THE IMPACT OF *STANLEY V. ILLINOIS* ON CUSTODY PROCEEDINGS FOR ILLEGITIMATE CHILDREN: PROCEDURAL PARITY FOR THE PUTATIVE FATHER?

I. INTRODUCTION

One out of every ten children born in the United States is illegitimate.[1] Despite evidence of both the permanence and growth of this phenomenon,[2] society persists in its hostile attitude toward out-of-wedlock unions and their offspring. Such animosity often finds expression in statutory and judicial approaches in this area.[3] A Pennsylvania court, summarizing the stigma attached to illegitimacy, wrote:

> Illegitimacy continues to strike a discordant and jarring note in our society. It is regarded as the fruit of a union of shame, irreverence and depravity. We have not yet achieved that sophistication which would allow us to deal with this problem without passion.[4]

One area in which such societal prejudice is evidenced is in the contrasting treatment afforded legitimate and illegitimate children when questions of custody arise. Progressive laws have been developed for dealing with legitimate offspring. During the nineteenth and early twentieth centuries, the ancient common law notion that children born in-wedlock were the property of their father[5] was discarded, and the Best Interests Doctrine, which made the welfare of the child the controlling factor in the custody determination, was almost universally adopted.[6] The traditional formulation of the court's role in applying the Best Interests Doctrine was enunciated by Judge Cardozo:

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[1] In 1968, the last year for which official, national figures are available, 9.7% of the children born in the United States were illegitimate. U.S. Census Bureau, Statistical Abstract of the U.S., 49, Table 61 (1971).

[2] The United States Census Bureau lists the following figures for the percentage of total births comprised by illegitimates:

1968	9.7%
1967	9.0
1966	8.4
1965	7.7
1960	5.3

U.S. Census Bureau, Statistical Abstract of the U.S., 48, Table 61 (1971). Although 1968 is the latest year for which authoritative data is available, it may readily be seen that illegitimacy is currently increasing at a stable rate of approximately 6 per 1000 births each year. Extrapolating from the above figures, illegitimacy for 1972 may be estimated at 12.1% of total births, or one out of every eight children born.

[3] The United States Supreme Court in Levy v. Louisiana, 391 U.S. 68, 70 (1968) felt compelled to state:

> We start from the premise that illegitimate children are not 'nonpersons'. They are humans, live and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.

See also Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

[4] Gwiszcz Appeal, 206 Pa. Super. 397, 400-01, 213 A.2d 155, 157 (1965).

[5] In Re Mark T, 8 Mich. App. 122, 136, 154 N.W.2d 27, 34 (1967).

[6] Id. at 140, 154 N.W.2d at 35; 26 Albany L. Rev. 335, 336 (1962). See, e.g., Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949).

> [The trial judge] acts as *parens patriae* to do what is best for the interests of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent' and make provision for the child accordingly.[7]

Thus, in the event of parental separation, the court examines both the mother and the father, and, in principle, custody is awarded solely on the basis of whose care would best foster the child's welfare.[8] These rules have been codified; Section 70 of the New York Domestic Relations Law is a prime example.[9]

In contrast, societal prejudice continues to permeate judicial disposition of children born out-of-wedlock. At ancient common law, partly in an effort to shield the English upper classes from the claims of offspring procreated in illicit liaisons with persons of a lower social status,[10] illegitimate children came within the doctrine of filius populi. Accordingly, custody and the incidents of parenthood were placed in the local church parish.[11] During the nineteenth century, the rule was changed to grant exclusive custody to the mother.[12] Subsequently, most common law jurisdictions accepted the putative father as a possible custodian,[13] and the Best Interests rule was, in theory, made a determinative factor in custody dispositions involving illegitimates.[14]

Despite these notable advances, the enlightened attitude and approach employed in custody dispositions for legitimate children has not been attained for illegitimates. A mandatory preference for one parent, the mother, persists, and the Best Interests

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[7] Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

[8] E.g., Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949); Sheil v. Sheil, 29 App. Div. 2d 950, 289 N.Y.S.2d 86 (2d Dep't 1968); Ullman v. Ullman, 151 App. Div. 419, 135 N.Y.S. 1080 (2d Dep't 1912). Admittedly, an informal bias towards the mother becomes a factor even in custody determinations for legitimates. See text accompanying notes 206-08 infra.

[9] N.Y. Dom. Rel. Law § 70 (McKinney Supp. 1970). See text accompanying note 183 infra. Although it does not appear to be required by the wording of the statute, the rule is interpreted as applicable to legitimate children only. E.g., Cornell v. Hartley, 54 Misc. 2d 732, 734 n.2, 283 N.Y.S.2d 318, 320 n.2 (Fam. Ct. 1967). Contra, Mahoff v. Matsoui, 139 Misc. 21, 247 N.Y.S. 112 (Sup. Ct. 1931); Godinez v. Russo, 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. (1966). See notes 98-104 infra.

[10] Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 499 (1967). See In Re Mark T, 8 Mich. App. 122, 145, 154 N.W.2d 27, 39 (1967).

[11] 26 Albany L. Rev. 335 (1962).

[12] Id. See Regina v. Brighton, 1 B. & S. 448, 121 Eng. Rep. 782 (Q.B. 1861).

[13] E.g., Fladung v. Sanford, 51 Ariz. 211, 75 P.2d 685 (1938); Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888 (1954); In Re Mark T, 8 Mich. App. 122, 154 N.W.2d 27 (1967); Meredith v. Meredith, 272 App. Div. 79, 69 N.Y.S.2d 462 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947); Application of Virginia Norman, 26 Misc. 2d 700, 205 N.Y.S.2d 260 (Sup. Ct. 1960); Kessler v. Wehnert, 114 N.Y.S.2d 598 (Sup. Ct. 1952); Lewisohn v. Spear, 174 Misc. 178, 20 N.Y.S.2d 249 (Sup. Ct. 1940); Mahoff v. Matsoui, 139 Misc. 21, 247 N.Y.S. 112 (Sup. Ct. 1931); French v. Catholic Community League, 69 Ohio App. 442, 44 N.E.2d 113 (1942); Allison v. Bryan, 26 Okla. 520, 109 P. 934 (1910); Human v. Hyman, 164 Pa. Super. 64, 63 A.2d 447 (1949).

