THE UNIFORM PARENTAGE ACT AND NONMARITAL MOTHERHOOD-BY-CHOICE

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I

INTRODUCTION

An increasing number of unmarried women are choosing to become mothers. These unmarried mothers-by-choice,[1] unlike the familiar and sometimes tragic unmarried mothers-by-accident, have intentionally become pregnant outside of marriage, intending to raise their child without the father's participation. Some unmarried mothers-by-choice conceive by artificial insemination, while others conceive naturally. In both cases, the biological fathers of their children understand that they will not act as their children's legal or social fathers.

The law governing family relations is ill-prepared to respond to nonmarital mothering-by-choice. Family law has traditionally assumed that childbirth outside of marriage is accidental, and that the best interests of both mother and child lie in the establishment of a legal father-child relationship.[2] Within this framework, the unmarried mother who objects to the establishment of a legal relationship between her child and her child's biological father[3] seems a curiosity.

The decision of the unmarried mother-by-choice to raise her children in a nonmarital family creates a potential conflict between her rights and interests and those of her children. Her choice implicates her constitutionally protected rights to procreate and to preserve family autonomy.[4] For women whose decision to become unmarried mothers is grounded in femi-

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1. The term "unmarried mother-by-choice" does not include widows, divorced women, women deserted by their husbands, or women whose pregnancies were unwanted or accidental, even though they are unmarried and are raising children alone. The essence of nonmarital motherhood-by-choice is a pre-conception plan to raise children without a legal father.

2. *See infra* text accompanying notes 38-45 & 271-79.

3. Throughout this article, the term "biological father" refers to a man whose sperm causes a pregnancy which results in the birth of a child. The word "father," standing alone, is misleading because it also describes a father who has some social relationship with the child as her parent. Many of the topics discussed here require referring to a man only insofar as he is the biological father of a child, without regard to whether he has a social relationship with the mother or the child. On the semantic difficulties in the use of the word " father," see A. RICH, OF WOMAN BORN xiv (1976); N. CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 11 (1978).

4. *See infra* text accompanying notes 178-245.

nist political principles, first amendment associational rights are also at stake.[5]

These rights must be balanced, however, against the constitutional right of her children to the equal protection of the law.[6] To the extent that the enforcement of legal rights against biological fathers benefits nonmarital children, the failure of the state to enforce these rights arguably denies nonmarital children equal protection of the law. The right to child support is the most obvious such advantage.[7] Although the Supreme Court has issued numerous decisions concerning procreative rights, the right to family autonomy, and the rights of nonmarital children, it has not yet resolved the tension between an unmarried woman's right to procreative and family autonomy and her child's right to equal protection of the law.

An opportunity for the Court to address this conflict may soon arrive. In 1973, the National Conference of Commissioners on Uniform State Laws enacted the Uniform Parentage Act (UPA),[8] in response to Supreme Court rulings on the rights of nonmarital children and parents. To date, nine states have adopted the UPA,[9] and others may follow. The UPA defines the legal relations between nonmarital children and their parents, but ignores the potential conflict between the rights of nonmarital children and the rights of unmarried women to procreative and family autonomy. The UPA blocks all avenues through which an unmarried woman might establish a family in which her child has no legal father.[10]

This Article proposes a resolution of this conflict. It analyzes the constitutionality of the UPA as applied to unmarried mothers-by-choice who raise their children by themselves or with other women as coparents, and without the biological fathers' involvement. The legal status of nonmarital motherhood through natural conception and conception by artificial insemination are both considered. The Article concludes that the UPA unnecessarily and unconstitutionally infringes upon the rights of unmarried mothers-by-choice. Two amendments to the UPA are proposed as a remedy, and it is argued that the amended UPA would adequately protect the rights of both unmarried mothers-by-choice and their children.

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5. *See infra* text accompanying notes 215-32.

6. U.S. CONST. amend. XIV, § 1.

7. *See infra* text accompanying notes 249-56.

8. UPA, 9A U.L.A. 587 (1979). The full text of the UPA appears in the Appendix.

9. CAL. CIV. CODE §§ 7000-7018 (West Supp. 1983); COLO. REV. STAT. §§ 19-6-101 to 19-6-129 (1978); HAWAII REV. STAT. §§ 584-1 to 584-26 (1976 & Supp. 1982); MINN. STAT. ANN. §§ 257.51-257.74 (West 1982); MONT. CODE ANN. §§ 40-6-101 to 40-6-131 (1981); NEV. REV. STAT. §§ 126.011-126.391 (1981); N.D. CENT. CODE §§ 14-17-01 to 14-17-26 (1981); WASH. REV. CODE ANN. §§ 26.26.010-26.26.905 (West Supp. 1983-1984); WYO. STAT. §§ 14-2-101 to 14-2-120 (1977). In addition, Indiana has adopted some of the UPA's key provisions. *See* IND. CODE ANN. §§ 31-6-6.1-2, -9 (Burns 1980).

10. *See infra* text accompanying notes 96-177.

II

NONMARITAL MOTHERHOOD-BY-CHOICE: THE SOCIAL REALITY

The unmarried mother is not a new phenomenon. When abortion was illegal, many unmarried women who became pregnant had little choice but to give birth.[11] Many of those who did not surrender their children for adoption raised them without the father's participation. Motherhood under these circumstances was usually involuntary.[12] Recently, however, unmarried women have voluntarily chosen motherhood without marriage.[13]

Although statistics are not available, there are indications that nonmarital mothering-by-choice is a growing practice. Surveys of infertility specialists reveal a small but significant number of requests by unmarried women for artificial insemination.[14] It is estimated that in recent years approximately 1,500 unmarried women per year have been artificially inseminated and have borne children.[15] Feminist health clinics in some cities offer advice to unmarried women on the techniques for artificial insemination,[16] and self-help guides for artificial insemination have periodically

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11. *See generally* J. MOHR, ABORTION IN AMERICA (1978). The right to abortion was recognized in *Roe v. Wade*, 410 U.S. 113 (1973). A few states legalized abortion prior to 1973, e.g., New York did so in 1970. J. MOHR, *supra*, at 260. Before the legalization of abortion, an unmarried pregnant woman either had to bear the child or risk an illegal abortion, for which the mortality rate was very high. *Id.* at 254-55.

12. *See generally* L. GORDON, WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA (1976). Because women have been economically dependent for most of American history, it is reasonable to assume that very few unmarried women freely chose to become mothers. *Id.* at 110. It is impossible to determine the number of American women at any point in time who were unmarried mothers-by-choice because there is little recorded history of women's reproductive choices.

13. *See* Leo, *Single Parent, Double Trouble,* TIME, Jan. 4, 1982, at 81; Rivlin, *Choosing to Have a Baby on Your Own,* MS., Apr. 1979, at 68; Dorgan, *Feminists Open a Sperm Bank*, Boston Globe, Oct. 10, 1982, at 11, col. 1; Dullea, *Women Consider Childbearing Over 30*, N.Y. Times, Feb. 25, 1982, at C1, col. 1 [hereinafter cited as Dullea (1982)]; Fleming, *New Frontiers in Conception*, N.Y. Times, July 20, 1980, § 6 (Magazine), at 14, col. 1; Dullea, *Artificial Insemination of Single Women Poses Difficult Questions*, N.Y. Times, Mar. 9, 1979, at A18, col. 1 [hereinafter cited as Dullea (1979)]. *See also* C. KLEIN, THE SINGLE PARENT EXPERIENCE (1973). Children born to unmarried women constituted approximately 17% of all births in 1979, as compared to approximately 10.7% of all births in 1970. NAT'L CENTER FOR HEALTH STATISTICS, OFFICE OF HEALTH RESEARCH, STATISTICS, AND TECHNOLOGY, PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, VITAL STATISTICS OF THE U.S.: 1978, VOL. 1—NATALITY at I-53 (1982); NAT'L CENTER FOR HEALTH STATISTICS, MONTHLY VITAL STATISTICS REPORT, Sept. 29, 1981, at 19. Although a significant portion of this increase is due to accidental adolescent pregnancies, it may also reflect an increase in the planned pregnancies of unmarried women.

14. *See* Dullea (1979), *supra* note 13.

15. Fleming, *supra* note 13, at 23.

16. These clinics include the Feminist Women's Health Center in Los Angeles, California, Fleming, *supra* note 13, at 23; the Feminist Women's Health Center in Oakland, California, Dorgan, *supra* note 13, at 11, col. 1; and the Vermont Women's Health Center in Burlington, Vermont, Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1, 3 n.3 (1981).

appeared.[17] In 1980, the American Civil Liberties Union, on behalf of an unmarried woman, challenged a policy of Wayne State University's Mott Clinic which allowed only married women to apply for artificial insemination.[18] The growing interest in nonmarital mothering-by-choice is also evidenced by frequent newspaper and magazine coverage of women who either have become or intend to become unmarried mothers-by-choice.[19] In 1979, a mass circulation women's magazine published an interview with an unmarried mother-by-choice, and described these unmarried mothers as "pioneers setting out for uncharted territories."[20] The interview was accompanied by an article giving advice to the woman who "wishes to have a child but prefers no relationship with the father for either herself or her child."[21]

Unmarried women choose to become mothers for various reasons. Some prefer to raise a child with another woman as coparent. Lesbian women constitute a significant percentage of this group.[22] They understandably prefer to avoid the constraints imposed by the existence of a legal father who is not part of the family unit, and the possible conflicts that may arise as a result of his exercise of paternal rights. A second group consists of women who prefer a traditional family, but for whom suitable male coparents are unavailable.[23] For these women, the only alternative to bearing children outside of marriage is not bearing them at all. Women who have

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17. One such pamphlet is LESBIAN HEALTH INFORMATION PROJECT, ARTIFICIAL INSEMINATION: AN ALTERNATIVE CONCEPTION (1979), available from San Francisco Women's Centers, 3543 18th Street, San Francisco, CA 94110.

18. Fleming, *supra* note 13, at 23. The suit was dropped when the clinic agreed to change its policy.

19. See sources cited *supra* note 13. One reporter canvassed the reaction of a group of 25 professional women who intended to become mothers to a recent French fertility study reporting a drop in fertility at age 30. She found that this group of women included not only married women but also unmarried women "giving serious thought to becoming single mothers." Dullea (1982), *supra* note 13, at C1, col. 1. At the 12th National Conference on Women and the Law, held in Boston, Massachusetts in April 1981, a session on nonmarital mothering-by-choice was well attended by women with both a professional and a practical interest in the subject.

20. Rivlin, *supra* note 13, at 94.

21. Ihara & Warner, *Making Illegitimacy Legitimate*, MS., Apr. 1979, at 92, 94.

22. *See* Fleming, *supra* note 13, at 14, 23; Dullea (1979), *supra* note 13. *See also* Kritchevsky, *supra* note 16.

23. *See generally* Dullea (1982), *supra* note 13. Dullea interviewed one such woman:

> "I've made a pact with myself," said Deborah Judell, who is 31, single and in public relations. " If I am 34 and there is no prospective mate on the scene, I intend to have a child." Noting that her decision was based on a sense of time running out and a conviction that she will be able to provide for a child, economically and emotionally, Miss Juddell said, " I hope my stance will not be seen as defiant, but I'm going to do it regardless."

Id. at C1, col. 2, C8, col. 3. The possibility that unmarried women might seek artificial insemination for this reason has long been recognized. W. FINEGOLD, ARTIFICIAL INSEMINATION 101 (2d ed. 1976), reports the existence of controversy in the 1940's about the artificial insemination of "spinsters." *See also* Dorgan, *supra* note 13.

strong family or community support and the economic means for parenting alone are those most likely to choose this route. In addition to the unmarried mothers-by-choice who fall into these two identifiable groups, there are others who prefer nonmarital motherhood to the traditional family for individual reasons, and who organize their nontraditional families in a variety of ways.[24]

Parenting is highly valued, both culturally and individually. It is one of the few remaining socially reinforced, nurturing activities in an increasingly fragmented society.[25] As a parent, the individual retains some personal control over her actions, often in contrast to limited opportunities elsewhere. It promises unique rewards as a long-term commitment to intensively caring for and interacting with another. It is also unique as a culturally celebrated role within the reach of almost everyone. Although few can obtain wealth, fame, or power, most people can become parents. Children are a source of pride and honor in contemporary American society, perhaps the only attainable badge of honor for many. Beyond its rewards in the present, parenting also provides an opportunity for the individual to transmit her attitudes, values, and beliefs, and those of sub-cultures to which she may belong, to the next generation. For these reasons or others, an enormous number of people devote a considerable portion of their lives to parenting.

For women, parenting has additional significance. Although men have historically controlled political, economic, and cultural institutions,[26] women have traditionally controlled the family.[27] Many women value the mothering role, through which they forge a meaningful historical link with their foremothers. This positive regard for the role of mothers is not necessarily linked to a similar regard for the traditional family. Many contemporary women encounter difficulties in sharing a coparenting relationship with a man, given a society in which women are accorded secondary status, and in which men are the beneficiaries of and the vehicles for transmitting that

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24. See the sources cited *supra* note 13 for examples.

25. *See* N. CHODOROW, *supra* note 3, at 213; L. GORDON, *supra* note 12, at 405. *See generally* E. ZARETSKY, CAPITALISM, THE FAMILY AND PERSONAL LIFE (1976).

26. *See generally* J. MITCHELL, WOMEN'S ESTATE (1971); Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157 (R. Reiter ed. 1975). On spouse abuse, see the results of a study sponsored by the National Institute of Mental Health, U.S. COMM'N ON CIVIL RIGHTS, BATTERED WOMEN: ISSUES OF PUBLIC POLICY (1978). On rape, see S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975). On pornography, see A. DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981). On sexual harassment in the workplace, see C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). Women who work full time still earn 59% of what men earn. WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN 6 (1979).

27. A. RICH, *supra* note 3, at 51-52 ("The one aspect in which most women have felt their own power in the patriarchal sense—authority over and control of another—has been motherhood. . . .").

secondary status.[28] For these women, parenting and its personal rewards may consequently be possible only through alternative channels.

Although the interest in and the practice of nonmarital mothering-by-choice are growing, the law has not responded to this development. The only existing legal categories readily applicable to the families of unmarried mothers-by-choice are those of illegitimacy. The history of the law governing illegitimacy has been the story of an evolution from a harsh and explicitly punitive posture toward the unmarried mother and her child, to a somewhat softened, more paternalistic approach.[29] The law assumes that it does the nonmarital child and her mother a service when it uses every means at its disposal to establish the identity of the child's biological father, thereby establishing his right and duty to participate, financially, and otherwise, in the child's upbringing. In contrast, the unmarried mother-by-choice views her procreative and parenting situation as a freely chosen one, which she prefers to other available options. To her, state interference of any kind, whether or not at the behest of the biological father, is an unwanted intrusion into her procreative and parenting choices. The dilemma that the law creates for the unmarried mother-by-choice must therefore be evaluated in light of the law governing illegitimacy.

Historically, the linking of legal parenthood to biological parenthood represented progress away from penalizing "illegitimate" children and their mothers. However, today many women and men are sufficiently informed about reproduction to exert some control over the process. Contraceptives are available for those who seek them. For many women, abortion is both available and affordable. In addition, advances in reproductive technology have led to artificial insemination, in vitro fertilization,[30] and surrogate mothering,[31] introducing a new kind of control and new possibilities for

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28. The oppression of women by men is not always direct or intentional. According to one school of Freudian psychoanalytic theory, "the normal male contempt for women" is the inevitable outcome of the male child's oedipal conflict when the resolution takes place within the traditional family with its sharply divided parental sex roles.

> Given that masculinity is so elusive, it becomes important for masculine identity that certain social activities are defined as masculine and superior, and that women are believed unable to do many of the things defined as socially important. It becomes important to think that women's economic and social contribution cannot equal men's.

N. CHODOROW, *supra* note 3, at 182. If this devaluation of women is in fact deeply imbedded in the male psyche, eradicating it will be an enormous task, one which a woman may not want to undertake in the most important and vulnerable spheres of her life.

29. *See infra* text accompanying notes 36-45.

30. In vitro fertilization refers to the process of removing ova from a woman's ovaries, fertilizing them in a test tube with sperm, and implanting a fertilized ovum in her uterus. *See generally* Flannery, Weisman, Lipsett & Braverman, *Test Tube Babies: Legal Issues Raised by In Vitro Fertilization*, 67 GEO. L.J. 1295 (1979); Lorio, *In Vitro Fertilization and Embryo Transfer: Fertile Areas for Litigation*, 35 SW. L.J. 973, 975-84 (1982).

31. Surrogate mothering is the practice whereby a married couple, who are unable to have children because of the wife's sterility, enter into a contract with a woman who is

reproduction. Finally, valid generalizations can no longer be made about the relative inability of women to support a child without the assistance of the child's father. Given the altered social context created by the accumulation of these changes, the rigid linking of legal parenthood to biological parenthood is open to question.

In the case of artificial insemination some states have already broken the link between biological parenthood and legal parenthood.[32] The link may also be broken in the case of surrogate motherhood, although the legal status of surrogate motherhood and of the surrogate mother and her child has not yet been addressed by statute.[33] The link has already been questioned in the case of a woman who deliberately becomes pregnant without the father's knowledge, refuses to have an abortion or to give the child up for adoption, yet seeks financial support for the child from the man who is involuntarily the child's father.[34] Now that sex education is commonplace and contraceptives and abortion are widely available, it seems unjust to impose the legal obligations of parenthood upon a man without his knowledge or consent and as a result of a woman's individual choice to have a child. Another situation in which legal parenthood has not always attached to biological parenthood is where a child is born to a cohabiting married couple, but not fathered by the husband. Some courts have denied men claiming to be the biological fathers of children born to married women the opportunity to establish their paternity. This opportunity is denied on the grounds that these state interests in fostering marital harmony, strengthen-

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artificially inseminated with the husband's sperm. The surrogate mother agrees to surrender all parental rights with respect to the child at the time of birth. *See generally*, Brophy, *A Surrogate Mother Contract to Bear a Child*, 20 J. FAM. L. 263 (1981-82); Comment, *Contracts to Bear a Child*, 66 CALIF. L. REV. 611 (1978).

