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A Chance for Positive Change: Exploring the Legal Hurdles Putative Fathers Face in the 21st Century

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NOTE

A CHANCE FOR POSITIVE CHANGE: EXPLORING THE LEGAL HURDLES PUTATIVE FATHERS FACE IN THE 21ST CENTURY

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I. Introduction and Historical Background of Parental Rights

In 2009, Pennsylvania residents Christopher Carlton and Shalanda Brown began a romantic relationship that resulted in Ms. Brown's pregnancy.[1] Unexpectedly, Ms. Brown left Mr. Carlton just four weeks before the birth of their child without telling him where she was going.[2] At the time of separation, Mr. Carlton had not taken any action to protect his parental rights over his unborn child.[3]

During her disappearance, Brown traveled to Utah, where she gave birth and later relinquished her parental rights to The Adoption Center.[4] Brown also executed a Birth Father Affidavit in which she stated she was single and did not disclose the father's identity.[5] She later returned to Pennsylvania and made efforts to rekindle her relationship with Carlton.[6] When Carlton asked to see his child, Brown told him she gave birth to a boy who had passed away, when in reality she gave birth to a girl and placed the baby up for adoption.[7] Meanwhile, The Adoption Center in Utah confirmed no one had registered as the putative father of the child at the Utah Office of Vital Records or filed an acknowledgement of paternity at the Pennsylvania Department of Public Welfare.[8]

In November 2010, after Brown's constant refusal to give Carlton any information about his child, Carlton filed a paternity action in Pennsylvania.[9] By that time, adoption proceedings for the child were already in progress in Utah.[10] A few weeks later, Brown finally told Carlton the truth about their child.[11] That very day, Carlton's Pennsylvania paternity suit was dismissed for lack of jurisdiction.[12] When the adoption proceed-

1. Carlton v. Brown, 323 P.3d 571, 575 (Utah 2014).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

ings for the child were finalized in Utah on December 29, 2010, there were no paternity proceedings pending either in Utah or Pennsylvania.[13]

Carlton v. Brown depicts the reality for many putative fathers and the various issues they face when attempting to exercise their parental rights.[14] A putative father is a man who either (1) claims to be the father of a child to whom he has not established a legal relationship; or (2) is alleged to be the father of a child born out of wedlock.[15] Recently, the topic of unwed fathers'[16] rights has gained popularity, as more unwed fathers across the nation challenge the constitutionality of laws governing their rights.[17]

While many cases recognize unwed fathers' rights, such an acknowledgment has not resolved the inequality between unwed fathers and unwed mothers and has left the unwed mother in a far superior position than the unwed father.[18] As such, the implementation of a national system that ensures putative fathers have the opportunity to establish paternity could better protect their rights.[19]

Until the 1960s, an illegitimate child's relationship with their biological parents was not constitutionally protected.[20] Two U.S. Supreme Court cases decided in 1968, *Levy v. Louisiana*[21] and *Glona v. American Guar.*

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13. *Id.*

14. *See id.* at 474 (addressing the issue of rights afforded to putative fathers who wish to contest adoptions).

15. *Putative Father Registry*, AM. ACAD. OF ADOPTION ATTY'S, http://www.adoptionattorneys.org/refinery/cache/pages/aaaa-page/birth-parents/putative-father-registry.html [https://perma.cc/A6H6-ZXSY] (last visited Nov. 12, 2016) [hereinafter *Putative Father Registry*].

16. The terms "unwed fathers" and "putative fathers" are used interchangeably throughout this note.

17. *See, e.g.*, H.U.F. v. W.P.W., 203 P.3d 943, 950 (Utah 2009) (indicating the putative father challenged the adoption proceeding of his child, but the court did not afford him a constitutional right to intervene); *see also In re* D.S., No. 16-0254, 2016 WL 1359134, at *2 (Iowa Ct. App. Apr. 6, 2016) (challenging termination of a father's parental rights where the father was deported and there was no evidence that he intended to abandon his children); Winkler v. Sherman, 137 A.D.3d 633, 633 (N.Y. App. Div. 2016) (holding the plaintiff, who was well over twenty-one years of age, did not have a constitutional right to the identity of his biological father, given the strong presumption that his mother's husband, who was listed on his birth certificate, is his father).

18. *See, e.g.*, CYNTHIA H. DEBOSE, MASTERING ADOPTION LAW & POLICY 48, 50 (Carolina Press 2015) (discussing the limited constitutional protections afforded to unwed fathers in comparison to unwed mothers).

19. *See, e.g.*, Mary Beck, *A National Putative Father Registry*, 36 CAP. U. L. REV. 295, 301 (2007) (arguing a national putative father registry will protect the putative father's rights by providing notice and opportunity to be heard in an adoption in any state).

20. DEBOSE, *supra* note 18, at 47.

21. 391 U.S. 68 (1968).

& Liab. Ins. Co.,[22] were the first to recognize the mother-child relationship warrants special protection, regardless of the mother's marital status.[23] In *Levy*, a mother's five illegitimate children brought a wrongful death action after her death, but the lower courts ruled the state statute allowing children to bring such claims precluded illegitimate children from doing so.[24] The U.S. Supreme Court reversed the ruling and held under the Equal Protection Clause that the state could not discriminate against illegitimate children because their rights involved the "intimate and familial relationship between a child and his mother," and when a child brings forth a claim for damages, the wrongdoers should not be allowed to go free merely because the child may be illegitimate.[25] The Court concluded the children were able to bring suit because their illegitimacy was not related to the wrongful death of the mother.[26] In *Glona*, the Court held the dismissal of a wrongful death action brought by a mother for the death of her illegitimate son violated the Equal Protection Clause.[27] Despite the holdings in *Levy* and *Glona*, the preexisting laws and perceptions about unwed fathers remained unchanged.[28]

This note argues courts should allow unwed fathers to exercise their rights in more than just a limited number of circumstances and should give them the same exclusivity to custody and presumption of parental fitness as afforded unwed mothers. Part II discusses the landmark Supreme Court cases delineating putative fathers' rights. Part III explains the views regarding protection of thwarted fathers' rights. Part IV explains the evolution of the Uniform Parentage Act (UPA) and its objectives regarding the establishment of the father-child relationship. Part V addresses California and New Jersey's adoption of the UPA and provides an in-depth analysis of their similarities and differences. Part VI analyzes the presumption of fatherhood in *Michael H. v. Gerald D.*[29] Finally, part VII examines the use of putative father registries to establish paternity.