[14] E.g., Payne v. Graham, 20 Ala. App. 439, 102 So. 729 (1925); Fladung v. Sanford, 51 Ariz. 211, 75 P.2d 685 (1938); Waldron v. Childers, 104 Ark. 206, 148 S.W. 1030 (1912); Strong v. Owens, 91 Cal. App. 2d 336, 205 P. 2d 48 (1949); Jackson v. Luckie, 205 Ga. 100, 52 S.E.2d 588 (1949); In re Soriano, 35 Hawaii 756 (1940); Glansman v. Ledbetter, 190 Ind. 505, 130 N.E. 230 (1921); Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907); Armstrong v. Price, 292 S.W. 447 (Mo. App. 1927); Veach v. Veach, 122 Mont. 47, 195 P.2d 697 (1948); In Re Application of Swartzkopf, 149 Neb. 460, 31 N.W.2d 294 (1948); Baker v. Baker, 81 N.J.Eq. 135, 85 A. 816 (1913); Meredith v. Meredith, 272 App. Div. 79, 69 N.Y.S.2d 462 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947); Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S.2d 792 (Fam. Ct. 1968); Browning v. Humphery, 241 N.C. 285, 84 S.E.2d 917 (1954); French v. Catholic Community League, 69 Ohio App. 442, 44 N.E.2d 113 (1942); Ex Parte Hendrix, 186 Okla. 712, 100 P.2d 444 (1940); Gwiszcz Appeal, 206 Pa. Super. 397, 213 A.2d 155 (1965); In Re Romero, 73 S.D. 564, 46 N.W.2d 108 (1951); Hayes v. Strauss, 151 Va. 136, 144 N.W.2d 432 (1928); In re Fields, 56 Wash. 259, 105 P. 466 (1909); Pierce v. Jeffries, 103 W.Va. 410, 137 S.E. 651 (1927); Doering v. Doering, 267 Wis. 12, 64 N.W.2d 240 (1954); Queen v. Nash [1883] 10 Q.B.D. 454, 52 L.J.Q.B. 442 (C.A. 1883); Barnardo v. McHugh [1891] A.C. 388, 61 L.J.Q.B. 721 (1891).

Doctrine, which looks solely to the welfare of the child, must compete with a prima facie right to custody in the mother.[15] Generally, courts will not even admit the possibility of an inconsistency between these two principles and instead rely on the axiom that the child's welfare and the mother's rights to custody are synonymous.[16] Unless demonstrably unsuited to care for her child, the mother is awarded custody.[17]

Although a majority of states do permit a grant of custody to the putative father, his right to custody is only secondary; it is dependent upon the mother's unavailability or unsuitability.[18] Procedurally, when both unwed parents seek custody, the father's qualifications, even when apparently superior, are not entitled to judicial consideration until the mother has been adjudicated unfit.[19] In other states the putative father does not have even a secondary right to custody of his unlegitimated out-of-wedlock child.[20] Thus, despite courtroom rhetoric expressing solicitude for the illegitimate's welfare, the summary procedures involved in the adjudication of the putative father's right to custody under both these rules lead one to question whether the law has yet abandoned the attitudes which engendered the filius populi rule. The unfairness to the illegitimate child has been noted by a number of courts.[21] The

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15 E.g., Mixon v. Mize, 198 So.2d 373 (Fla. Dist. Ct. of App. 1967); Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S.2d 792 (Fam. Ct. 1968); Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967); Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965); In re Hawthorne, 146 Pa. Super. 20, 21 A.2d 521 (1941). See Roe v. Doe, 58 Misc. 2d 757, 760, 296 N.Y.S.2d 865, 869 (Fam. Ct. 1968), wherein the court stated:

> There is hardly a better recognized principle in all the jurisdictions of the United States dealing with the matter of custody of children than the rule that the welfare of the child is the primary consideration in a determination of the question of custody and that the mother of an illegitimate child has a natural, primary and prima facie right to custody of her child as against the putative father.

16 See, e.g., Norcia v. Richard, 32 App. Div. 2d 656, 300 N.Y.S. 2d 608 (2d Dep't 1969), aff'd sub. nom. Anonymous v. Anonymous, 26 N.Y.2d 740, ___N.E.2d ___, 309 N.Y.S.2d 40 (1970). Right to custody is so strong that even in the rare cases where an inconsistency between the mother's right and the Best Interests Doctrine is recognized the mother may be granted custody anyway. Strong v. Owens, 91 Cal. App. 2d 336, 205 P.2d 48 (1949); Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965).

17 See cases cited in notes 15-16 supra.

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> [A] rule generally though not universally adopted [is] that the right of a father of an illegitimate child to its custody and control, although inferior to that of the mother, is superior to that of any other person.

Wade v. State, 39 Wash.2d 744, 746, 238 P.2d 914, 916 (1951) (adopting the above stated majority rule). Examples of other states adhering to the majority rule are: Alabama (Lewis v. Crowell, 210 Ala. 199, 97 So. 691 (1923)), Michigan (In Re Mark T, 8 Mich. App. 122, 154 N.W.2d 27 (1967)), New York (Meredith v. Meredith, 272 App. Div. 79, 69 N.Y.S.2d 462 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947) (but see Godinez v. Russo, 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. 1966)), Ohio (French v. Catholic Community League, 69 Ohio App. 422, 44 N.E.2d 113 (1942)), Pennsylvania (Human v. Hyman, 164 Pa. Super. 64, 63 A.2d 447 (1949)). New York law is illustrative of the application of the rule and the potential controversy which surrounds it.

19 E.g., Norcia v. Richard, 32 App. Div. 2d 656, 300 N.Y.S.2d 608 (2d Dep't 1969), aff'd sub nom. Anonymous v. Anonymous, 26 N.Y.2d 740, ___N.E.2d ___, 309 N.Y.S.2d 40 (1970); Meredith v. Meredith, 272 App. Div. 2d 79, 69 N.Y.S.2d 462 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947); Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967); Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965). But see Godinez v. Russo, 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. 1966).

20 E.g., California (Cal. Civ. Code Ann. § 200 (West Supp. 1969), Strong v. Owens, 91 Cal. App. 2d 336, 205 P.2d 48 (1949)), Georgia (Ga. Code Ann. § 74-203 (1964), Blakemore v. Blakemore, 217 Ga. 174, 121 S.E.2d 642 (1961)), Illinois (Ill. Ann. Stat. ch. 106 3/4 § 62 (Smith-Hurd Supp. 1972), discussed in Stanley v. Illinois, 405 U.S. 645 (1972)), Texas (Home of Holy Infancy v. Kaska, 397 S.W.2d 208 (Tex. 1964)), and Utah (Thomas v. Children's Aid Society of Ogden, 12 Utah 2d 235, 364 P.2d 1029 (1961)).

21 E.g., Godinez v. Russo, 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. 1966). This unfairness has not yet been eradicated. See text accompanying notes 94-111 infra.

