408. The presumption was often referred to as the "tender years doctrine." *Id.* This preference applied only to custody disputes over young children.

137. *See* Marcus, *Equal Protection: The Custody of the Illegitimate Child*, 11 J. FAM. L. 1, 23 (1971).

138. Roe v. Doe, 58 Misc. 2d 75, 296 N.Y.S.2d 865 (Fam. Ct. 1968); Meredith v. Meredith, 272 A.D. 79, 69 N.Y.S.2d 462, *aff'd*, 297 N.Y. 692, 77 N.E.2d 8 (1947); Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965). *See generally*, Tabler *supra* note 75.

Typical of the statutes embodying the mother's prima facie right were CAL. CIV. CODE ANN. § 200 (Deering 1971) and OR. REV. STAT. § 109.080 (1968). *See generally* Marcus, *supra* note 137.

139. *See* note 23 *supra*.

140. Statutes vesting an exclusive right to custody in unwed mothers would be tantamount to a presumption that all unmarried fathers are unsuitable parents; *Stanley* held this presumption invalid. *See* note 69 *supra*. *See also* notes 141-42 *infra* and accompanying text. In apparent conflict with *Stanley*, however, some statutes continue to vest a right to custody of illegitimate children solely in unwed mothers. *See, e.g.*, N.J. STAT. ANN. § 9:16-1 (West 1976) (mother has exclusive right to custody and control; however, E. v. T., 124 N.J. Super 535, 308 A.2d 41 (1973), held this

prohibits the granting of any preference to unwed mothers in custody decisions is not clear.

Vanderlaan v. Vanderlaan,[141] a case vacated and remanded in light of *Stanley*, suggests that a strong presumption in favor of the unwed mother will not withstand judicial scrutiny if the best interests of the illegitimate child would be served by allowing the father to retain custody.[142] Yet, in expressly recognizing the unwed father's right to the "companionship, care, custody and management" of his children,[143] *Quilloin* suggests that the degree of constitutional protection afforded a particular unwed father's parental rights may turn on the father's past and present relationship with his child and the presence or absence of substantial countervailing interests.[144] Thus, states may be permitted, in the child's best interest, to give precedence to the judicial preference of maternal custody over the custody rights of some unwed fathers.[145]

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section inapplicable to an admitted natural father); S.D. COMP. LAWS ANN. § 25-5-10 (1976) (mother entitled to custody).

Some states give only certain unwed fathers a right to custody. *See, e.g.,* GA. CODE ANN. § 74-203 (1973) (mother entitled to possession of child unless the father legitimates the child); UTAH CODE ANN. § 77-60-12 (1978) (father has no right to custody of child under 10 years old unless mother is unfit). These latter, more "tailored," laws may be valid under *Quilloin* and the implications of *Caban*. *See* notes 40-42, 44-45, 48, 59-62 *supra* and accompanying text.

141. 405 U.S. 1051 (1972). The Supreme Court vacated and remanded a state appellate court's reversal of a trial court determination that it was in the best interests of the illegitimate children to remain in the custody of their father. The state appellate court had invoked the state public policy against granting unwed fathers custody. *See* Vanderlaan v. Vanderlaan, 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970).

142. Because the mother in *Vanderlaan* contested the unwed father's custody, the case was unlike *Stanley*, in which the conflicting rights of an unwed mother were not present. *See* note 23 *supra*. By its remand the Court nevertheless suggested that the mother's custody rights cannot override the father's, at least if the child's best interests do not so require.

143. Quilloin v. Walcott, 434 U.S. 246, 248 (1978).

144. *See* note 40 *supra* and accompanying text; *cf.* Caban v. Mohammed, 441 U.S. 380, 393 n.14 (1979) (emphasizing the significance of an established parental relationship).

145. Caban v. Mohammed, 441 U.S. 380 (1979), indicates that in these circumstances a maternal preference may be inflexibly applied to all unwed fathers of newborns. In *Caban* the majority as well as the dissent suggest that the parental interests of unwed mothers and unwed fathers of newborns might be permissibly distinguished. *See* notes 61-62 *supra* and accompanying text. In fact, one dissenting justice specifically cited with approval the custodial preference given unwed mothers. 441 U.S. 380, 398-401 (Stewart, J., dissenting).