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22. 391 U.S. 73 (1968).

23. DEBOSE, *supra* note 18, at 47.

24. Levy v. Louisiana, 391 U.S. 68, 69 (1968).

25. *Id.* at 71.

26. *Id.* at 72.

27. Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 76 (1968).

28. *See generally* Erin Green, Note, *Unwed Fathers' Rights in Adoption: The Virginia Code vs. The Uniform Adoption Act*, 11 WM. & MARY J. WOMEN & L. 267, 269 (2005) (discussing how the Supreme Court did not begin to recognize the rights of unwed fathers until the early 1970s).

29. 491 U.S. 110, 113 (1989).

II. How Courts have Delineated Putative Fathers' Rights

Until recently, unwed fathers had no rights over their children because courts often deemed them unfit as parents and therefore presumed them to have no interest in their children.[30] Furthermore, if a man was married to a woman at the time she gave birth, he was presumed to be the child's biological father; as a result, there was no guarantee that an unwed father's relationship with his biological child would be constitutionally protected.[31] In turn, this lack of constitutional protection effectively deprived putative fathers both a right to notice of their child's adoption proceedings and a right to prevent the mother from placing the child up for adoption.[32] Decades after the U.S. Supreme Court afforded constitutional protection to unwed mothers, the Court slowly began to recognize the rights of unwed fathers.[33] In the "Unwed Father Cases," which emerged in the 1970s and 1980s, the Court warranted constitutional protection to unwed fathers who established a relationship with their child.[34]

A. *The First Step in Recognizing Unwed Fathers' Rights:* Stanley v. Illinois

Stanley v. Illinois[35] was the first case to recognize relationships between unwed fathers and their children and afford constitutional protection to unwed fathers' parental rights.[36] In *Stanley*, a father of three children brought suit against the state when, after the death of their mother, the state removed his children from his care and placed them with court-appointed guardians.[37] The father lived with the mother on-and-off for eighteen years, during which time the three children were born to them.[38] Pursuant to an Illinois statute, upon the death of the mother children of

30. Green, *supra* note 28.

31. *See* Michael H. v. Gerald D., 491 U.S. 110, 113–15 (1989) (revealing the harsh standard placed upon unwed fathers in attempting to rebut the presumption that they are not the child's father); *see also* Debose, *supra* note 18, at 49–50 (exploring the effects of the Supreme Court's decision not to afford the biological father an opportunity to prove paternity).

32. Tonya M. Zdon, Comment, *Putative Fathers' Rights: Striking the Right Balance in Adoption Laws*, 20 Wm. Mitchell L. Rev. 929, 931 (1994).

33. *See* Debose, *supra* note 18, at 48 (examining the trend in Supreme Court precedent as moving away from the common law presumption that a child is the child of the marital spouse).

34. *Id.*

35. 405 U.S. 645 (1972).

36. *See id.* at 658 (holding an Illinois law denying putative fathers the right to a hearing to determine their parental fitness after the death of the mother violated the Equal Protection Clause).

37. *Id.* at 646.

38. *Id.*

unwed fathers became wards of the State because there was an irrebuttable statutory presumption that unwed fathers were unfit to retain custody of their children.[39] Stanley claimed he was never proven to be an unfit parent and—because the state could not deprive unwed mothers and married fathers custody of their children absent such a showing—the state violated his equal protection rights.[40] The Court agreed with Stanley and concluded the interests of a man who has "sired and raised" his children warrant protection; further, if the father was deemed fit, the State's interest in the children is insignificant.[41] Nevertheless, the *Stanley* decision did not extend unwed fathers and unwed mothers the same level of constitutional protection, but served to rebut the traditional view that unwed fathers were generally absent from their children's lives and therefore unfit as parents.[42]

B. *Development of Standards for Protecting Fathers' Rights:* Quilloin v. Walcott

Although *Stanley* afforded some protection to the relationship between a biological father and his child, it left unclear whether such protection existed in every case or only when a custodial relationship was established.[43] The Court later addressed this dilemma six years after *Stanley* in *Quilloin v. Walcott*,[44] in which the Court first developed the "best interest of the child" standard.[45]

In *Quilloin v. Walcott*, Quilloin fathered a child with Walcott, a woman to whom he was never married.[46] Three years later, Walcott married a different man—the child being in her custody at all times.[47] After nearly a decade, Walcott's husband sought to adopt Walcott and Quilloin's child.[48] Quilloin, who neither previously sought custody of the child nor objected to the child's living with his mother and step-father, attempted

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39. *Id.*; Susan M. Zajac, *Doctrine of Family Integrity Protecting the Parental Rights of Unwed Fathers Who Have Substantial Relationships with Their Children*, 13 CONN. L. REV.145, 155 (1980).

40. Stanley v. Illinois, 405 U.S. 645, 646 (1972).

41. *Id.* at 651–52, 657–58.