United States Supreme Court in *Stanley v. Illinois*[22] considered the unfairness to the unwed father resulting from the minority rule. This Note will point out the inequities which exist for the putative father where the majority rule prevails, apply the *Stanley* rationale to that rule and its procedures as exemplified by New York law, and suggest needed reform.

II. THE DECISION IN *STANLEY V. ILLINOIS*

Under the Illinois law at issue in *Stanley*, the care of children was entrusted to their parents. "Parent" was defined as "the father and mother of a legitimate child or the survivor of them, or the natural mother of an illegitimate child."[23] The putative father was not only excluded from the legal definition of parent, but also statutorily denied the right to custody.[24] A "parent" could be deprived of custody only after a hearing. However, it was only necessary for the state to show summarily that a father currently exercising or seeking sole custody was not married to the mother for the child to become a ward of the state.[25] The unwed father was presumed at law to be unfit to raise his child.[26] Thus, Peter Stanley, upon the death of his intermittent mate of eighteen years, was denied custody of his two minor children by that union without a hearing on the question of his parental suitability.[27] The two children were made wards of the state and placed with court appointed guardians. In a five-two opinion,[28] the United States Supreme Court struck down this procedure on due process and equal protection grounds.[29]

Although Stanley had framed his objections to the Illinois statutory provisions solely in terms of equal protection,[30] the majority's analysis was based upon due

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22 405 U.S. 645 (1972) [hereinafter *Stanley*].

Although this Note will deal only with the putative father's position in custody dispositions in which both parents desire custody of the illegitimate, the unwed father is also severely disadvantaged in other respects concerning his child. For example, only the mother's consent is necessary for the adoption of an illegitimate child. Moreover, the father need not even be notified that an adoption is pending. E.g., Cal. Civ. Code Ann. § 124 (West Supp. 1969); N.Y. Dom. Rel Law § 111 (McKinney 1970). See In Re Mark T, 8 Mich. App. 122, 154 N.W.2d 27 (1967); In Re Brennan, 270 Minn. 455, 134 N.W.2d 126 (1965).

Note that the father's rights in regard to his illegitimate child are often dependent upon whether he has acknowledged, legitimated or adopted him. See, e.g., Labine v. Vincent, 401 U.S. 532 (1971) (discussing the Louisiana inheritance laws). The rules vary from state to state. In New York, a child is deemed acknowledged if he has been supported by the putative father; however, this does not alter the father's rights to custody. Cf. Anonymous v. Anonymous, 34 App. Div. 2d 942, 312 N.Y.S.2d 348 (1st Dep't 1970). See 26 Albany L. Rev. 335, 336 n.8 (1962) for some examples of such laws.

23 Ill. Ann. Stat. ch. 37 § 701-14 (Smith–Hurd Supp. 1972).

24 Ill. Ann. Stat. ch. 106 3/4 § 62 (Smith-Hurd Supp. 1972).

25 Under Illinois law, a child could be removed from parental care only after a hearing adjudicating the child to be "dependent", id. ch. 37, § 702-5, or "neglected", id. ch. 37, § 702-4, due to parental unsuitability. However, a child not in the care of a "parent" as defined by § 701-14 was also deemed "dependent", id. ch. 37, § 702-5(1)(a), regardless of the quality of parental supervision he received from that custodian. Thus, a preliminary question in a "dependency" hearing was whether a father exercising custody was a "parent", i.e., had been married to the mother. Upon a finding of "dependency" or "neglect", the child was made a ward of the court pending disposition to another custodian. Id. ch. 37, § 704-8.

26 405 U.S. at 650.

27 Since he was presumed unfit as a matter of law, the unwed father's claim of parental qualification was avoided as "irrelevant". Id.

28 Justices Powell and Rehnquist did not participate.

29 Justice Douglas concurred only in the due process analysis.

30 405 U.S. at 647. See In Re Stanley, 45 Ill.2d 132, 256 N.E.2d 814 (1970).

process requirements. Recognizing that procedural safeguards are not "applicable to every imaginable situation,"[31] the Court employed a balancing test, weighing the government function involved against the private interest affected by governmental action, and held that custody schemes were subject to the mandates of the due process clause. Relying on recent decisions, the majority held that the private interest, preservation of the integrity of the family unit, whether or not legally sanctioned,[32] warrants deference and protection under the due process clause of the fourteenth amendment.[33] Absent a powerful countervailing state interest, the Court reasoned that the means used by government to intervene in these relationships must be constitutionally defensible.[34] Illinois declared its interest to be that of assuring the welfare of its children by regulating certain aspects of family relationships.[35] While noting that this is a legitimate state interest, the Court emphasized that it was not evaluating the legitimacy of the state ends, but rather investigating the constitutionality of the means used to achieve these ends.[36] The majority inferred that the isolated state interest at issue was the retention of summary procedures for custody determinations involving putative fathers[37] and not the protection of the well-being of its young.[38] However, the majority stated, maintenance of such procedures which perfunctorily separate a child from a potentially fit, albeit unwed, father is clearly not a powerful state interest, as it impedes rather than advances the broader state goal.[39]

Having established the applicability of procedural safeguards to custody dispositions, the Court found that due process is denied when constitutionally protected interests are threatened by procedures and presumptions which foreclose inquiry into the very factors[40] upon which the state bases it power to abridge them.[41] The majority readily accepted the state's admission that some unwed fathers are suitable custodians for their children[42] and stated that administrative convenience to government obtained by the expediency of "procedure by presumption" is an

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[31] 405 U.S. at 650.

> [W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Id., quoting Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

[32] 405 U.S. at 651-52, citing Levy v. Louisiana, 391 U.S. 68, 71-2 (1968) and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-6 (1968). See also Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[33] 405 U.S. at 651-52, citing May v. Anderson, 345 U.S. 528, 533 (1953); Kovacs v. Cooper, 336 U.S. 77, 95 (1949); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The *Stanley* Court stated: "These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial." 405 U.S. at 652.

[34] 405 U.S. at 651, citing Kovacs v. Cooper, 336 U.S. 77, 95 (1949); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[35] Id. at 652.

[36] Id.

[37] See note 25 supra.

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> What is the state interest in separating children from fathers without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.

405 U.S. at 652-53.

[39] Id. at 657-58.

[40] See, e.g., Bell v. Burson, 402 U.S. 535 (1971) (accident liability of uninsured driver for posting a bond); Carrington v. Rash, 380 U.S. 89 (1965) (bona fide residence for voting).

[41] 405 U.S. at 657.

[42] Id. at 654.

insufficient state interest to justify denying putative fathers individual hearings on their qualifications as a parent.[43] Thus, the Illinois procedure was struck down by the Court for failing to comply with the mandates of the due process clause.