Cf. Boatwright v. Otero, 91 Misc. 2d 653, 398 N.Y.S.2d 391 (Fam. Ct. 1977) (if unadjudicated father who has openly acknowledged paternity and maintained an ongoing relationship with his child seeks custody, mother has no prima facie right to custody; custody determination turns on best interests of the child); *In re* Wright, 52 Ohio Misc. 4, 367 N.E.2d 931 (Ct. C.P. 1977) (putative father's custody right subject to unwed mother's superior right to custody, but admitted and adjudicated father's custody right, like the mother's, is subject to "best interests of the child").

Many states have abolished the tender years doctrine[146] in custody disputes over legitimate children.[147] Despite these changes, however, a strong maternal presumption might remain for children born out of wedlock.[148] Imposition of a "maternal preference" on the custody rights of unwed fathers without a similar imposition upon the custody rights of other fathers may implicate fourteenth amendment equal protection problems, yet *Quilloin* suggests that some unwed fathers may be validly classified apart from other fathers.[149]

V. VISITATION RIGHTS

As the parental role of unwed fathers expanded under the law, judicial recognition of visitation rights for unwed fathers correspondingly grew,[150] although these rights were never absolute.[151] Before *Stanley* only six states granted an unwed father visitation privileges over the opposition of the mother.[152] Today, however, those states which have considered the question of unwed father's visitation rights overwhelmingly grant the father a right to reasonable visitation if visitation serves the child's best interest.[153]

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146. *See* note 136 *supra* and accompanying text.

147. *See, e.g.,* Bazemore v. Davis, 394 A.2d 1377 (D.C. 1978); Spriggs v. Carson, 470 Pa. 290, 368 A.2d 635 (1977). *See generally* C. FOOTE, R. LEVY & F. SANDER, *supra* note 76, at 409; Solomon, *The Father's Revolution in Custody Cases*, 13 TRIAL 32, 33 (1977).

148. *See* Foster & Freed, *supra* note 89, at 337. *But cf.* Neal v. White, 362 So. 2d 1148 (La. Ct. App. 1978) (standard for custody determination is identical whether child is legitimate or illegitimate); Peterson v. Hayes, 252 Pa. Super. Ct. 487, 381 A.2d 1311 (1977) (same).

149. *Quilloin* suggests that unwed fathers who have never shouldered any significant parental responsibility for their children can be distinguished from other fathers. *See* note 48 *supra* and accompanying text. Thus, such fathers might be given less potent custody rights than other fathers.

150. Reeves, *supra* note 1, at 117.

151. "[O]nly a few states allowed the putative father visitation privileges where the mother ha[d] custody and oppose[d] the visits." Reeves, *supra* note 1, at 117 n.16.

152. *See* Strong v. Owens, 91 Cal. App. 336, 205 P.2d 48 (1949); Mixon v. Mize, 198 So. 2d 373 (Fla. Dist. Ct. App.), *cert. denied*, 204 So. 2d 211 (1967); Baker v. Baker, 81 N.J. Eq. 135, 85 A. 816 (Prerog. Ct. 1913); Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S.2d 792 (Fam. Ct. 1968); *Ex parte* Hendrix, 186 Okla. 712, 100 P.2d 444 (1940); Commonwealth v. Rozanski, 206 Pa. Super. 397, 213 A.2d 155 (1965). *See generally* Tabler, *supra* note 75, at 231-36.

153. Wingard v. Sill, 223 Kan. 661, 665, 576 P.2d 620, 624 (1978). *See* Bagwell v. Powell, 267 Ala. 19, 99 So. 2d 195 (1957); Strong v. Owens, 91 Cal. App. 2d 336, 205 P.2d 48 (1949); Forestiere v. Doyle, 30 Conn. Supp. 284, 310 A.2d 607 (Super. Ct. 1973); *In re* One Minor Child, 295 A.2d 727 (Del. 1972); Mixon v. Mize, 198 So. 2d 373 (Fla. Dist. Ct. App.), *cert. denied*, 204 So. 2d 211 (1967); Vallera v. Rivera, 39 Ill. App. 3d 775, 351 N.E.2d 391 (1976); Taylor v. Taylor, 295 So. 2d 494 (La. Ct. App.), *cert. denied*, 299 So. 2d 799 (1974); Gardner v. Rothman, 370 Mass. 79, 345 N.E.2d 370 (1976); Turner v. Saka, 90 Nev. 54, 518 P.2d 608 (1974); Baker v. Baker, 81 N.J. Eq.