42. Green, *supra* note 28, at 270.

43. Tyler M. Hawkins, Comment, *Adoption of Infants Born to Unaware, Unwed Fathers: A Statutory Proposal that Better Balances the Interests Involved*, 2009 UTAH L. REV. 1335, 1337 (2009).

44. 434 U.S. 246, 251 (1978).

45. *See* Quilloin v. Walcott, 434 U.S. 246, 251 (1978) (holding a proposed adoption was in the "best interest of the child").

46. *Id.* at 247.

47. *Id.*

48. *Id.*

to block the adoption process and obtain visitation rights.[49] The trial court granted the adoption over Quilloin's objection.[50] Quilloin's case made its way to the Supreme Court, where he contended the adoption violated the Equal Protection Clause because the state denied him the same authority to veto an adoption it afforded to married or divorced parents and unwed mothers.[51] The Court focused on Quilloin's lack of involvement in raising his child and rejected his argument.[52] Further, the Court held a father's parental rights could be terminated if the court found doing so is in the best interest of the child—especially if the father never attempted to establish a relationship with his child.[53] Similarly, a father who never sought custody, the Court concluded, lacked authority to contest the adoption of his child.[54]

The decision in *Quilloin* thus established a principle contravening that of *Stanley* (namely, that the court should not afford protection to an unwed father who fails to participate in raising his children to a significant degree).[55] Nevertheless, both cases determined the legal protection afforded a putative father would be based on the extent of the relationship established with his child.[56] Moreover, both *Quillion* and *Stanley* demonstrated courts' willingness to take a substantial leap towards recognizing the rights of putative fathers.[57] However, both cases failed to explain two key issues: the extent of parenting behavior warranting constitutional protection of their parental rights, and the time frame within which a putative father must establish a relationship with his child.[58]

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49. *Id.*

50. *Id.*

51. *Id.* at 252.

52. *See id.* at 256 (pointing out the father in question was never involved in his child's life).

53. *Id.*

54. *See id.* (recognizing the extent of commitment to the welfare of a child in determining whether a father, whom never shouldered meaningful responsibility for raising the child, has a right to contest the adoption).

55. *See* Hawkins, *supra* note 43, at 1338 (emphasizing the holdings of these two cases are at extreme ends of the spectrum, which leaves room for courts to interpret the parental rights of a putative father).

56. *See id.* (suggesting both cases weigh the amount of responsibility the putative father puts forth in determining his rights).

57. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (recognizing the Due Process Clause would be violated if a family was broken up without a showing of parental unfitness); *see also* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding unwed biological fathers are entitled to a hearing on parental fitness).

58. Hawkins, *supra* note 43, at 1338.

C. *Two Steps Forward and One Step Back:* Caban v. Mohammed

One year after *Quilloin*, the Supreme Court further clarified the rights of putative fathers in *Caban v. Mohammed*,[59] a very similar yet distinguishable case. Caban challenged the constitutionality of a New York statute allowing unwed mothers to block adoption proceedings concerning her child by withholding consent without affording unwed fathers the same rights.[60] Caban and Mohammed lived together for five years, during which time they had two children.[61] The birth certificate listed Caban as the father, and he lived with the children until he separated from their mother in 1973.[62] One year later, Mohammed married another man and she and her children took up residence with her new husband.[63] Over the years, Caban maintained contact with his children.[64] Eventually, the children's step-father petitioned to adopt them, and Caban and his new wife objected and cross-petitioned for adoption.[65] The lower court granted Mohammed's husband's petition to adopt the children, thereby terminating Caban's parental rights.[66]

In *Caban*, the U.S. Supreme Court considered the gender-based distinction between unwed fathers and unwed mothers provided in the state statute, but ultimately held the distinction did not bear any substantial relation to the state's interest in providing adoptive homes for its illegitimate children.[67] Building upon *Stanley*, *Caban* also declared unwed fathers could secure their parental rights in a much shorter time period than the eighteen years set forth in *Stanley*[68] and extended protection to men who created and maintained a relationship with their child.[69] In addition, *Caban* established courts have to prove—rather than presume—unwed fathers are unfit, as courts do with unwed mothers.[70] Taking *Stanley* and *Quilloin* one step further, *Caban* also presented the necessary

59. 441 U.S. 380 (1979).

60. Caban v. Mohammed, 441 U.S. 380, 385–87 (1979); *see also* Hawkins, *supra* note 43, at 1338 (indicating a putative father would not have to wait as long as eighteen years to earn his parental rights).

61. Caban v. Mohammed, 441 U.S. 380, 382 (1979).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 383.

66. *Id.* at 383–84.

67. *Id.* at 391.

68. *See id.* at 382 (showing a sufficiently substantial relationship where the unwed parents lived together for approximately five years). *But see* Stanley v. Illinois, 405 U.S. 645, 646 (1972) (showing a substantial relationship where the unwed parents lived together for eighteen years).

69. Caban v. Mohammed, 441 U.S 380, 393 (1979).

70. *Id.* at 394.

factors for establishing an unwed father's parental rights, including: whether he lived with the children and their mother for some time, held himself out as the children's father, and provided the children with care and support.[71]

D. *Creating Putative Father's Rights by Evidencing Responsibility and Interest:* Lehr v. Robertson

In the wake of these three Supreme Court cases, many states began to enact statutes to protect the newly recognized rights of unwed fathers.[72] Of the Unwed Father Cases, *Lehr v. Robertson*,[73] was the first to review these statutes and discuss unwed fathers' entitlement to notice of adoption proceedings.[74] Lehr sought to vacate an adoption order concerning his two-year-old daughter on the grounds that the order violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[75] The Supreme Court referenced *Stanley*, *Quilloin*, and *Caban* to address Lehr's claim of a protected liberty interest, focusing on the relationship between Lehr and his daughter.[76] The Court specifically scrutinized the following facts: although Lehr lived with the mother before their daughter's birth and visited the mother at the hospital, he never provided them with financial support, his name was not on the birth certificate, and he did not live with either at any time.[77] The Court reasoned a mere biological link does not warrant constitutional protection and further held an unwed father can acquire substantial protection under the Due Process Clause by demonstrating full commitment to the responsibilities of parenthood—as evidenced by his participation in raising his child and maintaining personal contact.[78]

Further, *Lehr* laid out steps an unwed father must take to transform a biological relationship with his child into a constitutionally protected one.[79] Although the *Lehr* factors may help an unwed father's relation-

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71. *Id.* at 389.

