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Ann Minnick Wheeler

A FATHER'S RIGHT TO KNOW HIS CHILD: CAN IT BE DENIED SIMPLY BECAUSE THE MOTHER MARRIED ANOTHER MAN?

*Ann Minnick Wheeler**

I. INTRODUCTION

The laws of most states provide that a child born to a married woman is presumed to be the legitimate child of the mother's husband at the time the child is born.[1] Under those laws, this presumption of legitimacy may be rebutted by proof that the mother's husband is not the child's biological father.[2] However, state laws vary as to what persons are entitled to rebut the presumption.[3] In a significant number of states, the biological father has been denied the right to rebut the presumption of

* Associate Professor of Law, California Western School of Law, San Diego. Formerly an associate attorney with Lord, Day & Lord, New York, and Gibson, Dunn & Crutcher, Los Angeles. B.A. 1971, College of William and Mary; J.D. 1977, University of Virginia.

1. The presumption of legitimacy began as a maxim of ancient Roman law and was later adopted by the English common law from which the rule was derived in the United States. Most states still have laws which embody a strong presumption of legitimacy. See *infra* notes 72-100 and accompanying text for a discussion of the presumption of legitimacy and the state interests asserted to support such a presumption.

2. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 16-17 (1971).

3. *See* Annotation, *Who May Dispute Presumption of Legitimacy of Child Conceived or Born During Wedlock*, 90 A.L.R. 3D 1032 (1979). In a number of states, the mother and the presumed father (and sometimes the child) are given standing to rebut the presumption, but the biological father of the child is not given this right. For example, the Uniform Parentage Act (UPA) provides that a man is presumed to be the natural father of a child if he and the child's natural mother are or have been married to each other and the child is born during the marriage. UNIF. PARENTAGE ACT § 4(a)(1), 9A U.L.A. 590 (1979). See *infra* Appendix for full text of relevant provisions of the UPA. This presumption may be rebutted by clear and convincing evidence and a court decree establishing paternity in another man. *Id.* § 4(b), 9A U.L.A. 591. However, only certain persons, namely the child, his natural mother and the man presumed to be the child's father, are given standing to rebut the presumption under the terms of the Act. *Id.* § 6(a), 9A U.L.A. 593. The Act makes no provision for a man claiming to be the natural father of a child to bring an action to establish paternity when another man is the presumed father of the child. In spite of the fact that the Act explicitly states that marital status is irrelevant in the establishment of a parent and child relationship, the UPA gives the biological father no right to establish a legal relationship with his child if the child's mother is married to another man at the time of the birth. *See id.* § 2, 9A U.L.A. 588.

Sixteen states have adopted the UPA, with each state having adopted its own modified version of the Act. 9A U.L.A. 352 (Supp. 1986). Some of these states have modified § 6 of the UPA to explicitly allow a biological father the right to rebut the presumption of legitimacy. *See, e.g.*, HAWAII REV. STAT. § 584-6 (1976); WASH. REV. CODE ANN. § 26.26.060 (1986).

legitimacy, even though the presumed father, the mother, and sometimes the child, have been given this right.

When a biological father is denied the right to rebut the presumption of legitimacy, the father is thereby foreclosed from establishing his paternity.[4] If the father cannot establish his paternity, he is denied all legal rights in regard to his child. He has no legally enforceable right of custody or visitation, and therefore may have no opportunity to develop a relationship with his child.

Where a statute is construed to deny all biological fathers the right to rebut the presumption of legitimacy, the biological father is denied the opportunity to a legal relationship with his child without consideration of the facts of his particular case. For example, if an unmarried woman becomes pregnant, and then, prior to the child's birth, marries a man other than the biological father, the biological father is by operation of such statute precluded from establishing any legal rights with respect to his child. Thus, the mother's unilateral action of marrying another man cuts off the biological father's rights to his child, even though the father may desire to know, nurture, love and support his child.[5] On the other hand, since many states allow the mother to rebut the presumption of

4. The issue of whether a biological father should be given the right to rebut the presumption of legitimacy may arise in a number of proceedings, including paternity, custody and visitation suits. *See* Matts, *Unwed Fathers: Is Arizona Denying Their Right to Recognition as Parents?*, 26 ARIZ. L. REV. 143 (1984). That article describes the various state procedures by which a natural father may establish his paternity. It groups these procedures into four classes, according to the method provided for conferring upon the father standing to assert his parental rights. *Id.* at 149-50.

In some proceedings a court may deny a biological father the right to rebut the presumption of legitimacy as a result of statutory construction. For example, in states that have adopted paternity statutes with provisions such as those of the UPA described in note 3, *supra*, the statutes explicitly specify those persons entitled to rebut the presumption of legitimacy. If the biological father is not included in the list of those entitled to rebut the presumption, a court may construe the statute to provide that the biological father does not have standing to rebut the presumption. *Id.* at 151-52.

In states where there is no statute specifying who may rebut the presumption of legitimacy, the issue of whether a biological father has standing to rebut the presumption arises in various proceedings brought by the biological father to establish his paternity or assert other rights regarding his child. For example, in states which provide statutory procedures by which unwed fathers may legitimate their children simply by assertion or acknowledgment, biological fathers may raise the standing issue in custody or visitation suits. The court must then decide whether or not the alleged father has a right to rebut the presumption of legitimacy because the alleged father's paternity must be established before the court can decide the ultimate issue of custody or visitation rights. In these cases, some courts have allowed the alleged father the right to rebut the presumption of legitimacy by clear and convincing evidence of his paternity, while others have denied the father this right. *Id.* at 154.

5. This hypothetical situation is very similar to the facts of A v. X, Y, and Z, 641 P.2d 1222 (Wyo.), *cert. denied*, 459 U.S. 1021 (1982), discussed *infra* notes 106-16 and accompanying text.

legitimacy and establish paternity in the biological father,[6] she may force upon the biological father legal obligations relating to the child.

The denial of the right of a biological father to rebut the presumption of legitimacy raises several constitutional issues. Does a biological father have a constitutionally protected right to an opportunity to develop a relationship with his child? If the father has such an interest, may a state nevertheless constitutionally deny all biological fathers the right to rebut the presumption on the basis of the state interests of protecting the child and/or the family created by the child, the mother and her husband? Even if these asserted state interests are deemed sufficient to justify denying a biological father a right to rebut the presumption of legitimacy, may such statutes be upheld when they give the biological mother the right to rebut the same presumption?

These questions require an examination of the due process and equal protection clauses of the fourteenth amendment to determine whether denying a biological father the right to rebut the presumption of legitimacy violates these constitutional guarantees. The United States Supreme Court has not rendered an opinion concerning this issue.[7] However, several state supreme courts have recently addressed the constitutionality of such statutes and these courts have been divided on the issue.[8]

This Article analyzes the constitional issues raised by statutes which are construed to deny standing to the biological father to rebut the presumption of legitimacy, and therefore deny him the right to establish his paternity. It focuses first on whether such statutes violate the due pro-

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6. *See, e.g.*, UNIF. PARENTAGE ACT § 6(a)(2), 9A U.L.A. 593 (1979) (giving the natural mother the right to rebut the presumption of legitimacy and the right to establish paternity in the biological father). See *infra* Appendix for the full text of these provisions of the UPA.

7. The United States Supreme Court denied certiorari in three cases which deal with this issue. A v. X, Y, and Z, 641 P.2d 1222 (Wyo.), *cert. denied*, 459 U.S. 1021 (1982). *See infra* notes 106-16 and accompanying text. *In re* Lisa R., 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475, *cert. denied*, 421 U.S. 1014, *reh'g denied*, 423 U.S. 885 (1975). *See infra* notes 127-41 and accompanying text; P.B.C. v. D.H., 396 Mass. 68, 483 N.E.2d 1094 (1985), *cert. denied*, 106 S. Ct. 1286 (1986); *see also infra* notes 165, 195, 221.

In another case, the Court dismissed an appeal by the biological father on the grounds of lack of a substantial federal question. However, Justice White and Justice Stevens noted probable jurisdiction in that case and would have set the case for oral argument. Michelle W. v. Ronald W., 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748 (1985), *appeal dismissed*, 106 S. Ct. 774 (1986). See *infra* notes 142-64 and accompanying text for a discussion of *Michelle W.* *See also* Vincent B. v. Joan R., 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1981), *appeal dismissed*, 459 U.S. 807 (1982) (dismissed for want of a substantial federal question).

8. *See, e.g., X, Y, and Z*, 641 P.2d 1222 (statute constitutional); R. McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980) (statute unconstitutional). *See infra* notes 106-16, 247-52 and accompanying text.

cess clause of the fourteenth amendment. It then considers whether statutes which deny a biological father the right to rebut the presumption of legitimacy, while giving the mother this right, violate the equal protection clause of the fourteenth amendment.

II. DUE PROCESS

A statute which is construed to deny all biological fathers the right to rebut the presumption of legitimacy may be challenged on the basis that it denies such a father the right to due process of law.[9] Such a statute may be deemed to violate due process if it prohibits a biological father from establishing legal rights vis-à-vis his child without a showing that the state interests supporting the statute outweigh the biological father's private interests.[10] Such a statute would arguably violate the biological father's right to procedural due process.[11]

Before a statute may violate an individual's rights under the due process clause, it must first be determined that the individual has an interest worthy of constitutional protection.[12] If an individual has an interest which is protected by the due process clause, it is then necessary to

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

10. See *infra* notes 101-79 and accompanying text for a discussion of the balancing process employed to determine whether a particular statute violates due process.

11. Although an argument may also be made that such a statute violates substantive due process, this argument would be weak, and therefore this Article does not address issues regarding substantive due process. Unless it could be established that the biological father's interest is a fundamental interest, the statute would be presumed valid and would only be deemed to violate substantive due process if it bore no relationship to the asserted ends of the legislation. *See* Bowers v. Hardwick, 106 S. Ct. 2841, 2846 (1986) (community morality notions provide "rational basis" to sustain law). Clearly, the statute in question would be upheld under this standard. Therefore, in order to illustrate that such a statute violates substantive due process, a showing is required that a biological father's right to a relationship with his child implicates a fundamental interest. If a fundamental interest is implicated, the statute will be deemed to violate due process unless the state shows that the regulation serves some compelling state interest, and that there is no less restrictive alternative for serving that interest. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

Although this would be a difficult showing for the state to make, it would also be very difficult for the biological father in such cases to show that he has a fundamental right to a relationship with his child. United States Supreme Court cases regarding the rights of biological fathers of illegitimate children, discussed *infra* at notes 20-59 and accompanying text, have indicated that the nature of a biological father's interest in his child varies depending on the facts of the individual case. Therefore, it would be difficult to categorize the interest of all biological fathers as a fundamental interest worthy of substantive due process protection.

Another argument which might be made is that the statute violates due process guarantees under the "doctrine of irrebutable presumptions." *See infra* note 21.

12. In analyzing a procedural due process question, the Supreme Court has indicated that there are two issues which should be considered separately. These issues are: (1) what deprivation of personal interests by the government warrant due process protection, and (2) what

determine what process must be accorded that person before he may be denied that interest.[13]

Accordingly, in analyzing a biological father's due process rights, the first issue which must be addressed is whether a biological father in such circumstances has any interest which should be deemed worthy of protection under this constitutional provision. Once it is determined that a biological father has such a constitutionally cognizable interest, it is then necessary to evaluate both the biological father's interest and the state interests to determine what type of procedure would best meet the parameters of the due process clause.

A. The Father's Interest

In addressing the issue of whether a biological father has any interest worthy of protection under the due process clause,[14] the relevant question is whether all biological fathers have a constitutionally cognizable interest in an opportunity to establish paternity. Four United States Supreme Court decisions support the view that a biological father has such a constitutionally cognizable interest.[15] Since all of these cases concern a biological father's interest in a child born to an unmarried woman, they do not explicitly address a biological father's right to rebut the presumption of legitimacy.[16] However, these cases suggest that every biological father has an opportunity interest in a relationship with his offspring, regardless of the marital status of the mother at the time of the child's birth.[17] Thus, these cases are not only important in considering

process is due. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-12, at 532-33 (1978). This Article treats these issues separately.

13. *Id.*

14. In order to find an interest worthy of protection under the due process clause, the Supreme Court has indicated that it is necessary to find a "liberty" or "property" interest which is being threatened by government action. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (Court found welfare entitlements may be protectible "property" interest). For a general discussion of the kinds of interests which have been deemed constitutionally cognizable interests in "liberty" or "property," see L. TRIBE, *supra* note 12, § 10-8 to § 10-11, at 506-32 (1978).

15. Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246, *reh'g denied*, 435 U.S. 918 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

16. As mentioned above, the Supreme Court has not issued an opinion regarding a biological father's interest in a relationship with his child when his child was born while the mother was married to another man. *See supra* note 7 and accompanying text.

17. *See infra* notes 20-66 and accompanying text. These cases represent a departure from the traditional view that a father's rights with respect to his child are dependent on the marital status of the mother at the time of his child's birth. Traditionally, under our legal system, if the mother of a child was married to the child's biological father at the time of the child's birth, the child was presumed to be the legitimate child of the biological father. Therefore, the

the interests of biological fathers in their illegitimate children,[18] but are also important in determining a biological father's interest in a relationship with his child when his child is born while the mother is married to another man.[19]

1. Review of United States Supreme Court decisions

a. Stanley v. Illinois

In *Stanley v. Illinois*,[20] the United States Supreme Court first recog-

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biological father had rights of custody and control of the child and had a duty to support the child.

If, on the other hand, the mother of the child was unmarried at the time of the child's birth, the child was deemed illegitimate. Under the common law, an illegitimate child was considered *filius nullius* or the "child of no man," and, therefore, the biological father had no legal rights with respect to the child. A biological father also had no rights with respect to the child if the child's mother was married to someone other than the biological father at the time of the child's birth. Since the child was presumed to be the legitimate child of the mother's husband, only the mother's husband would have the legal rights and responsibilities of fatherhood. *See generally* H. KRAUSE, *supra* note 2.

18. Much has been written about the effect of these cases upon the constitutional rights of fathers of *illegitimate* children. *See* Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313 (1984); Freytag, *Equal Protection and The Putative Father: An Analysis of* Parham v. Hughes *And* Caban v. Mohammed, 34 SW. L.J. 717 (1980); Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries Are Defined*, 19 J. FAM. L. 445 (1980-81); Comment, Caban v. Mohammed: *Extending the Rights of Unwed Fathers*, 46 BROOKLYN L. REV. 95 (1979); Note, *Limiting the Boundaries of* Stanley v. Illinois: Caban v. Mohammed, 57 DEN. L.J. 671 (1980); Note, *Constitutional Law—Equal Protection*—Caban v. Mohammed, 29 EMORY L.J. 833 (1980); Note, *Putative Fathers: Unwed, But No Longer Unprotected*, 8 HOFSTRA L. REV. 425 (1980); Comment, *Domestic Relations - Parental Rights of the Putative Father: Equal Protection and Due Process Considerations*, 14 MEM. ST. U.L. REV. 259 (1984); Note, *Adoption: The Rights of the Putative Father*, 37 OKLA. L. REV. 583 (1984); Note, *Delineation of the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290 (1985); Note, *The Rights of Fathers of Non-Marital Children to Custody, Visitation and to Consent to Adoption*, 12 U.C. DAVIS L. REV. 412 (1979); Note, *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 57 WASH. U.L.Q. 1029 (1979) [hereinafter *Unwed Fathers*]; *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980); *Supreme Court Review: 1978-79 Term*—Caban v. Mohammed, Parham v. Hughes, 7 HASTINGS CONST. L.Q. 445, 459 (1980).

19. For the purposes of this Article, the discussion of these cases will be limited to what they suggest concerning the interest of every biological father in an opportunity to establish his paternity and develop a relationship with his child.

20. 405 U.S. 645 (1972). Before *Stanley* was decided, the Supreme Court had already accorded constitutional protection to the family relationship. *See* May v. Anderson, 345 U.S. 528, 533 (1953) (right to care, custody, management, and companionship of children held more precious than property rights); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (primary parental right to custody, care, and nurture of children); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (basic civil rights to marry and procreate); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (right of parents to direct upbringing and education of their children).

In addition, the Court had previously extended constitutional protection to interests aris-

nized a biological father's constitutional right to a legal relationship with his illegitimate child. In this case, the Court held that the due process clause of the fourteenth amendment entitled the biological father to a hearing on his fitness before his illegitimate children could be removed from his custody.[21] In reaching this conclusion, the Court recognized that the father in this case had an interest deserving of protection under the due process clause.

The father's interest, as the Court expressed it, was "the private interest . . . of a man in the children he has sired and raised," and also "the interest of a parent in the companionship, care, custody, and management of his or her children."[22] Thus, the language of the Court was

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ing out of mother-illegitimate child relationships. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding unconstitutional a statute prohibiting filing of wrongful death actions by illegitimate children for death of their mother); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968) (declaring unconstitutional a statute denying unwed mother the right to bring wrongful death action upon the loss of her illegitimate child).

21. *Stanley*, 405 U.S. at 658. The Court in *Stanley* struck down the irrebuttable statutory presumption that all unmarried fathers were unfit to raise their children. The Court stated:

> It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.

Id. at 654 (footnote omitted).