Neither *Stanley* nor *Quilloin* addressed the question of whether the Constitution protects an unwed father's interests in visiting and being visited by his illegitimate children, although both cases found the unwed father's interest in the "*companionship*, care, custody and management" of his children to be "cognizable and substantial."[154] Numerous state court cases have afforded constitutional protection to unwed fathers' visitation interests,[155] and a few cases have suggested that unwed fathers have a right to a forum in which to establish their visitation rights.[156] Thus, a constitutional basis arguably exists for an unwed father's right to reasonable visitation privileges.[157]

The extent of that protection nevertheless raises an entirely different question. *Quilloin* suggests that the visitation privileges of irresponsible fathers may be subjected to the "best interests of the child" test or even withheld altogether.[158] *Caban* suggests that the visitation rights of an unwed father who has established a substantial relationship with his child cannot be denied by the mother's veto.[159] It remains to be seen,

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135, 85 A. 816 (Prerog. Ct. 1913); "Francois" v. "Ivanova," 14 A.D.2d 317, 221 N.Y.S.2d 75 (1961); *Ex parte* Hendrix, 186 Okla. 712, 100 P.2d 444 (1940); Commonwealth v. Rozanski, 206 Pa. Super. 397, 213 A.2d 155 (1965); *In re* Guardianship of Harp, 6 Wash. App. 701, 495 P.2d 1059 (1972); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974). *See also* Ritchie v. Ritchie, 58 Ill. App. 3d 1045, 374 N.E.2d 1292 (1978); *In re* Gerald G.G., 61 A.D.2d 521, 403 N.Y.S.2d 57 (Sup. Ct. 1978).

154. Quilloin v. Walcott, 434 U.S. 246, 248 (1978) (emphasis added); Stanley v. Illinois, 405 U.S. 645, 652 (1972) (emphasis added).

155. *See, e.g.,* Wingard v. Sill, 223 Kan. 661, 576 P.2d 620 (1978) (*Stanley* indicates that fit unwed father is entitled at reasonable times to visit child in custody of unwed mother); Peterson v. Hayes, 252 Pa. Super. Ct. 487, 381 A.2d 1311 (1977) (*Stanley* indicates that visitation rights of unwed father determined by same standard used for other fathers); J.M.S. v. H.A., 242 S.E.2d 696 (W. Va. 1978) (denial of visitation rights to unwed father without a hearing violates due process and equal protection).

156. *See* Felder v. Allsopp, 391 A.2d 243 (D.C. 1978), in which the court held that the paternity act's statute of limitations did not bar the unwed father from establishing visitation rights in an equitable proceeding.

> [W]e cannot here deny a forum to the unwed parent of a child seeking visitation rights without raising the specter of a denial of equal protection. *See Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L.E.2d 551 (1971). As we have said, "the right to visitation—the right to be with one's child—is the preeminent parental right . . . ."

391 A.2d at 245.

157. *But cf.* Schwartz, *supra* note 78, at 12-13 (three considerations may prompt court to hold visitation not to be a "constitutional right": visitation may encourage renewal of meretricious relationship; visitation will remind people of child's illegitimacy; and visitation can reduce mother's likelihood of adjusting and forming normal family relationship).

158. *See* notes 40-42 *supra* and accompanying text.

159. *See* notes 59-60, 140 *supra* and accompanying text.

however, how the potential countervailing interest of the custodial family unit will be weighed in this analysis.

VI. Conclusion

Though the parental rights and obligations of unwed fathers were once minimal, they now more closely match those of other parents. As a result of *Stanley* and its progeny, unwed fathers enjoy significant rights in the adoption, custody, and visitation of their illegitimate children. Nevertheless, the ambiguities and the narrow range of issues confronted in these cases leave open questions concerning which fathers shall receive constitutional protection and which protections shall be afforded to unwed fathers in various situations and proceedings.