72. *See* Robbin P. Gonzalez, *The Rights of Putative Fathers to Their Infant Children in Contested Adoptions: Strengthening State Laws that Currently Deny Adequate Protection* 13 Mich. J. Gender & L. 39, 45 (2006) (describing the implementation of a putative father registry by some states).

73. Lehr v. Robertson, 463 U.S. 248 (1983).

74. Gonzalez, *supra* note 72.

75. Lehr v. Robertson, 463 U.S. 248, 253, 259 (1983).

76. *See id.* at 253, 261–62 (distinguishing Lehr from the unwed fathers in *Stanley*, *Caban*, and *Quilloin* by emphasizing those cases contained the establishment, or the potential establishment, of a "clear and significant" parent-child relationship).

77. Lehr v. Robertson, 463 U.S. 248, 251–52 (1983).

78. *Id.* at 261.

79. *See id.* at 261–62 (indicating an unwed father's interest is protected when he shows full commitment to establishing a relationship with his child).

ship with his child receive constitutional protection, a father who does not grasp the unique opportunity to develop a relationship with his child will have no constitutional right to compel a state to listen to his opinion concerning the best interests of the child.[80] Apparently, the Court did not consider the likely ramifications of its decision in *Lehr*. Perhaps *Lehr's* standard should be applied in child support cases, where the mere existence of a biological link has been deemed sufficient to hold an unwed father financially responsible towards the child. If the mere existence of a biological link does not warrant protection of an unwed father's rights, then a biological link should not suffice for holding an unwed father financially responsible towards the child. Unfortunately, courts have yet to explore this idea.[81] In short, *Stanley*, *Quilloin*, *Caban*, and *Lehr* illustrate the amount of protection afforded to an unwed father's relationship is a direct result of the amount of responsibility he has assumed in the raising of his child.[82]

III. Exploring the Application of Supreme Court Cases to Thwarted Fathers' Rights

Courts have consistently held a putative father who has established a substantial relationship with his child will be afforded constitutional protection, and so, his rights may not be terminated without notice and hearing.[83] Conversely, the putative father who has failed to accept any parental responsibilities will not receive constitutional protection.[84]

Unfortunately, these decisions have not addressed whether courts will afford protection to putative fathers with "thwarted rights."[85] A thwarted father is one who, "through no fault of his own, has been unable to establish a relationship with his child."[86] Attempts to resolve this issue have resulted in inconsistent rulings and deference to the states.[87] While

80. *Id.* at 262.

81. *See* Robert Franklin, *Wisconsin: Court Denies Rights to Father with Substantial Relationship with Child*, Nat'l Parents Org. (Feb. 16, 2015), https://nationalparentsorganization.org/recent-articles?id=22195 [https://perma.cc/REY2-C7XF] (suggesting the Court used a double standard when calculating child support payments and when posed with the option to afford constitutional rights to punitive fathers).

82. *Cf.* Hawkins, *supra* note 43, at 1340–41 (highlighting how the Court's decision to afford constitutional protection to unwed fathers heavily depends on whether a father establishes a substantial relationship with his child).

83. Kristin Morgan-Tracy, Comment, *Right of the Thwarted Father to Veto the Adoption of His Child*, 62 U. Cin. L. Rev. 1695, 1700 (1994).

84. *Id.* at 1700–01.

85. *Id.* at 1701.

86. *Id.*

87. *See generally id.* 1701–15 (examining the various state court decisions that have attempted to address the unwed fathers' rights).

some courts are willing to extend protection to thwarted fathers, others have been reluctant.[88]

The issue is evident in *Lavell v. Adoption Institute*,[89] where a father brought action against The Adoption Institute to prevent adoption proceedings and obtain custody of his child.[90] Lavell and his child's mother lived together in Michigan.[91] They later moved to California, expecting their second child.[92] The couple lived together and held themselves out as husband and wife, even though they did not participate in a marriage ceremony.[93] The mother left Lavell with their first child and later gave birth to their second child, whom she immediately placed in the care of The Adoption Institute without notifying Lavell.[94] Lavell filed an acknowledgement of paternity in Michigan for both children and sought custody of the second child by taking the child into his home, but The Adoption Institute prevented him from taking the child because the claimed mother, being single, had already relinquished her parental rights and was allowed to do so under a California statute.[95] Nevertheless, the court affirmed the lower court's findings that Lavell legitimized his child before the mother relinquished her parental rights and was thus fit for custody because he made earnest efforts to provide a home for the child even after the mother attempted to thwart him.[96] Since *Lavell,* many courts have been unwilling to embrace a policy favoring legitimation by a putative father.[97] Indeed, states like California have read their parentage statutes as requiring a mother's consent before a putative father may legitimize his child.[98]

IV. Statutory Attempts at Resolving Discrimination Between Putative Fathers' and Mothers' Rights

While the Unwed Father Cases and the many state statutes that followed focused on the newly-recognized rights of unwed fathers, the

88. *Id.* at 1707.

89. 8 Cal. Rptr. 367 (Cal. Ct. App. 1960).