32. *See infra* text accompanying notes 148-164.

33. Courts that have addressed this issue have been reluctant to allow the mother to terminate her rights by a preconception contract for compensation. *See* Doe v. Attorney Gen., 106 Mich. App. 169, 307 N.W.2d 438 (1981) (Michigan statutes prohibiting any consideration in adoption upheld against people who want to enter into a surrogate mothering contract); Sykowski v. Appleyard, 8 FAM. L. REP. 2139 (Mich. Cir. Ct. Jan. 12, 1982) (child born to a married woman is conclusively presumed to be the child of the woman and her husband, despite a surrogate mothering contract between the woman and a third party). In *Sykowski* the court indicated that alteration of the law governing the parent-child relationship to accommodate surrogate mothering contracts must come from the legislature. *Id.* at 2140.

34. In Pamela P. v. Frank S., 110 Misc. 2d 978, 443 N.Y.S.2d 343 (Fam. Ct. 1981), the court held that a woman who had deliberately misled a man about her use of contraceptives with the intention of having him father her child could not collect support payments from him unless she could not support the child alone. Although this decision stops far short of declaring the defendant not to be the legal father of the child, it does suspend one of the primary legal obligations of fatherhood. The court thereby acknowledged the inappropriateness of hinging full legal parenthood upon biological parenthood, without regard to mitigating circumstances.

ing the family, and protecting children's interests override the putative father's interest in establishing a legal parent-child relationship.[35]

There is no single social reality which defines the power relations between women and men in the spheres of sexuality and reproduction. For some women and men, sex education, contraception, abortion, and changing employment opportunities have dramatically altered the balance of power and the possibilities for choice in sexual relations and parenthood. But this is not true for all. Women who have genuine options coexist with many women who still do not. Many adolescents especially are in the same position of ignorance and powerlessness that prevailed in previous eras. The well-employed woman who decides to have a child on her own is far less common that the ill-informed teenager who finds herself pregnant, unemployed, and with abortion or adoption either undesirable or not a genuine possibility.

Given these disparate realities, the law governing nonmarital children should not be predicated upon a single set of assumptions about the mother's or the father's situation; nor should it impose the same legal rules upon all. By leaving the current legal framework as a governing structure, but creating paths whereby women and men who wish to choose alternatives by express and formalized preconception agreements may do so, unmarried mothers-by-accident will remain protected from bearing alone the consequences of an accident for which both they and their children's fathers are responsible.

III

ILLEGITIMACY AND THE LAW

A. Nonmarital Children

Under common law, the nonmarital child was "illegitimate," a "filius nullius," or child of no one.[36] The stigma attached to her birth status was often the primary factor in determining the child's social status and the quality of her life. Severe legal disabilities were imposed upon the nonmarital child under common law. She had no right to financial support from her parents, and could not inherit from them by intestate succession.[37]

Some have observed that the institution of illegitimacy was primarily a means of discouraging sexual activity by unmarried women.[38] Although a

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35. *See* Vincent B. v. Joan R., 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1982); Petitioner F. v. Respondent R., 430 A.2d 1075 (Del. 1981). *But see* R.McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980); *In re* Adoption of McFayden, 108 Ill. App. 3d 329, 438 N.E.2d 1362 (1982).

36. 10 C.J.S. *Bastards* § 21 (1938).

37. C. FOOTE, F. LEVY & R. SANDER, CASES AND MATERIALS ON FAMILY LAW 626-36 (1976) [hereinafter cited as FOOTE]. *See also* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 22-28 (1971).

38. FOOTE, *supra* note 37.

woman who became pregnant and bore a child outside of marriage was not subject to criminal penalties, the extreme social stigma which she endured, combined with the legal disabilities imposed upon her child, were undoubtedly a deterrent to sexual relations. Some commentators have emphasized that the institution of illegitimacy was, and still is, both a product of, and means for reinforcing, male social dominance.[39] Because the social status of women and children was determined by reference to the husband or father, the common law treated as invisible a mother and child who were not "legitimated" by a legal connection to a man.

Lawmakers gradually came to view the institution of illegitimacy as excessively harsh toward nonmarital children, who were penalized solely for their parents' behavior.[40] Partly in response to this concern for the nonmarital child, and partly because of a concern for the drain on state revenues which support of these children created, most states adopted statutes that created paternity actions enabling the mother, child, or appropriate state agency to sue the father for child support.[41] Often the successful paternity action materially improved the lot of both mother and child. The availability of this action represented progress over the common law under which fathers had no duty to support their nonmarital children, even when they were conceived accidentally and their mothers could not adequately provide for them alone.

Thus, historically the paternity suit was an innovation which benefited mother and child by placing some responsibility for the consequences of sex outside of marriage on the father, rather than placing it all on the mother.[42] Progress in shifting some of the burden for nonmarital children from the mother to the father was achieved by linking legal parenthood to biological parenthood.[43] The wisdom of this linkage seemed too obvious to require justification or explanation. Since both biological parents were responsible for the child's birth, and since the nonmarital child's birth was considered shameful, each parent, it seemed, should share in the shame. Since a child

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39. H. KRAUSE, *supra* note 37, at 83; Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act*, 23 U. KAN. L. REV. 23-25 (1974).

40. *See* Levy v. Louisiana, 391 U.S. 68, 71-72 (1968); H. KRAUSE, *supra* note 37, at 71.

41. *See* FOOTE, *supra* note 37, at 645; H. KRAUSE, *supra* note 37, at 6. Some states did not adopt such a statute until the Supreme Court's decision in Gomez v. Perez, 409 U.S. 535 (1973). After *Gomez* any state that requires marital fathers to support their children must impose the same requirement upon nonmarital fathers. *See also* Mills v. Habluetzel, 456 U.S. 91 (1982) (one-year statute of limitations for paternity suits is unconstitutional).

42. The existence of the paternity suit was not necessarily detrimental to the interests of the rare woman who wanted to raise her children without parental involvement. In most states the sole purpose of the paternity suit was and is to secure support payments from the father, as opposed to legitimation of the child or the establishment of any paternal rights. Krause, *Bringing the Bastard into the Great Society*, 44 TEX. L. REV. 829, 848-54 (1966). *See also infra* notes 117 & 118.

43. *See* H. KRAUSE, *supra* note 37, at 68-69.

was a financial burden and imposed caretaking responsibilities, each parent, it seemed, should share that burden and those responsibilities.

The society in which the linking of legal parenthood to biological parenthood constituted progress was a society in which childbearing outside of marriage was viewed as a disgrace and a misfortune. It was a society in which ignorance about reproduction and lack of access to contraceptives or abortion was the norm.[44] Because women had virtually no employment opportunities, few could support a child alone.[45] The creation of the paternity action was an attempt to address the glaring inequities of a society and legal system in which only the nonmarital mother and her child bore the burdens and endured the stigma of illegitimacy.[46]

These changes did not take place overnight. Many common law disabilities imposed upon nonmarital families have remained in place until relatively recently. During the late 1960's, and throughout the following decade, a number of the remaining disabilities were challenged under the equal protection clause of the fourteenth amendment. The Supreme Court held in a series of cases that nonmarital children cannot arbitrarily, and solely on the basis of their birth status, be denied substantive rights granted to marital children. The Court afforded constitutional protection to the rights of a nonmarital child to recover for her mother's wrongful death,[47] to recover worker's compensation upon the death of her father,[48] to inherit by intestate succession from her father,[49] and to receive public assistance[50] and paternal support.[51]

A common theme in these decisions is that legally created disadvantages may no longer be imposed upon nonmarital children for the purpose of discouraging sexual relations and childbirth outside of marriage.

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bounds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.[52]

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44. *See* L. GORDON, *supra* note 12, at 61-62.
45. *See id.* at 110.
46. *See* H. KRAUSE, *supra* note 37, at 105-60.
47. Levy v. Louisiana, 391 U.S. 68 (1968).
48. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).
49. Trimble v. Gordon, 430 U.S. 762 (1977).
50. New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973).
51. Gomez v. Perez, 409 U.S. 535 (1973).
52. Weber v. Aetna Casualty & Surety Co., 406 U.S. at 175. This quotation from the opinion in *Weber* has been referred to in many subsequent opinions. *See, e.g.,* Trimble v. Gordon, 430 U.S. at 769-70; New Jersey Welfare Rights Organization v. Cahill, 411 U.S. at 620; Gomez v. Perez, 409 U.S. at 538.

Marital and nonmarital children who are similarly situated are thus entitled to the same legal rights. The equal protection clause prohibits the state from using nonmarital children as pawns for controlling the behavior of their biological parents.

The holdings of these cases have been somewhat diluted by other decisions upholding laws disadvantageous to nonmarital children.[53] In each of these later cases, a state interest other than, or in addition to, reinforcement of traditional morality and the traditional family was put forward. The Court has split sharply in these cases over the constitutionality of laws which, while serving some legitimate state interest, create obstacles to enforcing the rights of nonmarital children. The Court has upheld discriminatory Social Security Act eligibility conditions for survivor child's insurance benefits, because the congressional assumption that nonmarital children were less likely to be dependent upon their parents for support was found to be reasonable.[54] It has also upheld a Louisiana law barring nonmarital children from inheriting by intestate succession from their fathers on the grounds that the statute promoted Louisiana's substantial interest in the stability of land titles and in the prompt distribution of property left by decedents,[55] although it struck down a similar Illinois statute six years later.[56]

In the more recent case of *Lalli v. Lalli*,[57] three Justices[58] joined in a plurality opinion upholding a New York statute which prevented nonmarital children from inheriting by intestate succession unless their father had acknowledged paternity in a formal judicial proceeding. The Court found that the state's interest in the orderly and just distribution of property at death was sufficient to justify imposing this condition, even though a more carefully drawn and less discriminatory statute could have accomplished the state's purposes equally well.[59] Two justices did not join in the opinion, concurring only in the judgment.[60] The four dissenting justices argued that the New York statute should be struck down, because a more narrowly drawn statute would have served the state's purposes.[61] The Court's recent opinion in *Mills v. Hableutzel*,[62] although unanimous, clarified little. The

53. Lalli v. Lalli, 439 U.S. 259 (1978); Matthews v. Lucas, 427 U.S. 495 (1976); Labine v. Vincent, 401 U.S. 532 (1971).

54. Matthews v. Lucas, 427 U.S. 495, 509-12.

55. Labine v. Vincent, 401 U.S. 532.

56. Trimble v. Gordon, 430 U.S. 762 (1977). The Court attempted to distinguish the statutes on several grounds, *id.* at 767 n.12, 768 n.13, but acknowledged that " it is apparent that we have examined the Illinois statute more criticially than the Court examined the Louisiana statute in *Labine*," *id.* at 776 n.17.

57. 439 U.S. 259 (1978).

58. Justices Burger, Powell, and Stevens.

59. *Id.* at 273-74.

60. Justices Stewart, Blackmun, and Rehnquist each concurred separately. *Id.* at 276-77.

61. *Id.* at 278-79 (Brennan, J., dissenting).

62. 456 U.S. 91 (1982).

Court held that a one-year statute of limitations for child support actions brought by nonmarital children violated the equal protection clause of the fourteenth amendment. The alleged state interest in preventing stale and fraudulent claims was so implausible that the statute was struck without any extensive discussion of the controversies that arose in previous cases.

Despite the self-acknowledged inconsistencies in the Court's opinions on illegitimacy, some points are undisputed. A classification that discriminates against nonmarital children violates the equal protection clause if it exists solely for the sake of discouraging the bearing or begetting of nonmarital children.[63] Second, a heightened level of scrutiny, but not strict scrutiny, applies to classifications based upon birth status.[64] These two legal doctrines guarantee nonmarital children considerable constitutional protection from discriminatory laws, and represent clear progress away from the debased status of nonmarital children under the common law.

B. Nonmarital Fathers

Expanded protection for the rights of nonmarital children has been accompanied by increased recognition of the rights of nonmarital fathers. Before the Supreme Court's decision in *Stanley v. Illinois*,[65] state laws withholding parental rights from unmarried fathers were common and, for the most part, were unquestioned. In *Stanley*, the Supreme Court held for the first time that a father who had lived with and who had helped to raise his nonmarital children had a "cognizable and substantial" interest in retaining custody of the children.[66] The Court held that an Illinois law automatically making nonmarital children state wards when their mother died was unconstitutional because it violated the rights of unmarried fathers under both the due process and the equal protection clauses. The Court stated that the Illinois statute's presumption that unmarried fathers are unfit parents contravenes their substantial, constitutionally protected interest in the parent-child relationship.[67] As a result of the Court's decision in *Stanley*,

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63. The Court has noted the significance of the existence of an invidious motive in cases where it has overturned legitimacy-based classifications. "The basic rationale of these decisions is that it is unjust and ineffective for society to express its condemnation of procreation outside the marital relationship by punishing the illegitimate child who is in no way responsible for his situation and is unable to change it." Parham v. Hughes, 441 U.S. 347, 352 (1979). *See also* Lalli v. Lalli, 439 U.S. at 264-68; Trimble v. Gordon, 430 U.S. at 769-70; Weber v. Aetna Casualty & Surety Co., 406 U.S. at 175.

64. Mills v. Habluetzel, 456 U.S. at 99-100; Lalli v. Lalli, 439 U.S. at 265 (opinion of Powell, J.); Trimble v. Gordon, 430 U.S. at 767. *But see* Matthews v. Lucas, 427 U.S. at 504-509.

65. 405 U.S. 645 (1972). On the relation between *Stanley* and the UPA, see *In re* Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (1977).

66. 405 U.S. at 652. *See also* Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972).

67. 405 U.S. at 658.

legislation that discriminates against nonmarital fathers is subject to challenge.

In subsequent decisions concerning the rights of nonmarital fathers, however, the Supreme Court has created considerable confusion about its holding in *Stanley*.[68] Uncertainty about the nature of the parent-child relationship that is entitled to constitutional protection under *Stanley* has been at the center of this confusion. The outcome in *Stanley* is consistent with both the view that the biological relationship alone gives rise to special constitutional protection and the view that only a biological relationship accompanied by a social relationship will be protected. The Court's holding that, under the equal protection clause, nonmarital fathers should be accorded the same treatment as similarly situated marital fathers and nonmarital mothers,[69] suggests that a biological link is sufficient.

In *Quilloin v. Walcott*[70] the Supreme Court ruled that a father who had neither lived with nor helped to raise his nonmarital child could be denied a veto over the child's adoption, even though married or divorced fathers had a veto, regardless of their social relationship with the child. The adoption petition was filed by the mother's husband whom she had married three years after the child's birth. The child's biological father then filed a petition for legitimation, which, if granted, would have entitled him to a veto.[71] The state court denied legitimation after finding that it would not be in the best interests of the child,[72] rejecting the father's claim that the due process and equal protection clauses entitled him to a veto absent a finding of unfitness.[73] On appeal, the Supreme Court reaffirmed that the due process clause protects the parent-child relationship,[74] but found that it did not require the state "to find anything more than that the adoption, and denial of legitimation, were in the best interests of the child."[75] The Court summarily rejected the father's equal protection claim with the observation that the state was not required to treat him in the same way as separated or divorced fathers who no longer live with their children because he had never lived with or borne any responsibility for the child.[76]

A similar rationale was the basis for Justice Powell's plurality opinion in *Parham v. Hughes*[77] in which the Court upheld a statute that permitted the mother, but not the father, of a nonmarital child to sue for damages for

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68. Caban v. Mohammed, 441 U.S. 380 (1979); Parham v. Hughes, 441 U.S. 347 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978).
69. 405 U.S. at 658.
70. 434 U.S. 246 (1978).
71. *Id.* at 248-49.
72. *Id.* at 251.
73. *Id.* at 252-53.
74. *Id.* at 255.
75. *Id.*
76. *See id.* at 256.
77. 441 U.S. 347 (1979) (plurality opinion of Powell, J.).

the child's wrongful death.[78] The plurality held that classifications disadvantageous to nonmarital fathers should be reviewed only to determine whether the classification is rationally related to a legitimate state interest.[79] In this case, the Court found that the statute was a rational method for the state to deal with the problem of proving paternity[80] and thereby to effect its interest in maintaining an accurate and efficient system for the disposition of property at death. The Court dismissed the father's sex discrimination claim, finding that nonmarital mothers and fathers are not similarly situated due to the need to prove paternity.[81]

The Court swung the other way in *Caban v. Mohammed*,[82] striking down a statute granting an unmarried mother, but not father, a veto over the adoption of their child. The Court found that the parents were similarly situated for purposes of equal protection analysis,[83] despite its refusal to do so in *Parham*.[84] It concluded that the statute's "inflexible gender-based distinction"[85] violated the equal protection clause because it bore no substantial relation to the state's interest in facilitating the adoption of nonmarital children.[86] The Court distinguished *Quilloin* on the basis that the unmarried father in *Caban*, unlike the father in *Quilloin*, had lived with his children for several years, and had helped to raise them.[87]

Although confusion about their precise scope remains, the Supreme Court has explicitly recognized the constitutional rights of nonmarital fathers as well as the rights of nonmarital children under the equal protection clause. Even though the historical discrimination against nonmarital parents and children arose from the same prejudices and practices,[88] the Court has laid different constitutional foundations for those rights. Nonmarital children, although not a suspect class, are afforded a heightened level of protection under the equal protection clause, due to historical discrimination against them.[89]

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78. *Id.* at 349, 359.