Thus, *Stanley* has been cited as an important case representing the Supreme Court's application of the "doctrine of irrebuttable presumptions." *See, e.g.*, Prygoski, *When a Hearing is Not a Hearing: Irrebuttable Presumptions and Termination of Parental Rights Based on Status*, 44 U. PITT. L. REV. 879, 905-06 (1983). The Supreme Court has applied this doctrine in a number of other cases. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973). One commentator described this doctrine in the following manner:

> When a statutory provision imposes a burden upon a class of individuals for a particular purpose and certain individuals within the burdened class are so situated that burdening them does not further that purpose, then the rigid statutory classification must be replaced, to the extent administratively feasible, by an individual factual determination that more accurately selects the individuals who are to bear the statutory burden.

Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800, 800 (1974).

It should be noted that an argument may be made that this doctrine is an appropriate method of attacking a presumption of legitimacy which is conclusive as to all biological fathers. However, the text of this Article does not deal with this doctrine for two reasons. First, the theoretical basis of the doctrine is unclear, and the Supreme Court appears to be employing this doctrine with declining frequency. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 554 (2d ed 1983) [hereinafter NOWAK]. Second, the results which would be reached through the use of this doctrine may be reached through the use of the principles of equal protection and procedural due process which are discussed in this Article. *See* Prygoski, *supra*, at 920-21.

22. NOWAK, *supra* note 21, at 651. Peter Stanley lived with the mother of his three children intermittently for 18 years. After the children's mother died, the State of Illinois instituted dependency proceedings to make the children wards of the state. Stanley contended that

somewhat ambiguous as to the nature and extent of the constitutionally protectible interest of a biological father in regard to his illegitimate children. The Court's decision could be interpreted to mean that all biological fathers of illegitimate children have an interest deserving of protection under the due process clause; or it could be interpreted to mean that due process protection extends only to those unwed fathers who have participated in some way in the "raising" of their children.[23]

The Supreme Court has decided three cases since *Stanley* which have helped clarify the nature and extent of a biological father's due process interests concerning his illegitimate child.[24] Whereas in *Stanley* the biological father had custody of his children, these three subsequent cases concern the right of a non-custodial biological father to maintain a relationship with his illegitimate child. Each case deals with the non-custodial father's right to contest his child's adoption by the mother's husband. The adoption would have the effect of severing all of the biological father's rights with respect to his child.

b. Quilloin v. Walcott

In *Quilloin v. Walcott*,[25] the biological father of an illegitimate child sought to prevent his son's adoption by the mother's spouse while also seeking to establish his own paternity.[26] The biological father had not previously sought actual or legal custody of the child and had only intermittently visited the child over an eleven-year period. The Supreme Court held that, under these circumstances, where the father had never assumed any significant responsibility for the supervision, education, protection or care of his child, it did not violate the biological father's due process rights to allow the adoption over his objections.[27] The Court stated that the due process clause did not require the state to find anything more than that the adoption, and denial of legitimation, were in the

his children should not be removed from his custody unless the state could show that he was an unfit parent. *Id.* at 646-47.

23. *See Unwed Fathers*, *supra* note 18.

24. Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246, *reh'g denied*, 435 U.S. 918 (1978).

25. 434 U.S. 246, *reh'g denied*, 435 U.S. 918 (1978).

26. *Id.* at 247. The Georgia statute required only the consent of the mother for adoption of the child unless the natural father had legitimated the child. *Id.* at 248 n.3. Upon notification of the adoption petition, the biological father filed an application for a writ of habeas corpus to obtain visitation rights, a petition for legitimation, and an objection to the adoption. He later amended his pleadings to challenge the constitutionality of the state statute under the due process and equal protection clauses of the fourteenth amendment. *Id.* at 250-52.

27. *Id.* at 256.

" 'best interests of the child.' "[28]

The *Quilloin* case thus indicated that the extent of a biological father's rights pertaining to his child depends on the father's assumption of a significant degree of responsibility for the care and nurturing of the child.[29] When a father, as in *Quilloin*, has not assumed such responsibility for his child, his interest may not be great enough to outweigh the asserted state interests underlying the statute. Thus, the *Quilloin* Court held that the father's rights were outweighed by the state's interest in the welfare of the child.[30] Although *Quilloin* indicated that a father's relationship with his child may affect the weight accorded his interest, it nevertheless suggested that even a biological father who has not had a significant relationship with his child has a substantive interest which is deserving of protection under the due process clause.[31]

In addition, the language of the opinion may be construed to suggest that the due process clause requires a hearing in every case to determine whether the biological father's interest in those circumstances is outweighed by the asserted state interests.[32] The *Quilloin* Court specifically noted that the father was given a hearing at which he was afforded the opportunity to present proof of his fitness.[33] Although the Court did not state whether such a hearing was constitutionally required, it relied upon

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28. *Id.* at 255. The Court also noted that the adoption would "give full recognition to a family unit already in existence." *Id.*

29. Indeed, the Supreme Court suggests that if the father had been a custodial father, the state would have been required to prove the father unfit before the adoption could be allowed over his objection. The Court stated:

> 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."

Id. (citation omitted).

30. The interest asserted by the state to support the statute was the "best interests of [the] child." *Id.* at 251.

31. In *Quilloin*, the Court expressly recognized substantive due process rights in the biological father, even though it held those rights were not impermissibly burdened by the state's application of a "best interests of the child" standard in this case. *Id.* at 254. In discussing the father's due process claim, the Court stated:

> [W]e 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 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).

32. See *Unwed Fathers*, *supra* note 18, at 1034, which suggests that *Quilloin* may be interpreted as indicating that due process requires a hearing in all such cases.

33. *Quilloin*, 434 U.S. at 253-54.

the facts of the individual case in weighing the father's interests against those of the state. The opinion thus suggests that procedural due process may demand that such hearings be afforded all biological fathers of illegitimate children before termination of their rights in regard to their children.[34]

c. Caban v. Mohammed

The next Supreme Court case addressing an unwed father's rights with respect to his illegitimate child was *Caban v. Mohammed*.[35] In *Caban*, the biological father had developed a significant relationship with his illegitimate children in that he had lived with the children (and their mother) and had contributed to their support for several years. After he no longer lived with the children, he continued to maintain contact with them.[36]

When the children's mother and her husband sought to adopt the children, the father challenged the constitutionality of the New York statute that denied him the right to veto or consent to the adoption.[37] The Court held that under these circumstances, the statute was unconstitutional in that it violated the equal protection clause.[38]

The father in *Caban* had also contended that the statute denied him his due process right to maintain a parental relationship with his children absent a finding of his unfitness.[39] However, in a footnote, the Court 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."[40]

Although the Court in *Caban* expressed no opinion as to the due process rights of non-custodial unwed fathers, Justice Stevens in his dissent declared that "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."[41] Justice Stevens also stated that

34. Moreover, the *Quilloin* opinion suggests the kinds of factors which should be considered in a hearing to determine whether the biological father's rights to a relationship with his child should prevail. For example, the hearing should consider facts relating to the child's welfare and facts regarding the existence of a family unit in which the child resides. *Id.* at 253-55.

35. 441 U.S. 380 (1979).

36. *Id.* at 382-83.

37. *Id.* at 385.

38. *Id.* at 394. The Court held that the statute unconstitutionally discriminated against unwed fathers who had helped to raise their offspring.

39. *Id.* at 385.

40. *Id.* at 394 n.16.

41. *Id.* at 414 (Stevens, J., dissenting).

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.[42] Thus, Justice Stevens suggested that the biological father of an illegitimate child possesses an interest deserving of protection under the due process clause and that this interest may only be denied by a particularized finding that the state interests outweigh the father's interest under the facts of that case.

d. Lehr v. Robertson

The most recent Supreme Court case dealing with the rights of biological fathers with respect to their illegitimate children is *Lehr v. Robertson*.[43] In that case, the biological father never had contact with his two-year-old illegitimate child because the child's mother had hidden the child from him.[44] The father tried to locate both child and mother for two years, and finally did so with the help of a detective agency. Shortly thereafter, the father filed a "visitation and paternity petition."[45] However, he never signed the "putative father registry," which was the statutory means by which the father of an illegitimate child could inform the state of his intention to claim paternity[46] and thereby guarantee his receiving notice of a pending adoption. Because the father had not complied with this registration procedure and did not fall within any of the statutorily designated classes of putative fathers entitled to notice, he never received notice of the adoption proceeding brought by the mother and her new husband.[47]

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42. *Id.* at 414-15 (Stevens, J., dissenting).

43. 463 U.S. 248 (1983).

44. *Id.* at 269.

45. *Id.* at 252.

46. *Id.* at 251. The putative father registry was established to record the name and address of any person filing a notice of intent to claim paternity, either before or after the birth of a child out of wedlock. N.Y. SOC. SERV. LAW § 372-c(1) (McKinney 1977 & Supp. 1982-1983). If a putative father simply mailed a postcard to this registry, he thereby guaranteed that he would receive notice of any proceeding regarding the adoption of his child. N.Y. DOM. REL. LAW § 111-a2(c) (McKinney 1977 & Supp. 1982-1983).

47. N.Y. DOM. REL. LAW § 111-a2(a)-(h). Persons entitled to notice included:

> (a) any person adjudicated by a court . . . [in New York] . . . to be the father of the child;
>
> (b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry . . . ;
>
> (c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child . . . ;
>
> (d) any person who is recorded on the child's birth certificate as the child's father;
>
> (e) any person who is openly living with the child and the child's mother at the

The father challenged the constitutionality of the statutory scheme, which denied him notice and a hearing before his child's adoption, on two alternative grounds. First, he contended that a biological father's actual or potential relationship with his child is a liberty interest protected under the due process clause. Therefore, the state could not deprive him of that interest without first giving him notice and an opportunity to be heard.[48] Second, he claimed that the statute created a gender-based classification which violated the equal protection clause.[49] The Court held that the statute did not violate the father's due process or equal protection rights because the state had provided a means by which he could assert his parental rights, and he had failed to avail himself of that opportunity through the registry procedure.[50]

The Supreme Court placed great emphasis upon the fact that the biological father in this case did not have a developed relationship with the child.[51] The Court distinguished *Stanley* and *Caban*, where the fathers had significant relationships with their children, from *Quilloin* and *Lehr*, where there was little or no relationship between the fathers and their children.[52] The Court determined that fathers who have participated in raising their illegitimate children and have developed a relationship with them have constitutionally protected parental rights.[53] Fathers who have not developed a parent-child relationship with their children, but have only a biological relationship, are not entitled to the same parental rights.[54] Accordingly, the Court stated that the father who participates in the rearing of his child "acquires substantial protection under the Due Process Clause . . . [b]ut the mere existence of a biological link does not merit equivalent consitutional protection."[55]

Although the Court stated that the biological link does not deserve

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time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in a written, sworn statement;

(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument . . . ;

(h) any person who has filed with the putative father registry an instruction, acknowledging paternity of the child . . . .

Id.

48. *Lehr*, 463 U.S. at 255.

49. *Id.*

50. *Id.* at 264-67.

51. *Id.* at 262.

52. *Id.* at 261.

53. *Id.* at 261-62

54. *Id.*

55. *Id.* at 261 (citation omitted).

"equivalent constitutional protection" to that of a developed parent-child relationship, the Court's analysis did not suggest that that the biological link was insignificant. On the contrary, the biological link is extremely significant in that it is the only means by which a man may acquire the right to develop a parent-child relationship which is then worthy of constitutional protection.[56] Therefore, it may be argued that the right to establish the biological link is itself worthy of constitutional protection.

Indeed, the Court in *Lehr* suggests that states must provide a biological father of an illegitimate child the means by which he may establish his paternity so that he may have the opportunity to develop a relationship with his child.[57] Otherwise, the father's constitutional rights to maintain a relationship with his child depend on the cooperation of the mother or some other custodial parent in allowing the father to develop such a relationship.[58] The fact that statutory procedures to establish paternity were available to the father in *Lehr*, and he failed to avail himself of them, was the basis of the Court's holding that he was not constitutionally deprived of his right to a relationship with his child.[59]

2. Conclusions regarding the father's interest

Lehr and the other Supreme Court cases discussed above address a biological father's interest in maintaining a relationship with his child where the child's mother was unmarried at the time of the child's birth. However, these opinions suggest certain conclusions about the nature of a biological father's interest with respect to his child which are also relevant to a determination of a biological father's interest in establishing his paternity when his child is born while the child's mother is married to another man.

First, these cases indicate that a biological father has a constitutionally cognizable interest in a relationship with his child which does not depend on whether he was married to the child's mother when the child was born.[60] The biological link of father to child, not the marital status of the mother, provides the basis of the father's interest in a relationship

56. *Id.* at 262.

57. *See* Buchanan, *supra* note 18. The Buchanan article contains a thorough discussion of *Lehr* and the biological father's "opportunity interest."

58. *Id.* at 361-62.

59. *Lehr*, 463 U.S. at 264-65. Because the New York statute provided for the putative father registry and Lehr failed to sign the registry, the court held that he had not taken the necessary steps to maintain his interest in his child. *Id.*

60. The Court in *Stanley*, *Quilloin*, *Caban*, and *Lehr* never indicated that the fathers' rights were dependent on the marital status of the mother or father.

with his child.[61] Therefore, it would be improper to conclude that a biological father has no cognizable interest in his child simply because the child's mother was married to another man when the child was born.

Second, a strong argument can be made that *Lehr* suggests that the biological link is sufficient to give rise to an "opportunity interest" in the father to develop a relationship with his child, and that this "opportunity interest" is worthy of constitutional protection.[62] Therefore, a biological father has a strong interest in a right to rebut the presumption of legitimacy and to establish his paternity so that he may develop a relationship with his child.

Third, *Lehr* suggests that the constitutional protection afforded the father's "opportunity interest" is not dependent on an existing father-child relationship.[63] Although the Supreme Court decisions discussed above indicate that a biological father's parental rights with respect to his illegitimate child depend on a relationship between father and child, the outcome in *Lehr* suggests that the father's rights in that case would not have depended on an existing relationship if the state had not afforded a means by which the father could assert his paternity.[64] Therefore, in determining whether a biological father should be given the right to rebut the presumption of legitimacy and to establish his paternity, his lack of a developed relationship with his child alone should not dictate a conclusion that he has no interest worthy of protection under the due process clause.

Finally, the Supreme Court cases discussed above indicate that the weight of the father's interest may depend on the facts of the individual case.[65] Although a father may have a constitutionally cognizable interest

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61. Even though the Supreme Court indicated that a father's rights may depend on the extent to which he has developed a relationship with the child, it is the biological link which provides the basis for the right to develop that relationship. *See* Buchanan, *supra* note 18, at 352.

62. *See id.* at 351-81. In *Lehr*, Justice Stevens stated:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development.

Lehr, 463 U.S. at 262.

63. *See* Buchanan, *supra* note 18, at 360-61.

64. Justice Stevens suggested that the requirements of due process would not have been met if the state had not provided the father with a means by which he could establish a relationship with his child. He stated: "If this scheme were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate." *Lehr*, 463 U.S. at 263-64.

65. *See supra* notes 20-59 and accompanying text.

in establishing his paternity which does not depend on an existing relationship with his child, his interest may have more weight if he has a developed emotional or financial relationship with his child or if he has made persistent efforts to establish such a relationship.[66] Therefore, it is necessary for a court to consider the facts of each case to determine the weight to accord the father's interest.

In summary, a biological father has a strong interest in a right to establish his paternity because it is the only way in which he may be legally entitled to an opportunity to develop a relationship with his child. Since a biological father's interest in maintaining a developed parent-child relationship is an important interest worthy of due process protection, a biological father's interest in establishing his paternity certainly deserves equivalent constitutional protection.

B. The Required Procedure

Assuming that a biological father has a constitutionally cognizable interest in the opportunity to establish paternity and to develop a relationship with his child, it is necessary to determine what process must be accorded that father before he may be denied that interest.[67] In determining what procedural protection due process requires for a constitutionally cognizable interest, the Supreme Court has long employed a balancing test under which the infringed private interest is weighed against the asserted governmental interests underlying the procedure used by the state.[68] In *Mathews v. Eldridge*,[69] the Court explicitly set out the factors to be considered in this weighing process. The Court stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[70]

In applying this balancing test to determine whether denial of standing to rebut the presumption of legitimacy actually violates a biological

66. *See supra* notes 25-31, 51-55 and accompanying text.
67. *See supra* notes 12-13 and accompanying text.
68. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 570 (1972).
69. 424 U.S. 319 (1976).
70. *Id.* at 335 (citation omitted).

father's due process rights, a court must weigh the father's private interest against the state interests asserted to justify denial of standing. In addition, the court should consider "the risk of the erroneous deprivation"[71] of the father's interest through the use of such a conclusive presumption and the value and cost of possible alternatives to the use of this procedure.

1. The state interests

The state interests asserted to support denial of a biological father's right to rebut the presumption of legitimacy are the same as those claimed to be served by the presumption of legitimacy.[72] The primary governmental objectives asserted to support the presumption of legitimacy are: (1) to protect the child from the stigma of illegitimacy; (2) to provide private support for the child so that the child does not become a financial burden on the state; and (3) to protect the integrity of the family unit created by the mother, her husband and the child.[73]

When the presumption was first incorporated into English common law from the Roman law, the purposes underlying it were considered so important that it was treated as a substantive rule of law.[74] Therefore, it was a conclusive presumption which could not be rebutted by any party, no matter how strong the evidence that the mother's husband was not the father of the child.[75] Gradually, the English law was relaxed to allow the presumption to be rebutted, but only by evidence of lack of access between husband and wife which was "strong, distinct, satisfactory and conclusive."[76]

When the presumption was adopted into the laws of the United States, it was generally treated as a rebuttable presumption. However, the presumption has remained a very strong one, with court decisions varying as to the nature and kind of evidence necessary to rebut it.[77] In

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71. *Id.*

72. The state interests are the same as those underlying the presumption of legitimacy because whatever interests are served by a presumption of legitimacy are obviously served by denying someone the right to rebut the presumption.