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APPENDIX A

The following states recognize a presumption of legitimacy.

Alabama: Butler v. Butler, 254 Ala. 375, 48 So. 2d 318 (1950).

Alaska: 1962 Op. Att'y Gen., No. 13.

California: Kusior v. Silver, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

Colorado: COLO. REV. STAT. ANN. § 19-6-105 (1973).

Florida: Knauer v. Barnett, 360 So. 2d 399 (Fla. 1978).

Georgia: GA. CODE ANN. § 74-101 (1973).

Idaho: IDAHO CODE § 7-1119 (1979).

Illinois: ILL. ANN. STAT. ch. 106 3/4, § 5 (Smith-Hurd Supp. 1979).

Indiana: Profitt v. Profitt, 137 Ind. App. 6, 204 N.E.2d 660 (1964).

Iowa: Kuhns v. Olson, 258 Iowa 1274, 141 N.W.2d 925 (1966).

Kentucky: Williams v. Williams, 311 Ky. 45, 223 S.W.2d 360 (1949).

Maryland: Hale v. State, 175 Md. 319, 2 A.2d 17 (1938).

Michigan: People v. Chase, 171 Mich. 282, 137 N.W. 55 (1912).

Mississippi: Stone v. Stone, 210 So. 2d 672 (Miss. 1968).

Missouri: Bower v. Graham, 285 Mo. 151, 225 S.W. 978 (1920).

Nebraska: *In re* McDermott's Estate, 125 Neb. 179, 249 N.W. 555 (1933).

New Hampshire: Watts v. Watts, 115 N.H. 186, 337 A.2d 350 (1975).

New Jersey: L. v. M., 134 N.J. Super 69, 338 A.2d 227 (1975).

New Mexico: Melvin v. Kazhe, 83 N.M. 356, 492 P.2d 138 (1971).

New York: Stillman v. Stillman, 240 N.Y. 268, 148 N.E. 518 (1925).

North Carolina: State v. Green, 210 N.C. 162, 185 S.E. 670 (1936).

Ohio: Kawecki v. Kawecki, 67 Ohio App. 34, 35 N.E.2d 865 (1941).

Oklahoma: OKLA. STAT. ANN. tit. 10, § 1 (1966).

Oregon: OR. REV. STAT. §§ 41.350(6), .360(31) (1977).

Pennsylvania: Sheaffer Adoption, 58 LANC. REV. 15 (Orphans' Ct. 1961).

South Carolina: Tarleton v. Thompson, 125 S.C. 182, 118 S.E. 421 (1923).

South Dakota: S.D. COMP. LAWS ANN. §§ 25-5-1, -3 (1976).

Tennessee: Frazier v. McFerren, 55 Tenn. App. 431, 402 S.W.2d 467 (1964).

Texas: Adams v. Adams, 456 S.W.2d 222 (Tex. Civ. App. 1970).

Utah: Holder v. Holder, 9 Utah 2d 163, 340 P.2d 761 (1959).

Washington: Carfa v. Albright, 39 Wash. 2d 697, 237 P.2d 795 (1951).

West Virginia: Lipscomb v. Joplin, 131 W.Va. 302, 47 S.E.2d 221 (1948).

Wisconsin: WIS. STAT. ANN. § 891.39 (West 1971).

The following states have enacted the Uniform Parentage Act, which recognizes a presumption of paternity.

California: CAL. CIV. CODE §§ 7000-7018 (Deering Supp. 1979).

Colorado: COLO. REV. STAT. ANN. §§ 19-6-101 to -129 (1973).

Hawaii: HAWAII REV. STAT. §§ 584-1 to -26 (1976).

Montana: MONT. REV. CODES ANN. §§ 61-301 to -334 (Supp. 1977).

Nevada: 1979 Nev. Stats. ch. 599.

North Dakota: N.D. CENT. CODE §§ 14-17-01 to -26 (Supp. 1977).

Washington: WASH. REV. CODE ANN. §§ 26.26.010-.905 (Supp. 1978).