79. *Id.* at 351-52. Justice Powell, who concurred, stated that because the statute created a "gender-based distinction," the issue was whether the distinction was "substantially related" to achievement of an "important state objective." *Id.* at 359 (Powell, J., concurring).

80. *Id.* at 356 n.9.

81. *Id.* at 353.

82. 441 U.S. 380.

83. *Id.* at 389.

84. 441 U.S. at 355-56 (The mother and father were not similarly situated under the substantive law because only the father can unilaterally legitimate an illegitimate child.) The court did not consider the father's sex-discrimination claim at all in *Quilloin*, 439 U.S. at 253 n.13, because it had not been properly presented.

85. *Id.* at 392.

86. *Id.* at 391-93.

87. *Id.* at 381 n.7, 393 & n.14.

88. Unmarried fathers were both the victims and the beneficiaries of the law's differential treatment of unmarried mothers and fathers. Those unmarried fathers who wished to assert parental rights and duties were disadvantaged, while those who did not were favored.

89. *See supra* note 64.

Classifications disadvantageous to nonmarital fathers, however, are only subjected to ordinary scrutiny,[90] despite historical discrimination against them. Recognition of the rights of nonmarital fathers has come from the assignment of a special, constitutionally protected status to the parent-child relationship, and from the invalidation of sex-based classifications.[91] Future developments in the law concerning nonmarital fathers will probably be determined by the willingness of the Court to view them as similarly situated to nonmarital mothers, and through the further clarification of the nature of the father-child relationship that is entitled to special constitutional protection.

C. Nonmarital Mothers

Challenges to laws discriminating against nonmarital mothers have been infrequent. On the two occasions when the Supreme Court addressed the issue, it reviewed the challenged statutes only to determine whether the dissimilar treatment of marital and nonmarital mothers could be justified by a rational relationship to a legitimate state interest.[92] Under this standard of review, the Court struck down a state statute barring nonmarital mothers from suing for their child's wrongful death,[93] while it upheld a federal statute denying nonmarital mothers Social Security benefits that were available to marital mothers.[94]

Developments in the law of illegitimacy provide only limited comfort to the unmarried mother-by-choice. The Supreme Court's decisions, taken as a whole, prohibit enforcement of illegitimacy-based statutes with a solely punitive motivation; however, they do not necessarily signal a constitutionally mandated tolerance for the alternative family she contemplates. The Court has not yet decided whether promoting the traditional family is a legitimate state interest, despite the presence of this issue in the background of many cases.[95]

Meanwhile, the impetus created by the Supreme Court decisions toward redefining and expanding the constitutional rights of nonmarital children and fathers has resulted in the drafting of the UPA, whose provisions render nonmarital mothering-by-choice next to impossible.

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90. Parham v. Hughes, 441 U.S. at 357.

91. *See supra* text accompanying notes 65-87.

92. Califano v. Boles, 443 U.S. 282, 293 (1979); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 75 (1968).

93. *Glona*, 391 U.S. at 75.

94. Califano v. Boles, 443 U.S. at 293. *See* Comment, Califano v. Boles: *Unequal Protection for Illegitimate Children and Their Mothers*, 9 N.Y.U. REV. L. & SOC. CHANGE 241 (1979-80).

95. The Court referred to a state interest in promoting the traditional family in Parham v. Hughes, 441 U.S. at 358; Trimble v. Gordon, 430 U.S. 762, 768 (1977); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 173 (1972).

IV

THE UNIFORM PARENTAGE ACT

The UPA was drafted in 1973 by the National Conference of Commissioners on Uniform State Laws, as a model for the states in modernizing their laws concerning illegitimacy.[96] To date, nine states have adopted the UPA, and others are being urged to do so in order to conform their statutes to the recent Supreme Court illegitimacy decisions.[97]

The primary concern of the Commissioners who drafted and approved the UPA was to guarantee "substantive legal equality for all children regardless of the marital status of their parents."[98] The UPA is grounded in the theory that legal equality requires that the legal relations between nonmarital children and their parents be the same as those between marital children and their parents.[99] Thus under the UPA, the rights and duties of all parents are the same regardless of their marital status.[100]

Although the UPA has no provisions expressly governing the rights of unmarried mothers, its implications for the unmarried mother-by-choice can be traced from its provisions and from case law in the states that have adopted it. These implications will be explored first for the case of the unmarried mother-by-choice who secures the agreement of a man to father her child, and then for the case of the woman who is artificially inseminated.

A. Natural Conception

In states which have adopted the UPA, a woman who finds a man willing to father her child,[101] with the understanding that he will have no

96. UPA Commissioners' prefatory note, 9A U.L.A. 580-82 (1979).

97. *See* statutes cited *supra* note 9.

98. UPA Commissioners' prefatory note, 9A U.L.A. 581 (1979).

99. *Id.* § 2 Commissioners' comments, 9A U.L.A. 588 (1979).

100. *Id.* § 2; Krause, *The Uniform Parentage Act*, 8 FAM. L. QUART. 1, 8 (1974); see Griffith v. Gibson, 73 Cal. App. 3d 465, 470, 142 Cal. Rptr. 176, 179 (1977), where the court held that the California UPA requires equality of parental rights regardless of sex or marital status. There is some disagreement about whether the UPA is free from sex discrimination in its present form. In R.Mc.G. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980), the Colorado Supreme Court held that the mother and the putative father of a child must both have the right to rebut the presumption created by UPA § 4(a)(1) that the mother's husband is the child's father. The court held that UPA § 6(a)(2) violates the equal protection clause insofar as it allows the mother, but not the putative father to initiate an action to declare the nonexistence of the father-child relationship presumed under UPA § 4(a)(1). *But see* Vincent B. v. Joan R., 126 Cal. App. 3d 619, 627, 179 Cal. Rptr. 9, 13 (1982); A v. X, 641 P.2d 1222, 1224 (Wyo.), *cert. denied*, 103 S. Ct. 388 (1982).

101. In states in which fornication is a crime, her proposition would be an invitation to jointly commit that crime. If she offered him money for his services, he would face criminal liability for prostitution, and she for employing a prostitute, in states in which these acts are crimes, e.g., Massachusetts. *See* Commonwealth v. King, 374 Mass. 5, 372 N.E.2d 196 (1977). This raises the question whether the state may justify burdening an unmarried woman's constitutional right to procreate, *see infra* text accompanying notes 178-202, for the purpose of deterring illegal behavior.

paternal rights or responsibilities, faces two potential obstacles to creating her alternative family. The first is the biological father who changes his mind about his role after conception; the second is the state.

Both potential sources of difficulty are created by UPA section 6(d) which expressly provides that any agreement between a child's biological parents relieving one of them of parental rights and duties, however formalized, is not binding.[102] This provision arguably applies to a preconception agreement which, by its terms, prevents parental rights and duties from attaching to the biological father of the child of an unmarried mother-by-choice. Should the biological father change his mind about the agreement after conception, he may bring an action to declare the existence of a legal father-child relationship.[103]

The rights of the biological father who changes his mind are extremely broad. Under the UPA, the man who is the "natural" father of a child is the child's legal parent with all the "rights, privileges, duties, and obligations" that this entails under the law.[104] Since he and the mother have equal rights and duties[105] he must be presumed to have an equal right to custody, to visitation, and to make critical decisions for the child, and to have an equal duty to support the child.

A man who changes his mind about asserting paternal rights, and brings an action under the UPA despite a preconception agreement, may be awarded custody of the child by the court at the same time that it makes a determination of paternity.[106] The court may determine both paternity and custody as early as the time of birth.[107] The deciding factor is the best interests of the child.[108] Because the UPA is gender neutral, the mother will not be preferred when custody is disputed. This principle is noted in a discussion of the California UPA, published shortly after its passage.

> Once his paternity is established, his status becomes that of the child's legal, as well as biological, father, with rights and duties

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102. This provision was retained by eight of the states that have adopted the UPA. Under Minnesota's version of the UPA, such an agreement will bar a paternity action by the father and mother, but not by the state or the child. MINN. STAT. ANN. § 257.25 para. 4 (West 1983).

103. UPA § 6(c). The rights of the father in this situation are considered in more detail *infra* text accompanying notes 280-84. Actions were brought by men claiming paternal rights under the UPA in W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979); Donald J. v. Evna M., 81 Cal. App. 929, 147 Cal. Rptr. 15 (1978); Adoption of Marie R., 79 Cal. App. 3d 624, 145 Cal. Rptr. 122 (1978); *In re* Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (1977); Griffith v. Gibson, 73 Cal. App. 3d 465, 142 Cal. Rptr. 176 (1977); Perez v. Department of Health, 71 Cal. App. 3d 923, 138 Cal. Rptr. 32 (1977); Adoption of Rebecca B., 68 Cal. App. 193, 137 Cal. Rptr. 100 (1977); R.McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980).

104. UPA § 1.

105. *Id.* § 2.

106. *Id.* § 15(c).

107. *Id.* § 6(e).

108. *Id.* § 13(a).

equal to those of the child's mother. The court should then base its award of custody on considerations of parental fitness and the best interests of the child.[109]

As against a man who decides, despite a previous agreement, to assert parental rights, the mother cannot be sure that she will retain custody of the child. Especially when he is wealthier, or is married and his wife also wants the child, the mother may lose a custody battle. If she is a lesbian, and he is a heterosexual, her chances of maintaining custody may be further reduced.[110] Even if the man who participates in the conception should not gain custody, he is certain to be granted visitation rights over her objection.[111] If the biological father decides to assert paternal rights, there is no possibility under the UPA that the mother will succeed in raising the child without substantial paternal participation. Although there are no reported cases in UPA states involving a father who reneged on a preconception agreement, at least one case has been reported in a non-UPA jurisdiction. The court held that the biological father was the legal father of the child, and ordered support and visitation over the mother's objections.[112]

Even if the biological father does not change his mind after conception, an action may be brought to establish the father-child relationship by an "appropriate state agency."[113] This provision for a state initiated action was included in the UPA because the Commissioners thought it necessary in order to protect the interests of the child. The Commissioners' comment on this provision states:

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109. Note, *The Uniform Parentage Act: What it Will Mean for the Putative Father in California*, 28 HASTINGS L.J. 191, 215 (1976). *See also* Note, *The Uniform Parentage Act: An Opportunity to Extend Equal Protection to All Kansas Children*, 19 WASHBURN L.J. 110, 116 (1979).

110. Although some courts have held that a lesbian mother may not be presumed to be unfit as a parent, D.H. v. J.H., ___ Ind. App. ___, 418 N.E.2d 286 (1981); Bezio v. Patenaude, 1980 Mass. Adv. Sh. 2133, 410 N.E.2d 1207 (1980), other courts have not been so open-minded, Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981). *See generally*, Hunter & Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFFALO L. REV. 691 (1976); Note, *Parent and Child: M.J.P. v. J.G.P.: An Analysis of the Relevance of Parental Homosexuality in Child Custody Determinations*, 35 OKLA. L. REV. 633 (1982).

111. *See* Griffith v. Gibson, 73 Cal. App. 3d at 475, 142 Cal. Rptr. at 182; Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S.2d 792 (Fam. Ct. 1968); *but see* C.B.D. v. W.E.B., 298 N.W.2d 493 (N.D. 1980).

112. C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977).

113. UPA § 6(c). The only limitation on such actions is that the child have no "presumed father" under UPA § 4. In California, the State Department of Social Services may act, CAL. CIV. CODE § 7006(c) (West Supp. 1982); the district attorney may also bring an action if she believes the interests of justice will be served, *id.* § 7006(g). In Montana, the action may be brought by the Department of Social Rehabilitation Services or its local affiliates. MONT. CODE ANN. § 40-6-107 (1980). In Washington, the Department of Social Services and Health or the State of Washington may bring an action. WASH. REV. CODE ANN. § 26.26.060(2) (West Supp. 1982). In Wyoming, the Department of Health and Social Services is so authorized. WYO. STAT. § 14-2-104 (1977).

> Subsection (c) defines who may bring the action to ascertain paternity when no presumption applies [section 4 indicates who is presumed to be a child's father] . . . the Act contemplates that the principal interest involved is that of the child. . . .[114]

The Commissioners reiterated the rationale for state action in their comments on a later section:

> [T]o provide every infant with the means to exercise his rights, rather than leave his fortunes to the whim of his mother or the views of the social worker, an earlier draft of the Act contained a provision in Section 6(c) which read as follows:
>
> If a child has no presumed father under Section 4 and the action to determine the existence of the father and child relationship has not been brought and proceedings to adopt the child have not been instituted within [1] year after the child's birth, an action to determine the existence of the relationship *shall* be brought promptly on behalf of the child by the [appropriate state agency].[115]

This additional provision requiring the state agency to bring the action after one year was stricken from the final draft, according to the Commission's reporter, because " [i]n the press of the afternoon's business, the Conference failed to see the Committee's argument that substantive equality is an empty promise, so long as the father remains unknown."[116]

The UPA thus contemplates that when no father is named at the birth of a nonmarital child, the state agency will, for the child's sake, commence such an action. Although the UPA permits, but does not require the state agency to bring an action, identification of a father in all cases is its central aim. The state agency may be motivated to bring an action under the UPA by a belief that promoting the welfare of the child requires the establishment of a legal father-child relationship.[117]

This state initiated action to determine paternity should not be confused with the already familiar state-initiated paternity action to secure paternal financial support for a child on public assistance.[118] The latter

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114. UPA § 6(c) Commissioners' comment, 9A U.L.A. 594 (1979).

115. *Id.* § 7 Commissioners' comment, 9A U.L.A. 596-97.

116. Krause, *supra* note 100, at 12.

117. One expert in the area of family law has urged adoption of a policy, already adopted by Sweden, of mandatory state initiation of a paternity action whenever a nonmarital child is born. H. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 303-04 (1981). Organizations such as the Moral Majority might also support such state action, as a means of discouraging the formation of nonmarital families.

118. Assignment of child support rights to the state and cooperation in establishing paternity and collecting the support payments is a condition of eligibility for benefits under the Aid to Families with Dependent Children (AFDC) Program. 42 U.S.C. § 602(a)(26) (1976). States participating in the AFDC program are required to establish a child support

action is usually brought by a state only when the child is receiving or will receive public assistance,[119] and only to secure support payments. It typically does not result in legitimation of the child for purposes of determining other paternal rights and duties, or for inheritance purposes. The non-UPA paternity action by the state exists to secure the state's interest in protecting its coffers, not to secure the child's "substantive equality" with all marital children.[120]

The state agency need not be prevented from bringing an action under the UPA by an uncooperative mother. Once it brings the action, the mother may be compelled to testify at a hearing to determine the father-child relationship, under penalty of contempt for noncooperation.[121] The court is empowered to call any witness, including the mother's physician, and to seek "all other evidence relevant to the issue of paternity."[122] The child, the mother, and the putative father may be ordered to submit to blood tests or to any other appropriate medical tests.[123] Thus a state agency charged with the task of bringing the action to determine the father-child relationship has a powerful vehicle at its disposal, and almost certainly could ascertain the identity of the biological father.[124]

In the four states which have adopted the UPA with the provision for a state-initiated action intact,[125] only a few cases of state-initiated paternity

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enforcement program. *Id.* §§ 602(a)(27), 603(h), 653-60 (1976 & Supp. IV 1980). *See generally* H. KRAUSE, *supra* note 117, at 307-54.

119. States participating in the AFDC program are also required to include individuals that are ineligible for AFDC benfits in their child support enforcement programs, but are only required to secure support payments for them upon request. *Id.* §§ 654(b), 657(c) (1976 & Supp. IV 1980); 45 C.F.R. § 302.33 (1982).

120. *See* H. KRAUSE, *supra* note 117, at 200-02. However, in several states that have not enacted the UPA, a determination of paternity will result in full legitimation of the nonmarital child. *E.g.*, ALASKA STAT. § 25.20.050(a) (1977); IDAHO CODE § 7-1104 (1979); TENN. CODE ANN. § 36-234 (1977); TEX. FAM. CODE ANN. tit. 2, § 13.09 (Vernon Supp. 1982-83).

121. UPA § 10(b).

122. *Id.* §§ 10(c), 12.

123. *Id.* § 12(4). Courts have ordered blood tests over objections. J.L.R. v. Kidder County Social Service Board, 295 N.W.2d 401 (N.D. 1980); State v. Meacham, 93 Wash. 2d 735, 612 P.2d 795 (1980). Mandatory blood tests survived challenges under the U.S. Constitution in *Meacham* and Rose v. District Court, ___ Mont. ___, 628 P.2d 662 (1981).

124. Sophisticated blood tests now available can show with certainty that a particular man is not the father of a child, and can show with a 95% or greater probability that a particular man is the father of a child. Keith, *Resolution of Paternity Disputes By Analysis of the Blood*, 8 FAM. L. REP. 4001, 4002 (November 24, 1981). *See generally,* H. KRAUSE, *supra* note 117, at 213-46. In Gadbois v. Superior Court of Santa Clara County, 126 Cal. App. 3d 653, 179 Cal. Rptr. 19 (1981), a putative father was able to esablish with 99.3% probability that he was the father of a child.