73. For a thorough discussion of the public policy underlying the presumption of legitimacy, see Comment, *California's Conclusive Presumption of Legitimacy—Its Legal Effect and Its Questionable Constitutionality*, 35 S. CAL. L. REV. 437, 465-67 (1962).

74. Annotation, *Presumption of Legitimacy of Child Born to Married Woman as Affected by Lapse of More than Normal Period of Gestation After Access by Husband*, 7 A.L.R. 329 (1920).

75. *Id.* at 330.

76. Lord Lyndhurst in Morris v. Davies, 7 Eng. Rep. 365, 404 (1837).

77. Some jurisdictions place a very heavy burden on the defendant to rebut paternity. *See, e.g., In re* Findlay, 253 N.Y. 1, 170 N.E. 471 (1930). Other courts only require the defendant

addition, most states give only certain specified parties standing to rebut the presumption and in many states the biological father is not given this right.[78] In those states, the presumption remains conclusive as to the biological father.

The movement away from a conclusive presumption of legitimacy in England and the United States was the result of a recognition that the policies underlying the presumption were not, in many circumstances, as important as a just and accurate determination of the child's paternity. Today, changes in societal attitudes and modern scientific advancements cast even greater doubt upon the continuing validity of the purposes underlying the presumption. The discussion herein will examine the present validity of each of the purposes underlying the presumption and will focus specifically on whether each of these purposes is served by making the presumption conclusive as to the biological father, while making it rebuttable as to other parties.

a. stigma of illegitimacy

At the time the presumption was originally formulated, both law and society stigmatized the child who was born to parents who were not married.[79] Under then prevailing Western morality, the innocent child was often unfairly condemned or scorned because his parents were not married at the child's birth. The legal status of the child also depended on whether or not he was born "in wedlock." An illegitimate child was considered the child of no man and therefore had no rights of support or inheritance from his father.[80]

In recent years however, there has been swift progress in our laws toward equalizing the treatment of legitimate and illegitimate children.[81] The United States Supreme Court has held that statutes which weigh arbitrarily against illegitimates are an impermissible means to any government end and will be struck down.[82] Accordingly, laws now treat

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to rebut the presumption beyond a reasonable doubt. *See, e.g.*, Ventresco v. Bushey, 159 Me. 241, 191 A.2d 104 (1963); Commonwealth v. Leary, 345 Mass. 59, 185 N.E.2d 641 (1962). Finally, several jurisdictions require clear and convincing evidence to rebut the presumption of legitimacy. *See, e.g.*, State v. Mejia, 97 Ariz. 215, 399 P.2d 116 (1965).

78. *See* Annotation, *supra* note 3, at 1042.

79. *See* G. DOUTHWAITE, UNMARRIED COUPLES AND THE LAW 112 (1979); *see also* H. KRAUSE, *supra* note 2, at 1-5.

80. G. DOUTHWAITE, *supra* note 79, at 112.

81. Many state statutes have been revised to elevate the status of illegitimate children to that of legitimate children. *Id.*

82. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977) (striking down an Illinois statute permitting non-marital children to inherit by intestate succession only from their mothers); Gomez v. Perez, 409 U.S. 535 (1973) (holding that non-marital children have a right to public

legitimate and illegitimate children equally in most respects.[83]

Along with changes in the law, changing societal attitudes have resulted in less social stigma to those who are illegitimate. With the number of couples, especially couples in the public eye, who are choosing to have children out of wedlock,[84] there is less social opprobrium attached to the mother, the father or the child. Therefore, it is clear that avoiding the stigma of illegitimacy is not nearly as important today as it was when the presumption of legitimacy was originally formulated.

Even if the purpose of avoiding the stigma of illegitimacy has some continuing validity today, it is questionable whether this purpose is served by statutes which allow the mother or the presumed father to rebut the presumption, while denying the biological father this right. Indeed, if the biological father is allowed to rebut the presumption, it is for the purpose of establishing his paternity and "legitimating" the child as his own.[85] If the mother or the presumed father rebuts the presumption, the child may be left without a legal father and is, in effect, illegitimate. Therefore, it is difficult to understand how a presumption of legitimacy which is conclusive as to the biological father, but is not conclusive as to the mother or the presumed father, is designed to serve the purpose of protecting the child from the "stigma of illegitimacy."

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assistance); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 184 (1972) (holding that non-marital children may recover benefits because of their parent's disability under workmen's compensation laws); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (holding that the mother of a non-marital child may sue for the wrongful death of her child); Levy v. Louisiana, 391 U.S. 68 (1968) (holding that non-marital children have a right to recover damages for the wrongful death of their mother).

83. Although most laws that discriminate against illegitimates have been struck down, the Court does not consider illegitimacy a suspect classification, and it has permitted some legislative classifications to stand. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978) (upholding a New York statute requiring a judicial determination of paternity as a precondition to sharing in the estate of the father who dies intestate); Mathews v. Lucas, 427 U.S. 495 (1976) (upholding provisions of the Social Security Act which require non-marital children to prove dependency in situations where marital children need not); Labine v. Vincent, 401 U.S. 532 (1971) (upholding a Louisiana statute barring a non-marital child from sharing in the estate of her father who died intestate).

84. Approximately 3,681,000 live births occurred in the United States in 1982. About 715,200 (or 19.4%) of these children were illegitimate. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1986 at 58, 62 (106th ed. 1985). The overall percentage of illegitimate children has risen dramatically since 1960 when only 5.3% of children were born illegitimate. By 1970, the percentage had risen to 10.7% and by 1975, to 14.2%. *Id.* at 62.

85. A man would only be allowed to rebut the presumption in a proceeding in which he seeks to establish his own paternity.

b. *financial burden*

At the time the presumption of legitimacy originated in our laws, neither parent was responsible for the support of an illegitimate child since the child was considered *nullius filius* or "nobody's child."[86] Therefore, the state was responsible for the child's support. One purpose motivating the presumption of legitimacy was to prevent this additional financial burden from falling on the state by designating a legal father who would be responsible for support of the child.[87]

Today, both the mother and father of an illegitimate child are responsible for the child's support.[88] Moreover, present blood testing techniques make it possible not only to exclude the mother's husband as the father of the child, but also to determine paternity among almost any group of possible fathers.[89] Therefore, it is now possible in most cases to scientifically determine the legal father whose duty it is to support the child.

Thus, today the presumption of legitimacy really serves to relieve the state from support of a child only when the mother is unable to support the child and the biological father is unknown, unwilling or unable to support the child. In these situations the state is relieved from its burden of support as a result of the presumption because the mother's husband, a man who is not the child's biological father, is compelled to support the child. It is because of the obvious unfairness in such situations that many states give the presumed father the right to rebut the presumption.[90]

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86. S. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS § 1.05, at 1-12, 1-13, 1-14 (4th rev. ed. 1975).

87. *See Comment*, *supra* note 73, at 465-67.

88. Virtually all states now require that the father, as well as the mother, support their illegitimate children to some degree. *See generally* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 5.3-5.4 (1968).

89. The human leukocyte antigen test (HLA test) has the capability of excluding between 78% and 80% of all non-fathers. When this test is used in conjunction with several of the more conventional blood tests, the exclusion ratio is even more impressive. A joint report of the American Medical Association (AMA) and the American Bar Association (ABA) recommends the use of a series of seven serologic tests that offer a cumulative probability for excluding over 91% of all non-fathers. *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247, 257 (1976). Due to the increased reliability of such tests, some courts are allowing the admission of HLA tests to prove paternity. Under the traditional rule, admission of blood test results was limited to those situations in which such tests established that a putative father was not the true parent of a child. *See* Note, Cutchember v. Payne: *Approaching Perfection in Paternity Testing*, 34 CATH. U.L. REV. 227 (1984) (discussing recent court decisions which have accepted the HLA test as a reliable proof of paternity).

90. *See generally* Annotation, *supra* note 3 (listing some states which give a presumed father the right to rebut the presumption of legitimacy).

Statutes that allow the presumed father to rebut the presumption but do not give the biological father that same right, do not serve the purpose of avoiding a financial burden on the state. When the presumed father rebuts the presumption of legitimacy, the child has no legal father responsible for his support and this burden may fall upon the state. Conversely, if the biological father is allowed to rebut the presumption and establish his own paternity, the child will have a new legal father who is required to support the child. Thus, laws which allow the presumed father to rebut the presumption, but do not allow the biological father to do so, are structured so as to defeat, rather than support this purpose of the presumption.

c. family integrity

Courts have often stated that one of the primary purposes supporting the presumption of legitimacy is to protect the integrity of the family unit created by the mother, her husband and the child.[91] A conclusive presumption of legitimacy protects family integrity in two ways. First, the presumption protects family integrity by keeping knowledge of the child's true paternity from the mother's husband and the child. The presumption presumably serves this purpose because it helps to prevent marital disruption as a result of the husband's knowledge that he is not the biological father of the child.[92] Additionally, the presumption may prevent the child from suffering the confusion and torn loyalties which may result from learning that someone other than his mother's husband is his biological father.[93]

A second way in which family integrity may be protected by a conclusive presumption of legitimacy is that the presumption prevents a biological father from intruding into the family unit by enforcing visitation rights with his child. It is possible that in some situations such visitation rights could cause conflict between members of the family unit created by the mother, her husband and the child.

Clearly, for these reasons, a presumption of legitimacy which is conclusive as to all biological fathers serves the purpose of protecting family integrity in many cases. However, it is important to note that such a presumption also prevents a biological father from establishing his paternity in situations where the establishment of paternity would not protect

91. *See Comment, supra* note 73, at 465-67.

92. *See, e.g.*, A v. X, Y, and Z, 641 P.2d 1222, 1225-26 (Wyo.), *cert. denied*, 459 U.S. 1021 (1982); *see also infra* notes 106-16 and accompanying text.

93. See, e.g., Petitioner F. v. Respondent R., 430 A.2d 1075, 1079 (Del. 1981), discussed *infra* at notes 117-26 and accompanying text.

family integrity or where the potential disruption of the family is so slight that it should not be deemed to outweigh a biological father's interest in the opportunity to develop a relationship with his child. Thus, in many cases, a presumption conclusive as to all biological fathers may not serve the significant state interest of protecting family integrity.

For example, a conclusive presumption may not keep knowledge of the child's paternity from the presumed father or the child. A presumed father may already know that someone else is the child's biological father. The child may also know that the presumed father is not his or her biological father, or the child may be too young to understand the concept of paternity. In such cases, denial of a father's right to rebut the presumption does not preserve family integrity by keeping knowledge of paternity from the presumed father and the child. Under such circumstances, such withholding of knowledge may not be sufficiently important to outweigh the biological father's interest in the opportunity to develop a relationship with his child.

Furthermore, the fact that a conclusive presumption may keep the biological father from "intruding" into an ongoing family relationship may not be a significant state interest in many cases. For example, there may be no existing family unit formed by the mother and the presumed father. If the presumed father is dead or no longer married to the child's mother, denying a biological father the right to rebut the presumption of legitimacy does not necessarily serve to protect family harmony.

Moreover, in an action in which a biological father's paternity is established, a court could determine the rights of the biological father in a manner most conducive to protecting the child's welfare and family harmony under the circumstances of that particular case.[94] For example, the biological father may be given only limited visitation rights to the child if this is deemed to be in the child's best interests.[95]

Thus, whether denying standing to a biological father to rebut the presumption of legitimacy serves the purpose of protecting the family

94. The circumstances in such a case are similar to the situation in which a mother and father divorce after the child is born, and the mother who has custody of the child subsequently marries another man. In such cases, courts have structured the rights of the parties in a manner most conducive to the best interests of the child. For example, in a typical case, the mother may be given sole rights of custody and control of the child. The biological father may be given visitation rights with respect to the child, as well as a duty to support the child. The mother's husband normally has no duties or rights with respect to the child. However, since the child resides with him, the child is likely to develop a psychological parent-child relationship with him.

95. It is possible that a court may also determine that the mother's husband has certain legal rights regarding the child in spite of the fact that biological paternity has been established in another. *See infra* note 161 and accompanying text.

unit really depends on the circumstances of the particular case. Although denial of standing to the father may serve this purpose under some circumstances, it may not have any effect on family harmony in other situations, particularly where there is no existing family unit. Since in many cases there is no reason to deny rebuttal of the presumption in order to protect family integrity, legislatures in many states have given the mother and the presumed father the right to rebut the presumption.[96]

Courts have upheld statutes that give the mother and the presumed father this right, but deny the biological father the same right, on the rationale that the mother and the presumed father are within the family unit while the biological father is not.[97] These courts have reasoned that since the mother and the presumed father are within the family unit, they would only seek to rebut the presumption when the family unit cannot be threatened by such action. However, since the biological father is outside the family unit, he may decide to bring an action to rebut the presumption in circumstances in which the action would disrupt family integrity.[98] Therefore, these courts have held that the biological father should

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96. When the mother or presumed father seeks to rebut the presumption, it is clear that the circumstances are such that rebuttal would not disrupt family harmony. In this regard, one California court stated:

> The matter of "the integrity" of the family has been referred to from time to time as something which should not be impugned and that therefore the conclusive presumption should prevail regardless of truth or fact.
>
> . . . .
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> Does anyone believe that there is any integrity in the family where the wife has admittedly associated with other men and has given birth to a child which could not possibly in fact be the child of her husband and the husband has so charged such facts in a verified proceeding and has proven his allegations therein set forth beyond a peradventure of a doubt? Where is the moral soundness, the freedom from corruption, the state of innocence to be preserved in such a situation?

Wareham v. Wareham, 195 Cal. App. 2d 64, 84, 15 Cal. Rptr. 465, 478 (1961) (Fourt, J., concurring).

97. *See, e.g., X, Y, and Z,* 641 P.2d at 1225-26, discussed *infra* at notes 106-16 and accompanying text.

98. In addition, the Wyoming Supreme Court in *X, Y, and Z,* suggested that to give a claiming biological father the right to rebut the presumption would allow anyone outside of the family unit (i.e. even a person who is not the biological father), for any motive, to bring an action which may disrupt family harmony. *Id.* at 1227. Although in theory this reasoning may be accurate, it is unlikely that a man would seek to rebut the presumption and assert paternity for some motive other than his desire to establish a relationship with his child, since the claimant would be responsible for supporting the child if he is successful in establishing his paternity.

Moreover, if someone other than the biological father brings such an action simply to harass or to disturb those within the family unit, that person would be subject to suit for malicious prosecution. Furthermore, since there are other less complicated and less expensive means by which one with improper motives may notify the husband and/or the child of his alleged paternity, it seems unlikely that such a person would bring a court proceeding to rebut the presumption and to establish his paternity in such a situation.

not be given the right to rebut the presumption of legitimacy.

This difference in the position of those within and those outside the family unit may be sufficient to allow a statute distinguishing between the rights of the biological father and the rights of the mother and the presumed father to withstand challenge under the equal protection clause.[99] However, in analyzing whether such statutes violate the due process clause, the relevant question is not whether there is a legitimate reason for distinguishing between the rights of these parties. Rather, the relevant question is whether there is a legitimate state interest in denying all biological fathers the right to rebut the presumption and how much weight should be given that interest when balanced against the interest of biological fathers in establishing their paternity.[100]

Clearly the state has a legitimate interest in protecting family integrity and the welfare of the child. However, the weight that should be given this interest when balanced against a biological father's interest depends on the facts of the individual case. Where there is no family unit to protect, or where family harmony would not be significantly disrupted by establishing paternity in the biological father, the state interest should not be given as much weight as in situations where the family unit or family harmony would suffer significantly. Legislatures and courts have acknowledged that the weight of the state interest in protecting family harmony depends on the circumstances of the particular case by allowing the presumed father and the mother to rebut the presumption in situations where these parties determine that family harmony cannot or will not be protected.

2. Weighing the interests

Under the criteria set forth in *Mathews v. Eldridge*,[101] there are three distinct factors that must be weighed to determine what procedural protections due process requires in order to preserve a biological father's interest in an opportunity to establish paternity and to develop a relationship with his child.[102] These factors are: (1) the biological father's interest; (2) the state interests underlying denial of a biological father's right to rebut the presumption, and (3) the risk of "erroneous deprivation" of the father's interest through the use of such a conclusive presumption,

99. See *infra* notes 182-270 and accompanying text for a discussion of whether such statutes violate the equal protection clause.

100. *See supra* notes 67-70 and accompanying text.

101. 424 U.S. 319 (1976).