The majority also held, in a very brief acknowledgment of Stanley's equal protection claims,[44] that since all parents were constitutionally entitled to the procedural safeguards of a hearing on parental suitability, and since Illinois afforded such safeguards to married and divorced parents and unwed mothers, extending due process to these parents while denying it to putative fathers was violative of the equal protection clause of the fourteenth amendment.[45] Since the majority's due process analysis was clearly sufficient to invalidate the Illinois scheme, the facile and superficial[46] handling of equal protection seems to add nothing to the analysis of the case.

However, examination of Chief Justice Berger's dissent reveals why the majority employed this two-pronged approach. While both the majority and dissenting opinions recognized the principle that Supreme Court review extends only to arguments raised in the lower courts, the dissent took issue with the majority holding that the equal protection contentions raised below allowed the Supreme Court to expand its inquiry and center its analysis on due process considerations.[47] This strong dissent plus the equal protection stance of the case in the lower courts pressured the majority to reach the equal protection issue.

The cursory manner in which the Court handled the equal protection analysis and its reliance on procedural due process are probably indicative of the majority's reluctance either to cope with the strict dichotomy represented by the "rational basis"/"compelling interest" equal protection tests[48] or, in the alternative, to fashion a new method of analysis.[49] Under the rational basis test a statutory scheme is sustained

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[43] Id. at 656.

[44] In re Stanley, 45 Ill.2d 132, 256 N.E.2d 814 (1970).

[45] 405 U.S. at 658. Note that only four justices invalidated the Illinois procedure on equal protection grounds: Justice Douglas concurred only in the due process analysis, Justices Blackmun and Burger dissented, and Justices Powell and Rehnquist did not participate in the decision.

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> [I]n predicating a finding of constitutional invalidity under the Equal Protection Clause of the Fourteenth Amendment on the observation that a State has accorded bedrock procedural rights to some, but not to all similarly situated, ... we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court.

Id. at 658 n.10.

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> The only constitutional issue raised and decided in the courts of Illinois in this case was whether the Illinois statute that omits unwed fathers from the definition of 'parents' violates the Equal Protection Clause. We granted certiorari to consider whether the Illinois Supreme Court properly resolved that equal protection issue. ...
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> No due process issue was raised ... [or] decided by any state court. As Mr. Justice Douglas said for this Court in State Farm Mutual Automobile Ins. Co. v. Duel, 324 U.S. 154, 160 (1945), 'Since the (State) Supreme Court did not pass on the question, we may not do so.'

Id. at 659 (Burger, C.J., dissenting). See also Hill v. California, 401 U.S. 797, 805 (1971).

[48] See majority opinion in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-73 (1972), and the dissenting opinion of Justice Rehnquist in the same case, id. at 178-85, discussing the "compelling interest" and "rational basis" tests.

[49] On other occasions the Court has chosen the least controversial route to reach a desired end. In this context, note the differing approaches taken in Bell v. Burson, 402 U.S. 535 (1971), and Carrington v. Rash, 380 U.S. 89 (1965), the two cases relied on by the *Stanley* majority in considering the Illinois presumption. Although they both involved the same basic issue of presumption-founded procedures which precluded a hearing on the factors determinative under the state statutory scheme, the former was decided on due process grounds and the latter on equal protection. Both reach the same result of striking down the offending state procedures. It could be argued that a due process approach was chosen in *Bell* (suspension of driving licenses) since, unlike

if it is supported by valid considerations; a court may not strike down a law merely because it would legislate differently.[50] Until recently, Supreme Court rulings on classifications based on sex and illegitimacy have applied this analysis. In *Reed* v. *Reed*[51] the Supreme Court struck down an Idaho probate code provision giving preference to men over women in the appointment of administrators for decedents' estates, and in *Levy v. Louisiana*[52] and *Glona v. American Guarantee & Liability Insurance Co.*[53] it struck down statutes discriminating against illegitimacy in the distribution of wrongful death benefits. In contrast, the Court, in *Labine v. Vincent*,[54] upheld a Louisiana intestate succession provision which denied illegitimates, even though acknowledged by the father, inheritance rights accorded legitimate children. The fact pattern in *Stanley* is somewhat analogous to that of *Glona* in that both involved a denial of rights to a parent because of his child's illegitimacy. However, the instant situation, involving the strong state interest in the family structure, is more analogous to *Labine*, where the Court emphasized the state's concern in regulating disposition of property within its borders, then it is to *Levy* or *Glona*.[55] Additionally, the influence of the emotional and moralistic content of the question of illegitimacy on the judge as society's representative cannot be ignored. Illegitimacy poses a far greater threat to the integrity of the legally sanctioned family unit in the context of inheritance or custody rather than an action for wrongful death.[56]

In the dissenting opinion in *Stanley*, Chief Justice Berger articulated a variety of reasons which he believed would, under the rational basis test, sustain the Illinois statutory scheme which recognized only legitimate father-child relationships: the unwed mother, in contrast to the putative father, is easily identified and located;[57] the natural bonds of affection between a mother and the child she has nursed and carried are seldom found in the putative father;[58] and legally sanctioned marital unions

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Carrington (voting), it did not involve a fundamental right, mandating a "compelling interest" test, and the desired result could not have been reached under a "rational basis" equal protection analysis. See text accompanying notes 50-63 infra for a discussion of the traditional tests used in equal protection analyses.

50 E.g.,

> [T]he power to make rules to establish, protect, and strengthen family life ... is committed by the Constitution of the United States ... to the [state] legislature.... Absent a specific Constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws.

Labine v. Vincent, 401 U.S. 532, 538-39 (1971). See also Railway Express Agency Inc. v. New York, 336 U.S. 106, 109 (1949); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 418 (1920).

51 404 U.S. 71 (1971). Such a holding of invalidity using the rational basis test was a rarity. Morey v. Doud, 354 U.S. 457 (1957), a case dealing with economic regulation, is the only previous decision in modern Supreme Court history in which legislation was struck down under this permissive test.

52 391 U.S. 68 (1968).

53 391 U.S. 73 (1968).

54 401 U.S. 532 (1971).

55 See Justice Powell's majority opinion in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170 (1972), wherein he distinguishes *Labine* because of the strong state interest which it involved.

56 Cf. text accompanying notes 142-64 infra.

57 405 U.S. at 665. Contra, Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968), disposing of an argument that motherhood might be asserted fraudulently, stated:

> That problem, however, concerns burden of proof. Where the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock.