125. *See* CAL. CIV. CODE § 7006(c) (West Supp. 1983); MONT. CODE ANN. § 40-6-107(2) (1981); WASH. REV. CODE ANN. § 26.26.060(4) (West Supp. 1983-1984); WYO. STAT. § 14-2-104(c) (1977). Four of the nine states adopting the UPA have omitted the provision allowing a state agency to initiate an action when the state is not supporting the child. COLO. REV. STAT. § 19-6-107 (1978); MINN. STAT. ANN. § 257.57 (West 1982); NEV. REV. STAT. §§ 126.071(3), 126.081(3) (1981); N.D. CENT. CODE § 14-17-05 (1981). Hawaii does not ex-

actions have been reported. Although all of these have involved a child on public assistance, the cases make it plain that the state action under the UPA is not limited to such circumstances. In *D.G. v. Superior Court of Orange County*,[126] the district attorney brought an action under the UPA to obtain support payments for a child on public assistance. The court held that the action, since it was to determine paternity for support purposes only, should be brought under the relevant provisions of the welfare code instead.[127] The court noted that the California UPA, unlike the welfare code, authorizes an action by the State Department of Social Services or by the district attorney to determine not only that the parent-child relationship exists, but also to adjudicate a parent-child relationship for all other legal purposes (e.g., inheritance, custody, visitation).[128]

In *County of Los Angeles v. Superior Court*,[129] a court again distinguished a state-initiated paternity action brought solely to secure child support from an action to establish the parent-child relationship under the UPA:

> Although a district attorney may initiate such an action under the UPA in "the interests of justice" (sec. 7006(g)), he does so in the interest of a party and not in the interest of a county seeking reimbursement for moneys spent and to be spent on child support. Patently, the cause of action created by the UPA is separate and distinct from the cause of action prosecuted here by the county.[130]

Since the county was seeking to establish paternity only for child support purposes, the court held that provisions of the UPA were inapplicable. The district attorney in *Morrison v. Superior Court of Orange County*[131] avoided this confusion by bringing two separate causes of action in a suit to establish paternity, one under the UPA and one under the welfare code to recover county money spent for child support.

In *State v. Douty*,[132] the State of Washington brought an action under the UPA seeking to establish the father-child relationship. In clarifying a possible statute of limitations conflict with a statute authorizing a state-initiated paternity action for support only, the court explicitly acknowl-

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pressly provide for any state intervention under its UPA. *See* HAWAII REV. STAT. § 584-6 (1976) (who may bring an action to determine the father-child realtionship). Although there is no explicit indication of why these states have omitted this provision, the state intrusion it permits into private matters is apparent.

126. 100 Cal. App. 3d 535, 161 Cal. Rptr. 117 (1979).

127. *Id.* at 542, 161 Cal. Rptr. at 122.

128. *Id.*

129. 102 Cal. App. 3d 926, 162 Cal. Rptr. 636, *cert. denied*, 449 U.S. 864 (1980).

130. 102 Cal. App. 3d at 929, 162 Cal. Rptr. at 637.

131. 100 Cal. App. 3d 852, 161 Cal. Rptr. 169 (1980).

132. 20 Wash. App. 608, 581 P.2d 1074 (1978), *rev'd on other grounds*, 92 Wash. 2d 930, 603 P.2d 373 (1979).

edged that the UPA permits a state-initiated action even when public funds are not at stake.[133]

These are the only cases in which a UPA action has been brought on behalf of a state. Although all were brought at least in part because of the state's economic interest, the language of the statutes and the opinions in these cases make it clear that the state may bring an action in the absence of an economic interest.

The choice of an unmarried woman to bear children and to raise them in a nontraditional family without a legal father is effectively denied by the threat of a state-initiated action and the broad court powers to inquire into the question of paternity. If a court finds that a particular man is the father of a child, the court then rules on support, custody, and guardianship, visitation privileges, and "any other matter in the best interest of the child."[134] The court may consider the mother's opposition to the biological father's participation in her family and the biological father's unwillingness to participate in any way in the child's life, but is not bound by their preferences in defining their respective legal rights and duties. The parents might agree to ignore the court's orders on support and visitation, but, of course, neither could prevent the other from enforcing the court's orders if he or she chose to do so.

A woman contemplating raising her child in a nontraditional family therefore cannot, when she decides to have a child, ensure that the biological father will not at some point change his mind and choose to assert his court-determined rights. At worst, she risks paternal intrusion in her family; at best, she faces the constant threat of such intrusion. Furthermore, a judicial determination of legal paternity may impede or preclude her from assigning certain legal rights and duties, such as custody of the child in case of the mother's incapacitation or death, to a third party who is or will become a psychological parent to her child.[135]

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133. 20 Wash. App. at 612-17, 581 P.2d at 1077-79.

134. UPA § 15(c). *See* Gadbois v. Superior Court, 126 Cal. App. 3d 653, 179 Cal. Rptr. 19 (1981); Louden v. Olpin, 118 Cal. App. 3d 565, 173 Cal. Rptr. 447 (1981); Donald J. v. Evna M., 81 Cal. App. 3d 929, 147 Cal. Rptr. 15 (1978); Griffith v. Gibson, 73 Cal. App. 3d 465, 142 Cal. Rptr. 176 (1977). One "other matter" which the courts have been asked to resolve is the child's surname. *See In re* Marriage of Schiffman, 28 Cal. 3d 640, 169 Cal. Rptr. 918, 620 P.2d 579 (1980); Donald J. v. Evna M., 81 Cal. App. 3d at 93-39, 147 Cal. Rptr. at 19-22.

135. This situation would arise, for example, for a lesbian couple, one of whom is the child's mother. The two women would be the child's psychological parents, but only the biological mother would be a legal parent. The other woman could not become a legal parent by adopting the child because, generally, with the exception of stepparents, adoption laws do not permit the adoption of a child without the termination of her biological parents' rights. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Change*, 49 S. CAL. L. REV. 10, 41 (1975); *see also* UNIF. ADOPTION ACT § 14(a)(1), 9 U.L.A. 44 (1971). *But see In re* A.J.J., 108 Misc. 2d 657, 438 N.Y.S.2d 444 (Sur. Ct. 1981) (an unmarried father was permitted to adopt his nonmarital child without a termination of the mother's rights).

The threat of a state initiated action to declare the existence of the father-child relationship will also deter men from agreeing to intercourse with unmarried women who want to have a child. A prospective biological father cannot ensure that the woman will not change her mind and insist on court-ordered child support,[136] or that the child will not, possibly with coaching by a third party, demand court-ordered support. The prospective biological father's uncertainty about his future legal status increases the difficulty that a prospective unmarried mother-by-choice will encounter in finding a man to agree to impregnate her.[137]

Nonmarital mothering-by-choice is further discouraged by the possibility that, even if an unmarried mother-by-choice managed to withhold information about paternity from a court, she will nonetheless have to endure the massive invasion of privacy and the penalities for civil contempt under the UPA's provisions for extracting information about paternity.[138] This possibility has a chilling effect on other unorthodox lifestyle choices.

Modification of section 6(d) of the UPA is the simplest and most straightforward way to establish the option of unmarried mothering-by-choice. Section 6(d) provides that "an agreement . . . between an alleged or presumed father and the mother or child, does not bar an action under this section." Adding a clause to section 6(d) that creates an exception for preconception contracts[139] would provide a mechanism for an unmarried mother-by-choice to establish her family with the assurance that no action to establish a father-child relationship could be brought.

The mother could make a testamentary appointment of a third party as her child's guardian upon her death, but this would not bar adoption of the child by another, including the father. Note, *The Lesbian Family: Rights in Conflict Under the California Uniform Parentage Act*, 10 GOLDEN GATE U.L. REV. 1007, 1035-37 (1980).

136. In Fournier v. Lopez, 5 FAM. L. REP. 2582 (Cal. Ct. App. May 2, 1979), an unmarried mother successfully sued her child's biological father for support despite the existence of an oral preconception contract, entered into before the effective date of the UPA, precluding such an action. The court declared the contract void as based on illicit consideration of meretricious sexual services. *Id.*

137. In some cases these potential problems may encourage her to withhold her intention to become pregnant from a sexual partner, or even deliberately to mislead him about her use of contraceptives, outcomes which are clearly contrary to public policy.*See* Pamela P. v. Frank S., 100 Misc. 2d 978, 443 N.Y.S.2d 343 (Fam. Ct. 1981).

138. *See supra* text accompanying notes 121-24.

139. A preconception contract might take the following form:

> We, [man's name], as the potential impregnator of [woman's name], and [woman's name], do hereby voluntarily and unconditionally agree that [man's name] will have no legal rights or duties of any nature with respect to any child born to [woman's name], even though [man's name] may be the biological father of said child, that he will have no right to custody of or visitation with said child, or any other paternal rights, and that he will have no duty to support said child or any other paternal obligation. We understand this agreement is binding and final and cannot be revoked.

It would be advisable for both parties to sign such agreements before a notary public.

The proposed amendment to section 6(d) would not dramatically alter the effect of the UPA. It would permit the consensual alteration of prospective legal rights and duties only when a prospective biological father agrees before conception that he will not be the child's legal father. If an unmarried woman's rights to procreation and to family autonomy are unconstitutionally burdened by the provisions of the UPA, as is argued below, this modification, or its equivalent, is constitutionally required.

B. Artifical Insemination

A second option for the potential unmarried mother-by-choice is to conceive by artificial insemination (A.I.D.).[140] An estimated 1,500 unmarried women per year have been artificially inseminated by physicians in recent years.[141] Other unmarried women have inseminated themselves using sperm donated by friends or anonymous donors.[142] Writers on the legal aspects of A.I.D. are aware that unmarried women seek artificial insemination;[143] some have recommended that A.I.D. be made illegal for them.[144]

For women who want to raise children without paternal participation, artificial insemination may be preferable to natural conception. The possibility of protecting anonymity, and thereby preventing interference by the state or by a biological father who changes his mind, is much greater. If the procedure is performed by a medical worker who mediates between the woman and the donor, neither the woman nor the donor will know the other's identity. As long as a woman who conceives naturally cannot legally prevent a suit to establish her child's paternity, artificial insemination appears to be the safest route to achieving her goal.

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140. Artificial insemination has been defined as the "introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means." OR. REV. STAT. § 677.355 (Supp. 1981). Artificial insemination of a woman with her husband's sperm is called A.I.H. Artificial insemination of a woman with the sperm of a donor who is not her husband is called A.I.D. *See* W. FINEGOLD, *supra* note 23, at 17.

141. A recent survey of the practice of A.I.D. in the United States revealed that 9.5% of the doctors surveyed who perform A.I.D. have inseminated unmarried women. Curie-Cohen, Luttrell & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENG. J. MED. 585 (1979).

142. *See id.*

143. Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAM. L.Q. 1, 5 (1980); Shaman, *Legal Aspects of Artificial Insemination*, 18 J. FAM. L. 331 (1980); Smith, *A Close Encounter of the First Kind: Artificial Insemination and an Enlightened Judiciary*, 17 J. FAM. L. 41 (1978); Note, *Artificial Insemination—Its Socio-Legal Aspects*, 33 MINN. L. REV. 145, 150 n.32 (1949).

144. W. FINEGOLD, *supra* note 23, at 101-102; Wadlington, *Artificial Insemination: The Dangers of a Poorly Kept Secret*, 64 Nw. U. L. REV. 777, 802 (1970); Note, *Legal and Social Implications of Artificial Insemination*, 34 IOWA L. REV. 658, 666 (1949) ("A single woman who becomes artificially inseminated and the doctor who knowingly aids in the undertaking should be punished in severe enough fashion to deter such activity."). Note, *supra* note 136, at 150-51. *But see* Smith, *supra* note 143. One author has argued that unmarried women have a constitutional right to artificial insemination. Kritchevsky, *supra* note 16, at 27-40.

For unmarried women, the legal status of artificial insemination is uncertain in both UPA and non-UPA states. Section 5 of the UPA provides that when a married woman is artificially inseminated with the semen of a donor who is not her husband, the donor is not the legal father. Her husband is the legal father, provided that he consented to the procedure.[145] The UPA is silent on the status of children conceived by artificial insemination who are born to unmarried women. Given that the UPA as a whole was drafted primarily out of concern for the legal status of nonmarital children, its silence on this subject is surprising. The UPA's drafters concede as much, noting in their comment on section 5 that the UPA inadequately covers the "many complex and serious problems raised by the practice of artificial insemination."[146]

Artificial insemination of unmarried women posed a special problem for the drafters. The core premises of the UPA (i.e., that the Constitution mandates substantive legal equality for all children, and that substantive equality requires identification of a father and enforcement of the child's rights against him) are not easily abandoned.[147] In the case of an A.I.D. child, the most likely candidate for the child's legal father is the semen donor. But it is difficult to justify conditioning the imposition of legal paternity on the semen donor on the marital status of the woman inseminated.

For a child who is naturally conceived, the child's biological father is her legal father, regardless of whether her mother is married to him, to someone else, or to no one.[148] This rule is abandoned for children who are artificially conceived. The UPA provides that a husband who consents to the insemination of his wife, and not the semen donor, is "treated in law as if he were the natural father of a child thereby conceived."[149] It is unclear whether the semen donor will also be treated as though he were not the

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145. UPA § 5.

146. UPA § 5 Commissioners' comments, 9A U.L.A. 593 (1979).

147. This problem also arises for an A.I.D. child born to a married woman when her husband has not consented to the procedure. The only candidate for father other than the semen donor is the medical person who aids in the insemination. However, in some cases there may be no medical intermediary, and in other cases the medical worker may be female, and thus not an appropriate candidate for fatherhood.

148. UPA §§ 1, 2. However, the biological father cannot bring a paternity action if another man is presumed to be his child's natural father under UPA § 4(a)(1), (2), (3). UPA § 6(a). Only the child, her natural mother or the presumed natural father can bring an action to rebut the presumption of paternity and declare the nonexistence of the presumed father-child relationship. *Id.* This situation would exist when, for example, the mother was married to another man when the child was born or conceived. UPA § 4(a). The Supreme Court of Colorado has held that, under these circumstances, the UPA's denial of standing to bring a paternity action to the biological father violates the equal protection clause of the fourteenth amendment. R.McG. v. J.W., 200 Colo. 345, 615 P.2d 666 (1980). *But see* Vincent B. v. Joan R., 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1982), A v. X, 641 P.2d 1222 (Wyo.), *cert. denied*, 103 S. Ct. 388 (1982).

149. UPA § 5(a).

natural father when the mother of the child conceived by artificial insemination is unmarried.

Seven of the nine states that have adopted the UPA have adopted its artificial insemination provision vebatim or in modified form.[150] All of these statutes provide that the spouse of a married woman who conceives by artificial insemination is the legal father of the child so conceived. Four of these statutes modify the provisions of the UPA and either implicitly or explicitly contemplate and permit artificial insemination for unmarried women. The California, Colorado, and Wyoming statutes provide that a semen donor is not the legal father of a child conceived by A.I.D. when it is performed by a licensed physician.[151] The Washington statute provides that a semen donor is not the legal father unless he and the mother agree in writing that he shall be.[152] The Minnesota, Montana, and Nevada statutes, however, are modeled on the UPA's provision, and are silent on the status of A.I.D. for unmarried women.[153]

Seventeen other states that have not adopted the UPA have enacted statutes governing some aspects of artificial insemination.[154] Sixteen of these statutes provide that a child conceived by artificial insemination is the legitimate child of its mother and her husband if the husband consented to the procedure.[155] Eleven are, like the UPA, silent on the status of childen conceived by the artificial insemination of unmarried women,[156] and three

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150. CAL. CIV. CODE § 7005 (West Supp. 1982); COLO. REV. STAT. § 19-6-106 (1978); MINN. STAT. ANN. § 257.56 (West 1982); MONT. CODE ANN. § 40-6-106 (1981); NEV. REV. STAT. § 126.061 (1981); WASH. REV. CODE ANN. § 26.26.050 (West Supp. 1983-84); WYO. STAT. § 14-2-103 (1977). Hawaii and North Dakota omitted the provision concerning artificial insemination from their versions of the UPA.

151. CAL. CIV. CODE § 7005; COLO. REV. STAT. § 19-6-106; WYO. STAT. § 14-2-103. Each of these states has modified the UPA's provision concerning A.I.D. so that it is applicable to all women, married or unmarried.

152. WASH. REV. CODE ANN. § 26.26.050.

153. MINN. STAT. ANN. § 257.56; MONT. CODE ANN. § 40-6-106; NEV. REV. STAT. § 126.061.

154. ALASKA STAT. § 25.20.045 (Supp. 1982) ARK. STAT. ANN. § 61-141 (1971); CONN. GEN. STAT. ANN. §§ 45-69f to 45-69n (West 1981); FLA. STAT. § 742.11 (1981); GA. CODE ANN. §§ 19-7-21, 43-34-42 (1982); KAN. STAT. ANN. §§ 23-128 to 23-130 (1981); LA. CIV. CODE ANN. art. 188 (West Supp. 1983); MD. EST. & TRUSTS CODE ANN. § 1-206 (1974); MICH. COMP. LAWS ANN. § 333.2824 (1980); N.Y. DOM. REL. LAW; § 73 (McKinney 1977); N.C. GEN. STAT. § 49A-1 (1976); OKLA. STAT. tit. 10, §§ 551-53 (1981); OR. REV. STAT. §§ 109.239, 109.243, 109.247, 677.355, 677.360, 677.365, 677.370, 677.990 (1981); TENN. CODE ANN. § 53-446 (Supp. 1982); TEX. FAM. CODE ANN. § 12.03 (Vernon 1975); VA. CODE § 64.1-7.1 (1980); WIS. STAT. ANN. §§ 767.47(9), 891.40 (West 1981 & Supp. 1982-1983).

155. The Arkansas statute, ARK. STAT. ANN. § 61-141, concerns only intestate succession, and is included in a chapter titled "Illegitimate Children."