102. *See supra* text accompanying note 70.

and the value of alternative procedural safeguards.[103]

In evaluating the biological father's interest versus those of the state, state courts employ two significantly different methods of analysis. First, a court may weigh these interests in a general way and decide that in all cases the state interests will outweigh the biological father's interest or that in all cases the biological father's interest will outweigh the state interests. Under this analysis, if a court finds that a biological father's interest always outweighs the state interests, then the statute denying him the right to rebut the presumption would be deemed unconstitutional on its face. However, if a court finds that the state interests always outweigh any biological father's interest, the statute would be deemed constitutional and no biological father would be allowed to rebut the presumption of legitimacy under any circumstances. This method of analysis is represented by a recent decision of the Wyoming Supreme Court and is referred to herein as the "Wyoming Approach."[104]

The second method of evaluating the competing interests is to consider the facts of the particular case in weighing the biological father's interest against the state interests and to evaluate these interests on a case by case basis. Thus, this method allows a court to consider the facts of the individual case in deciding whether to give a particular biological father the right to rebut the presumption. Under this method, a court would not hold that a statute is unconstitutional on its face, but would hold that it is unconstitutional *as applied* to the facts of a particular case when the court determines that a biological father should be given the right to rebut the presumption. This is the method which has been employed by the California Supreme Court and will be referred to herein as the "California Approach."[105]

Cases setting forth both approaches are discussed below. Although the California Approach is preferable to the Wyoming Approach, the California Approach is not the most preferred method of analysis since it requires that in every case a court must decide the constitutionality of a statute denying the biological father the right to rebut the presumption of legitimacy.

a. the Wyoming Approach

The issue of whether a biological father's due process rights are vio-

103. *Id.*

104. See *infra* notes 106-26 and accompanying text for a discussion of cases following the Wyoming Approach.

105. See *infra* notes 127-68 and accompanying text for a discussion of cases following the California Approach.

lated by a denial of his right to rebut the presumption of legitimacy arose in *A v. X, Y, and Z*,[106] a recent case decided by the Supreme Court of Wyoming. The Wyoming statute in question was based on the Uniform Parentage Act.[107] The statute conferred no standing to a biological father to establish paternity in a child born in wedlock to a mother and her husband.

In this case, the child was conceived approximately three months before the mother married the presumed father but was born after she had married him.[108] The putative biological father alleged that he was the biological father of the child; that he had financial means to provide for the child's needs and that he desired to do so.[109] He requested that he be declared the child's legal father and that he be given visitation rights and an obligation to support the child.[110] Although the court assumed that all of the putative father's allegations were true, it nevertheless found that he was not denied due process by a construction of the statute which conferred no standing on him to establish his paternity.[111]

In analyzing the father's claim that the lower court's construction of the statute denied him due process, the Wyoming Supreme Court first stated that the father had no private interest which was entitled to protection by legal process, since he had no statutory or common law right to maintain an action for paternity.[112] The court thus suggested that the only interest a father could have in this situation is an interest created by law and that a biological father has no constitutionally cognizable interest which arises from his biological connection to the child.

Although the court rejected the contention that the biological father had any interest in his child which deserved protection under the Constitution, it stated that even assuming arguendo that such an interest existed, the father would still not be denied due process by a statute denying him the right to rebut the presumption of legitimacy.[113] The court stated that any assumed private interest on the part of the father must be weighed against the government interests of protecting the fam-

106. 641 P.2d 1222 (Wyo.), *cert. denied*, 459 U.S. 1021 (1982).

107. WYO. STAT. §§ 14-2-101 to -120 (1977). These provisions are identical to those provisions of the UPA set forth, *infra* in the Appendix.

108. It should be noted that the child was less than two years old at the time this case was decided. *X, Y, and Z*, 641 P.2d at 1222.

109. *Id.*

110. *Id.*

111. *Id.* at 1226-27. In addition, the court held that the claimant was not denied equal protection of the law. *Id.* at 1224. *See also infra* notes 194-98 and accompanying text, 222-26 and accompanying text.

112. *X, Y, and Z*, 641 P.2d at 1226-27.

113. *Id.* at 1227.

ily unit and the legitimacy and well-being of the child.[114] Weighing these interests, the court held that the government function far outweighed any private interest of the father.[115] Therefore, the due process clause did not require a hearing to protect any interest the father may have.[116]

Similarly, in *Petitioner F. v. Respondent R.*,[117] the Supreme Court of Delaware held that a state statute denying a biological father standing to seek custody or visitation with respect to his child conceived and born during the marriage of the mother to another man did not deprive the biological father of any due process rights. In this case, the biological father had filed a petition in the family court to seek custody or visitation rights with respect to his child born two days before he filed the petition.[118] Under the state custody statute, only a "parent" had standing to initiate a child custody proceeding and only a "parent" denied custody was entitled to visitation privileges.[119]

Thus, the court recognized that the father's action was, in effect, one for determination of his parentage of the child. The court held that the word "parent," as used in the statute, meant the child's legal parent, and in the case of a married woman who bears a child, her husband is the legal father and parent because of the presumption of legitimacy.[120] Therefore, the biological father had no standing as a "parent" to seek

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114. *Id.*

115. In reaching this conclusion, the court quoted the trial court's opinion letter which stated:

> "I don't believe that a statute which prevents a biological father from bastardizing a child violates due process of law. It appears that the legislature has carefully weighed the various social values and decided that the biological father's rights are subordinate to the collective rights of the child, the mother, the presumed father and the family unit."

Id.

116. In fact, the Wyoming court suggested that if the state had afforded a hearing to the father, that may have been construed as state action violative of the due process clause in that it infringed on the "private realm of family life" protected by this clause. The court stated:

> The bringing of such action and the resulting hearing would attack the family unit and the child's legitimacy and well being, and it would cause the harm sought to be avoided, regardless of the outcome of the hearing. Any stranger desiring to injure the mother, the child, or the presumed father, for whatever reason, could inject disruptive elements into the family unit by instituting such action.

Id.

117. 430 A.2d 1075 (Del. 1981).

118. The claimant sought custody "so that he might better provide for the needs of the child." *Id.* at 1077. The mother and her husband jointly acknowledged parentage of the child in an affidavit and opposed the petition for custody and visitation by the claiming biological father. They alleged that they were cohabitating at the time of the child's conception and birth, and that they lived together with the child and other children as a family unit. *Id.*

119. DEL. CODE ANN. tit. 13, §§ 721, 727 (1974 & Supp. 1978).

120. *Petitioner F.*, 430 A.2d 1075 at 1077-78.

custody or visitation.[121]

Relying on *Stanley v. Illinois*,[122] the biological father asserted that he was constitutionally entitled to a hearing on the issue of his paternity because the right of a natural father is a substantial liberty interest protected by the due process clause. The Delaware court stated that it agreed fully with the principle set forth in *Stanley* that unwed fathers are generally entitled to the protection of the Constitution.[123] However, the court stated that it did not follow from *Stanley* "that a man claiming paternity has a constitutionally protected interest in a determination of his parental status . . . with respect to a child conceived and born during the marriage . . . of the child's mother to [another man]."[124]

The court thus distinguished *Stanley* from *Petitioner F.* because *Stanley* did not involve the determination of paternity. Moreover, the court distinguished the interest of the father in *Stanley*, whose interest was in the children he had " 'sired and raised,' " from the interest of the father in *Petitioner F.* who "in the eyes of the law and in actuality, is a stranger to the child."[125]

The court went on to state that even assuming arguendo, that the father in this case had a constitutionally cognizable interest, that interest must be weighed against competing state interests to determine if the father's interest warranted due process protection. The court held that in this case any constitutionally cognizable interest of the father would be outweighed by "the very powerful countervailing public interest in promoting the marital relationship, preserving intact an existing family unit, and protecting the minor child from confusion, torn affection, and the life-long stigma of illegitimacy."[126]

In summary, under the Wyoming Approach represented by the decisions of the Wyoming Supreme Court and the Delaware Supreme Court, the courts did not appear to consider the facts of the individual

121. *Id.* at 1078. Although in this case, the Delaware Supreme Court denied the biological father standing to rebut the presumption of legitimacy, the court was construing the word "parent" in the child custody act in effect at that time. Since the date of this case, Delaware has adopted a version of the UPA which explicitly allows a biological father the right to bring an action to rebut the presumption of legitimacy. *See* DEL. CODE ANN. tit. 13, § 805 (Supp. 1984) (effective July 19, 1983).

122. 405 U.S. 645 (1972). See *supra* notes 20-24 and accompanying text for a discussion of *Stanley*.

123. *Petitioner F.*, 430 A.2d at 1078. The court also cited Caban v. Mohammed, 441 U.S. 380 (1979) and Quilloin v. Walcott, 434 U.S. 246, *reh'g denied*, 435 U.S. 918 (1978). *See supra* notes 25-42 and accompanying text.

124. *Petitioner F.*, 430 A.2d at 1078-79.

125. *Id.* at 1079.

126. *Id.*

case in weighing the biological father's interest against the competing state interests. Rather, these decisions suggest that in every case, no matter what the facts, such a biological father has no constitutionally protectible interest in his child; therefore, the state interests underlying the presumption of legitimacy will always prevail. Accordingly, a state statute which denies a biological father the right to rebut the presumption of legitimacy and to establish his paternity would never violate a father's due process rights. Thus, these courts indicate that it is not a denial of due process for a statute to provide a conclusive presumption of legitimacy as to all biological fathers.

b. the California Approach

In 1975, the California Supreme Court decided *In re Lisa R.*[127] There, the main issue was whether the biological father could offer proof to establish his paternity despite the California statute which provided that the child was presumed the legitimate issue of the mother's marriage to another man. Under the statute, only the mother, her husband, their descendants or the state could dispute the presumption of legitimacy.[128] Therefore, the presumption was conclusive as to the biological father because he lacked standing to contest it.[129] The biological father argued that the denial of standing was a violation of his due process rights.

Relying heavily on *Stanley*, the court weighed the competing private and state interests.[130] It reasoned that the biological father had a constitutionally cognizable interest in his child which arose from the fact that he had lived with the child's mother both before and after the child's birth, had contributed to her support, and had visited the child when he was able to do so.[131] The state interests identified by the *Lisa R.* court

127. 13 Cal. 3d. 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975).

128. CAL. EVID. CODE § 661 (West 1966) (current version at CAL. CIV. CODE § 7004 (West 1983)).

129. *Lisa R.*, 13 Cal. 3d at 647, 532 P.2d at 130, 119 Cal. Rptr. at 482.

130. *Id.* at 647-51, 532 P.2d at 130-33, 119 Cal. Rptr. at 482-85. The court stated:

> In broad terms *Stanley* states that the interest of an unwed father in his children is not only cognizable but also of sufficient substance to warrant deference except when the deprivation comports with equal protection and due process requirements. . . . The question whether appellant, as one claiming to be Lisa's natural father, can rebut the presumption that Lisa is the issue of her mother's marriage must thus be resolved by weighing the competing private and state interests.

Id. at 648, 532 P.2d at 131, 119 Cal. Rptr. at 483.

131. *Id.* at 649, 532 P.2d at 131-32, 119 Cal. Rptr. at 483-84. The child's mother was separated from her husband and was living with the biological father at the time of the child's birth. The mother, biological father and child continued to reside as a family for four or five months. The mother then returned to her husband and took the child with her, contrary to the wishes of the biological father. *Id.*

were protection of the child's welfare, protection of the child from the stigma of illegitimacy, and protection of the family unit.[132] Weighing the father's interests and the state interests, the court held "for reasons at least as compelling as those in *Stanley*, that a presumption which precludes to appellant in the instant circumstances a right to offer evidence to prove that he is the father of the minor child is unreasonable, arbitrary and capricious and a denial of due process."[133]

The *Lisa R.* court recognized that the asserted state interests were legitimate legislative purposes, but held that these purposes were insufficient to justify an irrebutable presumption as to the father under the facts of this case.[134] First, the court noted that a conclusive presumption as to the biological father did not necessarily serve to secure the child's welfare but, to the contrary, could actually defeat that purpose if the natural father were able to provide proper parental care and control.[135]

Second, the state's interest in protecting the child from the stigma of illegitimacy was deemed insufficient to overcome the father's rights because a biological father seeking to establish his paternity would undoubtedly intend to legitimatize the child.[136] Third, the *Lisa R.* court noted that the presumption did not serve the purpose of protecting the family unit in this case because there was no longer any such unit existing. Both the child's mother and the presumed father were dead at the time the biological father sought to establish paternity.[137]

The *Lisa R.* court also recognized that another possible legitimate state interest supporting a conclusive presumption of legitimacy would be the increased speed and efficiency of judicial inquiry.[138] The court thus suggested that the state might assert that a conclusive presumption saves

132. *Id.* at 649-50, 532 P.2d at 132, 119 Cal. Rptr. at 484.

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

134. *Id.* at 650-51, 532 P.2d at 132-33, 119 Cal. Rptr. at 484-85.

135. *Id.* at 650, 532 P.2d at 132, 119 Cal. Rptr. at 484. The child in this case had been made a dependent ward of the juvenile court because of certain drug and alcohol related problems of her mother and her mother's husband, the presumed "legal" father. The child had resided in several foster homes. At the time of the fourth annual review by the juvenile court of the child's dependency status, the biological father sought to establish his paternity to afford him visitation rights and eventually to terminate the child's dependency status. The juvenile court held that he had no standing to offer evidence of his paternity. In the juvenile court proceeding, the father had offered proof that he planned to establish a relationship with the child and thereafter to establish a home for her. *Id.* at 640-41, 532 P.2d at 125-26, 119 Cal. Rptr. at 477-78.

136. The court noted that in this case it appeared that the biological father had already legitimatized the child in accordance with the relevant state statute. *Id.* at 649 n.14, 532 P.2d at 131 n.14, 119 Cal. Rptr. at 483 n.14.

137. *Id.* at 650, 532 P.2d at 132, 119 Cal. Rptr. at 484.

138. *Id.* at 650-51, 532 P.2d at 132-33, 119 Cal. Rptr. at 484-85.

courts the time and effort of having to determine in each case whether the father should be given standing. However, the court indicated that the state's interest in administrative efficiency would not be sufficient to outweigh the biological father's interest in every case.[139]

Analogizing to *Stanley*, the *Lisa R.* court rejected the notion that a presumption of legitimacy which is conclusive as to the biological father should be upheld for the reason that it is more convenient to presume in each case that the mother's husband is the father than to allow a biological father to prove that he is the father.[140] The court thus indicated that in every such case a court must determine whether due process requires that the claiming biological father be allowed to present proof of his paternity.[141]

The California Supreme Court recently decided *Michelle W. v. Ronald W.*,[142] which also addressed due process issues resulting from a state statute that denied a biological father the right to rebut the presumption of legitimacy. The facts of this case are particularly interesting with regard to the weighing of the competing private and state interests under the due process clause.

In *Michelle W.*, the biological father had a sexual relationship with the child's mother while she was married to another man. The child was born during the marriage. The mother, her husband (the presumed father) and the child lived together for four years after the child's birth and the presumed father fulfilled all the obligations of parenting the child. Following dissolution of the marriage, custody of the child was given to the child's mother.[143] Approximately one year after the marriage was dissolved, the mother married the child's biological father and the child thus became a member of this new family unit.

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139. *Id.*

140. The court noted that in *Stanley*, the Supreme Court concluded that due process precluded the conclusiveness of the presumption of unfitness, even though it may be argued that unwed fathers are seldom fit parents. *Id.*

141. The court stated in a footnote:

> As our discussions have indicated, the reasonableness of a statutory limitation on the right to offer proof of parentage depends on circumstances prevailing in each particular case. Accordingly, a court, before receiving evidence thereof, must in each instance make a preliminary determination, as by offer of proof, that due process concepts would be offended if the particular claimant to parentage were denied an opportunity to prove his claim.

Id. at 651 n.17, 532 P.2d at 133 n.17, 119 Cal. Rptr. at 485 n.17.

142. 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748 (1985), *appeal dismissed*, 106 S. Ct. 774 (1986).

143. At the time the mother and the presumed father were divorced, the issue of paternity was not raised. After the dissolution, the presumed father provided child support for the child and exercised his visitation rights on a regular basis. *Id.* at 358-59, 703 P.2d at 90, 216 Cal. Rptr. at 750.

The biological father then brought an action to establish his paternity of the child.[144] The California trial court construed the California statute to deny the claiming biological father the right to rebut the presumption of the child's legitimacy.[145] On appeal, the claiming biological father asserted that the statute prevented him from establishing a legal parent-child relationship and thereby deprived him of a liberty interest protected by the due process clause.[146]

The California Supreme Court stated that the issue of whether the statute violated the claiming biological father's due process rights " 'must be resolved by weighing the competing private and state interests.' "[147] In order to determine the weight of the private interest involved, the *Michelle W.* court first reviewed the United States Supreme Court cases of *Stanley*, *Quilloin v. Walcott*,[148] and *Lehr v. Robertson*,[149] and the California Supreme Court case of *Lisa R.* The court concluded that the biological father's abstract interest in establishing paternity was "not as weighty as the interests of the fathers in *Stanley* and *Lisa R.*"[150] In reaching this conclusion, the court stated that there was a clear and significant difference between the termination of a developed parent-child relationship and a denial of a right to legally establish paternity.

The court then suggested that the important distinction is that the putative biological fathers in *Stanley* and *Lisa R.* " 'were seeking to establish their legal relationship with children who otherwise had no parents and were wards of the state.' "[151] The court pointed out that the state in this case had not made any effort to prevent the biological father from establishing a relationship with the child. The state was only

144. The action was also brought by the child, Michelle, age six, through her guardian ad litem. *Id.* at 359, 703 P.2d at 90, 216 Cal. Rptr. at 750.

145. California Evidence Code § 621(a) provides in full: "(a) Except as provided in subdivision (b), the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." CAL. EVID. CODE § 621(a) (West Supp. 1986). Subdivision (b) allows rebuttal of the presumption of subdivision (a) by blood test evidence. *Id.* § 621(b). Subdivision (d) provides: "The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child." *Id.* § 621(d). No statutory provision explicitly allows the biological father the right to raise a notice of motion for blood tests.

146. *Michelle W.*, 39 Cal. 3d at 359-60, 703 P.2d at 90-91, 216 Cal. Rptr. at 751.