Wyoming: WYO. STAT. §§ 14-2-101 to -120 (1977).

APPENDIX B

The following states recognize as legitimate those children born out of wedlock whose natural parents subsequently marry. In addition to marriage, these states may require the father either explicitly or implicitly to recognize the child as his own through some formal act, court proceeding, or other course of conduct.

Alabama: ALA. CODE tit. 26, § 26-11-1 (1975).

Alaska: ALASKA STAT. § 25.20.050(a) (1977).

Connecticut: CONN. GEN. STAT. § 45-274(b) (1979).

Delaware: DEL. CODE ANN. tit. 13, § 1301 (1974).

Florida: FLA. STAT. ANN. § 742.091 (West Supp. 1979).

Georgia: GA. CODE ANN. § 74-101 (1973).

Hawaii: HAWAII REV. STAT. § 338-21 (1976).

Idaho: IDAHO CODE § 32-1006 (1963).

Illinois: ILL. ANN. STAT. ch. 40, § 303 (Smith-Hurd Supp. 1979).

Indiana: IND. CODE ANN. § 29-1-2-7 (Burns 1972).

Iowa: IOWA CODE ANN. § 595.18 (West Supp. 1979).

Kansas: KAN. STAT. ANN. § 23-125 (1974).

Kentucky: KY. REV. STAT. ANN. § 391.090(3) (Baldwin 1978).

Louisiana: LA. CIV. CODE ANN. art. 198 (West 1952).

Maine: 1979 Me. Leg. Serv. tit. 18a, § 2-109.

Maryland: MD. EST. & TRUSTS CODE ANN. § 1-208 (1974).

Massachusetts: MASS. ANN. LAWS ch. 190, § 7 (Michie/Law. Co-op 1969).

Michigan: MICH. STAT ANN. § 27.3178(153) (Supp. 1979).

Minnesota: MINN. STAT. ANN. § 517.19 (West Supp. 1979).

Mississippi: MISS. CODE ANN. § 91-1-15 (1972).

Missouri: MO. REV. STAT. § 474.070 (1978).

Montana: MONT. REV. CODES ANN. § 40-6-203 (1979).

Nebraska: NEB. REV. STAT. § 13-109 (1977).

New Hampshire: N.H. REV. STAT. ANN. § 457:42 (1968).

New Jersey: N.J. STAT. ANN. § 9:15-1 (West 1976).

New Mexico: N.M. STAT. ANN. § 29-1-20 (1954).

New York: N.Y. DOM. REL. LAW § 24 (McKinney 1977).

North Carolina: N.C. GEN. STAT. § 49-12 (1976).

Ohio: OHIO REV. CODE ANN. § 2105.18 (Page Supp. 1978).

Oklahoma: OKLA. STAT. ANN. tit. 10, § 2 (West 1966).

Pennsylvania: 20 PA. CONS. STAT. ANN. § 2107 (Purdon Supp. 1979), 48 PA. CONS. STAT. ANN. § 167 (Purdon Supp. 1979).

Rhode Island: R.I. GEN. LAWS § 15-8-21 (1970).

South Carolina: S.C. CODE § 20-1-60 (1977).

South Dakota: S.D. COMP. LAWS ANN. § 25-5-5 (1976).

Tennessee: TENN. CODE ANN. § 36-307 (1977).

Utah: UTAH CODE ANN. § 77-60-14 (1978).

Vermont: VT. STAT. ANN. tit. 14, § 554 (1974).

West Virginia: W. VA. CODE § 42-1-6 (1966).

Wisconsin: WIS. STAT. ANN. § 48.84 (West Supp. 1978).

The following states legitimate the illegitimate children of those fathers who assert or acknowledge their paternity through some act or course of conduct.

Alabama: ALA. CODE tit. 26, § 26-11-2 (1975).

Alaska: ALASKA STAT. § 25.20.050(a) (1977).

Connecticut: CONN. GEN. STAT. § 45-274(b) (1979).

Delaware: DEL. CODE ANN. tit. 13, § 1301 (1974).

Georgia: GA. CODE ANN. § 74-103 (1973).

Hawaii: HAWAII REV. STAT. § 338-21 (1976).