156. ALASKA STAT. § 25.20.045; FLA. STAT. § 742.11; GA. CODE ANN. §§ 19-7-21, 43-34-42; LA. CIV. CODE ANN. art. 188; MD. EST. & TRUSTS CODE ANN. § 1-206; MICH. COMP. LAWS ANN. § 333.2824; N.Y. DOM. REL. LAW § 73; N.C. GEN. STAT. § 49A-1; TENN. CODE ANN. § 53-446; VA. CODE § 64.1-7.1; WIS. STAT. ANN. §§ 767.47(9), 891.40.

arguably prohibit A.I.D. for unmarried women,[157] although none of them provides for a criminal penalty. Only Texas and Oregon have enacted statutes that clearly relieve the semen donor of all paternal rights and duties. The Texas statute provides that a semen donor is never the legal father unless he is the mother's husband.[158] The Oregon statute implicitly contemplates the A.I.D. of unmarried women[159] and provides that the semen donor is not the legal father.[160]

There are no reported cases interpreting any of these artificial insemination statutes, and before they were enacted, only a few courts addressed the question of the status of children conceived by artificial insemination. Most of these cases concern the legal status of an A.I.D. child of a married woman whose husband had consented to the insemination. Some courts held that such a child is illegitimate,[161] but others held that she is the legitimate child of the mother and husband.[162] Some did not rule as to legitimacy, but resolved disputes about support and visitation on other grounds.[163] Statutes that have been enacted in twenty-three states, legitimating the A.I.D. children of a woman whose husband consented to the proce-

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157. CONN. GEN. STAT. ANN. § 45-69g(b) (1981) ("A.I.D. shall not be performed unless the physician receives in writing the request and consent of the husband and wife desiring the utilization of A.I.D. for the purpose of conceiving a child or children."); KAN. STAT. ANN. § 23-128 (1981) ("The technique of heterologous artificial insemination may be performed in this state at the request and with the consent in writing of the husband and wife desiring the utilization of such technique for the purposes of conceiving a child or children."); OKLA. STAT. tit. 10, § 553 (1981) ("No person shall perform the technique of heterologous artificial insemination unless. . . , and then only at the request and with the written consent of the husband and wife desiring the utilization of such technique."). At least one commentator interprets these statutes otherwise, taking them to be silent on the legality of A.I.D. for unmarried women. Kritchevsky, *supra* note 16, at 18-19.

158. TEX. FAM. CODE ANN. § 12.03 (Vernon 1975).

159. OR. REV. STAT. § 677.365 (1981) ("Artificial insemination shall not be performed upon a woman without her prior written request and consent and, if she is married, the prior written request and consent of her husband.").

160. OR. REV. STAT. § 109.239 (1981).

161. Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963); Doornbos v. Doornbos, 23 U.S.L.W. 2308 (Dec. 13, 1954), *appeal dismissed*, 12 Ill. App. 2d 473, 139 N.E.2d 844 (1956).

162. *In re* Adoption of Anonymous, 74 Misc. 2d 99, 345 N.Y.S.2d 430 (Sup. Ct. 1973) (woman's A.I.D. child cannot be adopted over veto of former husband who had consented to A.I.D.); Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948) (husband is entitled to same visitation after divorce as a "natural" parent).

163. K.S. v. G.S., 182 N.J. Super. 102, 440 A.2d 64 (Super. Ct. Ch. Div. 1981) (husband consented to wife's A.I.D. and therefore is liable for child support at the time of divorce); People v. Sorenson, 68 Cal. 2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968) (husband who consented to A.I.D. is estopped from claiming he has no duty to support the child); Anonymous v. Anonymous, 41 Misc. 2d 886, 246 N.Y.S.2d 835 (Sup. Ct. 1964) (husband who consented to A.I.D. for his wife is estopped from claiming he has no duty to support the child); People *ex rel* Abajian v. Dennett, 15 Misc. 2d 260, 184 N.Y.S.2d 178 (Sup. Ct. 1958) (wife is estopped from opposing ex-husband's visitation of A.I.D. child on grounds that he is not the legitimate father because she did not raise the issue at the time of the divorce).

dure, settle the issues raised in these cases.[164] However, in the other twenty-seven states they are still unresolved.

The status of a child conceived by artificial insemination of an unmarried woman is undetermined, except in the six states that have enacted statutes which provide that the semen donor is not the legal father.[165] Presumably, the mother is the sole legal parent in these states. In the remaining states clarification of legal parentage of A.I.D. childen born to unmarried women is essential so that an unmarried woman may conceive by A.I.D. with the assurance that she will be the child's sole legal parent. In the only reported case concerning the A.I.D. of an unmarried woman, *C.M. v. C.C.*,[166] the court held, despite the mother's strenuous objections, that the semen donor was the child's legal father, was entitled to visitation, and was required to pay child support.[167] Although the case may have little precedential significance because of its unique facts, the court's opinion illustrates the kind of reasoning which might create problems for the unmarried woman who conceives by artificial insemination.

In *C.M. v. C.C.*, C.M., the semen donor, and C.C., the mother, knew each other well at the time of insemination. C.M. contended that he gave his semen to C.C., who then artificially inseminated herself, with the understanding that he would act as the child's father.[168] C.C. denied that there ever was such an understanding. After the child was born, C.M. sued for visitation rights, and C.C. objected to both visitation and support. In holding that C.M. was the legal father, with visitation rights and support duties, the court surprisingly did not indicate whether it accepted C.M.'s or C.C.'s version of the facts. Their understanding was treated as irrelevant to the decision. The court based its decision on two points. First, the court determined that C.M. knew how the semen he gave to C.C. would be used and consented to the plan. Hence, the court held, he should be responsible for the consequences:

> C.M.'s consent and active participation in the procedure leading to conception should place upon him the responsibilities of fatherhood. The court will not deny him the privileges of fatherhood.[169]

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164. *See supra* text accompanying notes 150-55.

165. *See supra* text accompanying notes 151-59.

166. 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom. Rel. Ct. 1977); *see also* C.M. v. C.C., 170 N.J. Super. 586, 407 A.2d 849 (Juv. & Dom. Rel. Ct. 1979) (C.M. has the right to have his name entered on the birth certificate as the child's father).

167. It is worth noting that neither the mother nor the child was receiving public assistance. This case has been the occasion for much critical comment. Kritchevsky, *supra* note 16, at 16 n.71; Shaman, *supra* note 143, at 343-44; Smith, *supra* note 143, at 41-47.

168. Doctors who were consulted had refused to perform the procedure, but, inadvertently or not, explained to C.C. how to inseminate herself artificially. 152 N.J. Super. at 161, 377 A.2d at 821.

169. *Id.* at 168, 377 A.2d at 825.

Second, the court determined that it was in the child's best interests to have a father.[170] The court stated:

> It is in a child's best interests to have two parents whenever possible. The court takes no position as to the propriety of the use of artificial insemination between unmarried persons, but must be concerned with the best interests of the child in granting custody or visitation, and for such consideration will not make any distinction between a child conceived naturally or artificially.[171]

Although such an outcome would not be likely in situations where the semen donor remains anonymous, his anonymity may not be protected. Under the UPA, a state agency may initiate an action to determine paternity when a child is born to an unmarried woman and no father is named.[172] The court has considerable means at its disposal to gain this information.[173]

If the courts, as in *C.M. v. C.C.*, "will not make any distinction between a child conceived naturally or artificially"[174] when the mother is unmarried, then a legal father-child relationship may be judicially established under the UPA. In cases of natural conception, courts do not excuse men who have an extremely limited acquaintance with the mother from the duties and rights of fatherhood on that ground.[175] By a minimal extension of this logic, semen donors who have never met the child's mother may be named as a child's legal father if a court decides that it is in the child's best interests. Furthermore, semen donors know the intended use of their semen and consent to this use. Because of the substantial parallels between the situation of the semen donor and that of a "natural" father, it is essential to

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170. *Id.* at 167, 377 A.2d at 825. The court's suggestion that the child's best interests were relevant to the determination of legal fatherhood constitutes a novel use of the "best interests of the child" test. The test is ordinarily applied to determine custody, visitation rights and other related questions. Here the test is applied not to determine some feature of the parent-child relationship, but to determine who the parents will be. Under the traditional application of the test the court would have first determined who is a parent under the law, and then considered the best interests of the child in deciding questions of custody and visitation for parents and for others making claims. Parents have certain rights and duties with respect to their children which other interested parties do not ordinarily have. For example, a court may not remove an infant from her indigent natural parents and give her to wealthy adoptive parents even if the "best interests of the child" would be promoted. *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979).

171. 152 N.J. Super. at 167, 377 A.2d at 825.

172. UPA § 6(c).

173. *See supra* text accompanying notes 121-24. These provisions of the UPA do not explicitly apply to semen donors. However, a woman can be compelled to answer any questions necessary to determine who is the child's father under § 10(b). If she does not know, her doctor can be compelled to testify under § 10(c). If neither she nor the doctor nor any other party knows for certain who the father is, the court could order tests on the likely candidates under §§ 11 and 12, if the pool of candidates is known.

174. 152 N.J. Super. at 167, 377 A.2d at 825.

175. *See, e.g., id.* at 168, 377 A.2d at 825.

clarify the status of semen donors if a *C.M. v. C.C.* outcome is to be avoided.[176]

If section 5 of the UPA were modified to provide that the donor of semen for use in the artificial insemination of any woman is not the legal father of the child so conceived, a second avenue would be opened for nonmarital mothering-by-choice. As one of the medical pioneers of A.I.D. observed, the avenue a woman chooses will depend upon "many tangible and intangible factors such as religion, education, parental upbringing, associates, sexual knowledge, job, ages, politics, etc."[177]

V

CONSTITUTIONAL PROTECTION OF NONMARITAL MOTHERHOOD-BY-CHOICE

A. The Unmarried Woman's Right to Procreate

Under the fifth and fourteenth amendments to the Constitution, unmarried women have a fundamental right to procreate. The Supreme Court first articulated the right to procreate in *Skinner v. Oklahoma*,[178] where it held that a statute allowing the state to sterilize certain types of habitual criminals was unconstitutional. The statute violated the equal protection clause of the fourteenth amendment because its classification of those criminals who could and could not be sterilized did not survive the Court's strict scrutiny. The Court explained that the right to procreate is "one of the basic civil rights of man [sic]," and that state infringement of the right is constitutional only when justified by a compelling state interest.[179] No such interest justified the state's decision to sterilize certain classes of criminals, but not others.[180]

In addition to infringing upon a fundamental right, the statute in *Skinner* also threatened the political and cultural autonomy of minority groups. The Court raised the specter of a majority restricting procreation to its own members: "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disap-

176. Kritchevsky, *supra* note 16, at 16, seems to think that as long as a semen donor is not known to the mother, a *C.M. v. C.C.* outcome is avoidable. This overlooks the existence of an apparatus under the UPA that enables the court to discover the donor's identity in all but the most carefully executed cases.

177. Guttmacher, *Foreward* to W. FINEGOLD, *supra* note 23, at viii.

178. 316 U.S. 535 (1942).

179. *Id.* at 541. The Court distinguished Buck v. Bell, 274 U.S. 200 (1927), in which a Virginia statute allowing sterilization of "feeble-minded" persons was upheld. In *Buck*, the state's interest in sterilizing those who were believed to transmit their "defect" to their offspring was found sufficient.

180. *Skinner*, 316 U.S. at 541-42. The Court might just as easily have overturned the statute as an infringement upon liberty interests protected by the due process clause of the fourteenth amendment, as Justice Stone advocated in his concurrence. *Id.* at 544.

pear."[181] Although not relying primarily on this consideration, the Court took account of the constitutional protection of political and cultural expression in its opinion.[182]

Skinner, which is cited frequently by the Court as establishing the fundamental right to procreate,[183] is one of a number of cases recognizing a right to individual autonomy in decisions relating to procreation, abortion, contraception, marriage, family relationships, and child rearing and education.[184] The right to procreate was one of the first rights to individual privacy and autonomy articulated by the Court and is now a firmly entrenched constitutional doctrine.

Since *Skinner*, the Supreme Court has declared unconstitutional state action which substantially burdens the right to procreate, while not directly restricting it. In *Cleveland Board of Education v. LaFleur*,[185] the Court found that the city's maternity leave rule, which required all teachers to take a leave during certain stages of pregnancy, penalized a woman's assertion of her fundamental constitutional right to bear children.[186] The Court cited *Skinner* for the proposition that rules affecting this basic right must be narrowly drawn to serve compelling state interests.[187] In *Turner v. Department of Employment Security of Utah*,[188] the Court, citing *LaFleur*, held that a Utah law automatically making pregnant women ineligible for unemployment benefits, whether or not they were unemployed because they were pregnant, was an unconstitutional infringement of a basic human liberty.[189]

The Court did not address the issue in two other cases where a burden on the right to procreate was arguably at stake. In *Dandridge v. Williams*,[190] the Court held that a state imposition of a maximum welfare grant for all families, regardless of their size, was constitutional, even though one of the state's goals was to discourage welfare recipients from having children.[191] Without alluding to the constitutional right to procreate, an issue raised by

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181. *Id.* at 541.

182. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-12 (1978).

183. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152 (1973).

184. There is some disagreement about whether these are rights of individuals or of families. Although some Supreme Court decisions have been ambiguous on this point, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965), most commentators have argued that these rights belong primarily to individuals, and secondarily to families. Richards, *The Individual, the Family and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. Rev. 1 (1980); *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1161-62 (1980) [hereinafter cited as *Developments in the Law*].

185. 414 U.S. 632 (1974).

186. *Id.* at 640.

187. *Id.*

188. 423 U.S. 44 (1975).

189. *Id.* at 46.

190. 397 U.S. 471 (1970).

191. *Id.* at 483-84.

the appellees in their brief,[192] the Court commented: " [H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights. . . ."[193] Only Justice Marshall, in a footnote to his dissenting opinion, discussed the burden imposed by this statute on the right to procreate, and he dismissed it summarily. He stated that "the effect of the maximum grant regulations upon the right to procreation is marginal and indirect at best, totally unlike the compulsory sterilization law that was at issue in *Skinner*."[194] In the second case, *Geduldig v. Aiello*,[195] the Court upheld a state's exclusion of pregnancy from disability coverage, again without consideration of its impact on the right to procreate. Although *Geduldig* was decided between *LaFleur* and *Turner*, the Court did not resolve its apparent inconsistency in these cases.

The Court's failure to consider the implications of state action on the right to procreate in *Dandridge* and *Geduldig* is surprising. It may be due to the Court's adoption of the view, stated by Justice Marshall in *Dandridge*, that withholding economic benefits does not itself seriously burden the exercise of this right.[196] This is somewhat baffling, because mandatory leave for pregnant teachers and the presumption that pregnant women are unfit for employment appear no more burdensome, and perhaps less so, than denial of the means of subsistence to pregnant women and the childen they bear. Yet while the Court did not invoke the right to procreate in either *Dandridge* or *Geduldig*, it did not intimate that there is no such right, or that it is not a fundamental right.

The fundamental right to procreate is a right of individuals, both married and unmarried. This principle was articulated in *Eisenstadt v. Baird*,[197] where the Court found that a statute prohibiting the distribution of contraceptives to unmarried people violated their rights under the equal protection clause of the fourteenth amendment. In holding that the statutory classification bore no rational relation to a legitimate state interest,[198] the Court stated that it is the individual's decision to procreate that is protected from state interference.

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the married couple is not an independent entity with a mind and heart of its own, but an association of

192. Brief for Appellees at 31-34, Dandridge v. Williams, 397 U.S. 471 (1970). *See also* Note, *Legal Analysis and Population Control*, 84 HARV. L. REV. 1856, 1856-65 (1971) on *Dandridge* and the right to procreate.

193. *Dandridge*, 397 U.S. at 484.

194. *Id.* at 520 n.14.

195. 417 U.S. 484 (1974).

196. *See infra* text accompanying notes 209-12.

197. 405 U.S. 438 (1972).

198. Because the statute failed to withstand even ordinary scrutiny, the Court did not need to invoke the strict scrutiny test applicable when a statute infringes a "fundamental" right. *Id.* at 447 n.7.

> two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[199]

The proposition that reproductive rights are individual rights was reiterated in *Roe v. Wade*,[200] where the Court held that a pregnant woman has a constitutional right to choose abortion. The right identified by the Court was a right of personal privacy.[201] In keeping with this doctrine, the Court struck down a statute requiring a husband's consent before a married woman could have an abortion in *Planned Parenthood of Central Missouri v. Danforth*.[202]

B. Burdens Imposed on the Right to Procreate by the Uniform Parentage Act

The UPA stands in the way of an unmarried woman's exercise of her fundamental right to procreate. Whether its provisions violate the Constitution depends in part on whether the burdens imposed on the exercise of this right are so substantial as to require justification by a compelling state interest.[203] Although the Supreme Court has not articulated a hard and fast rule for determining when a burden on the exercise of a fundamental right is of constitutional dimension, the Court's decisions in the related areas of contraception and abortion illuminate this problem. The Court has held that because the right to procreate is a fundamental constitutional right, the state may not directly prohibit abortion,[204] prohibit the use of contraceptives,[205] or restrict the distribution of contraceptives,[206] without a compelling state interest. The Court has also struck down state statutory requirements that

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199. *Id.*

200. 410 U.S. 113 (1973).

201. *Id.* at 153.

202. 428 U.S. 52 (1976). In Roe v. Wade, 410 U.S. at 165 n.67, the Court expressly reserved decision on the question whether a spousal consent requirement could be constitutionally imposed. In *Danforth*, 428 U.S. at 71, the Court concluded that the Missouri statutory requirement was "inconsistent with the standards enunciated in *Roe v. Wade*. . . ." "[W]e cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right." *Id.* at 70. *See also* Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).