147. *Id.* at 360, 703 P.2d at 91, 216 Cal. Rptr. at 751 (quoting *In re* Lisa R., 13 Cal. 3d 636, 648, 532 P.2d 123, 131, 119 Cal. Rptr. 475, 483 (1975)).

148. 434 U.S. 246 (1978).

149. 463 U.S. 248 (1983).

150. *Michelle W.*, 39 Cal. 3d at 362, 703 P.2d at 92, 216 Cal. Rptr. at 752-53.

151. *Id.* (quoting Estate of Cornelius, 35 Cal. 3d 461, 466, 674 P.2d 245, 248, 198 Cal. Rptr. 543, 547, *appeal dismissed*, 466 U.S. 967 (1984)).

preventing him from establishing a "legal" relationship where the child had a continuing emotional and financial relationship with the presumed father.[152]

The opinion thus suggests several conclusions reached by the *Michelle W.* court about the nature and extent of a biological father's interest in establishing his paternity. Most importantly, the court's language may be interpreted to suggest that the biological father has an interest in establishing paternity which, in an appropriate case, is deserving of due process protection. The court suggested that the relevant inquiry is not whether the father has a constitutionally cognizable interest in his child, but rather, how much weight should be accorded the father's interest under the facts of the particular case.

In determining the weight to be given to the father's interest, the *Michelle W.* court suggested several considerations. First, the court indicated that the biological father's interest is not as great when the child has a parent and more particularly when the child, as in this case, has a "legal" father with whom she or he has an existing emotional and financial relationship.[153] On this point, the court's reasoning is questionable, since facts concerning the child's relationship with the presumed father are more relevant to an analysis of the state interest in protecting family integrity.

Second, the court suggested that since the biological father in this case had a developed relationship with the child, his interest in establishing paternity was accorded less weight. The court indicated that since he already had a relationship with the child, the state was not depriving him of an interest in such a relationship by denying him a right to establish paternity.[154] This conclusion does not comport with prior United States Supreme Court cases which indicate that the weight to be accorded a biological father's interest in his child is dependent upon the father's efforts to develop a relationship with his child.[155] Moreover, the court did not adequately address the point that the biological father's interests were affected by depriving him the right to establish a legal relationship with his child.[156]

In examining the weight of the governmental interests involved in

152. *Michelle W.*, 39 Cal. 3d at 362, 703 P.2d at 92, 216 Cal. Rptr. at 752. The court stated that it left open the issue of the validity of section 621 as applied to situations where the state has attempted to prevent the relationship between a child and its biological father. *Id.* at 362 n.4, 703 P.2d at 92 n.4, 216 Cal. Rptr. at 752 n.4.

153. *Id.* at 362, 703 P.2d at 92, 216 Cal. Rptr. at 752.

154. *See supra* note 152 and accompanying text.

155. *See supra* notes 20-66 and accompanying text.

156. If the biological father is unable to legally establish his paternity, he has no legal rights

this case, the *Michelle W.* court stated that the important governmental interests were the upholding of the integrity of the family and the protection of the child's welfare.[157] The court indicated that the state's interest in protecting the family was served by preserving the developed parent-child relationship with the "legal" (i.e., presumed) father even though the child was not living with the presumed father.[158] It suggested that this furthered the child's welfare because such relationships furnish young children with social and emotional strength and stability. The court thus implied that when a child has a presumed father with whom the child has a developed parent-child relationship, and that presumed father opposes the establishment of paternity in another, the state has a strong interest in the protection of that relationship, even if the presumed father is not part of the family unit in which the child resides.[159]

In reality, the court's opinion appears to be more concerned with protecting the rights of the presumed father than with protecting the family unit or the welfare of the child. Although the *Michelle W.* court indicated that preserving the legal relationship between the child and presumed father protected family integrity and the child's welfare, under the facts of this case, it is difficult to see how these interests were served by denying the biological father the right to establish paternity. It can be inferred from the facts that the child was living with the biological father and thus had a relationship with him which was probably of a parent-child nature. It also seems apparent that the child was aware that this man claimed to be her biological father and that her mother did not dispute that assertion.[160] Therefore, the establishment of paternity in the biological father could not have brought her previously unknown infor-

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with regard to his child which he may enforce. Therefore, his relationship with his child is totally dependent on the mother allowing him to have a relationship with the child.

157. *Michelle W.*, 39 Cal. 3d at 362, 703 P.2d at 92, 216 Cal. Rptr. at 753. The court expressly rejected the presumed father's argument that the stigma of illegitimacy should be considered as a state purpose supporting the constitutionality of § 621. The court stated that because the state had adopted the Uniform Parentage Act which states that "the parent and child relationship extends equally to every child and every parent, regardless of the marital status of their parents," a consideration of the stigma of illegitimacy is without any legal effect. *Id.* at 362 n.5, 703 P.2d at 92 n.5, 216 Cal. Rptr. at 752 n.5.

158. *Id.* at 363, 703 P.2d at 93, 216 Cal. Rptr. at 753. The court made this observation regarding the state's interest with reference to the child's claim. However, the state interests underlying the statute are the same, regardless of whose private interests are being evaluated. Moreover, the court states that the interest of the child in this case is treated as an appendage to the rights of the biological father.

159. *Id.*

160. The court noted that the guardian ad litem bringing suit on behalf of the child was a family friend of the mother and the biological father. *Id.*

mation about her parentage which could have caused her confusion and torn loyalties.

Furthermore, in this case there was no reason why the establishment of paternity in the biological father would have necessarily resulted in any disruption in the child's life which would be detrimental to her welfare. If the biological father were determined to be the child's legal father, a court could have structured the rights of the parties involved in a manner most conducive to the child's welfare. For example, the biological father could have been given shared custody with the mother. This would not have changed the home environment for the child since the child was already living with the mother and the claiming biological father.

Moreover, under California law, it is possible that the presumed father's visitation rights could have been maintained even if he were no longer the child's "legal" father.[161] The child could thus have enjoyed the same emotional relationship with him that she enjoyed when he was her "legal" father. Therefore, in this case the only real change in the position of the child which necessarily would have resulted from the biological father becoming the child's legal father would have been that the burden of support would have shifted to the biological father.

Therefore, it appears that in spite of the language of the opinion, the real concern of the court in *Michelle W.* was a weighing of the respective interests of the presumed father and the biological father. It seems the court really made a determination as to which person it deemed most deserving of a "legal" father-child relationship with the child. The court concluded that the presumed father was most deserving of legal paternity since he was originally presumed the legal father, had supported the child, and had maintained a relationship with the child. This interest was deemed more important than the biological connection asserted by the biological father, even though he also had an emotional relationship with the child.

The California Supreme Court's analysis in this case deserves special attention because it clearly demonstrates the subjective manner in which a court may apply the balancing test to determine whether a biological father's due process rights have been violated. It also indicates that a court must employ this balancing process in *every case* in which a biologi-

161. *See id.* at 367-69, 703 P.2d at 95-97, 216 Cal. Rptr. at 755-58 (Bird, C.J., dissenting). Chief Justice Bird, in a dissenting opinion, argued that under California law the presumed father in this case would have been entitled to visitation rights even if the biological father had been established as the "legal" father of the child. Id. (Bird, C.J., dissenting).

cal father seeks the right to rebut the presumption of legitimacy.[162] Indeed, the *Michelle W.* court stated that it did not interpret the presumption of legitimacy contained in the statute to be a "conclusive and unchangeable presumption,"[163] because the competing interests must be weighed in each case to determine whether due process requires that the biological father be given the right to rebut the presumption.[164]

Therefore, under the California Approach set forth in *Michelle W.* and in *Lisa R.*, the facts of the individual case must be considered in weighing a biological father's interests against the asserted state interests.[165] These interests cannot be weighed by the court in any abstract sense but only on a case by case basis. For example, in the case of *Lisa R.*, the fact that the biological father had made diligent efforts to establish his paternity and develop a relationship with his child was considered a significant factor in determining the weight to be accorded the father's interest.[166] Moreover, the fact that there was no family unit to

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162. *See id.* at 360, 703 P.2d at 91, 216 Cal. Rptr. at 751. The court stated: "We have held that the issue of whether section 621 adequately protects a putative father's interests *'must be* resolved by weighing the competing private and state interests.' " *Id.* (quoting *In re* Lisa R., 13 Cal. 3d 636, 648, 532 P.2d 123, 131, 119 Cal Rptr. 475, 483, *cert. denied*, 421 U.S. 1014, *reh'g denied*, 423 U.S. 885 (1975)) (emphasis added).

163. *Id.* at 364, 703 P.2d at 94, 216 Cal. Rptr. at 754.

164. The court stated:

> In our due process analysis, we have declined to interpret section 621 as an absolute bar to all suits to establish paternity by either the putative father or the presumed legitimate child. Rather, we have applied the balancing test analysis of *Lisa R.* and *Estate of Cornelius.* In contrast to *Caban*, although Donald R. and Michelle [the putative father and the child] are not able to rebut the presumption under the facts of this case, this does not mean that all putative fathers and all presumed legitimate children are barred in all cases.

Id. at 365, 703 P.2d at 94, 216 Cal. Rptr. at 754.

165. A recent case decided by the Supreme Judicial Court of Massachusetts also considered the facts of the case in deciding that due process did not require that the biological father be given the right to rebut the presumption of legitimacy *under the circumstances* involved in that case. P.B.C. v. D.H., 396 Mass. 68, 73, 483 N.E.2d 1094, 1097 (1985), *cert. denied*, 106 S. Ct. 1286 (1986).

In addition, a special concurring opinion in a recent case decided by the Colorado Supreme Court also considered the facts of the case in determining the weight to be accorded the state interests and the biological father's interest. *See* R. McG. v. J.W., 200 Colo. 345, 354, 615 P.2d 666, 671 (1980) (Dubofsky, J., specially concurring). In weighing these interests, this concurring judge stated that the state's interest would prevail if the father had not continually tried to maintain contact with the child and had not indicated his desire to support his child. *Id.* at 355, 615 P.2d at 673. However, since the father in *R. McG.* had made such efforts to form a relationship with his child, and since he had no alternative remedy to protect his interest in the child, the concurring judge found that he had standing to assert his interests in a court proceeding. The concurring judge stated that "[o]therwise, his constitutional right to due process of law in order to protect his basic right to conceive and raise his child has been denied." *Id.* at 356, 615 P.2d at 674 (Dubofsky, J., specially concurring).

166. *See supra* note 131 and accompanying text.

protect was extremely important in the court's determination that the state's interests were not of sufficient importance to outweigh the biological father's interests.[167]

Similarly, in *Michelle W.*, the California Supreme Court emphasized the necessity of considering the facts of each case in weighing the private and state interests in order to determine the constitutionality of the statute as applied to that particular case.[168] Although the court did not hold that the statute was unconstitutional on its face, it did, in effect, hold that a statute cannot constitutionally provide a presumption of legitimacy which is conclusive as to all biological fathers in all circumstances.

Thus, under the California Approach, a court must examine the facts of each case in weighing the private and state interests, and determine whether the statute is unconstitutional as applied in that case. Therefore, the constitutionality of the statute may be subject to review in each case in which a biological father seeks to rebut the presumption of legitimacy.

c. summary

In weighing the private and state interests, the California Approach is preferable to the Wyoming Approach. Since the strength of these interests varies significantly according to the facts of a particular case, those facts should influence a court's weighing of the biological father's interest and the state interests. Therefore, it is not possible to weigh these interests in an abstract sense, as did the Wyoming Supreme Court, and to determine that in every case the state interest outweighs the biological father's interest.

For example, the language of the United States Supreme Court opinion in *Lehr v. Robertson*[169] suggests that a biological father has a protectible interest to establish paternity even if his only connection with the child is the biological link.[170] However, it is clear that the interest of a father who has developed a relationship with his child should be accorded greater weight in the determination of whether his due process rights have been violated.[171]

Similarly, there is no way to meaningfully evaluate the state's interest in any general way. The weight of the state's interests is affected by the facts of each case. For example, protecting a child from the stigma of

167. *See supra* text accompanying note 137.
168. *See supra* notes 147-59 and accompanying text.
169. 463 U.S. 248 (1983).
170. *See supra* note 62 and accompanying text.
171. *See supra* notes 27-31 and text accompanying notes 51-55.

illegitimacy is not as significant an interest if the facts indicate that the father intends to legitimate the child. Providing private support for the child is not a weighty state interest if the facts demonstrate that the biological father is willing and able to support the child. Indeed, this state interest may carry no weight if the facts show that the presumed father will not or cannot support the child, while the biological father can and will do so.

Furthermore, protection of the family unit, which is the strongest state interest underlying the presumption today, may have very little weight in certain circumstances. For example, where it is clear that the presumed father and child already have knowledge that the child is not the child of the presumed father, this purpose is less compelling. Moreover, in many cases there is no family unit to protect. The mother and the presumed father may be divorced or the presumed father may be deceased at the time the action is brought, and the child may have no existing father-child relationship with the presumed father. In these cases, the asserted state interest of protecting the family unit would have little force.

Certainly, a biological father's interest should be deemed to outweigh the state interests when the biological father has a developed relationship with the child, is willing and able to legitimate and support the child, and there is no family unit to protect.[172] In other situations as well, the biological father's interest may outweigh the state interests because of the facts of the particular case. Therefore, whenever a biological father seeks the right to rebut the presumption of legitimacy, a court should consider the facts of the individual case to determine whether denial of this right to the biological father violates his right to due process of law.

3. Alternative procedures

To determine the requirements of procedural due process, *Mathews v. Eldridge*[173] suggests that a court must consider not only the private and state interests involved in such cases, but also the availability of alternative procedures.[174] Thus, a court should consider the value and cost of alternative procedures which may protect the biological father's inter-

172. However, if a court followed the reasoning of the California Supreme Court in *Michelle W.*, 39 Cal. 3d 354, 703 P.2d 88, 215 Cal. Rptr. 748, it may also be necessary for the child and the presumed father not to have any continuing relationship in order for the biological father's interest to outweigh the state interests. *See supra* notes 151, 153, 158-59 and accompanying text.

173. 424 U.S. 319 (1976).

174. *Id.* at 348-49. *See also supra* notes 65-70 and accompanying text.

est and the state interests, while imposing relatively little burden upon the state. Although the cases discussed above failed to address this issue, an evaluation of available alternative procedures is essential to determine the procedural due process protections required for a biological father's interest.

The procedural alternative to a conclusive presumption of legitimacy is an individualized hearing to determine whether the biological father, under the circumstances of that particular case, should be given the right to rebut the presumption. In evaluating this alternative procedure under the *Mathews* analysis, it is necessary first to examine the value of a hearing in reducing the risk of an "erroneous deprivation" of a biological father's interest through the use of a conclusive presumption.[175] Second, it is necessary to examine the fiscal and administrative burden which would be imposed upon the state by the requirement of a hearing in each case.[176]

a. the value and costs of a hearing

The use of a conclusive presumption of legitimacy carries a high risk of "erroneous deprivation" of the father's interest. This could be reduced, if not avoided, by the use of an individualized hearing. A presumption which is construed to deny every biological father the right to rebut the presumption of legitimacy does not take into consideration the facts of each individual case. Therefore, such a presumption allows a biological father's interest in developing a legal relationship with his child to be permanently foreclosed without regard to an actual finding that the state interests may be served in that case by a denial of this right to the biological father.

Indeed, under the facts of a particular case, the interests of the state in protecting the welfare of the child may best be served by granting the biological father the right to rebut the presumption of legitimacy and to establish his paternity.[177] In such cases, the use of a conclusive presumption erroneously deprives the father of his right to a relationship with his child. Therefore, a hearing in each case to determine whether the father should be allowed to establish his paternity would clearly avoid the risk of an erroneous determination, resulting in a serious and irreversible deprivation of a father's important paternal rights.

Although the value of individualized hearings is significant, it is still

175. *See Mathews*, 424 U.S. at 348-49.
176. *See id.* at 347.
177. *See supra* note 135 and accompanying text.

necessary to evaluate the costs of such hearings to determine if they are required under the due process clause. It is clear that individualized hearings would impose a greater fiscal and administrative burden on the state than does the use of a conclusive presumption. However, the Supreme Court has often indicated that constitutionally cognizable interests are entitled to due process even though some administrative efficiency may be sacrificed.[178] Therefore, the value of individualized hearings to protect the important interests of biological fathers should outweigh the costs associated with the provision of such hearings.

Moreover, in California and in other states which may apply the California Approach on this issue, hearings are currently required to determine whether the statute violates due process as applied to the facts of each case.[179] In those states there would be no additional burden placed on the state in requiring an individualized hearing in each case to determine whether a biological father should be given the right to rebut the presumption of legitimacy.

b. the nature of the hearing

The only significant difference in the procedure employed by the California Supreme Court and the procedure employed by a court following the *Mathews* analysis would be the purpose of the hearing which is held in each case. The purpose of the hearing required by the California Supreme Court is to determine the constitutionality of the statute as applied to the facts of the case. The purpose of the hearing required by a court following the *Mathews* analysis would not be a determination of the constitutionality of the statute, since the statute would be deemed unconstitutional on its face.

Under the *Mathews* analysis, a statute construed to deny all biological fathers the right to rebut the presumption of legitimacy should be unconstitutional on its face because: (1) a biological father has an important interest in an opportunity to develop a relationship with his child; (2) the government's primary interest in protecting the welfare of the child is not served in all cases by denying the biological father the right to rebut the presumption; and (3) there is an available alternative proce-

178. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 580 (1975) (procedural safeguard must be afforded "if that may be done without prohibitive cost"); Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) ("[p]rocedural due process is not intended to promote efficiency"); *Stanley*, 405 U.S. at 656 (due process clause "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones").