Idaho: IDAHO CODE § 16-1510 (Supp. 1978).

Indiana: IND. CODE ANN. § 29-1-2-7 (Burns 1972).

Louisiana: LA. CIV. CODE ANN. art. 200 (West Supp. 1979).

Maryland: MD. EST. & TRUSTS CODE ANN. § 1-208 (1974).

Michigan: MICH. STAT. ANN. § 27.3178(153) (West Supp. 1979).

Mississippi: MISS. CODE ANN. § 93-17-1 (1972).

Nebraska: NEB. REV. STAT. § 13-109 (1977).

New York: N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1967).

North Carolina: N.C. GEN. STAT. § 49-10 (Supp. 1977).

Ohio: OHIO REV. CODE ANN. § 2105.18 (Page Supp. 1978).

Oklahoma: OKLA. STAT. ANN. tit. 10, § 55 (West 1966).

South Dakota: S.D. COMP. LAWS ANN. § 25-6-1 (1976).
Tennessee: TENN. CODE ANN. § 36-301-03 (1977).
Utah: UTAH CODE ANN. § 78-30-12 (1977).

APPENDIX C

The following states require all illegitimate fathers to consent to the adoption of their illegitimate children.

Arizona: ARIZ. REV. STAT. ANN. § 8-106 (Supp. 1978) (consent of both natural parents necessary).

Illinois: ILL. ANN. STAT. ch. 4, § 9.1-8 (Smith-Hurd Supp. 1979); (parents of all children required to give consent).

Iowa: IOWA CODE ANN. §§ 600.3, 600A.8 (West Supp. 1979) (father's consent required).

Montana: 1979 Mont. Laws ch. 33, § 40-8-111 (1979) (consent of both parents required).

Oregon: OR. REV. STAT. § 109.312 (1977) (consent of parents required).

Rhode Island: R.I. GEN. LAWS § 15-7-5 (1977) (consent of parents required).

South Dakota: S.D. COMP. LAWS ANN. § 25-6-4 (1976) (parents required to consent).

Wisconsin: WIS. STAT. ANN. § 48.84 (West Supp. 1979) (consent of father required).

The following states require certain illegitimate fathers to consent to the adoption of their illegitimate children.

Alabama: ALA. CODE tit. 26, § 26-10-3 (1975) (father's consent required when his paternity established); Roe v. Conn, 417 F. Supp. 769 (D. Ala. 1976) (father's consent required after legitimation).

Alaska: ALASKA STAT. § 20.15.050(a)(3) (Supp. 1979) (consent of natural father required if married to mother at time of or after conception of child); *id.* § 20.15.040(a)(2) (1975) (consent required if father legitimates child).

California: CAL. CIV. CODE §§ 224, 7004 (Deering Supp. 1979) (presumed father required to consent).

Colorado: COLO. REV. STAT. §§ 19-1-103(21), -4-107(1)(g), -6-105 (Supp. 1978) (presumed father required to consent).

Connecticut: CONN. GEN. STAT. §§ 45-61d, -61(i)(b)(2) (1979) (father's consent required if his paternity has been acknowledged or adjudicated, or if he has regularly contributed to child's support).

Delaware: DEL. CODE ANN. tit. 13, §§ 906(7)(b), 908(2) (Supp. 1978) (nat-

ural father's consent required if father identified and if in best interests of child).

Florida: FLA. STAT. ANN. § 63.062 (West Supp. 1979) (father's consent required if paternity established, paternity acknowledged, or if father provided support in repetitive, customary manner).

Hawaii: HAWAII REV. STAT. § 578-2(a) (1976) (adjudicated father, presumed father, and concerned natural father must consent).

Idaho: IDAHO CODE §§ 16-504, -1510 (Supp. 1978) (father's consent required if he acknowledges child and receives it into his family).

Indiana: IND. CODE ANN. § 31-3-1-6(a) (Burns Supp. 1979) (father whose paternity judicially established must consent).

Kentucky: KY. REV. STAT. ANN. § 199.500 (Baldwin 1978) (consent of father required if paternity judicially established or acknowledged by affidavit).