203. " 'Compelling' is the key word; where a decision as fundamental as whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Carey*, 431 U.S. at 686.

204. Roe v. Wade, 410 U.S. 113, 155-56 (1973).

205. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

206. *Carey*, 431 U.S. at 687-89.

indirectly restrict access to abortion by limiting it to accredited hospitals[207] or prohibiting use of certain techniques.[208]

Although laws restricting the use of contraceptives and the availability of abortion obviously do not directly require women to procreate, they make the choice not to procreate more difficult. Protecting a fundamental right means guaranteeing that conditions that burden it will not be tolerated without a compelling state interest. The right to choice in procreation extends beyond the right to be free from direct governmental coercion in the decision to procreate or not to procreate.

The Supreme Court has in a few cases found that a burden upon the exercise of the fundamental right to procreate was not sufficiently substantial to call for strict scrutiny. In *Maher v. Roe*[209] and *Harris v. McRae*,[210] the Court held that the refusal to provide Medicaid funds for abortions when funds are provided for childbirth does not significantly burden exercise of the right to procreate. It reasoned that the withholding of Medicaid funds places no direct obstacles in the path of an indigent pregnant woman, but merely encourages her to make a certain choice.[211] The language of these funding decisions indicates that the Court distinguishes sharply between restrictions created de novo by the state, and restrictions created by the state's denial of economic benefits. Although that distinction may not survive analytical scrutiny,[212] it does appear to establish a criterion for determining when burdens on the right to procreate are considered sufficiently significant to trigger strict scrutiny.

Measured by the standard articulated in the abortion and contraception decisions, the burden that the UPA imposes on an unmarried woman's right to procreate is a constitutionally significant one. The provisions of the UPA effectively prevent unmarried women from exercising their fundamental right to procreate. By rendering unenforceable, contracts that prevent parental rights and duties from attaching to a man who fathers an unmarried woman's child[213] and by failing expressly to prevent parental rights and duties from attaching to the semen donor when an unmarried woman is artificially inseminated,[214] the UPA effectively guarantees that women who might otherwise have had children will not do so. Unless she can find a man who is willing to take on or to risk taking on an eighteen-year financial commitment and to enter into a legal relationship of signal importance with

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207. Doe v. Bolton, 410 U.S. 179 (1973).
208. *Danforth*, 428 U.S. 52 (1976).
209. 432 U.S. 464 (1977).
210. 448 U.S. 297 (1980).
211. Harris v. McRae, 448 U.S. at 316-18; Maher v. Roe, 432 U.S. at 474.
212. *See Harris*, 448 U.S. at 329-37 (Brennan, J., dissenting); *id.* at 341-48 (Marshall, J., dissenting); *id.* at 348-49 (Blackmun, J., dissenting); *id.* at 349-57 (Stevens, J., dissenting); *Maher*, 432 U.S. at 482-90 (Brennan, J., dissenting).
213. *See supra* text accompanying notes 102-38.
214. *See supra* text accompanying notes 145-53.

her child, her right to procreate is meaningless. This barrier to her bearing a child is a state-imposed barrier, and not a natural or biological one. The creation of a legal relationship between her child and its biological father by the state prevents her from procreating.

C. The Unmarried Woman's Right to Family Autonomy

In addition to burdening an unmarried woman's exercise of her right to procreate, the UPA also implicates her right to family autonomy.[215] If she has a child in a UPA state, she is deprived of the right to choose the kind of family structure within which she will raise her child. If the burden on this second fundamental right is also of constitutional dimension, then the state must justify its action by a compelling state interest.

The right to be free from state interference in matters relating to the rearing of children is a fundamental constitutional right protected by the fifth and fourteenth amendment guarantees of liberty. This right was first articulated in *Meyer v. State of Nebraska*,[216] in which a statute forbidding the teaching of foreign languages in the elementary schools was found to infringe the right of parents to educate their children as they see fit. Subsequent cases further defined and expanded upon the right of parents to supervise their children's upbringing.[217]

In each of these cases, the Court emphasized that the primary responsibility for the education and rearing of children lies with the parents,[218] and that this parental prerogative is a fundamental constitutional right.[219] Even though the state had significant interests at stake in these cases, the Court would not abandon the principle that "[t]he child is not the mere creature of the State."[220] In *Yoder*, the right of Amish parents to refuse to send their children to high school was affirmed, despite the fact that educating children is "at the very apex of the function of a State."[221] In both *Meyer*[222] and *Yoder*,[223] the Court also emphasized the critical importance of family

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215. Part of the value of the right to procreate derives from the concomitant freedom of parents to raise their children as they see fit. *Developments in the Law*, *supra* note 184, at 1353. If the unmarried woman's right to procreate is conditioned upon her establishing something other than the kind of family she would choose, both her right to procreate and her right to family autonomy are involved.

216. 262 U.S. 390 (1923).

217. Wisconsin v. Yoder, 406 U.S. 205 (1972) (statute compelling high school attendance held invalid as applied to Amish children); Prince v. Massachusetts, 321 U.S. 158 (1944) (statute prohibiting child labor upheld); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (statute requiring all children to attend public schools held invalid).

218. It was in *Prince*, 321 U.S. at 166, that the Court made the often cited remark that "the custody, care and nurture of the child reside first in the parents."

219. *E.g.*, Meyer v. State of Nebraska, 262 U.S. at 399-400.

220. Pierce v. Society of Sisters, 268 U.S. at 535.

221. Wisconsin v. Yoder, 406 U.S. at 213.

222. 262 U.S. at 400-01.

223. 406 U.S. at 215-19.

independence for avoiding state imposition of cultural uniformity through education.

This protected sphere of family autonomy is not limited to the education of children, nor is it limited in application to the traditional nuclear family. The Court made this explicit in *Moore v. City of East Cleveland*,[224] by declaring unconstitutional an ordinance that permitted only certain kinds of families to reside in designated areas. The plurality opinion written by Justice Stewart explicitly recognized that constitutional protection of the family reaches beyond the nuclear family, and that the ordinance's strict limitation on which relatives could live together as a family violated the relatives' constitutional rights.[225] In response to the argument that *Meyer* and *Pierce* established a right of family autonomy only for the nuclear family, the *Moore* Court noted that certain family rights have been protected under the fourteenth amendment[226] because the family is the institution through which moral and cultural values are transmitted.[227] Yet this function is not served exclusively by the nuclear family; it can be effectively fulfilled by other types of families.[228] The plurality concluded that the freedom of personal choice in matters of family and personal life articulated in earlier cases must be construed to include the extended family and stated that "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in the case."[229]

As noted in *Moore*, the fundamental constitutional right of family autonomy belongs to the family group by virtue of its role in transmitting values. This point was further articulated in *Smith v. Organization of Foster Families*:[230]

> Thus the importance of familial relationship to the individuals involved and to the society stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.[231]

To refuse to extend the Constitution's protection to certain kinds of families would burden the right of the individual to choose the type of familial relationships that she deems most desirable. The Constitution bars the state

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224. 231 U.S. 494 (1977).

225. Justice Stevens based his concurrence on the right of a property owner to use her property as she chooses. *Id.* at 513-18.

226. *Id.* at 499-501.

227. *Id.* at 503-04.

228. *Id.* at 504-05.

229. *Moore*, 431 U.S. at 501.

230. 431 U.S. 816 (1977).

231. *Id.* at 844 (citation omitted).

"from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns,"[232] and thus protects the individual's right to make choices critical to the transmission of values free from state coercion.

D. Burdens Imposed upon the Right to Family Autonomy by the Uniform Parentage Act

The UPA prevents a woman from forming a family without a legal father for her children.[233] It thus denies every woman her right to form the kind of family structure and lifestyle she chooses. The family she chooses might include only herself and her children, but might also include another adult or adults. She and her children may or may not belong to a larger extended family. Her choice is constitutionally protected because her family may serve the protected functions of the family—the transmission of moral and cultural values, the formation of intimate emotional attachments, the promotion of a way of life—as well as the marital family.

Furthermore, the family structure of the unmarried mother-by-choice may be chosen by feminists[234] who, if denied this choice, would not have families at all. Barriers to nonmarital mothering-by-choice thus impede the development of feminist values,[235] the transmission of those values to the next generation, and the formation of communities of such families to oppose mainstream patriarchal institutions and values.[236] The Supreme Court held, in *Meyer*,[237] *Pierce*,[238] and *Yoder*,[239] that the family's choice to oppose mainstream cultural and political institutions by keeping children out of public schools is constitutionally protected. The same principle re-

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232. *Moore*, 431 U.S. at 506.

233. *See supra* text accompanying notes 101-77.

234. A feminist is a person who believes that a person's sex in and of itself should have no cultural significance; it should not be determinative of economic status, employment opportunities, political power, social status, prospects for a good life, or ability to effectively function as a human being. A feminist is also a person who perceives that contemporary American women are seriously disadvantaged in all of these respects. Since the traditional family has been and continues to be a primary vehicle for transmission of this system of values in which women are seriously disfavored, it appears to many feminists that alternatives to this traditional form should be explored. *See* J. MITCHELL, *supra* note 26.

235. For a discussion and analysis of feminist values, see M. DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM (1978).

236. Many parts of the country have active feminist communities. At present, women's centers are the focal points of many feminist communities, e.g., the New Haven Women's Center, New Haven, Conn.; the Cambridge Women's Center, Cambridge, Mass.; the Somerville Women's Center, Somerville, Mass. Numerous newsletters and journals, sometimes published by women's centers, serve as vehicles for communication within a community, and among communities. *See, e.g.*, SOJOURNER, THE NEW ENGLAND WOMEN'S JOURNAL OF NEWS, OPINIONS, AND THE ARTS, published at 143 Albany Street, Cambridge, Mass.

237. 262 U.S. 390 (1923).

238. 268 U.S. 510 (1925).

239. 406 U.S. 205 (1972).

quires constitutional protection of a woman's choice to bear children and to raise them without a legal father.[240]

The UPA either prevents an unmarried woman from procreating or forces upon her a type of family unit contrary to her choosing. If she has children, she must accept that her child's biological father will also be the child's legal father, with a full set of parental rights and duties. This restricts her ability to transfer legal rights and duties to other persons. It also means that if the biological father changes his mind about his noninvolvement after conception, the mother risks losing custody. If she retains custody, she risks substantial paternal involvement in the child's upbringing.[241] These restrictions infringe upon her right to choose a type of family structure in which she herself can flourish and best nurture her children. Under the criteria set out in cases such as *Roe v. Wade*,[242] *Griswold v. Connecticut*,[243] *Carey v. Population Services International*,[244] and *Eisenstadt v. Baird*[245] this burden is substantial enough to require the application of strict scrutiny.

VI

THE INTERESTS OF NONMARITAL CHILDREN, BIOLOGICAL FATHERS AND THE STATE

The UPA creates substantial barriers to the unmarried woman's exercise of her fundamental rights to procreate and to family autonomy which may be removed by modifying the UPA to allow nonmarital mothering-by-choice, as proposed above.[246] Restrictions on the exercise of these fundamental rights are constitutional only if the less restrictive alternatives impair some compelling state interest.[247] Thus, only if the state has some compelling interest which is served by the UPA, but not served when it is modified, may the UPA survive constitutional scrutiny.

A. Nonmarital Children and Nonmarital Motherhood-by-Choice

The state interest in protecting the rights and interests of children must be considered in weighing the relative constitutional merits of the UPA and

240. Because rights of association and of political expression are implicated in the family choices of an unmarried mother-by-choice, first amendment values are also implicated. *See* Comment, *supra* note 88, at 268.

241. *See supra* text accompanying notes 104-13.

242. 410 U.S. 113 (1973).

243. 381 U.S. 479 (1965).

244. 431 U.S. 678 (1977).

245. 405 U.S. 438 (1972).

246. *See supra* text accompanying notes 139, 177. There are alternative ways to eliminate the UPA's constitutional infirmities. It is not claimed that the proposed modifications of the UPA are constitutionally required as against all such alternatives or that additional modifications might not be necessary for other reasons.

247. Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1977).

the modified UPA. The drafters of the UPA attempted to base its provisions on the Supreme Court's decisions defining the rights of nonmarital children.[248] If the state's acquiescence in nonmarital mothering-by-choice would infringe on the constitutional rights of nonmarital children, protection of those rights might justify placing burdens on the exercise of an unmarried woman's right to procreate.

It should be noted that the proposed statutory scheme is not premised on the unmarried mother's waiver of her child's rights with respect to the biological father. No rights are waived because no rights against the biological father would ever come into existence, whether the child is conceived naturally or artificially. Nevertheless, the mother's choice to form this kind of family might reasonably be thought inequitable to her child, who will have no legal father. Thus, a powerful justification is required if the state is to permit nonmarital mothering-by-choice.

1. Equal Protection and Nonmarital Children

Under the modified UPA, the children of unmarried mothers-by-choice have no legally enforceable rights against their biological fathers. The issue, then, is whether these children are thereby denied the equal protection of the law. The Supreme Court decisions defining the rights of nonmarital children do not expressly hold that their legal rights against their biological parents must be the same as the legal rights of marital children, but these decisions are open to this interpretation.[249] Read narrowly, the Court's opinions hold that laws which are disadvantageous to nonmarital children are not valid if the state's sole purpose in passing such laws is to discourage childbearing ouside of marriage.[250] Read broadly, however, the opinions indicate that any state created classifications based on birth status must be justified by a substantial state interest.[251]

If equal protection of the law requires that the legal rights of all children with respect to their biological parents be the same, then there is a direct conflict between an unmarried woman's fundamental rights to procreate and to family autonomy, and the right of nonmarital children to the equal protection of the law. It should not, however, be assumed at the outset that unless the legal rights of all children are the same, some children will effectively be denied the equal protection of the law. The family structure within which a child's rights are defined must be considered in evaluating the requirements of equal protection.

To evaluate the impact of nonmarital mothering-by-choice on the constitutional rights of childen, it is necessary to ascertain the nature and extent of

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248. UPA Commissioners' prefatory note, 9A U.L.A. 580 (1979).
249. *See supra* text accompanying notes 47-64.
250. *See supra* note 63.
251. *See supra* note 64.

the disadvantages to children, if any, that result from it. The proposed modifications of the UPA allow the formation of families in which the mother is the child's sole legal parent, and the biological father has no role in the child's rearing. It is difficult to generalize about the effect on children of being raised in such a family. Just as "two-parent families"[252] come in an enormous variety, the families of unmarried mothers-by-choice may vary considerably. In some two-parent families, both parents live with, support, and nurture the children; in others, only one parent lives with the children, as in families where the parents are divorced or separated. Likewise, in some families of unmarried mothers-by-choice, the mother and a long-term companion may both live with, support, and nurture the children;[253] in others, only one adult may reside with the children. In both kinds of families, a parent will sometimes be involved in full-time child care and household maintenance, and sometimes not. Legal parenthood dictates only legal rights and duties; it cannot, and does not, dictate family practices. Having two legal parents does not guarantee a materially good life to a child; nor does having only one legal parent guarantee her a materially deprived life. Nor can the families of unmarried mothers-by-choice be assumed to lack the desirable features that two-parent families are assumed to possess.

The rights to support and to intestate succession from their legal parents[254] are two significant rights of children. Only differences in the number of people with respect to whom they have legal rights distinguishes children of unmarried mothers-by-choice from children of two-parent families. A child with one legal parent will have these rights against only one person instead of two. The extent to which this difference disadvantages a child will vary. In some families of unmarried mothers-by-choice, a third party who is not a parent may help support the child and may leave her an inheritance. Furthermore, having rights to support and to intestate succession with respect to one willing and well-to-do parent will be vastly preferable, from a material point of view, to having these rights with respect to two unemployed parents.

In a hypothetical society where there is little variation in adult income, there might be a genuine question about whether a child who has a legal right to support from only one parent would be disadvantaged relative to a child who has a legal right to support from two parents. Even in such a

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252. As used here, the rubric "two-parent families" encompasses all families that include two legal parents, regardless of whether the parents are married or live in the same household.

253. Because adoption laws typically do not allow both the mother and her companion to be legal parents, the children of unmarried mothers-by-choice will have only one legal parent, even if they do have more than one psychological parent. *See supra* note 135.

254. On intestate succession see E. CLARKE, L. LUSKY & A. MURPHY, GRATUITOUS TRANSFERS ch. 2 (1979).

society, however, parents would still allocate different portions of that uniform income to the support of their children. But in a society where there is enormous variation in individual income, such as the contemporary United States, no assumption can be made that the child with only one legal parent will be materially disadvantaged relative to the child with two legal parents.

Although the majority of American families now receiving public assistance consist of unmarried or divorced mothers and their children, most of these families have two legal parents, but the legal fathers will not or cannot support their children.[255] There is no reason to assume that unmarried mothers-by-choice are more likely to require public assistance for themselves and their children than women, married or unmarried, whose children have a legal father.[256]

In view of these social realities, there is a hollow ring to the argument that the modified UPA violates the rights of the children of unmarried mothers-by-choice. The formalistic view that equal protection of the law means precise identity for all children of legal rights relating to their biological parents presumes a conflict between the rights of unmarried mothers-by-choice and their children when, in fact, there is none.

2. *Resolving a Conflict of Rights*

While an assumption that the children of unmarried mothers-by-choice would be disadvantaged or deprived of the equal protection of the law because they have no legal rights against their biological fathers is erroneous, the law is not always premised upon social reality. It is therefore appropriate to consider how a conflict between the constitutional rights of an unmarried mother-by-choice and her child might be resolved, if such a conflict is assumed, or is found to exist by a legislature or court. Balancing competing constitutional rights requires accommodation of the competing rights by restricting each as narrowly as possible. This task requires a more detailed understanding of the substance of a child's right to equal protection of the law.