179. *See supra* notes 140-41 and 152-68 and accompanying text.

dure of providing an individualized hearing in each case which would greatly increase the protection afforded the biological father's interest while imposing relatively little additional burden upon the state. Thus, a court applying the *Mathews* analysis should hold that due process requires a hearing in each case to determine whether the biological father should be given the right to rebut the presumption of legitimacy.

Therefore, the focus of the hearing required under the *Mathews* analysis should be on factors relating to whether it is in the best interests of the child to allow the biological father the right to rebut the presumption of legitimacy and to establish his paternity. This is the appropriate focus of such a hearing because the biological father's interest in a relationship with his child will be protected unless it is shown that the establishment of paternity in the biological father would not promote the child's welfare. Since protecting the child's welfare is the primary policy underlying the state's interest in a conclusive presumption of legitimacy, such a hearing also protects the state's interest.

The factors which should be considered in a hearing to determine whether it is in the child's best interests to allow the biological father to establish his paternity would include: (1) the nature of the existing relationship between the biological father and the child; (2) the existence and nature of a family unit created by the mother, the child and the child's presumed father; and (3) the biological father's ability and desire to assume the obligations of fatherhood.[180] The court should also consider any other relevant factors in determining whether denying the father standing to establish paternity would be in the child's best interests.

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180. These factors are similar to those suggested by the Supreme Court in Quilloin v. Walcott, 434 U.S. 246, *reh'g denied*, 435 U.S. 918 (1978). *See supra* note 33 and accompanying text.

One of the primary factors to be considered in each hearing is the existence and nature of the family unit in order to preserve a harmonious family environment for the child. However, it should be noted that at least one court has suggested that there should be no hearing to determine whether a biological father has a right to rebut the presumption, because such a hearing would disrupt family harmony. *See supra* note 116 and accompanying text.

Although a hearing itself may have the potential to cause some disruption in the family unit, this should not be sufficient to deny all biological fathers the right to such a hearing. First, the hearing could be a closed proceeding in which only necessary parties are given notice and an opportunity to appear. Second, it is highly unlikely that the hearing itself would be the source from which the presumed father and the child learn of the biological father's alleged paternity. If a biological father wants to assert his paternity, he may do so by simply notifying the presumed father or the child that he is the child's biological father.

Moreover, it is not knowledge of paternity, but rather the creation of legal rights in the biological father, which really has a significant potential for disruption of the family unit. The hearing itself determines whether, under the facts of that case, the creation of legal rights in the father may disrupt the family unit.

These factors are primarily the same factors which are considered under the California Approach in balancing the biological father's interest against the state interests.[181] However, it is preferable for a court to hold that, based on *Mathews*, due process requires a hearing in every case to determine whether a father should be given the right to establish his paternity, rather than to hold that in each case the constitutionality of the statute must be reviewed to determine whether a conclusive presumption violates the father's due process rights as applied to the facts of that case.

Although the decision of whether the biological father should be given the right to rebut the presumption of legitimacy may be the same under either approach, the *Mathews* approach is preferable because it does not compel a review of the constitutionality of the statute in every case. It also allows the court to focus its attention more squarely on protecting the welfare of the child as well as protecting the rights of the biological father.

C. *Conclusions Regarding Due Process*

A statute that is construed to deny all biological fathers the right to rebut the presumption of legitimacy should be deemed unconstitutional on its face as a denial of due process of law. A biological father's interest in an opportunity to establish his paternity and to develop a relationship with his child is worthy of protection under the due process clause. Therefore, a biological father should not be denied the right to establish paternity unless the state interests clearly outweigh the biological father's interest.

Since the weight of these interests depends on the facts of the individual case, it is necessary for a court to consider the facts of each case in evaluating these interests. Thus, due process requires a hearing in each case to determine whether a biological father should have the right to rebut the presumption of legitimacy and to establish his paternity. A biological father should be denied this right only if it is shown that it is in the best interests of the child to prevent him from establishing his paternity.

III. EQUAL PROTECTION

The constitutionality of statutes that deny a biological father the right to rebut a presumption of legitimacy and establish his paternity may also be challenged on the grounds that such statutes violate the

181. *See supra* notes 127-59 and accompanying text.

equal protection clause of the fourteenth amendment.[182] A statute that denies a biological father the right to rebut the presumption of legitimacy and to establish his paternity, while giving the mother this right, creates a classification which arbitrarily treats a biological father differently than the child's biological mother.

To determine whether this classification violates the equal protection clause, a two-part analysis is required. It is necessary first to determine what standard of review a court should apply with respect to such a statutory classification,[183] and, second, to analyze whether this statutory classification can be upheld under the appropriate standard.

A. The Applicable Standard of Review

A classification that denies biological fathers the right to rebut the presumption of legitimacy, while giving the mother this right, must touch upon a fundamental right to trigger strict scrutiny analysis.[184] Generally, in order for a right to be deemed fundamental, the right must be "explicitly or implicitly guaranteed by the Constitution."[185] No

182. U.S. CONST. amend. XIV, § 1 provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The same constraints placed upon the states by the equal protection clause of the fourteenth amendment are placed upon the federal government by the due process clause of the fifth amendment. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

183. Historically, there were two standards of review which were applied by courts in determining whether a statute violates the equal protection clause. The first or conventional standard requires only that the differing treatment of classes under the statute must be "rationally related" to a conceivable "legitimate state interest." *See, e.g.*, Vance v. Bradley, 440 U.S. 93, 97 (1979). Under the second standard, the statutory classification is subject to "strict scrutiny" and the state has the burden of establishing that it has a "compelling interest" which justifies the law and statutory purpose. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967). Generally, this second test has been applied to statutory classifications which are drawn along lines which render it "suspect," such as classifications based on race or national origin. *See, e.g., Loving*, 388 U.S. at 11 (prohibition on miscegenation); Korematsu v. United States, 323 U.S. 214, 216 (1944) (restrictions on movement of Japanese-Americans). The test has also been applied to classifications which touch upon a "fundamental interest" or "rights explicitly or implicitly guaranteed by the constitution." *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (sterilization of criminals).

Some statutory classifications, which have not been considered "suspect" or to touch upon a "fundamental right," nevertheless have been judged by a third standard of review more demanding than the traditional "rational basis" test. Classifications based on alienage, illegitimacy, or gender have been deemed to be subject to an intermediate-level scrutiny. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 223-24 (1982) (alienage); Trimble v. Gordon, 430 U.S. 762, 766-67 (1977) (illegitimacy); Craig v. Boren, 429 U.S. 190, 197 (1976) (gender).

184. Since the classification in question does not involve a "suspect class" such as race or origin, it must touch upon a "fundamental interest" in order for it to be deemed subject to strict scrutiny. *See supra* note 183.

185. *See, e.g.*, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

United States Supreme Court case has suggested that a father's right to a relationship with his child born while he is not married to the child's mother is a fundamental right guaranteed by the Constitution. Indeed, in cases dealing with the rights of fathers of illegitimate children, the Supreme Court has indicated that this is not a fundamental right and accordingly has never applied the strict scrutiny standard to a review of classifications denying the father this right.[186]

However, a statutory classification that denies biological fathers the right to establish their paternity, while giving biological mothers that same right, may nevertheless be subject to a stricter standard of review than the "rational basis" test.[187] Such a classification may be deemed a gender-based classification and therefore the state may be required to meet an intermediate level of review which is higher than the rational basis test but lower than the strict scrutiny test.[188]

In order for a court to consider such a classification to be gender-based, the court must view the classification as one distinguishing between men and women on the basis of sex. A statute that distinguishes

186. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246, *reh'g denied*, 435 U.S. 918 (1978). See also *supra* notes 25-42 and accompanying text for a discussion of those cases.

187. Under the "rational basis" test such a classification most likely will be upheld since the Supreme Court has routinely upheld statutes under this standard of review. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (upholding federal statute effectively providing, in some situations, more retirement benefits to those who had worked first for a non-railroad employer and then a railroad employer than to those who had worked first for a railroad employer and then a non-railroad employer); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding rule excluding methadone-program participants from employment as bus drivers). *But see* United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) ("mere rationality" review used to strike down federal statute denying food stamps to households containing unrelated persons).

188. Gender classifications were originally subjected only to the rational basis test. *See* L. TRIBE, *supra* note 12, at 1060. Therefore, such classifications were usually upheld. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948) (upholding statute prohibiting a woman not the wife or daughter of a tavern owner from becoming a bartender), *disapproved*, Craig v. Boren, 429 U.S. 190, 210 n.23 (1976). In the early 1970's, the Supreme Court began to subject gender-based classifications to a stricter level of review, although the Court still purported to be employing the rational basis test. *See* Reed v. Reed, 404 U.S. 71, 75-77 (1971) (invalidating state statute preferring males over females in the administration of estates); *see also* L. TRIBE, *supra* note 12, at 1063. In one case, a plurality of four justices even argued that such classifications should be deemed "suspect" and therefore subject to strict scrutiny. *See* Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (invalidating federal statute automatically providing benefits to married servicemen, but requiring servicewomen to demonstrate the dependence of their husbands). Although the Court never resolved that gender classifications should be held subject to strict scrutiny, in 1976 it began to review such classifications under an "intermediate" level of review which was expressly higher than the rational basis test. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (invalidating statute prohibiting the sale of 3.2% beer to men ages 18-21, but not to women).

between the rights of biological parents of a child on the basis of whether a parent is male or female may be deemed a gender-based classification. For example, in *Caban v. Mohammed*,[189] the United States Supreme Court held that the inflexible statutory distinction between the rights of unwed mothers and unwed fathers with respect to their authority to veto the adoption of their children was an invalid gender-based distinction.[190]

Accordingly, statutes that give a mother the right to rebut the presumption of legitimacy and to establish paternity in the biological father, while denying the biological father that same right, may be deemed to distinguish between biological parents on the basis of gender. Indeed, in one recent case, the Colorado Supreme Court held that such a statutory scheme was based on a gender classification which discriminated between natural mothers and claiming natural fathers and, therefore, the court utilized the intermediate level equal protection analysis in reviewing the statute's constitutionality.[191] The Colorado Supreme Court stated:

> This statutory scheme creates more than a difference in treatment of natural mothers and fathers. It establishes contrary treatment. . . . Section 19-6-107(1) exemplifies a gender-based classification predicated on an overbroad generalization that a mother has a legitimate interest in establishing a determination of paternity in a non-spousal father, while such father has no interest in establishing a determination of paternity in himself.[192]

However, in *A v. X, Y, and Z*,[193] the Wyoming Supreme Court suggested that the identical statutory scheme was not gender-based because the statute not only allowed the mother the right to establish paternity in someone other than the presumed father, it also gave the child and the presumed father this right.[194] The court suggested that since approximately 50% of children and 100% of presumed fathers who may assert

189. 441 U.S. 380 (1979).

190. *Id.* at 394. See *supra* notes 35-42 and accompanying text for a discussion of the case.

191. R. McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980).

192. *Id.* at 351-52, 615 P.2d at 671. See *infra* notes 247-52 and accompanying text for a discussion of this case.

193. 641 P.2d 1222 (Wyo.), *cert. denied*, 459 U.S. 1021 (1982).

194. *Id.* at 1226. The Wyoming Supreme Court also stated that the statutory scheme should not be deemed to be gender-based because a biological father could assert his interest under other statutory provisions not applicable to the case. For example, the biological father could assert his interest pursuant to the statute in circumstances "in which the child has no presumed father, or in which the presumption of paternity resulted from a man taking the child into his home and holding it out as his own." *Id.* The court thus suggested that one should look to the statute as a whole, rather than to individual provisions, in order to determine whether a particular provision is gender-based. *Id.*

this right would be male, it is difficult to conclude that the classification is gender-based.[195]

The *X, Y, and Z* court stated that "[t]he classification is based on a distinction between those within the family unit and those without regardless of gender."[196] Thus, according to the Wyoming court's analysis, the classification is not gender-based and its constitutionality under an equal protection analysis would only be subject to the "rational relationship" test.[197] Nevertheless, the Wyoming court stated that the classification would pass constitutional challenge under a gender-based standard of review and indeed under any standard by which it may be measured.[198]

Although the Wyoming court may be correct in its assertion that the classification in the statute is based on distinctions between those within the family unit and those outside the family unit, the classification nevertheless distinguishes between the rights of biological parents with respect to their child on the basis of the sex of the parent. It gives the female biological parent rights that it does not give the male biological parent, and therefore, the classification should be reviewed as a gender-based classification.[199]

Furthermore, even if the classification is viewed as distinguishing between those within the family unit and those outside the family unit, it should still be deemed a gender-based classification despite the fact that the family unit includes both males and females. The classification does not distinguish between two groups—one group consisting of biological fathers (and all those outside the family unit) and another group consisting of biological mothers, their husbands and the children. The mother's right to bring an action does not depend on the concurrence of her husband or the child.[200] Therefore, even though persons of the male sex are

195. *Id.* A recent opinion of the Supreme Judicial Court of Massachusetts also determined that such a statutory scheme was not gender-based because it allowed presumed fathers as well as mothers to initiate proceedings raising the issue of the child's paternity. P.B.C. v. D.H., 396 Mass. 68, 74-75, 483 N.E.2d 1094, 1098 (1985), *cert. denied*, 106 S. Ct. 1286 (1986).

196. *X, Y, and Z*, 641 P.2d at 1226.

197. See *supra* notes 183, 187, 188 discussing rational basis test.

198. *Id.* The court stated that the classification would withstand even the strict scrutiny test.

199. *See supra* notes 189-92 and accompanying text.

200. Professor Harry D. Krause, who was instrumental in the drafting of the UPA, asks whether it makes sense to view *X, Y, and Z* as a sex discrimination case. He then raises this question:

> Would the problem disappear (and gender equality be preserved), if the UPA provided that a married mother may not bring an action against another man *without her husband's consent*? The low likelihood that a married mother might wish to bring such an action against the will and without the consent of her husband caused

also given a statutory right to bring the action, the biological mother as an individual is given rights that are not given to the child's biological father. Thus, such statutes discriminate between biological parents based on their sex.

Since these statutes are gender-based, their constitutionality should be reviewed under the intermediate level of review accorded gender-based classifications, i.e., the classification "must serve important governmental objectives" and must be substantially related to the achievement of those objectives.[201] Although the United States Supreme Court has indicated in some cases that if the sexes are not "similarly situated," a gender-based statute will only be subject to minimum rationality review,[202] its decisions in this regard are not uniform. Other cases dealing with gender-based classifications have applied an intermediate level of review and have suggested that the fact that the sexes may not be "similarly situated" is not sufficient to uphold the statute's constitutionality.[203]

This Article contends that the intermediate level of review is the preferred standard of review for the gender-based classification in question here, since it assures adequate protection of the biological father's interest. The fact that the sexes are not similarly situated in these circumstances should not be deemed sufficient to justify the application of a minimum rationality review. However, under the intermediate level of review, the fact that the sexes are not similarly situated is an important consideration in determining whether the statute is "substantially related" to its proclaimed governmental purpose.[204]

B. Application of the Standard

In order for a statute to overcome a constitutional challenge under

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the drafters of the UPA to disregard this possibility. If dissenting Justice Rose and the majority of the Colorado Supreme Court in *R. McG. v. J.W.*, cited in the dissent, have a point, this drafting error should be remedied.

H. KRAUSE, FAMILY LAW, CASES, COMMENTS, AND QUESTIONS 814 (2d ed. 1983).

In Michelle W. v. Ronald W., 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 748 (1985), the California Supreme Court rejected the contention that the statute involved an impermissible gender-based distinction, because the mother of the child could bring suit to rebut the presumption of legitimacy only if the biological father had filed an affidavit with the court acknowledging paternity of the child. The court thus stated that the rights of the mother and the biological father were conditioned upon each other. *Id.* at 365, 703 P.2d at 94, 216 Cal. Rptr. at 754-55.

201. *Craig*, 429 U.S. at 197.

202. *See, e.g.*, Parham v. Hughes, 441 U.S. 347, 354-55 (1979) (plurality opinion of Stewart, J.).

203. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 281 (1979).

204. See *infra* notes 219-42 and accompanying text which discuss the "similarly situated approach."

the intermediate level of review accorded gender-based classifications, such a classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."[205] In applying this standard to the statutory classification in question, the first issue a court must resolve is whether the objectives underlying the classification are important.

The legislative objectives which theoretically underlie statutes construed to deny a biological father the right to rebut the presumption of legitimacy and establish his paternity, while giving the biological mother this right, are the same as those traditionally stated to underlie the presumption of legitimacy. Those objectives are: (1) protection of the child from the stigma of illegitimacy; (2) provision of private support for the child; and (3) protection of the family unit.[206]

A court would certainly hold that these asserted state interests are important.[207] The United States Supreme Court has recognized that a state has a legitimate interest in protecting and preserving the integrity of the family unit.[208] Moreover, the asserted state interest of protecting the well-being of illegitimate children, and in particular of promoting their legitimatization, has been recognized by the Court.[209] Furthermore, the Court typically has had little difficulty in finding that the legislative objectives that are proclaimed to underlie statutory gender-based distinctions are "important."[210] Therefore, there seems little question that a

205. Craig v. Boren, 429 U.S. 190, 197 (1976). Some commentators suggest that this standard has no predictable application and therefore cannot support consistent decisionmaking. *See* Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of* Kahn v. Shevin *and* Orr v. Orr, 30 SYRACUSE L. REV. 639, 671 (1979); *see also* Note, *Refining the Methods of Middle-Tier Scrutiny: A New Proposal for Equal Protection*, 61 TEX. L. REV. 1501, 1554 (1983).