90. *Id.* at 368.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.* (stating the father had no prior knowledge of the mother's desire to leave).

95. *See id.* at 368–69 (noting the father diligently sought his children, secured a house to care for his children, and requested that the mother marry him).

96. *Id.* at 369.

97. Diane C. Wilson, Note, *The Uniform Parentage Act: What it Will Mean for the Putative Father in California*, 28 Hastings L.J. 191, 197 (1976).

98. *Id.*

UPA[99] sought to make children its primary focus.[100] In fact, UPA emphasizes the most important rights were not those of the parents but those of the child.[101] The National Conference of Commissioners on Uniform State Laws (NCCUSL) first adopted UPA in 1973 and the American Bar Association (ABA) approved it in 1974.[102] Because cases like *Levy* and *Glona* found the unequal treatment of children based on the marital status of their biological parents unconstitutional, UPA eradicated discriminatory statutory distinctions between illegitimate and legitimate children that had existed for decades.[103] In addition to treating children equally and promoting equality among single parents, UPA established provisions for determining paternity,[104] rules for presumption of parentage,[105] and guidelines for establishing a parent-child relationship.[106]

UPA recognizes four kinds of fathers: acknowledged fathers, adjudicated fathers, alleged fathers, and presumed fathers.[107] First, an acknowledged father is one who has established a father-child relationship through a voluntary claim of paternity, with the consent of the mother.[108] UPA conceptualizes an acknowledged father as a biological father who is not married to the mother of the child but who nevertheless maintains a

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99. UNIF. PARENTAGE ACT, §§ 101–905 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

100. *See* Wilson, *supra* note 97, at 204 (providing substantive legal equality for all children regardless of the marital status of their parents).

101. Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 8 (1974).

102. *Id.* at 1.

103. Megan S. Calvo, *Uniform Parentage Act—Say Goodbye to Donna Reed: Recognizing Stepmothers' Rights*, 30 W. NEW ENG. L. REV.773, 777 (2008).

104. UNIF. PARENTAGE ACT, Art. 3 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

105. UNIF. PARENTAGE ACT, § 204 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

106. UNIF. PARENTAGE ACT, § 201 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

107. UNIF. PARENTAGE ACT, § 102 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002). The Act was amended in 2002 in an effort to address issues concerning developments in reproductive and scientific technologies—mainly those regarding the use of DNA testing in determining a child's genetic parent. UNIF. PARENTAGE ACT, § 102 CMT. (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002). There are currently seven states that have adopted the 2002 version of the UPA: Delaware, North Dakota, Oklahoma, Texas, Washington, Wyoming, and Utah. *Legislative Fact Sheet – Parentage Act*, NAT'L CONF. OF COMM'RS ON UNIF. L. (2016), http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act [https://perma.cc/H7BT-UT7N].

108. UNIF. PARENTAGE ACT, §§ 301–02 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

relationship with her and is present at the child's birth.[109] Second, an adjudicated father is one a court determines to be the father of a child.[110] This type of father may or may not be the biological father.[111] Third, an alleged father is one who either alleges himself, or is alleged by someone else, to be the biological father or a possible biological father of a child but whose paternity has yet to be determined.[112] Fourth, presumed fathers are addressed in section 204 of UPA, which lists the instances wherein paternity is presumed.[113] For example, under UPA a man is presumed to be the father of a child if he is linked to the child through marriage.[114] In other words, a presumption of paternity exists where a child was born during the time the man was married to the mother or if the marriage has terminated and the child was born within 300 days thereafter.[115] Moreover, paternity is presumed if:

> . . . after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and the assertion is in a record filed with [state agency maintaining birth records]; he agreed to be and is named as the child's father on the child's birth certificate; or he promised in a record to support the child as his own.[116]

Once a presumption of paternity is established, it may be difficult to challenge it.[117] UPA also protects presumed fathers from the claims of other fathers, including biological fathers, by placing limitations on challenges raised against the presumed father.[118] The presumption that a child born during a marriage is conceived from that marital union has long been connected to the continuous efforts of courts and states to pre-

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109. Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood,* 14 WM. & MARY BILL OF RTS. J. 909, 915 (2006).

110. UNIF. PARENTAGE ACT, § 102(2) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

111. Dowd, *supra* note 109, at 915.

112. UNIF. PARENTAGE ACT, § 102(3) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

113. UNIF. PARENTAGE ACT, § 204 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

114. UNIF. PARENTAGE ACT, § 201(a)(1)–(2) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

115. UNIF. PARENTAGE ACT, § 201(a)(1)–(2) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

116. UNIF. PARENTAGE ACT, § 201(a)(4) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

117. *See* UNIF. PARENTAGE ACT, § 204(b) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002) (requiring adjudication to rebut a presumption of paternity).

118. Dowd, *supra* note 109, at 915.

serve the image of the traditional family.[119] While many courts continue to adhere to this image, preservation of traditional familial stereotypes is less prevalent in contemporary society.[120]

V. State Adoption of UPA

In accordance with UPA, many states have enacted statutes containing "presumed father" provisions mirroring those in UPA, while others have revised the rebuttable presumption that a putative father is unfit for parental rights.[121] In particular, California and New Jersey have reproduced UPA's language pertaining to presumed fathers.[122]

A. *California*

Prior to enacting UPA, California did not recognize the rights of putative fathers.[123] Although both parents were required to provide support for the child under California law, the mother was the only parent entitled to child custody, services, and earnings.[124] While putative fathers were periodically allowed visitation rights over the objections of the mother, they had no rights to notice of adoption proceedings.[125]

It was not until after *Stanley* that California allowed establishing putative father's rights through legitimation.[126] Section 7611 of the California Family Code (CFC), for example, is an exact replica of the standard laid out in section 204 of UPA.[127] Moreover, the CFC, like UPA, is premised on the presumption of paternity through marriage.[128] However, a key

119. *See* Calvo, *supra* note 103, at 781–82 (claiming courts today adhere to the presumption of legitimacy from early common law and consider it a foundational principle).