Louisiana: LA. REV. STAT. ANN. § 9:404 (West 1965) (parental rights of father not terminated by mother's consent to adoption when father has acknowledged or legitimated the child).

Maine: ME. REV. STAT. ANN. tit. 19, § 532-C (Supp. 1978) (known father who establishes parental rights to the child must consent to adoption).

Maryland: MD. CODE ANN. art. 16, § 74 (1973) (father's consent required for legitimated child).

Michigan: MICH. STAT. ANN. §§ 27.3178 (555.33), 27.3178 (555.37) (Supp. 1979) (father whose identity and whereabouts are known and who has made provision for child's care must consent to adoption).

Minnesota: MINN. STAT. ANN. §§ 259.24, .26 (West Supp. 1978) (father's consent required when father has substantially supported child, has openly lived with child, has filed an affidavit stating his intention to retain parental rights, or has been adjudicated child's parent).

New Hampshire: N.H. REV. STAT. ANN. §§ 170-R:5, :6 (1977) (father's consent required if father known and files notice of intent to claim paternity).

New Jersey: *In re* Adoption of B., 152 N.J. Super. 546, 378 A.2d 90 (1977) (though not classified a "parent" under N.J. REV. STAT. § 9:3-18 (1976), father's consent required when father has not forsaken his parental obligation toward child).

New Mexico: N.M. STAT. ANN. § 22-2-25 (Supp. 1975) (father's consent required when father's paternity acknowledged or previously established in judicial proceeding).

New York: *In re* Gerald G. G., 61 A.D.2d 521, 403 N.Y.S.2d 57 (Sup. Ct. 1978) (though father's consent not expressly required, N.Y. DOM. REL. LAW § 111 (McKinney 1977), natural father who has been a devoted and unwed parent must consent). *See generally* Caban v. Mohammed 441 U.S. 380 (1979).

North Carolina: N.C. GEN. STAT. § 48-6 (Supp. 1977) (father's consent required if father substantially supported child, if his paternity was judicially established or acknowledged, or if child was legitimated).

North Dakota: N.D. CENT. CODE §§ 14-15-05, -06 (1971) (father's consent required if child legitimated).

Ohio: OHIO REV. CODE ANN. § 3107.06 (Page Supp. 1978) (father's consent required if his paternity judicially established).

South Carolina: S.C. CODE § 15-45-70 (Supp. 1978) (father's consent required if he has consistently exercised parental rights and performed parental duties).

Tennessee: TENN. CODE ANN. § 36-111 (1977) (father's consent required if child legitimated).

Utah: UTAH CODE ANN. § 78-30-4 (1977) (father's consent required if he has filed notice of his claim of paternity before placement of child).

Washington: WASH. REV. CODE §§ 26.32.030, .040 (Supp. 1978).

West Virginia: W. VA. CODE § 48-4-1 (Supp. 1978) (consent of judicially or personally declared father required).

Wyoming: WYO. STAT. § 1-22-109 (1977) (father's consent required if name known).

The following states do not require illegitimate fathers to consent to the adoption of their illegitimate children.

Georgia: GA. CODE ANN. § 74-203 (1973) (father is not "recognized" parent and his consent is not required). *See* Quilloin v. Walcott, 238 Ga. 230, 232 S.E.2d 246 (1977), *aff'd*, 434 U.S. 246 (1978).

Kansas: KAN. STAT. ANN. § 59-2102 (1976) (only mother of illegitimate child required to consent to child's adoption).

Massachusetts: MASS. ANN. LAWS ch. 210, § 2 (Michie/Law. Co-op Supp. 1978) (only mother's consent required).

Mississippi: MISS. CODE ANN. § 93-17-5 (1972) (father not deemed a parent for purposes of adoption).

Missouri: MO. REV. STAT. § 453.030 (1978) (only mother's consent required).

Oklahoma: OKLA. STAT. ANN. tit. 10, §§ 60.5, .6 (West Supp. 1978) (father's consent not required).

Pennsylvania: 1 PA. CONS. STAT. ANN. § 411 (Purdon Supp. 1979) (father's consent not necessary).

Vermont: VT. STAT. ANN. tit. 15, § 435 (Supp. 1979) (mother's consent sufficient).