206. *See supra* notes 72-100 and accompanying text.

207. *See, e.g.*, R. McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980). There, the Colorado Supreme Court stated that there was no question that "the interest of the state in preserving the integrity of family units already in existence and fostering child rearing in harmonious family settings" are important interests and within the state's power to implement. *Id.* at 351, 615 P.2d at 670. However, as discussed previously, the actual importance of these interests may vary, depending on the facts of the case. For example, the interests of protecting the child from the stigma of illegitimacy and providing the child with support from a presumed father may not be significant in a situation where the biological father seeks to establish his paternity. If the biological father establishes his paternity, he will "legitimate" the child and will be compelled to support the child. Therefore, the primary legislative objective which may support the classification is the protection of the family unit from the possible disruption which may result from the assertion of paternity in someone other than the mother's husband. *See supra* notes 91-100 and accompanying text.

208. Meyer v. Nebraska, 262 U.S. 390 (1923).

209. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 391 (1979); Quilloin v. Walcott, 434 U.S. 246, 255, *reh'g denied*, 435 U.S. 918 (1978).

210. In most cases, the Court has found that the asserted legislative objective is important.

court would find that the legislative objectives that are asserted to support the denial of a biological father's right to rebut the presumption of legitimacy are important.

The second and more difficult question in analyzing whether the gender-based classification involved in these statutes can overcome a challenge under the equal protection clause, is whether the classification is "substantially related" to these objectives. United States Supreme Court decisions reveal two possible approaches regarding the "substantial relation" requirement.[211]

Under one approach, the state must show a substantial difference between men and women that is relevant to the classification.[212] Accordingly, this approach requires the state to show that the reason for burdening members of one sex does not apply with equal force to members of the other sex because the sexes are not "similarly situated."[213] This approach, referred to herein as the "similarly situated approach,"[214] has been most prominent in the Court's decisions.[215]

A second approach to the "substantial relation" requirement has been explicitly recognized by the Court in recent cases.[216] Under this approach, the state must not only show that the classification is based on relevant differences between men and women, but also that there is a sufficiently good reason for the differing treatment of the sexes.[217] Under this approach, hereinafter the "gender-neutral approach,"[218] it is more

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See, e.g., Orr v. Orr, 440 U.S. 268, 280 (1979) (provision for needy spouses and compensation for past discrimination); *Craig*, 429 U.S. at 199-200 (enhancement of traffic safety). *But see, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 727-30 (1982) (state failed to establish "important" purpose in limiting enrollment in nursing school to women); *Orr*, 440 U.S. at 279-80 (preference for family unit in which wife is dependent not a permissible purpose).

211. For a thorough discussion of the two methods by which the Supreme Court has treated the "substantial relation" requirement, see Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Comment, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149 (1985).

212. For a complete review of cases applying this approach to gender-based classifications, see Comment, *supra* note 211.

213. *Id.* at 154-56.

214. In referring to this approach, this Article has adopted the terminology employed in Comment, *supra* note 211. Another commentator has referred to this approach as the "Rehnquist-Stewart approach" because these Justices usually employ this method of analysis in cases regarding gender discrimination. Freedman, *supra* note 211, at 931-38.

215. *See* Comment, *supra* note 211, at 154.

216. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981); Michael M. v. Superior Court, 450 U.S. 464 (1981); *Orr*, 440 U.S. 268.

217. *See* Comment, *supra* note 211, at 153-54.

218. *Id.* at 154. This Article has adopted the terminology employed in Comment, *supra* note 211, in referring to the "gender-neutral" approach. Another commentator designated this the "Brennan-Marshall approach" since Justices Brennan and Marshall (usually joined by

difficult for the state to demonstrate that the classification is "substantially related" to important government objectives. Since the Court has yet to decide unambiguously which approach is appropriate, it is necessary to examine the statutory classification in question under both approaches to determine whether it may be deemed "substantially related" to the asserted state interests.

1. The similarly situated approach

Under the "similarly situated" approach, the relevant question is whether the classification is based upon a substantial difference between biological mothers and biological fathers. This classification denies biological fathers the right to rebut the presumption of legitimacy and to establish paternity, while giving biological mothers this same right. Therefore, under this approach, it would be necessary for the state first to show that there is a substantial difference between biological mothers and biological fathers. The state, however, must also establish that this difference is relevant to the purposes upon which the classification is purportedly based, namely: (1) protection of the child from the stigma of illegitimacy; (2) provision of support for the child; and (3) protection of the family unit.[219]

It would be difficult for a state to meet this burden and show that there is any substantial difference between biological fathers and biological mothers that would be relevant with respect to protecting the child from the stigma of illegitimacy or to providing support for the child. If a mother is allowed to rebut the presumption and is successful in such an action, the child may be denied the status of legitimacy and the support of the child's presumed father. If, however, the biological father is successful in such an action, he will legitimate the child and incur an obligation to support the child.[220] Thus, the classification that allows mothers, but not biological fathers, to rebut the presumption of legitimacy, can actually work against the state's asserted interests of protecting the child from the stigma of illegitimacy and of providing support for the child.

It may be possible for a state, however, to show that a substantial difference exists between biological mothers and biological fathers with respect to the proclaimed purpose of protecting the family unit. In this regard, the state may argue that biological mothers are part of the family

Justice White and recently by Justice O'Connor) have employed this approach in analyzing sex discrimination cases. *See* Freedman, *supra* note 211, at 949-60.

219. See *supra* notes 72-100 and accompanying text for a discussion of the purposes upon which such legislation is based.

220. *See supra* notes 79-90 and accompanying text.

unit in which the child resides and biological fathers are not. Biological mothers would therefore be less likely to bring an action to rebut the presumption of legitimacy and establish paternity in someone other than the presumed father when that action may threaten the family unit. Arguably, a biological mother would not bring such an action unless the family unit has already been disrupted or unless the mother perceives that the family unit is strong enough to withstand any potentially disruptive effects of that action.

This argument was accepted by the Wyoming Supreme Court in *A v. X, Y, and Z.*[221] The analysis of the court there indicates how the "similarly situated" approach may be used in determining whether a statutory classification that denies biological fathers the right to rebut the presumption of legitimacy and to establish their paternity violates the equal protection clause.[222] In concluding that the statute did not violate the equal protection clause,[223] the court stated that "[i]f the classification can be said to be gender-based, it is not invidious but only realistically reflects the fact that sexes are not similarly situated in these circumstances."[224]

In reaching this conclusion, the Wyoming court stated that the statutory classification was based on "obvious" biological differences between men and women and that these differences are "the very foundation of the classification."[225] These differences, according to the court, are that women give birth to children where men do not and, therefore, the fact of motherhood is obvious while the fact of fatherhood must be proven.[226] Thus, the Wyoming court indicated that the statutory classification was based on certain biological differences between men and women.

Some United States Supreme Court cases have indicated that certain biological differences are legitimate distinctions upon which some classifications may be based without violating the equal protection clause.[227]

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221. 641 P.2d 1222, 1225 (Wyo.), *cert. denied*, 459 U.S. 1021 (1982). This argument was also accepted by the Supreme Judicial Court of Massachusetts in P.B.C. v. D.H., 396 Mass. 68, 74-75, 483 N.E.2d 1094, 1098 (1985), *cert. denied*, 106 S. Ct. 1286 (1986).

222. The Wyoming Supreme Court did not identify its approach as the similarly situated analysis or distinguish its approach from the gender-neutral analysis. However, the language of the opinion indicates that the court did in fact apply the rationale of the similarly situated approach. *X, Y, and Z*, 641 P.2d at 1225.

223. *Id.* at 1224-26.

224. *Id.* at 1226. However, the court stated that the classification was not, in any case, gender-based and thus indicated it should only be subject to minimum rationality review. *See supra* notes 194-98 and accompanying text.

225. *X, Y, and Z*, 641 P.2d at 1225.

226. *Id.*

227. *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464 (1981) (plurality opinion); Gedu-

For example, in *Michael M. v. Superior Court*,[228] the Court upheld California's statutory rape law, which penalized men, but not women, for having sexual intercourse with persons under eighteen years old. Justice Rehnquist's plurality opinion justified the statute's differing treatment of the sexes on the ground that young women were not "similarly situated" to young men "with respect to the problems and the risk of sexual intercourse,"[229] because of the fact that only women can become pregnant.

Justice Rehnquist's opinion indicated that this biological difference between the sexes was sufficiently related to the asserted state purpose of this classification, which was to prevent teenage pregnancies.[230] Justice Rehnquist concluded that the threat of becoming pregnant was a "natural" deterrent to sexual intercourse for minor women, but not for males, since they could not become pregnant.[231] Therefore, it was reasonable for the state to "equalize" the deterrent for both sexes by penalizing males for sexual intercourse with young women.[232] Thus, Justice Rehnquist's opinion attempted to show how biological differences between the sexes were sufficiently related to the asserted state purpose of preventing teenage pregnancies.[233]

Whenever the state seeks to support a classification on biological differences, it should be necessary for the state to show that such biological differences are related to the purpose of the classification. However, in *X, Y, and Z*, the Wyoming Supreme Court made no effort to illustrate how the asserted biological differences between the sexes were relevant to a statutory classification which denied a biological father the right to establish his paternity while simultaneously giving the biological mother that right. While the biological differences between a man and a woman may be relevant to other classifications within the Uniform Paternity Act (UPA), such as a distinction between the procedure required of a mother to establish her maternity versus the procedure required of a father to establish his paternity, these biological differences do not support the statutory classification at issue in this case.[234]

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lig v. Aiello, 417 U.S. 484 (1974) (approving state and employer temporary disability plans that excluded benefits for pregnancy).

228. 450 U.S. 464 (1981) (plurality opinion).

229. *Id.* at 471.

230. *Id.* at 469-73.

231. *Id.* at 473.

232. *Id.*

233. However, Justices Brennan and Stevens, in separate dissents, asserted that Justice Rehnquist's reasoning did not adequately establish the relationship between the classification and the statute's asserted goal. *Id.* at 488 (Brennan, J., dissenting); *id.* at 496 (Stevens, J., dissenting).

234. The Wyoming court suggested that one must look at all the classifications in the UPA

Another basis upon which the Wyoming Supreme Court determined that biological mothers and biological fathers are not similarly situated is that the mother in these circumstances is a part of the family unit in which the child resides, while the biological father is outside the family unit.[235] The court agreed with the lower court opinion which stated that the legislative objective in creating the statutory classification was to protect the family unit from a suit by one outside the marriage because such a suit could well destroy the marriage.[236] The court approved the analysis of the lower court which stated that no problem existed in allowing mothers, or others within the family unit, to bring a parentage action because those persons "are in the best position to judge whether the marriage can stand the trauma or has already failed."[237]

Thus, the Wyoming court actually upheld the gender-based classification on the basis of a difference between a biological mother and a biological father which is created by law. When a mother is married at the time of her child's birth, the mother is within the family unit where the child resides because the law provides that the biological mother has a right to custody and presumes that her husband at the time of the child's birth is the child's father.[238] Yet, if someone other than the mother's husband is the child's biological father, the law prevents the biological father from being a part of the family unit in which the child resides. Thus, the difference in the positions of a biological mother and a biological father with respect to the family unit is a legally-created distinction.

Arguably, a court should not justify a gender-based classification on the basis of a legally-created difference between the sexes, because a legislature may then create "real" sex differences and use those differences to support a subsequent gender-based statute.[239] However, the state may contend that the legally-created distinction, that biological mothers are part of the family unit while biological fathers are not, is based on certain

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to determine whether the statutory scheme as a whole invidiously discriminates against biological fathers. *X, Y, and Z,* 641 P.2d at 1226; *see also supra* note 194.

235. *A v. X, Y, and Z,* 641 P.2d at 1225-26. *See supra* note 95 and accompanying text.

236. *Id.* at 1225.

237. *Id.*

238. If a child is born to a married woman, our laws today provide that the mother and her husband (the child's presumed father) have an equal right to custody of the child. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 17.1, 17.4 (1968). Thus, our laws determine that the mother and her husband will be within the family unit in which the child resides.

239. See Freedman, *supra* note 211, at 939, for a discussion and critique of the approach by which the state may try to justify certain gender classifications on the basis of certain other gender distinctions previously created by the state itself.

natural or biological differences between the sexes. Since the woman gives birth to the child and the man does not, maternity is easier to prove than paternity. The state may argue that for this reason mothers are given custody of their children at birth and are thus part of the family unit in which their children reside.

If the legally-created distinction is deemed to be based on biological differences, then it is arguable that a statute denying a biological father the right to establish his paternity, while giving the mother that right, may be justified on the basis of this legally-created distinction. Some United States Supreme Court decisions[240] have suggested that when legally-created differences are based on certain natural or biological differences between the sexes, those legally-created differences may validly support a classification based upon them.[241] Thus, it is possible that a court applying the similarly situated approach could uphold the classification in question because the legally-created difference in the positions of the biological mother and the biological father may be based on natural or biological differences between the sexes.

Although a court could apply this reasoning to justify the classification in question, a court should not do so for two reasons. First, whether a court should justify a classification on the basis of a legally-created distinction is debatable, even if that legally-created distinction may be based on certain biological differences.[242] That the state can make a biological father an "outsider" to his child simply because he did not physically give birth to the child, and then justify denying him the right to a relationship with his child because he is an outsider, hardly seems fair.

Second, and even more unfairly, statutes that deny the biological father the right to establish paternity, while giving the mother the right to establish the biological father's paternity, could be drawn in a manner which would give *both* biological parents the right, and still serve the asserted state interests. Since the statutes could be drawn in such a gender-neutral manner, a court should not justify the classification on the basis that the biological parents are not similarly situated. A court reviewing the classification in question should not apply the "similarly situated" approach, but should instead follow the gender-neutral approach, described below.

240. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981); Parham v. Hughes, 441 U.S. 347 (1979); Schlesinger v. Ballard, 419 U.S. 498 (1975).

241. *See* Freedman, *supra* note 211, at 939-40.

242. *See supra* note 239.

2. The gender-neutral approach

Under the gender-neutral approach, a state must show not only that there is a difference between men and women which is relevant to the legislative objective of the classification, but also that there is a sufficient reason for not treating the sexes identically.[243] Accordingly, this approach requires that the state demonstrate that a statute which discriminates against one sex furthers or protects a state interest that would not have been protected by a gender-neutral classification. Thus, a court applying the gender-neutral approach must consider the feasibility of effective gender-neutral alternatives to achieve the asserted state interests.[244] When these alternatives are available, the court must hold that a broad sex-based classification is not substantially related to the asserted state interests.

Several gender-neutral alternatives to gender-based statutes have been suggested in recent Supreme Court cases. One such gender-neutral alternative is a statute which burdens both sexes, rather than just one sex, and yet still accomplishes the asserted legislative objective.[245] Thus, one gender-neutral alternative to the statutes in question here would be statutes which deny *both* biological mothers, as well as biological fathers, the right to rebut the presumption of legitimacy and to establish paternity in a non-spousal father. Since denying both mothers as well as fathers this right would serve the asserted state objective of protecting the family unit, the state must show that there is a good reason for not also preventing mothers from challenging the presumption.

Therefore, under a gender-neutral test, the state would have to illus-

243. *See* Comment, *supra* note 211, at 152-56. As that commentator points out, the gender-neutral test is not simply an alternative to the similarly situated approach, but is a requirement imposed in addition to the similarly situated test. *Id.* at 156.

244. *See, e.g., Orr*, 440 U.S. at 281-83. Justice Brennan, writing for the majority, reasoned that a statute making only husbands liable for alimony was not substantially related to achieving the state goal of providing financial assistance to needy spouses. A gender-neutral alternative was available in the form of individual hearings where a decision could be made about financial need. See also Freedman, *supra* note 211, at 949-51, discussing the importance of gender-neutral alternatives in analyzing a statute under the gender-neutral approach.

245. *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980). In *Wengler*, the Supreme Court struck down a provision of Missouri's workmen's compensation laws that denied a widower death benefits unless he could show that he was mentally or physically incapacitated or dependent on his wife's earnings; however, a widow was given death benefits without having to make such a showing. Although the Court conceded that providing for needy spouses was an "important government objective," the Court stated that the "discriminatory means employed [did not] itself substantially serve[]" that end because the needs of widows and widowers would just as effectively be met if the state granted "benefits to all members of both classes or . . . [paid] benefits only to those members of either class who c[ould] demonstrate their need." *Id.* at 151.

trate not only that there is a relevant difference in the situation of the biological father and the biological mother,[246] but also that there is a good reason for not burdening biological mothers, as well as biological fathers. Assuming that the expressed legislative purpose of avoiding disruption of the family unit could be served by burdening *both* sexes—that is, by giving neither sex the opportunity to disrupt the family unit—the gender-neutral approach would require the state to show that the classification advances some interest that would not be furthered by such a gender-neutral statute.

The availability of such a gender-neutral alternative appears to be the basis of the Colorado Supreme Court's decision in *R. McG. v. J. W.*[247] In that case, the court determined that the equal protection clause was violated by a statutory classification which operated to deny the biological father standing to establish his paternity, while giving the biological mother that right.[248] In reaching this conclusion, the court held that the classification did not substantially further the asserted governmental end of protecting the family unit, because it permitted the biological

246. This showing is required under the similarly situated test. It could probably be met by a showing that only mothers are within the family unit in which the child resides and thus, arguably, are substantially less likely to bring an action which would disrupt the family unit.