120. *Id.* at 782.

121. *See id.* at 777–83 (stating twenty-one states have adopted a version of UPA's presumed-father provision, with language variations in certain jurisdictions).

122. *See* Cal. Fam. Code § 7611 (West 2014) (providing the same presumption of paternity language listed in UPA § 204); N.J. Stat. Ann. § 9:17 (West 1998) (reiterating similar presumption of paternity language as listed in UPA § 204).

123. Wilson, *supra* note 97, at 195.

124. *Id.* at 195–96.

125. *Id.* at 196.

126. *Id.* at 195–96.

127. *See* Unif. Parentage Act, § 204 (Nat'l Conf. of Comm'rs on Unif. St. L. 2000) (amended 2002) (stating a man is presumed to be the father, if after the birth of the child, he and the mother were married); Cal. Fam. Code § 7611 (West 2014) (reiterating UPA § 204's standard that a person is presumed to be the parent of the child if they marry the child's mother after the child's birth).

128. *See* Unif. Parentage Act, § 204 (Nat'l Conf. of Comm'rs on Unif. St. L. 2000) (amended 2002) (specifying a man is presumed to be the father of a child if he and the mother are married and a child is born during the marriage); Cal. Fam. Code § 7611 (West 2014) (declaring a person is presumed to be the natural parent of a child if married or attempted to marry the natural mother of the child).

difference between UPA and the CFC relates to the attainment of a presumption of paternity through a potentially invalid marriage prior to the birth of the child.[129] While UPA contains no provisions detailing how to or who must declare the attempted marriage invalid,[130] under the CFC only a court can declare an attempted marriage prior to the child's birth invalid.[131]

The CFC also distinguishes itself from UPA by presuming a man is the father if the child in question is born within 300 days after cohabitation with the child's mother has ended and requires no further actions on his part.[132] Further, UPA states, where there is an attempted marriage prior to the child's birth, the presumed father must assert his paternity over the child and record the assertion with a state agency—regardless if the marriage is valid or not.[133] If the father has not made such an assertion, he must show he has agreed to be listed as child's father on the birth certificate or has promised to support the child.[134] Conversely, California only requires the presumed father agree to be listed on the child's birth certificate or to support the child through a voluntary promise or court order.[135]

Furthermore, the CFC provides another scenario for determining a presumed father: that is, where "the child is in utero after the death of the [biological father],"[136] and in connection with section 249.5 of the California Probate Code, "was in utero using the [biological father]'s genetic material within two years after a certificate of death was issued or a judgment determining the [biological father]'s death was entered, whichever occurs first."[137]

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129. *See* UNIF. PARENTAGE ACT, § 204 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002) (permitting room for interpretation because the legislature does not explicitly require courts to determine issues of marriage validity and termination of cohabitation). *But see* CAL. FAM. CODE § 7611(b) (West 2014) (recognizing only courts hold the power to declare marriage invalid).

130. UNIF. PARENTAGE ACT, § 204(a)(3) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

131. CAL. FAM. CODE § 7611(b)(1) (West 2014).

132. *Compare* UNIF. PARENTAGE ACT, § 204 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002) (referencing several other actions required before the person is presumed to be the father) *with* CAL. FAM. CODE § 7611(b)(2) (West 2014) (emphasizing an attempted marriage that is invalid without a court order determines whether a person is presumed to be the natural parent).

133. UNIF. PARENTAGE ACT, § 204(a)(4) (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2000) (amended 2002).

134. *Id.*

135. CAL. FAM. CODE § 7611(c) (West 2014).

136. *Id.* § 7611(f).

137. CAL. PROB. CODE § 249.5 (West 2006).

While UPA requires another man be adjudicated the father of a child in order to rebut a presumption of paternity,[138] the CFC requires the person challenging the presumption to show, at the time of conception, the presumed father was impotent or sterile or the mother was not cohabitating with her husband.[139] A presumption can also be rebutted by blood tests requested by filing a motion, "within two years of the child's birth by either (1) the husband or the presumed father, (2) the child, through a guardian ad litem, or (3) the mother of the child, if the natural father of the child has filed an affidavit acknowledging paternity."[140]

B. *New Jersey*

New Jersey's statute for presumption of fatherhood is worded similarly to the CFC, providing for the same scenarios in which a man will be deemed a "presumed father" whether or not the child is born during a valid marriage.[141] A key difference between the California and New Jersey presumption statutes, however, is that the latter makes specific mention of presumption of paternity concerning children who have not yet attained majority.[142] Rather, the New Jersey statute looks to whether the presumed father (1) took the minor child into his home and held out the child to be his; (2) supported the child while openly holding out that the child was his; or (3) acknowledged paternity in a writing and filed it with a local registry of vital statistics and such paternity is not disputed by the mother within a reasonable time after she has been informed about the filing.[143] Although New Jersey does not provide any specific method for rebutting the presumption, the statute implements a "clear and convincing evidence" standard by which a party may rebut it.[144] Finally, if conflicting presumptions exist, the presumption with the most logical and policy-oriented facts controls.[145]

VI. Difficulties Associated with Rebutting the Marital Presumption

Despite all the substantive changes states made to their marital presumption statutes, courts maintain wide discretion in interpreting them,