The right at issue for the child of an unmarried mother-by-choice cannot simply be the right to have two legal parents. If equal protection of

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255. In 1979 almost one half of all families below the poverty line were headed by women and approximately thirty percent of all families headed by women were below the poverty line. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, No. 125, at 29-30, 35 (1980).

256. *See* Fleming, *supra* note 13, Dullea (1979), *supra* note 13, and Rivlin, *supra* note 13 for interviews with unmarried mothers-by-choice or potential unmarried mothers-by-choice who gave considerable thought to how they would support their children. See especially Dullea (1979), *supra* note 13, which quotes Linda Gryczan of the Lesbian Mothers Defense Fund in Seattle: " 'The women who used it [A.I.D.] in this community make long-range plans about finances, school, who they want to raise children with. It would be nice if all children had the benefits of that much forethought before they were conceived.' "

the law meant that children have a right to have two legal parents (when both biological parents are alive and identified), then the state would violate that right when it terminates the parental rights of biological parents and permits an unmarried person to adopt a child. Many states now allow unmarried adults to adopt a child, however, even when one or both of the child's biological parents are alive.[257] The notion that the child's constitutional rights to equal protection of the law are thereby violated is far-fetched. In the case of adoption, securing an adequate living situation for the child is more important than preserving a legal relationship between the child and unwilling or incompetent biological parents. Accordingly it is more plausible to view the child's purported interest in having two legal parents as a right to the advantages that are assumed to accompany having two legal parents. These advantages may be either economic, developmental, or both.

i. Economic Disadvantages

It may be assumed for the sake of argument that children of unmarried mothers-by-choice are economically disadvantaged compared to children with two legal parents. Even so, the state may not burden the fundamental rights to procreate and to family autonomy in order to remove that economic disadvantage. State restrictions on fundamental constitutional rights must be narrowly tailored to serve the state's compelling interests. In *Zablocki v. Redhail*,[258] the Supreme Court addressed the question whether the state may burden parents' fundamental rights in order to protect children's economic interests. The Court held that the state could not prohibit a father from exercising his fundamental right to marry because he owed support payments to his former wife, even though the state had a legitimate and substantial interest in promoting the welfare of children. The state was advised to use the other means at its disposal "since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry. . . ."[259]

Likewise, the state may not burden an unmarried woman's fundamental rights to procreate and to structure her family autonomously for the sake of protecting the economic interests of children. Such a restriction is not narrowly tailored to the state's end. Even if the state could restrict the right to procreate in the name of equally protecting such interests, it would have to do so by limiting the right to procreate on the basis of economic status,

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257. *See* 2 C.J.S. *Adoption of Persons* § 15 (1972) ("In the absence of statutory prohibition, and frequently under express statutory authorization, an unmarried person may adopt a child.") *See also* 2 AM. JUR. 2D *Adoption* § 10 (1962), UNIF. ADOPTION ACT § 3(2), 9 U.L.A. 20 (1971).

258. 434 U.S. 374 (1978).

259. *Id.* at 388. *See also* Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1977).

and not by prohibiting nonmarital mothering-by-choice. If it is clear that state-imposed economic qualifications for exercise of the right to procreate would be unconstitutional, it is even clearer that prohibiting nonmarital mothering-by-choice to protect children's economic interests is unconstitutional.

ii. Developmental Disadvantages

If it is assumed that children of unmarried mothers-by-choice are developmentally disadvantaged, the consequences of this assumption can best be tested in the context of more specific assumptions about the nature of such disadvantages. In *Beyond the Best Interests of the Child*,[260] a widely cited book on child custody, the authors, Goldstein, Freud and Solnit, posit a theory of a child's basic needs, which may serve as a starting point for discussion.

Goldstein, Freud and Solnit paint a picture of an ideal family which they admit is "not often matched by reality":[261]

> [T]he "family," however defined by society, is generally perceived as the fundamental unit responsible for and capable of providing a child on a continuing basis with an environment which serves his numerous physical and mental needs during immaturity. . . . The child's body needs to be tended, nourished, and protected. His intellect needs to be stimulated and alerted to the happenings in his environment. He needs help in understanding and organizing his sensations and perceptions. He needs people to love, receive affection from, and to serve as safe targets for his infantile anger and aggression. He needs assistance from the adults in curbing and modifying his primitive drives (sex and aggression). He needs patterns for identification provided by the parents, to build up a functioning moral conscience. As much as anything else, he needs to be accepted, valued, and wanted as a member of the family unit consisting of adults as well as other children.[262]

These essential needs appear to be ones that could be easily fulfilled by any caring, reasonably conscientious adult, including an unmarried mother-by-choice. However, in further defining these needs, the authors mention several ways in which they believe a family may fail to meet them.[263] First, physical care may be given either too routinely (as in an institution) or excessively, thereby failing to "arouse the positive response which is the first

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260. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter cited as BEYOND THE BEST INTERESTS].

261. *Id.* at 15.

262. *Id.* at 13-14.

263. *Id.* at 15-16.

primitive base for later social attitudes." Second, parental involvement with the child may be insufficient to fulfill her emotional demands. Third, there may be too little sibling contact, so "that the child does not learn to balance his own wishes against those of others." Fourth, "[t]he sexual identities of the parents may be insufficiently resolved, so as to create confusion in the child about his own sexual identity." Fifth, "[p]arents may provide unsuitable models for identification." Finally, the family may be "incomplete," either having only one parent or having only one child, the last of which causes difficulties for the child in acquiring healthy sharing attitudes.

Although Goldstein, Freud and Solnit do not purport to offer an exhaustive list of ways in which a family may fail to meet a child's needs, and although their theory is culture-bound in the extreme,[264] their examples are useful for the purpose of evaluating the families of unmarried mothers-by-choice. Of particular relevance is their belief that a child whose family includes only one parent or only one child is disadvantaged in some respects.

> Families may be incomplete. The prolonged absence or death of one parent may place the child at risk. He is deprived of the benefits of a relationship with two adults who have an intimate relationship with each other. The family may be without other children, a situation which may make it more difficult for the child to acquire the give-and-take and sharing attitudes governing the peer community.[265]

An "incomplete" family is not an ideal family from the child's point of view.

For the sake of argument, it can be assumed that the children of unmarried mothers-by-choice are disadvantaged in the above ways. First, these children are more likely than other children to be deprived of the benefits of "a relationship with two adults who also have an intimate relationship with each other."[266] Second, unmarried mothers-by-choice are more likely than other parents to have only one child, and to have "unresolved sexual identities."[267]

Even if these assumptions are accepted, the state may not unduly burden the fundamental rights to procreate and to family autonomy in order

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264. The authors' list of children's essential needs is obviously compiled with industrialized Western societies in mind; it would not necessarily apply to child rearing in radically different cultures.

265. BEYOND THE BEST INTERESTS, *supra* note 260, at 16 (footnote omitted).

266. *Id.*

267. Although all unmarried mothers-by-choice may be expected to be held suspect, those who are lesbians are particularly likely to be the target of this criticism. The effect of parental sexual orientation upon the sexual adjustment of children is a topic of debate. In several recent cases, courts have rejected the assumption that the homosexuality of a parent will have a negative emotional effect on their children. *See* Bezio v. Patenaude, 381 Mass. 563, 410 N.E.2d 1207 (1980); Doe v. Doe, 222 Va. 736, 284 S.E.2d 799 (1981). *But see* Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981).

to prevent such disadvantages. When the fundamental rights of unmarried mothers-by-choice are at stake, state restrictions must be narrowly tailored to effect the removal of the hypothetical disadvantages. For example, if the state determined that screening prospective parents for unresolved sexual identities would benefit children, it would have to screen everyone.[268] A restriction that equates the desire to be an unmarried mother-by-choice with having an "unresolved" sexual identity or with belonging to an "incomplete" family is both overinclusive and underinclusive.[269]

State deterrence of nonmarital mothering-by-choice thus cannot be justified by a compelling interest in the equal protection of children's rights. Even if children of unmarried mothers-by-choice are found to be somewhat more disadvantaged than other children in the respects indicated, and even if the state has a legitimate interest in preventing the birth and rearing of children into disadvantaged families, these considerations alone cannot justify seriously burdening the constitutional right of unmarried women to procreate. A constitutional mandate to protect children from disadvantages would have to be implemented by state restrictions addressed directly to prevention of those disadvantages.[270]

B. The Parens Patriae Power and the Police Power

Under both its parens patriae power and its police power, the state is provided with a limited basis to intervene in the family to protect the interests of children. The parens patriae power is the power of the state to protect or to promote the welfare of young children who lack the capacity to act in their own best interests.[271] Under the police power, the state may

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268. Courts have sometimes rejected the presumption that a person with an unorthodox sexuality is an unfit parent. In Bezio v. Patenaude, 410 N.E.2d at 1216, the Massachusetts Supreme Judicial Court stated that: " In the total absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, we believe the judge's finding that a lesbian household would adversely affect the children to be without basis in the record."

269. In fact it may be possible to predict on the basis of demographic information which marriages are most likely to fail, and hence whose children are likely to be raised in "incomplete" families. By the same logic that allows the state to discourage nonmarital mothering-by-choice, the state may advance its interest in protecting children from growing up in "incomplete" families by discouraging procreation by couples whose marriages are statistically likely to fail.

270. Another possible difficulty for children of unmarried mothers-by-choice is emotional trauma from not knowing the identity of their biological father. However, it is not necessarily true that these children will not know their biological fathers' identities. Further, adopted children experience the same difficulty. If all children have a right to know the identity of their biological parents, this presents no greater a problem for nonmarital mothering-by-choice than it presents for adoption; in neither case is this problem insurmountable.

271. *Developments in the Law, supra* note 184, at 119.

legislate to protect the public health, safety, morals, or the general welfare.[272] Appealing to the parens patriae power, states have passed laws permitting the removal of children from families on the basis of parental neglect or abuse.[273] The police power has been invoked to prohibit child labor,[274] to require immunization of children,[275] and to compel school attendance through a certain age.[276] The parens patriae power and the state's police power operate by carving out exceptions to the general rule that the state may not interfere with family autonomy.[277]

Since the state may not discourage nonmarital mothering-by-choice to protect the constitutional rights of children,[278] it may not invoke its parens patriae power or its police power to do so. Neither the parens patriae power nor the police power justifies the imposition by the state of burdens on the right of unmarried women to procreate. Even if the children of unmarried mothers-by-choice are on the average more emotionally disadvantaged than other children because they are raised in an incomplete family or they have a parent with an "unresolved" sexual identity, or are materially disadvantaged, the means chosen to protect children's interests must be more carefully chosen. The state cannot burden the constitutional rights of unmarried women under any of its powers unless the burdens imposed are closely tailored to compelling state interests.

The disadvantages that might conceivably fall upon the children of unmarried mothers-by-choice have their counterparts in more traditionally structured families. However, these counterparts are usually viewed with greater equanimity than are the potential disadvantages to children of unmarried mothers-by-choice. For example, two-parent families with only one child are considered incomplete families under the Goldstein, Freud and Solnit theory.[279] Yet the notion that the state could intervene in such families to guarantee that a child had an adequate level of peer contact, or that the state could assign every "only child" a legal sibling in hopes of discouraging couples from having only one child, seems shocking. The provisions of the UPA, in imposing legal fatherhood upon all biological fathers in the name of the interests of children and against the will of all parties, takes precisely this tack.

If having only one legal parent is a disadvantage it is no greater a disadvantage than being an only child, growing up poor, being the child of

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272. Prince v. Massachusetts, 321 U.S. 158 (1944). *Developments in the Law, supra* note 184, at 1198-99.

273. *See generally* Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293 (1972).

274. *See* Prince v. Massachusetts, 321 U.S. 158, 165-70 (1944).

275. *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

276. *See* Wisconsin v. Yoder, 406 U.S. 205, 229-30 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

277. *See Developments in the Law, supra* note 184, at 1214-16, 1218.

278. *See supra* text accompanying notes 268-70.

279. *See supra* text accompanying notes 263-65.

an interracial couple, being the child of excessively religious parents, growing up in a foreign culture, having antisocial parents, and so forth. It does not belong in the same class with other, more egregious harms, such as suffering physical abuse or neglect. It is only by the erroneous equation of the possible disadvantages of having only one legal parent with these egregious harms that protecting children's rights appears to justify state imposition of burdens on nonmarital motherhood-by-choice.

C. The Rights of the Biological Father

If sections 5 and 6 of the UPA are modified to allow nonmarital mothering-by-choice, men who enter into a preconception contract which prevents paternal rights and duties from attaching will be held to the terms of that contract. In the case of a biological father who changes his mind, the state will be called upon to enforce the contract. Some might consider the importance of parental rights a reason for allowing a biological father to change his mind, and to assert parental rights despite the contract.

Parental rights are permanently waivable in other contexts. Parents who release their child for adoptioin forever waive all parental rights and duties, and are held to that waiver should they later change their minds.[280] The interest of the biological parents in changing their minds after adoption and retracting their waivers is made secondary to the state's interest in facilitating adoption. The state could have designed the adoption procedure to permit the father or mother to retract his or her waiver of parental rights. The state did not do so because people might be reluctant to adopt a child if the biological parents could, at any time, reopen the question of whether the best interests of the child required returning physical and legal custody to the biological parents.[281] For these reasons, biological parents are not permitted to change their minds after adoption. Clearly, parental rights and duties are not absolutely inalienable.

There are equally good reasons to enforce the waiver of paternal rights against biological fathers who enter into preconception contracts that prevent paternal rights from attaching. A postconception repudiation of the contract would shatter the family plan of the unmarried mother-by-choice to the detriment of both mother and child, as well as other members of the contemplated family. The sudden introduction of a stranger into the family unit could have destructive consequences. Ensuing controversies over custody, visitation, and such matters as the child's education and religion might disrupt the lives of both the child and the planned family. Just as biological parents are not permitted to change their minds after waiver of their rights

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280. *See* UNIF. ADOPTION ACT § 8, 9 U.L.A. 32 (1979).
281. *See* 2 AM. JUR. 2D *Adoption* § 46 (1962).

at the time of adoption, biological fathers should not be permitted to repudiate their preconception contracts.

Enforcing preconception contracts against biological fathers who change their minds does not infringe upon the paternal rights that the UPA was designed to protect. The drafters of the UPA emphasized that the model statute was intended to bring state law into compliance with recent Supreme Court decisions defining the constitutional rights of unmarried fathers.[282] The Court has held in a number of cases that statutes which presume greater parental rights in unmarried mothers than in fathers, and which grant virtually no parental rights to fathers, violate their constitutional rights to due process and equal protection.[283] The modifications of sections 5 and 6 of the UPA do not, however, limit the rights of fathers who have not entered into such contracts and thereby consented to the abrogation of their paternal rights.[284]

D. Protecting State Revenues

At least one state legislature that has passed the UPA has made it quite clear that its primary motivation was economic. The Nevada legislature articulated this concern as a preface to its version of the UPA:

> WHEREAS, The failure of parents to provide adequate financial support and care for their children is a major cause of financial dependency and a contributing cause for social delinquency; and
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> . . .
>
> WHEREAS, It is the duty of the state to conserve money for public assistance by providing reasonable and effective means to enforce the obligations of persons who are responsible for the care and support of their children . . . .[285]

The proposed modifications to sections 5 and 6 of the UPA, on the other hand, would allow an unmarried mother-by-choice to be the sole legal parent of her child. If such an unmarried mother-by-choice is forced to seek public assistance for herself and her child, the child's biological father cannot under this legislative scheme be held liable for child support.[286]

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282. UPA Commissioners' prefatory note, 9A U.L.A. 580 (1979).

283. *See supra* text accompanying notes 65-93.

284. If the UPA violates the constitutional rights of would-be unmarried mothers-by-choice, it may also violate the constitutional rights of unmarried men to procreate and to structure their families autonomously. However, whether the UPA impermissibly burdens the unmarried man's rights must be analyzed separately.

285. Act of June 2, 1979, ch. 599, 1979 NEV. STAT. 1269.

286. The biological father cannot under the proposed statutory scheme be held liable, because he is not its legal father. Biological fathers who have entered into preconception contracts should have the same status as biological parents whose parental rights have been terminated by the state. They would have neither legal rights nor legal duties with respect to the child.

However, this possibility is not a sufficiently weighty rationale for burdening nonmarital mothering-by-choice. Burdens on nonmarital mothering-by-choice implicate unmarried women's constitutional rights to procreate and to family autonomy, and therefore must be closely tailored to state interests.[287] Under this test, burdens on nonmarital mothering-by-choice which are designed to prevent familial indigency must fall, because nonmarital mothering-by-choice is not synonymous with indigency. Thus, the state may not burden nonmarital mothering-by-choice as a means of protecting its revenues. The constitutional rights of the potential unmarried mother-by-choice cannot be held hostage to the possibility that she will become indigent.

E. Promoting the Traditional Marital Family

The final state interest which must be considered is its interest in promoting the traditional marital family. The families of nonmarital mothers-by-choice are nontraditional families. Burdens imposed by the state on nonmarital mothering-by-choice thus may be directly aimed at promoting the traditional marital family. However, it is debatable whether this is even a permissible state interest, much less the compelling state interest necessary to justify burdening a fundamental right.

In its illegitimacy line of decisions, the Supreme Court has occasionally referred to a state interest in protecting the traditional marital family, although it has never articulated the nature and boundaries of such an interest.[288] At the same time, however, the Court has invalidated state protection of traditional sex roles as discriminatory.[289] In light of this rejection and of the role of the traditional marital family in creating and perpetuating women's secondary social, economic, and political status, the state should not be permitted to prefer the marital family to its alternatives.