The *Stanley* majority suggested that the burden of proof be borne by the putative father. 405 U.S. at 657 n.9. As to the problem of locating the unwed father, the Court noted the availability of the usual means of service and stated that those who did not respond could not be heard to complain that they did not partake in the custody proceeding. Id. The same logic applies to those who have so disassociated themselves from the family unit that they cannot be located by such means.

58 405 U.S. at 665. But see text accompanying notes 146, 152-55, 166-70 infra.

occupy a valued position in our society.[59] Additionally, the Chief Justice noted that classification schemes need not be so perfect as to include the unusual situation in order to comply with equal protection mandates[60] and that the barrier to Stanley and those in his position was not insurmountable since the father may legitimate his position vis-a-vis his child.[61] Although the dissent's arguments are rebuttable,[62] the majority would have had great difficulty in concluding that there was no reasonable basis to uphold the Illinois statute under a traditional equal protection analysis.[63] It is most probable that the majority realized that the statute would be sustained under this permissive standard and, therefore, wished to avoid evaluating the Illinois procedure by this test.

However, the majority's concern for the rights of putative fathers was not strong enough to motivate the Court to apply the strict scrutiny of the compelling state interest test to the Illinois statute. This test applies in two situations: where a "suspect" classification or a "fundamental" personal right is involved. At the time *Stanley* was decided, neither discrimination based on sex nor on illegitimacy had been accorded the status of a suspect category[64] and preservation of the integrity of the family unit had yet to be enunciated as a fundamental right.[65] Although the *Stanley* Court itself declined explicitly to denote either the interest of a father in his child or the interest of preserving the family unit as "fundamental" within an equal protection framework, the majority, nevertheless, reached virtually the same result in the course of its procedural due process analysis. Balancing, as part of that analysis, the precise nature of the governmental function versus the private interest involved,[66] the Court stated that the interest of a man in the children he has sired and raised warrants deference

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[59] 405 U.S. at 664. See also Labine v. Vincent, 401 U.S. 532, 538 (1971):

> The social difference between a wife and a concubine is analogous to the difference between a legitimate and an illegitimate child. One set of relationships is socially sanctioned, legally recognized, and gives rise to various rights and duties. The other set is illicit and beyond the recognition of the law.

Contra, see text accompanying notes 161-64, 172-79 infra.

[60] 405 U.S. at 666. Accord, e.g., Railway Express Agency Inc. v. New York, 336 U.S. 106, 110 (1949).

[61] 405 U.S. at 664. The importance of this factor in relation to an equal protection claim involving illegitimacy was also noted by the Supreme Court in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 171 (1972) and Labine v. Vincent, 401 U.S. 532, 539 (1971). But see 405 U.S. at 647-49; text accompanying notes 146-47, 193-94 infra.

[62] See notes 57-59 supra.

[63] E.g., Justice Brennan's cogent refutation of any rational basis supporting the Louisiana inheritance scheme which discriminated against illegitimates was not accepted by a majority of the Court in Labine v. Vincent, 401 U.S. 532, 555-56 (1971) (Brennan, J. dissenting). Although the Supreme Court found no rational bases for an Idaho probate law which discriminated against women, Reed v. Reed, 404 U.S. 71 (1971), or for wrongful death statutes, Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968), and more recently a workmen's compensation scheme, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), all of which discriminated against illegitimacy, Chief Justice Burger's dissent, see text accompanying notes 57-61 supra, would appear to indicate that the Illinois custody scheme, like the statutes in *Labine*, was thought to be supported by considerations sufficiently substantial to sustain it under a rational basis equal protection analysis.

[64] See text accompanying notes 51-54 supra.

[65] See text accompanying notes 51-54 supra.

Preservation of the integrity of the family unit has been accorded the treatment of a "fundamental right" only when it has arisen in conjunction with another strongly protected constitutional interest, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy); Meyer v. Nebraska, 262 U.S. 390 (1923) (freedom of speech), or where basic notions of decency were involved, e.g., Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of convicts). Note that in Dandridge v. Williams, 397 U.S. 471 (1970), the majority's opinion required that a fundamental right be a constitutionally protected one, but in a later case, the Court did not specifically enunciate such a requirement for a fundamental right. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[66] 405 U.S. at 650. See text accompanying notes 31-39 supra.

and protection,[67] and noted that the Supreme Court has "frequently emphasized the importance of the family,"[68] whether legitimized by marriage or not.[69] The majority concluded that Stanley's interest in retaining custody of his children was "cognizable and substantial"[70] and that a putative father was constitutionally entitled to a hearing of fitness before he could be denied such custody.

One possible reason for the *Stanley* Court's refusal to recognize preservation of the family unit as a fundamental right in an equal protection context can be found in analyzing the Supreme Court's opinion in *Weber v. Aetna Casualty & Surety Co.*,[71] which was decided shortly after *Stanley*. *Weber* is the strongest indication yet of the Court's recent impatience with the strict dichotomy of the rational basis/compelling interest tests and represents what could be the beginnings of an attempt to devise a more flexible equal protection standard.

Justice Marshall's dissent in *Dandridge v. Williams*[72] represents the first advocacy of restructuring equal protection analysis. Two years later, in *Eisenstadt v. Baird*,[73] the Court, while purporting to apply the rational basis test to a Massachusetts statute prohibiting distribution of contraceptives to unmarried individuals, in reality employed a test midway between rationality and compelling interest.[74] Finally, in *Weber*, the Supreme Court, faced with a Louisiana statute discriminating against illegitimate children in actions to recover workmen's compensation benefits, took a more definite stand on the equal protection issue. After first reviewing the rational basis and compelling interest tests, the Court postulated a hybrid of these two tests as the proper standard. Justice Powell, writing for the majority in an eight-one decision, stated:

> The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?[75]

Weber provides the most direct statement to date of the Supreme Court's desire to avoid being locked into a choice between two rigid tests in adjudicating every equal protection claim brought before the Court. In deciding *Stanley* the Court may have relied upon due process grounds as a convenient alternative to this unsatisfactory choice. From an academic standpoint, application of the *Weber* test would have been preferable to the Court's evasion of the equal protection issue. While the Court's reasons for declining to apply the new analysis are unclear, it may be surmised that at that time a majority of the Justices felt uncomfortable with the new test or did not consider *Stanley* an appropriate vehicle for its pronouncement.

The core of the *Stanley* decision remains the due process mandate that a constitutionally protected interest may not be abridged without a hearing on the

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67 Id. at 651.

68 Id., citing May v. Anderson, 345 U.S. 528, 533 (1953); Kovacs v. Cooper, 336 U.S. 77, 95 (1949); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

69 405 U.S. at 651-52, citing Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968). See also Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

70 405 U.S. at 652.

71 406 U.S. 164 (1972).