138. Unif. Parentage Act, § 201(b) (Nat'l Conf. of Comm'rs on Unif. St. L. 2000) (amended 2002).
139. Cal. Fam. Code § 7540 (West 2014).
140. *Id.* § 7541(a)–(c).
141. N.J. Stat. Ann. § 9:17 (West 1998).
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*

particularly where a third party seeks to adopt a putative father's child.[146] Of the cases addressing the issue of the presumption of paternity, *Michael H. v. Gerald D.*, which began in the California courts and was eventually appealed to the U.S. Supreme Court, is the most prominent.[147]

Michael H. was involved in an adulterous relationship with Carole D., which resulted in the conception of a child; the child was born while Carole was still married to another man, Gerald D.[148] Gerald was listed on the child's birth certificate and continuously held the child out to be his, but soon after the birth, Michael H. was informed that he could be the father.[149] Michael and Carole both took blood tests a few months after the child's birth that showed a 98.07% probability Michael was the father.[150] Soon thereafter, and for various time periods during the first four years of the child's life, Michael H. lived with both Carole and the child and held the child out as his own.[151] Michael later sought visitation rights to the child, but the Superior Court, strictly interpreting section 621 of the CFC, ultimately declined them because evidence submitted by both Carole and Gerald demonstrated Gerald was neither sterile nor impotent at the time of conception.[152] Michael subsequently challenged the decision on the grounds that the court had violated his procedural and substantive due process rights.[153] Victoria, the child, also challenged the decision on the basis that she was entitled to the preservation of her *de facto* relationship[154] with Michael as well as her relationship with Gerald.[155]

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146. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (explaining that under California law, illegitimate children are treated just like legitimate children).

147. Munonyedi Ugbode, Note, *Who's Your Daddy?: Why the Presumption of Legitimacy Should Be Abandoned in Vermont*, 34 VT. L. REV. 683, 688 (2010).

148. Michael H. v. Gerald D., 491 U.S. 110, 113 (1989).

149. *Id.* at 113–14.

150. *Id.* at 114.

151. *Id.*

152. *Id.* at 113–15.

153. *Id.* at 116.

154. *Id.* "The *de facto* relationship focuses on basic elements such as the type of relationship established between the child and the third party, whether the third party was a part of the same household as the child or whether the third party took on support obligations." Lindsy J. Rohlf, Note, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 699 (2009). A *de facto* parent is one who has participated in the child's life as a member of the child's family but has to biological relation to the child. *Id.* at 699–700. Such a parent must have lived with the child, and with the consent or encouragement of the child's legal parent, perform a share of caretaking functions at least to the same extent as the legal parent. *Id.* at 700.

155. Michael H. v. Gerald D., 491 U.S. 110, 116 (1989).

On appeal, the U.S. Supreme Court focused solely on the issue of whether the type of relationship between Michael and Victoria typically receives constitutional protection.[156] The Court rejected Michael's argument that *Stanley*, *Quilloin*, *Caban*, and *Lehr* all establish biological fatherhood coupled with an established paternal relationship creates a liberty interest because, according to the Court, these cases rested upon traditional notions of family relationships and not upon the factors he referenced.[157] The Court also contended, while most states allow natural fathers, including those who have not established a relationship with the child, to rebut a marital presumption, the most important factor is whether these states award parental rights to the natural father of a child conceived during and born into the marriage.[158] The Court found that no case awarded such rights.[159] With regard to Victoria's assertions, the Court held multiple paternity is traditionally unrecognized, and allowing a child to bring forth a claim of illegitimacy or rebut a marital presumption serves no purpose other than to disrupt what might otherwise be a peaceful marital union.[160] The facts and reasoning of *Michael H.* demonstrate the difficulty of rebutting the marital presumption because courts hold the preservation of the family unit in high regard.[161] However, when the court uses the "preservation of the family unit" rationale in this way, the court further restricts the already limited avenues that afford putative fathers the opportunity to establish their parental rights. It is as though the hand offering a remedy is the same one taking it away.

VII. Implementing Putative Father Registries to Establish Paternity

When determining whether a putative father's rights deserve recognition or whether a putative father has demonstrated a commitment to his parental responsibilities, courts have often looked to factors such as whether he lived with the mother or the child after the birth of the child, whether he provided support to the child, or whether he publicly acknowledged the child as his own.[162] However, as in *Carlton*, courts also

156. *Id.* at 124.
157. *Id.* at 123.
158. *Id.* at 127.
159. *Id.*
160. *Id.* at 131.
161. *See* Alexandra Eisman, *The Extension of the Presumption of Legitimacy to Same-Sex Couples In New York*, 19 Cardozo J.L. & Gender 579, 580 (2013) (suggesting *Michael H. v. Gerald D.* shows that courts are more willing to promote "family units" than the rights of putative fathers).
162. Adoption of Kelsey S., 823 P.2d 1216, 1226 (Cal. 1992).

consider the father's initiation of legal custody proceedings or his registration with a state system acknowledging paternity.[163]

Currently, thirty states—excluding California and New Jersey—help putative fathers establish paternity through putative father registries.[164] Putative father registries enable unwed fathers to acknowledge paternity, or the possibility of paternity for a child born out of wedlock, voluntarily.[165] The acknowledgment of paternity through putative father registries benefits fathers and children because, upon timely registration, fathers are guaranteed notice to adoption proceedings and any action pertaining to the termination of his parental rights.[166] Moreover, the type of information required registering paternity varies from state to state, but federal mandates require, at a minimum, basic information regarding parties who may be involved.[167]

Due to the lack of publicity for putative father registries, many men do not know they exist and thus lose out on the full benefits of registering as a child's biological father.[168] In addition, fathers who are aware of the registries may shy away due to the difficulty of determining which state registration they should file in or the possibility that filing a registration

163. *See, e.g.*, Carlton v. Brown, 323 P.3d 571, 575 (Utah 2014) (suggesting Mr. Carlton's parental rights would have been protected if he had taken action to establish them).