247. 200 Colo. 345, 615 P.2d 666 (1980). The statutory provisions in question were the Uniform Parentage Act, COLO. REV. STAT. 1973 § 19-6-101 to 129 (1978 Rept. Vol. 8). (These provisions are the same as those included in the Appendix to this Article.) Despite the fact that he had no explicit statutory authority to bring a paternity action, the claiming natural father in this case commenced such an action on behalf of himself and the minor child. His complaint alleged that he was the natural father of the child and that he was the only man who had sexual intercourse with the child's mother at the time of the child's conception, although at the time of conception and birth, the child's mother was married to the presumed father. His complaint further stated that the natural mother had admitted that he was the father, and blood tests had been unable to exclude him as the natural father. The child's mother and presumed father denied the claimant's alleged paternity and moved for summary judgment on the ground that claimant lacked standing to sue under the UPA to bring the action.

The juvenile court granted the motion of the claiming natural father for serological testing of himself and the presumed father prior to hearing the motion for summary judgment. The results of these tests showed that the probability of the claiming natural father's paternity was 98.89%. The presumed father refused to comply with the request for an additional blood sample when the testing laboratory was unable to isolate a sufficient number of lymphocytes from his first blood sample. Affidavits filed by the claiming natural father in opposition to the summary judgment stated, among other things, that the natural mother had acknowledged in a sworn codicil to her will and in correspondence that he was the natural father of the child. Furthermore, his affidavit stated that the child had visited with him almost daily. The child was one and one-half years old and had developed a close relationship with the claimant's three other children.

Irrespective of this evidence, the juvenile court rejected the claimant's constitutional arguments and granted the summary judgment motion on behalf of the mother and the presumed father.

248. *R. McG.*, 200 Colo. at 350-53, 615 P.2d at 670-72.

mother "to undo the state's interest in preserving family stability by seeking both a declaration of non-paternity in the presumed father and a declaration of paternity in the non-family natural father."[249] The court thus implied that even when the biological mother and the biological father were not "similarly-situated," because only the mother was within the family unit, the classification violated the equal protection clause when it did not also burden the mother. Since the asserted state interest could also have been furthered by denying her the same rights which were denied the father, the court determined that the classification could not be upheld.

The Colorado court applied the rationale of the gender-neutral approach—that is, that a gender-based classification violates equal protection when there is a gender-neutral alternative available which would also serve the asserted state interest. The court suggested that a state statute that treats the sexes identically by burdening both biological parents is an available and satisfactory gender-neutral alternative. Thus, the state could have avoided the invalidation of the statute under the gender-neutral approach only by showing that there was a good reason for not also denying the mother the right to rebut the presumption.[250] For example, the state in this case could have claimed that there was a good reason for giving the mother the right to rebut the legitimacy presumption in order to ensure support for the child.[251]

However, the Colorado court suggested that even if the state had asserted its interest in providing support for the child, this would not have been sufficient to justify the classification. The court indicated that in order to justify the classification on that basis, the statute must condition the mother's right to bring an action for a declaration of paternity in a non-spousal father upon the presumed father's desertion or non-support.[252] The Colorado court thus implied that even if the state interest in providing support for the child would justify a distinction between the rights of the biological mother and biological father, the statute nevertheless violated the equal protection clause because it was not drawn as precisely as it could have been in order to achieve this state interest.

A second possible gender-neutral alternative is thus suggested by the language of the Colorado Supreme Court. That alternative is a narrowly

249. *Id.* at 351, 615 P.2d at 670. In its equal protection analysis, the court conceded that the governmental ends were important. However, the court stated that the real controversy in this case concerned the means used to achieve those ends.

250. See *supra* notes 243-46 and accompanying text regarding the showing which the state must make to override a gender-neutral alternative.

251. *See supra* text accompanying notes 69-70.

252. *R. McG.*, 200 Colo. at 351, 615 P.2d at 670-71.

drawn classification which would serve the state interests as well as the broad gender-based classification which discriminates between all men and all women based on generalizations about the sexes. Such a gender-neutral alternative was also suggested by the United States Supreme Court in *Caban v. Mohammed*,[253] where the Court held that the gender-based classification violated the equal protection clause. The statutory provisions in question provided that an unwed father, unlike an unwed mother, had no authority to veto the adoption of his child by withholding his consent.[254] The unwed father could prevent his child's adoption only by showing that the best interests of the child would not be served by the adoption.

The Court stated that the proclaimed state interest of promoting the adoption of illegitimate children could be protected in a way that did not draw such an "inflexible gender-based distinction" as that made under the relevant statutory provisions.[255] The Court stated that the primary reason that the statute would further the state interest of facilitating adoption is the difficulty in locating and identifying an unwed father and that this was not a concern when a father has had a relationship with the child.[256] Therefore, the Court suggested that the statutory classification could have been drawn more narrowly and still have fulfilled the state's interest by providing that an adoption may proceed without the consent of a parent when the parent has not come forward to establish a relationship with the child or when the parent has abandoned the child.[257] The Court thus indicated that the statute could have been drawn on a gender-neutral basis which would have furthered the state interests as well as they would be served by the gender-based classification.[258]

The Court held that the statute violated the equal protection clause

253. 441 U.S. 380 (1979). See *supra* notes 35-42 and accompanying text for a discussion of *Caban*.

254. *See supra* note 33.

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

256. *Id.* at 392-93.

257. *Id.* at 392.

258. In a footnote, the Court stated:

> We do not suggest, of course, that the provision of § 111 making parental consent unnecessary in cases of abandonment is the only constitutional mechanism available to New York for the protection of its interest in allowing the adoption of illegitimate children when their natural fathers are not available to be consulted. In reviewing the constitutionality of statutory classifications, "it is not the function of a court 'to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme formulated by [the state]. . . ." *We note some alternatives to the gender-based distinction of § 111 only to emphasize that the state interests asserted in support of the statutory classification could be protected through numerous other mechanisms more closely attuned to those interests.*

Id. at 393 n.13 (citations omitted) (emphasis added).

because the state had not shown that the different treatment given unwed fathers and unwed mothers bore a substantial relationship to the state interest in promoting the adoption of illegitimate children. The Court stated that the statutory classification was "another example of 'overbroad generalizations' in gender-based classifications."[259] The Court concluded that "this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interest."[260]

Similarly, an argument can be made regarding a statute that gives *all* biological mothers the right to rebut the presumption of legitimacy and to establish paternity in a non-spousal father, while denying *all* biological fathers this right. If the asserted state interests are the protection of the family unit and provision for support of the child, the statute can be drawn more narrowly and still serve these interests. For example, the statute might provide that a biological *parent* will be allowed these rights if, and only if, it can be shown that: (1) the mother is no longer married to the child's presumed father; or (2) the presumed father has abandoned the child; or (3) the presumed father is no longer supporting the child.[261]

Such a statute would be gender-neutral and would protect both the family unit (if there was one to protect) and the welfare of the child. Since the statute could be drawn more narrowly and still serve the asserted state interests, the classification which distinguishes between all biological fathers and all biological mothers should be deemed an overbroad, gender-based classification. It is based on an undifferentiated distinction between biological mothers and biological fathers, and is applicable in all cases, even when the state interests cannot be served. Therefore, under the gender-neutral approach, this statute violates the equal protection clause because a more narrowly drawn gender-neutral alternative is available.

A third gender-neutral alternative to the statutory classification in question would be a statute which provides for individualized hearings to determine whether a biological parent should be given the right to rebut the presumption of legitimacy and to establish paternity in a non-spousal father. The statute would allow either parent to show that he or she should be given this right and thus, would be gender-neutral. It would also serve the asserted state interests because the hearing would deter-

259. *Id.* at 394.

260. *Id.*

261. This was suggested by the Colorado Supreme Court's opinion in *R. McG.*, 200 Colo. at 351-52, 615 P.2d at 670-71.

mine whether denial of this right is necessary to protect the family unit or the child's welfare.

Such a gender-neutral alternative was employed by the Supreme Court in *Orr v. Orr*[262] to strike down an Alabama law that provided that husbands, but not wives, could be required to pay alimony upon divorce. In that case, the Court conceded that the governmental objectives were both legitimate and sufficiently important.[263] Moreover, the Court explicitly assumed that the situation of the sexes was significantly different in relation to these objectives,[264] which would usually result in the classification being sustained under conventional equal protection analysis applying the "similarly situated" approach.[265] However, the Court held that because Alabama had already held individualized hearings at which the parties' relative financial situations were considered, the state's purpose could be fulfilled by making individualized determinations as to alimony without having to rely upon broad gender-based classifications.[266] The Court concluded that "[w]here, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex."[267]

Accordingly, a statute providing for individualized hearings to determine whether a biological parent should have the right to establish paternity in a non-spousal father is an available gender-neutral alternative to a gender-based classification. Since the asserted state interests of protecting the family unit and the child's welfare could be protected by such a gender-neutral statute, the gender-based classification may be deemed unnecessarily broad, thus violating equal protection.

The state, however, could assert that the gender-based classification may be justified on the basis of the administrative savings which result from not having a required hearing in every case. Indeed, the Court's opinion in *Orr* stressed the fact that individualized hearings were already required under the Alabama statute so there was "not even an adminis-

262. 440 U.S. 268 (1979).

263. *Id.* at 280. The asserted government interests were: (1) assisting needy spouses; and (2) reducing the disparity in economic conditions between men and women which resulted from prior discrimination against women.

264. *Id.* at 281. The court stated that it would have reached the same decision "even if sex were a reliable proxy for need, and even if the institution of marriage did discriminate against women . . . ." *Id.*

265. See *supra* notes 204-22 and accompanying text for a discussion of the similarly situated approach.

266. *Orr*, 440 U.S. at 281-82.

267. *Id.* at 283.

trative-convenience rationale" which justified use of a gender-based classification.[268]

Yet, the Court in *Orr* also noted that even if the gender-neutral statute would result in more hearings than were required under the gender-based classification, it would not justify the use of the classification. The Court stated that even if "some administrative time and effort were conserved" by the gender-based classification, " '[t]o give a mandatory preference to members of either sex . . . merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.' "[269] Thus, *Orr* implies that a gender-neutral statute, even if that statute involved individualized hearings not otherwise required, is a preferred alternative to a gender-based classification. Moreover, a strong argument may be made that a state's interest in administrative efficiency alone cannot justify the use of an unnecessarily broad gender-based classification.[270]

In summary, if a court were to review the classification in question, there are at least two effective gender-neutral alternatives which would serve the asserted state interests equally as well as does the gender-based classification. First, the statutes could be narrowly drawn so that both sexes are burdened except in certain specified situations. For example, the statutes could provide that a biological parent may have the right to rebut the presumption of legitimacy only if it is shown that: (1) there is no existing family unit to protect; or (2) the presumed father is not supporting the child. Such a gender-neutral statute would protect the family unit and provide support for the child.

A second gender-neutral alternative is a statute providing that every biological parent has a right to a hearing to determine whether he or she should be allowed to rebut the presumption of legitimacy under the circumstances of that case. Since the focus of the hearing would be a determination of whether rebuttal of the presumption could disrupt family harmony or be detrimental to the child's well-being, such a gender-neutral statute would serve the state interests of protecting the family unit and the child's welfare. Although such a statute would result in additional costs to the state, a state's interest in administrative efficiency is not as strong as other state interests. Since a hearing would protect not

268. *Id.* at 281.

269. *Id.* at 282 n.12 (citation omitted).

270. *See* Reed v. Reed, 404 U.S. 71, 76 (1971). In *Reed*, the Court stated that although the government's objective of reducing the workload of probate courts was "not without some legitimacy," the use of the gender classification "merely to accomplish the elimination of hearings on the merits" was impermissible. *Id.*

only the private interests of a biological father but also the state interest of protecting the child's welfare, such a statute is a preferred alternative to the gender-based classification in question.

C. *Conclusions Regarding Equal Protection*

Statutes that give all biological mothers the right to rebut the presumption of legitimacy, while denying all biological fathers that right, should be deemed to violate the equal protection clause. In making this determination, courts should focus on whether the state interest of protecting the child's welfare is served by the classification in question. To determine whether the classification is "substantially related" to the purpose of serving the child's welfare, it is necessary to examine the facts of the individual case.

Although the biological parents are not usually "similarly situated" in that the biological mother is within the family unit and the biological father is not, this is not sufficient justification for denying biological fathers the right to establish their paternity in all cases. Since this difference in the position of biological mothers and biological fathers is itself a distinction created by the state, the state should at least have to show that the statute could not be designed in a gender-neutral manner and still serve the child's welfare.

It is possible for a statute to be designed to compel consideration of the child's welfare in each case by: (1) limiting the right of any parent to rebut the presumption of legitimacy to specific instances in which it would be in the child's best interests; or (2) requiring a hearing in every case in which a parent seeks to rebut the presumption. Since the statute could be designed in a gender-neutral fashion which would take into account the facts of each case, a classification distinguishing between all biological mothers and all biological fathers is unnecessarily broad. Therefore, in consideration of all the interests involved in such cases, and specifically in consideration of the child's welfare, a court should apply the gender-neutral approach to a review of the statutory classification in question and hold that such classifications are unconstitutional as violative of the equal protection clause.

III. CONCLUSION

Statutes construed to deny all biological fathers the right to rebut the presumption of legitimacy and to establish their paternity, while giving all biological mothers this right, should be held unconstitutional on their face because they violate the due process clause and/or the equal protection clause of the fourteenth amendment. In analyzing the consti-

tutionality of such statutes under either the due process clause or the equal protection clause, there are two primary considerations.

First, all biological parents should have a right to establish their parentage and thus obtain an opportunity to develop a relationship with their children. This right to an opportunity to form a parent-child relationship should not depend on the sex of the parent or the marital status of the parents at the time of the child's birth. However, if a parent does not seize the opportunity to establish parentage and develop a significant relationship with his or her child, or if a parent subsequently abuses or neglects that relationship, then the parent may lose the right to maintain that relationship.

Second, no biological parent should be deprived of the right to establish parentage and develop a relationship with his or her child unless the state shows that there are overriding state interests served by denying the parent this right. In this regard, the only state interest which should be deemed of sufficient value to override the opportunity interest of the biological parent is the welfare of the child. Clearly, administrative efficiency should not be a sufficient state interest to deny a parent this right.

Assuming that the state's interest in the child's welfare is the only state interest which may outweigh the right of a biological parent to an opportunity to develop a relationship with his or her child, the appropriate consideration is whether statutes that deny *all* biological fathers the right to rebut the presumption of legitimacy and establish their parentage serve the state interest of protecting the child's welfare. Clearly, it is impossible to determine whether such statutes serve the child's welfare without examing the facts of the individual case. In some cases, a conclusive presumption may serve to protect family harmony and thereby serve the child's welfare. In other cases, there may be no family unit to protect or the child may have no emotional or financial relationship with the presumed father and the child's interests may best be served by establishing a relationship with the biological father. Thus, it is necessary to examine the circumstances in each case to determine what is in the best interests of the child.

The only way in which a court can consider the facts of each case is through a hearing. Statutes that require a hearing when either biological parent seeks the right to rebut the presumption of legitimacy would meet the requirements of due process and equal protection. The only loss to the state would be the administrative effort of having a hearing in each case. In states such as California, where a hearing is required to determine the constitutionality of the statute as applied to the facts in every case, the marginal loss of administrative efficiency would be the require-

ment of additional hearings when mothers seek to rebut the presumption. In states that do not presently require hearings, the interest in administrative efficiency should not be deemed to outweigh the more important interests that would be served by requiring a hearing in each case.

Not only do these hearings protect the biological father's interest, they protect the child's interest by establishing the welfare of the child as the deciding factor in determining whether the paternity of the biological father should be legally established. Since the child's welfare is, and should be, the major state interest, such statutes would better serve not only the father's interest but also the interests of the state.

APPENDIX

UNIFORM PARENTAGE ACT, 9A U.L.A. 587 (1979). The relevant sections read as follows:

Section 1. [Parent and Child Relationship Defined]

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

Section 2. [Relationship Not Dependent on Marriage]

The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

Section 3. [How Parent and Child Relationship Established]

The parent and child relationship between a child and

(1) The natural mother may be established by proof of her having given birth to the child, or under this Act;

(2) the natural father may be established under this Act;

. . . .

Section 4. [Presumption of Paternity]

(a) A man is presumed to be the natural father of a child if:

(1) he and the child's natural mother are or have been married to each other and the child is born during the marriage, . . . ;

. . . .

(4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child; or

(5) he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau].

. . . .

Section 6. [Determination of Father and Child Relationship; Who May Bring Action; When Action May Be Brought]

(a) A child, his natural mother, or a man presumed to be his father under Paragraph (1), (2), or (3) of Section 4(a), may bring an action

(1) at any time for the purpose of declaring the existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a); or

(2) for the purpose of declaring the non-existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a) only if the action is brought within a reasonable time after obtaining knowledge of relevant facts, but in no event later than [five] years after the child's birth. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

(b) Any interested party may bring an action at any time for the purpose of determining the existence or non-existence of the father and child relationship presumed under Paragraph (4) or (5) of Section 4(a).

(c) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 4 may be brought by the child, the mother or personal representative of the child, the [appropriate state agency], the personal representative or a parent of the mother if the mother has died, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

. . . .

Each of the sixteen states that has adopted the Uniform Parentage Act has its own modified version. 9A U.L.A. 581 (1979).