72 397 U.S. 471 (1970). Justice Marshall stated that, rather than attempting to define a fundamental right, the Court should concentrate on "the character of the classification in question, the relative importance to the individual in the class discriminated against of the government benefits that they do not receive, and the asserted state interests in support of the classification." Id. at 520-21.

73 405 U.S. 438 (1972).

74 In an unusual analysis, the court intensively scrutinized and then discounted the purposes for the law which were advanced by the State.

75 406 U.S. 164, 173 (1972).

determinative factors underlying the statutory scheme; when violative of this rule, procedure by presumption cannot stand. Although the Illinois formulation that unwed fathers are presumed unfit is not the law in the majority of American jurisdictions, nonetheless, putative fathers in these states also are handicapped in that they are presumed "less fit."[76] This presumption is generally translated into procedural barriers which, under the *Stanley* rationale, are suspect. While the presumption of "less fitness", unlike that of "unfitness", is not a complete bar to custody, its application nonetheless deprives the unwed father of meaningful consideration in custody dispositions.[77] New York provides a good example of the problems in this area.

III. APPLICABLE NEW YORK LAW

A. General Principles

In New York, as in most American jurisdictions,[78] custody dispositions[79] for out-of-wedlock children are governed by two principles: the Best Interests Doctrine[80] and a maternal preference rule.[81] Under this latter principle, unless first proven to be unfit as a custodian,[82] "the mother has the right to custody of an illegitimate child as against the father, though the father has the right to custody as against a stranger."[83] Thus, in these jurisdictions, Peter Stanley, in the absence of a finding of his unsuitability as a parent, would have succeeded to custody of his children upon the death of the mother.[84]

However, in the more common situation in which the mother is alive and desires custody, the application of the maternal preference rule can foreclose the putative father's claim to custody as completely as the discredited Illinois law.[85] For, in

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[76] See text accompanying notes 18-22 supra.

[77] See note 19 supra.

[78] See note 18 supra.

[79] The out-of-custody parent may contest custody by bringing a writ of habeas corpus, N.Y. Dom. Rel. Law § 70 (McKinney 1964), or by petition and order to show cause, id. § 240. The proceeding may be initiated in either the Supreme Court or the Family Court. N.Y. Fam. Ct. Act § 651 (McKinney Supp. 1972). The procedure is the same for both the married and the out-of-wedlock parent.

[80] Meredith v. Meredith, 272 App. Div. 79, 82, 69 N.Y.S.2d 462, 465 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947), wherein the court stated:

> When the question of custody of [illegitimate] children is brought before this court by habeas corpus, it is the duty of the court to look solely to their welfare and decide accordingly.

[81] The term "maternal preference rule" is herein used to denote the rule by which the mother has a prima facie right and the father a secondary right to custody of an illegitimate child. See text accompanying notes 82-3 infra.

[82]

> The proper statement of the rule is that the mother of an illegitimate child is prima facie entitled to its custody and, when she is a proper and suitable person, the court will award its custody to her as against the father or anyone else.

Meredith v. Meredith, 272 App. Div. 79, 82, 69 N.Y.S.2d 462, 465 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947). Accord, In re Hawthorne, 146 Pa. Super. 20, 21 A.2d 521 (1941); Wade v. State, 39 Wash.2d 744, 238 P.2d 914 (1951).

[83] Meredith v. Meredith, 272 App. Div. 79, 82, 69 N.Y.S.2d 462, 465 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947).

[84] See, e.g., Human v. Hyman, 164 Pa. Super. 64, 63 A.2d 447 (1949).

[85] The putative father may be deprived of consideration for custody even if the mother does not want to care for the child, for the unwed mother is permitted to unilaterally release the illegitimate for adoption without even notifying the putative father. See note 22 supra.

contrast to proceedings for custody of legitimate children where the parents appear as equals before the court and receive concurrent evaluation, with the best interests of the child the sole factor of concern,[86] the putative father is subjected to a bifurcated procedure.[87] To preserve the unwed mother's primacy of right, initially only her fitness is adjudicated. Once her suitability is established, she is awarded custody and all inquiry is ended; as in *Stanley*, "the unwed father's claim of parental qualification is avoided as 'irrelevant'."[88] The father's qualifications are considered by the court only if there is a finding of maternal unfitness.[89] Thus, a judicial determination of maternal fitness is a complete bar to a comparison of the custodial suitability of the father relative to the mother, the balancing process which the Best Interests Doctrine makes determinative of custody.

Cornell v. Hartley[90] provides an excellent example of the injustice that can result from such a procedure. The court awarded the mother custody holding, "the petitioner [father] has failed to demonstrate to my satisfaction that the respondent [mother] is not a proper or suitable person to have the custody of her illegitimate daughter."[91] In sharp contrast to the showing of instability and indiscretions on the part of the unwed mother in her relation with her child, the putative father was acknowledged to "sincerely [love] his daughter," be "genuinely concerned for her welfare" and "quite capable of providing an adequate home" for her if given the opportunity.[92] However, these factors were considered by the court *only* with respect to granting the father visitation privileges. One commentator has stated that had the case been adjudicated in accordance with the rules and procedures applicable to the legally sanctioned family, the unwed father would have prevailed in the custody decision.[93] However, because of the child's illegitimate status, a stable, loving father-daughter relationship was terminated without any meaningful consideration of the father's qualifications.

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86 N.Y. Dom. Rel. Law § 70 (McKinney Supp. 1970) (see text accompanying note 183 infra); Bunim v. Bunim, 298 N.Y. 391, 83 N.E.2d 848 (1949); Sheil v. Sheil, 29 App. Div. 2d 950, 289 N.Y.S.2d 86 (2d Dep't 1968); Ullman v. Ullman, 151 App. Div. 419, 135 N.Y.S. 1080 (2d Dep't 1912).

87 It is unclear from what statutory basis the New York courts have derived the unwed mother's prima facie right to custody and the procedural disadvantages of the putative father which it engenders. See Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. Fam. Law 1, 25 (1971).

88 405 U.S. at 650.

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> Whether the [mother's] misconduct is the result of mental weakness or inherent wickedness, obviously she is not a proper and suitable person to have custody of the infant.
>
> The next question is: Bearing in mind that the primary consideration is the welfare of the infant, was the court justified in awarding custody to [the father].

Meredith v. Meredith, 272 App. Div. 79, 85, 69 N.Y.S.2d 462, 468 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947).