164. States that have enacted putative father registries are: Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming. *State Putative Father Registries*, N.H JUDICIAL BRANCH (Oct. 8, 2015), http://www.courts.state.nh.us/probate/registrylist.pdf [https://perma.cc/TN9L-MTTD].

165. *See* Beck, *supra* note 19, at 298 (arguing a national putative father registry will protect putative fathers' rights should they actively seek to establish paternity).

166. *Putative Father Registry*, *supra* note 15.

167. *Id.* Examples of the types of information required on an acknowledgement of paternity include: the current name, address, social security number, and date of birth of both parents; the child's current full name, date of birth, and place of birth; signatures of the mother, the father, witnesses or notaries; a statement signed by both parents stating they understand that signing the affidavit is voluntary and that they understand their rights, responsibilities, options and consequences. *Id.*

168. *See* Beck, *supra* note 19, at 298 (revealing media attention does not focus on the potential benefits of putative father registries); *see also* Kevin N. Maillard, *Sex & the Single Man: What if Your Partner Has a Kid?*, ATLANTIC (Apr. 24, 2014), http://www.theatlantic.com/national/archive/2014/04/sex-and-the-single-man/360979 [https://perma.cc/97KX-XU92] (suggesting the putative father registry programs are too inconspicuous or complex, for people to understand the benefits brought by these registries).

could subject them to child support obligations.[169] Despite the many factors that may deter a putative father from using these registries,[170] the problems with putative father registries that do exist can be minimized, if not eliminated altogether. For example, setting up a national putative registry could help alleviate some of the issues, but this approach would fully depend on the enactment of putative father registries by additional states.[171] Under this arrangement, if a putative father timely registered, states with functional putative father registries would ensure he receives notice of dependency or adoption proceedings concerning his child.[172] Furthermore, enacting a national putative father registry would facilitate notice of adoption proceedings to unwed fathers in interstate adoption situations because information the father submits to the state registry would be transmitted to the national database.[173]

Encouraging states to enact putative father registries also comes with its own advantages. For example, eliminating the publication of such registries in newspapers protects putative fathers' privacy rights.[174] Furthermore, putative father registries also help the mother in several ways, for instance: (1) they relieve her of the need to inform the potential father about her pregnancy or adoption of the child, (2) they inform her about whether a man actually wishes to assume financial and custodial responsibilities for the child, and (3) they protect her privacy by not requiring her to divulge her sexual contacts to adoption agencies, courts, or adoptive parents.[175] Finally, putative father registries promote secure adoption placements because a putative father who does not make a timely filing will not be guaranteed notice to any proceedings concerning the child.[176]

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169. *See* Beck, *supra* note 19, at 298 (showing how putative fathers will not use the registries because state relocation is very common and many people do not want the burden of being a parent).

170. *See, e.g.*, Maillard, *supra* note 168 (displaying various factors that deter putative fathers from using putative father registries). Some information asked of unwed fathers registering at putative father registries include their partners' height, weight, social security number, possible date(s) of sexual intercourse, and more. *Id.*

171. *See* Beck, *supra* note 19, at 298 (contending that establishing a national putative father registry would eliminate the common problems resulting from unwed mothers and their children crossing state lines).

172. *Id.* at 301.

173. *Id.*

174. *Id.* at 310.

175. *Id.* at 311–13.

176. *See id.* at 313 (claiming requiring a father to timely file in the registry will protect the state's interest in providing efficiency and permanency for children).

It is important to note that nationalizing putative father registries benefits children the most.[177] Registering putative fathers in a national registry, although not a petition for custody or a determination of paternity,[178] ensures the child has a diligent and invested father who wishes to participate in his custodial and financial care, and if the putative father has not registered, the child is ensured prompt placement with an adoptive family.[179]

VIII. CONCLUSION

Although the recognition of unwed father rights has increased substantially since the 1970s, the vast majority of court decisions have yet to address the many issue putative fathers continue to face. As such, courts should continue to level the playing field for unwed fathers and mothers by providing both parents constitutionally protected rights to the child and applying the presumption of parental fitness to both—unless facts and circumstances require otherwise. Until this occurs, however, it is evident from longstanding court decisions like *Carlton* that putative fathers who desire protection of their parental rights should demonstrate parental responsibilities or establish paternity through state putative father registries. Nonetheless, the effectiveness of putative father registries depends on the timely filing by the putative father in the appropriate jurisdiction and the extent to which the putative father knows the required information. Putative father registries, if implemented on a national scale, could be a step in the right direction for parenthood equality between unwed fathers and mothers.

Additionally, although establishing a national putative father registry provide benefits, doing so requires twenty additional states to jump on the putative father registry bandwagon. Even then, if an unwed father demonstrates commitment and still unsuccessfully attempts to establish his parental responsibilities, he should take comfort in knowing courts will afford him some kind of protection regardless if he used a putative father registry. As for Christopher Carlton, the Pennsylvania man who unsuccessfully attempted to obtain custody of his daughter after the mother lied to him about her status, the Utah Supreme Court's holding

177. *Id.*

178. Maillard, *supra* note 168.

179. *See* Beck, *supra* note 19, at 313 (supporting a national putative father registry system that protects a father's right to his natural born children, advances the safety rights of the mother, and supports the state's interest in providing permanency for children).

that the Utah Adoption Act's imposition of a deadline on out-of-state fathers violated his due process rights has given him a second chance.[180]

180. Brooke Adams, *Court Gives Dad Second Chance in Adoption*, SALT LAKE TRIB., (Feb. 25, 2014, 8:43 PM), http://archive.sltrib.com/story.php?ref=/sltrib/news/57593247-78/utah-adoption-carlton-court.html.csp [https://perma.cc/92GW-JZSG].