Traditionally, the wife's role in the family required that she place her needs, wants, and interests second to those of her husband, no matter how personally desructive this requirement might be.[290] Because her station in life was to serve the family, serious involvement in activities in the public sphere was all but precluded.[291] Thus, the state's attempt to restrict child-

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287. *See supra* text accompanying notes 178-245.

288. *See supra* note 95.

289. Stanton v. Stanton, 421 U.S. 7, 14 (1975). The Supreme Court held that the state's preference for reinforcing the "old notion" that "generally it is the man's primary responsibility to provide a home and its essentials" could not be the basis for sex-based discrimination. *Id.* at 10. "No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Id.* at 14-15. Because these old notions are disadvantageous to women and occasionally to men, the state may not hold on to the "role-typing society has long imposed." *Id.* at 15.

290. J. MITCHELL, *supra* note 26, at 99-122, 137-40, 159-72.

291. *See generally* E. ZARETSKY, *supra* note 25.

bearing to the confines of the traditional marital family is an attempt by it to restrict the exercise of fundamental constitutional rights to a context which historically has been, and very frequently still is, seriously disadvantageous to women. Although not all unmarried mothers-by-choice are or will be women whose choice is grounded in this perception of the role of the traditional family, at least some women will choose nonmarital motherhood because they cannot create marital families in which their full equal humanity is recognized. The state may neither prefer the traditional family, nor promote it by burdening the exercise of fundamental constitutional rights by a group which has historically been subjected to discrimination through this very institution.[292]

Further, even if the state did have a legitimate interest in promoting the traditional marital family as a preferred social form for childbearing and child rearing, it would not follow that the state may burden nonmarital mothering-by-choice. Because an unmarried woman's fundamental constitutional rights to procreate and to family autonomy are implicated, the state may not restrict nonmarital mothering-by-choice without a compelling state interest.[293] If there is a legitimate state interest in promoting the traditional marital family, it is difficult to ascertain any basis for upgrading it to the status of a compelling interest. Absent an interest of this magnitude, the state may not interfere on these grounds with the rights of the unmarried mother-by-choice.

VII

CONCLUSION

The constitutional rights of unmarried women are substantially burdened by the provisions of the UPA. There is no compelling interest in protecting the rights and interests of children or fathers, in protecting the state's coffers, or in promoting the traditional marital family which can justify this burden.

The proposed modification of UPA section 6 would allow preconception contracts between an unmarried woman and a man who will impregnate

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292. *See supra* note 289.

293. In a situation with significant parallels the Supreme Court held that even though the state has a legitimate interest in "promoting normal childbirth," as opposed to abortion, Harris v. McRae, 448 U.S. 297, 314-15 (1980), it "may not place obstacles in the path of" a woman's freedom to choose abortion, *id.* at 316. The state may provide incentives for the favored choice, but it may not construct obstacles to the disfavored choice. Thus even if promoting the traditional marital family is a permissible state interest, the state may promote it only by creating incentives for choosing it, and not by impeding the formation of nontraditional families. If the distinction between withholding benefits (or incentives) and imposing burdens is a specious one, *see supra* note 212, then the state may not express a preference by either means.

her, relieving him of parental rights and duties. The proposed modification of section 5 would specify that a man who donated semen for the artificial insemination of an unmarried woman has no parental rights and duties. These two modifications would provide avenues for unmarried women to exercise their rights to procreate and to create the family structure of their choosing.

Neither lawmakers nor the judiciary have considered the possibility of nonmarital motherhood-by-choice, and the existence of a right to make that choice. It is only as women have moved into the workplace in larger numbers that nonmarital motherhood has become an economically feasible choice for even a few women. It is only as the historical and contemporary reality of women's secondary status has gained broader recognition that some women have begun to see nonmarital motherhood as a political choice, and have found themselves able to make the choice to parent either alone or with other women. The law must soon respond to the social reality of women who do now and who will in the future raise children in nonmarital families.

APPENDIX

UNIFORM PARENTAGE ACT

§ 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.

§ 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.

§ 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;

(3) an adoptive parent may be established by proof of adoption or under the [Revised Uniform Adoption Act].

§ 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, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court;

(2) before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and,

(i) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) if the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation;

(3) after the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) he has acknowledged his paternity of the child in writing filed with the [appropriate court or Vital Statistics Bureau];

(ii) with his consent, he is named as the child's father on the child's birth certificate, or

(iii) he is obligated to support the child under a written voluntary promise or by court order;

(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]. If another man is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.

(b) A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

§ 5. [Artificial Insemination]

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

§ 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, parternity 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.

(d) Regardless of its terms, an agreement, other than an agreement approved by the court in accordance with Section 13(b), between an alleged or presumed father and the mother or child, does not bar an action under this section.

(e) If an action under this section is brought before the birth of the child, all proceedings shall be stayed until after the birth, except service of process and the taking of depositions to perpetuate testimony.

§ 7. [Statute of Limitations]

An action to determine the existence of the father and child relationship as to a child who has no presumed father under Section 4 may not be brought later than [three] years after the birth of the child, or later than [three] years after the effective date of this Act, whichever is later. However, an action brought by or on behalf of a child whose paternity has not been determined is not barred until [three] years after the child reaches the age of majority. Sections 6 and 7 do not extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing of decedents' estates or to the determination of heirship, or otherwise.

§ 8. [Jurisdiction; Venue]

(a) [Without limiting the jurisdiction of any other court,] [The] [appropriate] court has jurisdiction of an action brought under this Act. [The action may be joined with an action for divorce, annulment, separate maintenance or support.]

(b) A person who has sexual intercourse in this State thereby submits to the jurisdiction of the courts of this State as to an action brought under this Act with respect to a child who may have been conceived by that act of intercourse. In addition to any other method provided by [rule or] statute, including [cross reference to "long arm statute"], personal jurisdiction may be acquired by [personal service of summons outside this State or by regis-

tered mail with proof of actual receipt] [service in accordance with (citation to "long arm statute")].

(c) The action may be brought in the county in which the child or the alleged father resides or is found or, if the father is deceased, in which proceedings for probate of his estate have been or could be commenced.

§ 9. [Parties]

The child shall be made a party to the action. If he is a minor he shall be represented by his general guardian or a guardian ad litem appointed by the court. The child's mother or father may not represent the child as guardian or otherwise. The court may appoint the [appropriate state agency] as guardian ad litem for the child. The natural mother, each man presumed to be the father under Section 4, and each man alleged to be the natural father, shall be made parties or, if not subject to the jurisdiction of the court, shall be given notice of the action in a manner prescribed by the court and an opportunity to be heard. The court may align the parties.

§ 10. [Pre-Trial Proceedings]

(a) As soon as practicable after an action to declare the existence or nonexistence of the father and child relationship has been brought, an informal hearing shall be held. [The court may order that the hearing be held before a referee.] The public shall be barred from the hearing. A record of the proceeding or any portion thereof shall be kept if any party requests, or the court orders. Rules of evidence need not be observed.

(b) Upon refusal of any witness, including a party, to testify under oath or produce evidence, the court may order him to testify under oath and produce evidence concerning all relevant facts. If the refusal is upon the ground that his testimony or evidence might tend to incriminate him, the court may grant him immunity from all criminal liability on account of the testimony or evidence he is required to produce. An order granting immunity bars prosecution of the witness for any offense shown in whole or in part by testimony or evidence he is required to produce, except for perjury committed in his testimony. The refusal of a witness, who has been granted immunity, to obey an order to testify or produce evidence is a civil contempt of the court.

(c) Testimony of a physician concerning the medical circumstances of the pregnancy and the condition and characteristics of the child upon birth is not privileged.

§ 11. [Blood Tests]

(a) The court may, and upon request of a party shall, require the child, mother, or alleged father to submit to blood tests. The tests shall be performed by an expert qualified as an examiner of blood types, appointed by the court.

(b) The court, upon reasonable request by a party, shall order that independent tests be performed by other experts qualified as examiners of blood types.

(c) In all cases, the court shall determine the number and qualifications of the experts.

§ 12. [Evidence Relating to Paternity]

Evidence relating to paternity may include:

(1) evidence of sexual intercourse between the mother and alleged father at any possible time of conception;

(2) an expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy;

(3) blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;

(4) medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts. If a man has been identified as a possible father of the child, the court may, and upon request of a party shall, require the child, the mother, and the man to submit to appropriate tests; and

(5) all other evidence relevant to the issue of paternity of the child.

§ 13. [Pre-Trial Recommendations]

(a) On the basis of the information produced at the pre-trial hearing, the judge [or referee] conducting the hearing shall evaluate the probability of determining the existence or non-existence of the father and child relationship in a trial and whether a judicial declaration of the relationship would be in the best interest of the child. On the basis of the evaluation, an appropriate recommendation for settlement shall be made to the parties, which may include any of the followng:

(1) that the action be dismissed with or without prejudice;

(2) that the matter be compromised by an agreement among the alleged father, the mother, and the child, in which the father and child relationship is not determined but in which a defined economic obligation is undertaken by the alleged father in favor of the child and, if appropriate, in favor of the mother, subject to approval by the judge [or referee] conducting the hearing. In reviewing the obligation undertaken by the alleged father in a compromise agreement, the judge [or referee] conducting the hearing shall consider the best interest of the child, in the light of the factors enumerated in Section 15(e), discounted by the improbability, as it appears to him, of establishing the alleged father's paternity or nonpaternity of the child in a trial of the action. In the best interest of the child, the court may order that the alleged father's identity be kept confidential. In that case, the court may designate a person or agency to receive from the alleged father and disburse on behalf of the child all amounts paid by the alleged father in fulfillment of obligations imposed on him; and

(3) that the alleged father voluntarily acknowledge his paternity of the child.

(b) If the parties accept a recommendation made in accordance with Subsection (a), judgment shall be entered accordingly.

(c) If a party refuses to accept a recommendation made under Subsection (a) and blood tests have not been taken, the court shall require the parties to submit to blood tests, if practicable. Thereafter the judge [or referee] shall make an appropriate final recommendatiion. If a party refuses to accept the final recommendation, the action shall be set for trial.

(d) The guardian ad litem may accept or refuse to accept a recommendation under this Section.

(e) The informal hearing may be terminated and the action set for trial if the judge [or referee] conducting the hearing finds unlikely that all parties would accept a recommendation he might make under Subsection (a) or (c).

§ 14. [Civil Action; Jury]

(a) An action under this Act is a civil action governed by the rules of civil procedure. The mother of the child and the alleged father are competent to testify and may be compelled to testify. Subsections (b) and (c) of Section 10 and Sections 11 and 12 apply.

(b) Testimony relating to sexual access to the mother by an unidentified man at any time or by an identified man at a time other than the probable time of conception of the child is inadmissible in evidence, unless offered by the mother.

(c) In an action against an alleged father, evidence offered by him with respect to a man who is not subject to the jurisdiction of the court concerning his sexual intercourse with the mother at or about the probable time of conception of the child is admissible in evidence only if he has undergone and made available to the court blood tests the results of which do not exclude the possibility of his paternity of the child. A man who is identified and is subject to the jurisdiction of the court shall be made a defendant in the action.

[(d) The trial shall be by the court without a jury.]

§ 15. [Judgment or Order]

(a) The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes.

(b) If the judgment or order of the court is at variance with the child's birth certificate, the court shall order that [an amended birth registration be made] [a new birth certificate be issued] under Section 23.

(c) The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy and confinement.

(d) Support judgments or orders ordinarily shall be for periodic payments which may vary in amount. In the best interest of the child, a lump sum payment or the purchase of an annuity may be ordered in lieu of periodic payments of support. The court may limit the father's liability for past support of the child to the proportion of the expenses already incurred that the court deems just.

(e) In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, a court enforcing the obligation of support shall consider all relevant facts including

(1) the needs of the child;

(2) the standard of living and circumstances of the parents;

(3) the relative financial means of the parents;

(4) the earning ability of the parents;

(5) the need and capacity of the child for education, including higher education;

(6) the age of the child;

(7) the financial resources and the earning ability of the child;

(8) the responsibility of the parents for the support of others; and

(9) the value of services contributed by the custodial parent.

§ 16. [Costs]

The court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including blood tests, to be paid by the parties in proportions and at times determined by the court. The court may order the proportion of any indigent party to be paid by [appropriate public authority].

§ 17. [Enforcement of Judgment or Order]

(a) If existence of the father and child relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated under this Act or under prior law, the obligation of the father may be enforced in the same or other proceedings by the mother, the child, the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, support, or funeral, or by any other person, including a private agency, to the extent he has furnished or is furnishing these expenses.

(b) The court may order support payments to be made to the mother, the clerk of the court, or a person, corporation, or agency designated to administer them for the benefit of the child under the supervision of the court.

(c) Willful failure to obey the judgment or order of the court is a civil contempt of the court. All remedies for the enforcement of judgments apply.

§ 18. [Modification of Judgment or Order]

The court has continuing jurisdiction to modify or revoke a judgment or order

(1) for future education and support, and

(2) with respect to matters listed in Subsections (c) and (d) of Section 15 and Section 17(b), except that a court entering a judgment or order for the payment of a lump sum or the purchase of an annuity under Section 15(d) may specify that the judgment or order may not be modified or revoked.

§ 19. [Right to Counsel; Free Transcript on Appeal]

(a) At the pre-trial hearing and in further proceedings, any party may be represented by counsel. The court shall appoint counsel for a party who is financially unable to obtain counsel.

(b) If a party is financially unable to pay the cost of a transcript, the court shall furnish on request a transcript for purposes of appeal.

§ 20. [Hearing and Records; Confidentiality]

Notwithstanding any other law concerning public hearings and records, any hearing or trial held under this Act shall be held in closed court without admittance of any person other than those necessary to the action or proceeding. All papers and records, other than the final judgment, pertaining to the action or proceeding, whether part of the permanent record of the court or of a file in the [appropriate state agency] or elsewhere, are subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only upon an order of the court for good cause shown.

§ 21. [Action to Declare Mother and Child Relationship]

Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this Act applicable to the father and child relationship apply.

§ 22. [Promise to Render Support]

(a) Any promise in writing to furnish support for a child, growing out of a supposed or alleged father and child relationship, does not require consideration and is enforceable according to its terms, subject to Section 6(d).

(b) In the best interest of the child or the mother, the court may, and upon the promisor's request shall, order the promise to be kept in confidence and designate a person or agency to receive and disburse on behalf of the child all amounts paid in performance of the promise.

§ 23. [Birth Records]

(a) Upon order of a court of this State or upon request of a court of another state, the [registrar of births] shall prepare [an amended birth registration] [a new certificate of birth] consistent with the findings of the court [and shall substitute the new certificate for the original certificate of birth].

(b) The fact that the father and child relationship was declared after the child's birth shall not be ascertainable from the [amended birth registration] [new certificate] but the actual place and date of birth shall be shown.

(c) The evidence upon which the [amended birth registration] [new certificate] was made and the original birth certificate shall be kept in a sealed and confidential file and be subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only upon an order of the court for good cause shown.

§ 24. [Custodial Proceedings]

(a) If a mother relinquishes or proposes to relinquish for adoption a child who has (1) a presumed father under Section 4(a), (2) a father whose relationship to the child has been determined by a court, or (3) a father as to whom the child is a legitimate child under prior law of this State or under the law of another jurisdiction, the father shall be given notice of the adoption proceeding and have the rights provided under [the appropriate State statute] [the Revised Uniform Adoption Act], unless the father's relationship to the child has been previously terminated or determined by a court not to exist.

(b) If a mother relinquishes or proposes to relinquish for adoption a child who does not have (1) a presumed father under Section 4(a), (2) a father whose relationship to the child has been determined by a court, or (3) a father as to whom the child is a legitimate child under prior law of this State or under the law of another jurisdiction, or if a child otherwise becomes the subject of an adoption proceeding, the agency or person to whom the child has been or is to be relinquished, or the mother or the person having custody of the child, shall file a petition in the [ ] court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court.

(c) In an effort to identify the natural father, the court shall cause inquiry to be made of the mother and any other appropriate person. The inquiry shall include the following: whether the mother was married at the time of conception of the child or at any time thereafter; whether the mother was cohabiting with a man at the time of conception or birth of the child; whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy; or whether any man has formally or informally acknowledged or declared his possible paternity of the child.

(d) If, after the inquiry, the natural father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with Subsection (f). If any of them fails to appear or, if appearing, fails to claim custodial rights, his parental rights with reference to the child shall be terminated. If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine custodial rights.

(e) If, after the inquiry, the court is unable to identify the natural father or any possible natural father and no person has appeared claiming to

be the natural father and claiming custodial rights, the court shall enter an order terminating the unknown natural father's parental rights with reference to the child. Subject to the disposition of an appeal, upon the expiration of [6 months] after an order terminating parental rights is issued under this subsection, the order cannot be questioned by any person, in any manner, or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter.

(f) Notice of the proceeding shall be given to every person identified as the natural father or a possible natural father [in the manner appropriate under rules of civil procedure for the service of process in a civil action in this state, or] in any manner the court directs. Proof of giving the notice shall be filed with the court before the petition is heard. [If no person has been identified as the natural father or a possible father, the court, on the basis of all information available, shall determine whether publication or public posting of notice of the proceeding is likely to lead to identification and, if so, shall order publication or public posting at times and in places and manner it deems appropriate.]

§ 25. [Uniformity of Application and Construction]

This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

§ 26. [Short Title]

This Act may be cited as the Uniform Parentage Act.

§ 27. [Severability]

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are severable.

§ 28. [Repeal]

The following acts and parts of acts are repealed:

(1) [Paternity Act]

(2)

(3)

§ 29. [Time of Taking Effect]

This Act shall take effect on _____.