90 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967). See also Strong v. Owens, 91 Cal. App. 2d 336, 205 P.2d 48 (1949); Mixon v. Mize, 198 So.2d 373 (Fla. Dist. Ct. App. 1967); Norcia v. Richard, 32 App. Div. 2d 656, 300 N.Y.S.2d 608 (2d Dep't 1969); Roe v. Doe, 58 Misc. 2d 757, 296 N.Y.S.2d 865 (Fam. Ct. 1968); Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965); In re Hawthorne, 146 Pa. Super. 20, 21 A.2d 521 (1941).

91 Cornell v. Hartley, 54 Misc. 2d 732, 737, 283 N.Y.S.2d 318, 323 (Fam. Ct. 1967).

92 Id. at 734, 283 N.Y.S.2d at 320.

93 Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. Fam. Law 1, 29 (1971). The *Cornell* court itself states:

> While the welfare of the child is paramount and indeed the only proper consideration for the determination of the custody of a child whether legitimate or illegitimate ... nevertheless, in the case of an illegitimate child the rules for making that determination are different than in the case of a legitimate child.

54 Misc. 2d at 734, 283 N.Y.S.2d at 320 (Fam. Ct. 1967).

B. Judicial Attempts at Modification of the Maternal Preference Rule

New York courts have not been totally insensitive to the problems engendered by a maternal preference rule. Motivated by concern for the welfare of the illegitimate who is injured when his best interests must compete with the mother's primacy of right,[94] some courts have attempted to elevate the Best Interests Doctrine to a position of predominance at the expense of the mother's prima facie right to custody. A necessary corollary of increasing the emphasis on the child's best interests in selecting a custodian is a more equitable consideration of the father as a potential caretaker.

In their attempts to give proper pre-eminence to the Best Interests Doctrine the New York courts have developed two distinct approaches, one moderate, the other radical. Under the moderate approach, used in the *Lewisohn v. Spear*[95] line of cases,[96] the courts continued to speak of adherence to the maternal preference rule, but ameliorated the effect of the rule by including a consideration of the father's suitability in the initial stage of the proceedings. While purporting to first examine the mother's fitness alone, these courts also took cognizance of the father's qualifications; when these were superior, the vague standards of "proper" and "suitable" used to assess maternal fitness were manipulated to reach the desired result.[97] In effect these courts have held the mother to a higher standard of fitness in the face of a qualified putative father.

A more radical approach was taken by the courts in *Mahoff v. Matsoui*[98] and *Godinez v. Russo*,[99] where the primacy of the unwed mother was specifically abandoned. The notion of parental property rights in the child was rejected "except as [such rights] are consistent with the interest of the child,"[100] and retention of the prima facie right in the natural mother discredited as "a continuation of a stigma which attaches to an illegitimate child, . . . patently unfair both to the child and to the Family Court."[101] Instead, these courts held that the same principle, that of looking solely to the child's best interests, which controls in custody dispositions for legitimate children,[102] applied to illegitimates as well.

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[94] See Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965). Cf., e.g., Strong v. Owens, 91 Cal. App. 2d 336, 205 P.2d 48 (1949); Norcia v. Richard, 32 App. Div. 2d 656, 300 N.Y.S.2d 608 (2d Dep't 1969), aff'd sub nom. Anonymous v. Anonymous, 26 N.Y.2d 740, ___N.E.2d ___, 309 N.Y.S.2d 40 (1970).

[95] 174 Misc. 178, 20 N.Y.S.2d 249 (Sup. Ct. 1940).

[96] See Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. Fam. Law 1, 26-28 (1971).

[97] Id. at 26. See Application of Virginia Norman, 26 Misc. 2d 700, 205 N.Y.S.2d 260 (Sup. Ct. 1960); Kessler v. Wehnert, 114 N.Y.S.2d 598 (Sup. Ct. 1952). The statement in Meredith v. Meredith, 272 App. Div. 79, 85, 69 N.Y.S.2d 462, 469 (2d Dep't), aff'd mem. 297 N.Y. 692, 77 N.E.2d 8 (1947) (emphasis added) that "[s]urely, the child will fare *better* with her father than with her mother," is indicative of the consideration given the putative father under the *Lewisohn* approach.

[98] 139 Misc. 21, 247 N.Y.S. 112 (Sup. Ct. 1931).

[99] 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. 1966).

[100] Mahoff v. Matsoui, 239 Misc. at 22, 247 N.Y.S. at 114. Accord, Lewisohn v. Spear, 174 Misc. 178, 20 N.Y.S.2d 249 (Sup. Ct. 1940); In re Hawthorne, 146 Pa. Super. 20, 21 A.2d 521 (1941). Cf. Anonymous v. Anonymous, 34 App. Div. 2d 942, 312 N.Y.S.2d 348 (1st Dep't 1970).

[101] Godinez v. Russo, 49 Misc. 2d 66, 68, 266 N.Y.S.2d 636, 639 (Fam. Ct. 1966). Note that *Godinez* speaks only in terms of fairness to the child and does not reach the equal protection issue. But see the dissent in Labine v. Vincent, 401 U.S. 532, 549 (1971), which would probably consider the different rules for legitimate and illegitimate children as a denial of equal protection for the latter.

[102] N.Y. Dom. Rel. Law § 70 (McKinney Supp. 1970), quoted in text accompanying note 183 infra.

> [T]he proper standard is that which is enumerated in section 70 of the Domestic Relations Law ... regardless of the manner of birth of the child involved.[103] This Court should be granted the same privileges and powers in determining the custody of a child born out of wedlock as between the putative father and the natural mother as exist in the case of legitimate children.[104]

Despite court initiated attempts to liberalize custody proceedings involving illegitimates, represented by the *Lewisohn* and *Godinez* approaches, reliance on the maternal preference rule to foreclose the custody rights of the putative father is still a reality in New York. For example, *Mahoff* has been widely cited, but only for the proposition that unwed fathers may be awarded custody,[105] rather than for its evenhanded treatment of the parents.[106] *Cornell v. Hartley*,[107] the leading post-*Godinez* case, refused to consider the putative father's parental suitability and represents a return to the strict standard of maternal preference. *Cornell* and its progeny[108] reject even the moderate approach of *Lewisohn* which, although retaining a degree of preference for the natural mother,[109] still permitted some flexibility in the custody determination. Since the *Lewisohn-Godinez-Cornell* conflict has not yet been reviewed by the New York appellate courts,[110] these differing approaches continue to vie for adherence in current custody decisions.[111]

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103 Cf. DeSylva v. Ballentine, 351 U.S. 570 (1956) (interpreting "children" under California law to include illegitimates who had been acknowledged by their father).

104 Godinez v. Russo, 49 Misc. 2d 66, 68, 266 N.Y.S.2d 636, 639 (Fam. Ct. 1966). Cf. Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S.2d 792 (Fam. Ct. 1968) (visitation rights for the putative father).

Godinez maintained that since the Family Court has been endowed with "special facilities and powers [to obtain] a deep insight into the needs of the child as well as the *relative* financial, social and emotional abilities" of the parents seeking custody, it is especially important that it be given the extensive flexibility and power in custody determinations for illegitimates which presently exist for legitimate children. 49 Misc. 2d at 68, 266 N.Y.S.2d at 639 (emphasis added). These attributes of the Family Court were also noted in 26 Albany L. Rev. 335, 339 (1962). Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967), accepted *Godinez* only to the extent of its discussion of the attributes of the Family Court and relied on the case to argue for greater investigatory powers for that court.

105 E.g., Application of Virginia Norman, 26 Misc. 2d 700, 205 N.Y.S.2d 260 (Sup. Ct. 1960); Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967). The court in Mahoff v. Matsoui, 139 Misc. 21, 247 N.Y.S. 112 (Sup. Ct. 1931) divided custody between the mother and the father.

106 Perhaps this is because of the unusual fact pattern in *Mahoff*. The parents had lived together for ten years in Russia, Turkey and the United States, and it was debatable whether a valid common law marriage had been established. The court declined to rule on this question since a finding would either render the mother's present marriage bigamous or bastardize the child, and held that the same rule would control the custody disposition regardless of whether or not the parents were married. 139 Misc. at 22, 247 N.Y.S. at 114.

107 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967). See text accompanying notes 90-93 supra.

108 E.g., Norcia v. Richard, 32 App. Div. 2d 656, 300 N.Y.S.2d 608 (2d Dep't 1969) aff'd sub nom. Anonymous v. Anonymous, 26 N.Y.2d 740, ___N.E.2d ___, 309 N.Y.S.2d 40 (1970); Roe v. Doe, 54 Misc. 2d 757, 296 N.Y.S.2d 865 (Fam. Ct. 1968).

109 Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. Fam. Law 1, 28 (1971).

110 Nor has the equal protection issue for putative fathers and illegitimates inherent in the different rules employed by New York courts for legitimate and illegitimate children been ruled on by the appellate courts.

111 E.g., Norcia v. Richard, 32 App. Div. 2d 656, 300 N.Y.S.2d 608 (2d Dep't 1969), aff'd sub nom. Anonymous v. Anonymous, 26 N.Y.2d 740, ___N.E.2d ___, 309 N.Y.S.2d 40 (1970), took the *Cornell* stance on this question. However, the *Norcia* court stated:

> [W]e must conclude that the welfare of such a very young child will be better served by allowing him to remain with his mother, particularly where as at bar, the learned Trial Justice made no finding that the mother ... was an unfit custodian.

Id. at 657, 300 N.Y.S.2d at 610, thus implying that the lower court had employed a mode of analysis akin to that of *Godinez*.

IV. APPLICATION OF *STANLEY* TO NEW YORK LAW

A. Strict Application of the Maternal Preference Rule

The resurgence in *Cornell v. Hartley*[112] of traditional attitudes toward the placement of illegitimates serves to illustrate not only the precariousness of lower court attempts at reform, but also the procedural disadvantage at which the putative father continues to operate in states adhering to the New York maternal preference rule. Under such a rule, the unwed father is presumed "less fit" and, when the mother is determined to be a suitable custodian, is denied a hearing to rebut this presumption. Analogous to the holding in *Stanley*, a scheme such as this which deprives a father of the opportunity to have custody of his children without reference to his fitness as a parent, the very factor which the state itself deems fundamental, is repugnant to the due process clause.[113] Therefore, discrediting the New York-type presumption of "less fitness" mandates the replacement of the bifurcated hearing for custody of the illegitimate child with an integrated hearing in which the qualifications of both parents would be considered simultaneously.

Presently in New York, under the *Cornell* approach, in contrast to the alternative approaches advocated by the *Lewisohn v. Spear*[114] and *Godinez v. Russo*[115] lines of cases,[116] the unwed mother's prima facie right to custody dominates the custody hearing. Her qualifications *alone* are examined. The presumption of her fitness is strong and difficult to controvert.[117] Once the mother's suitability is established, she is awarded custody and all inquiry on the question is at an end. The father is thus denied custody without the court ever considering his ability to provide for his child's best interests. Under *Cornell*, a finding of maternal fitness is as effective a bar to adjudication of the putative father's parental qualifications as was the Illinois scheme invalidated by *Stanley*. Illinois sought to justify its failure to consider individually the determinative factor of fitness by arguing that all unwed fathers can reasonably be presumed to be unsuited to rear their children.[118] The *Stanley* Court rejected this rationale stating, "all unmarried fathers are not [unfit and neglectful]; some are wholly suited to have custody of their children,"[119] and held that each putative father must be afforded an opportunity for an individualized hearing on his parental qualifications.

In *Stanley*, a balancing of state versus private interests resulted in the conclusion that unwed fathers having sole custody of their out-of-wedlock children were entitled to due process when that parent-child relationship was threatened by state action under the Illinois "dependent children" statute.[120] It is apparent that the factors to be weighed and the ultimate balance to be struck are the same when putative fathers are threatened with loss of custody to the mother in a legal contest governed by a maternal preference rule. Both classes of fathers share the same constitutionally

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112 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967).

113 405 U.S. at 653 states:

> In Bell v. Burson, 402 U.S. 535 (1971), we found a scheme repugnant to the Due Process Clause because it deprived a driver of his license without reference to the very factor (there fault in driving, here fitness as a parent) that the State itself deemed fundamental to its statutory scheme.

114 174 Misc. 178, 20 N.Y.S.2d 249 (Sup. Ct. 1940).

115 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. 1966).

116 See text accompanying notes 95-111 supra.

117 E.g., Norcia v. Richard, 32 App. Div. 2d 656, 300 N.Y.S.2d 608 (2d Dep't), aff'd sub nom. Anonymous v. Anonymous, 26 N.Y.2d 740, ___N.E.2d ___, 309 N.Y.S.2d 40 (1970).

118 405 U.S. at 653 and n.5, citing the Illinois brief.

119 Id. at 654.

120 See note 25 and text accompanying notes 30-39 supra.

protected private interest, the preservation of family relationships.[121] The valid broad state end, protection of the welfare of its minor children[122] by providing fit custodians for them, is also the same. In both situations the isolated state interest is the expediency of maintaining summary procedures for judicial determination of the unwed father's right to custody of his children.[123] In *Stanley*, the Illinois concern for expediency was not deemed to be of overriding significance, since the summary procedures impaired the more general state goal by perfunctorily separating children from potentially fit fathers.[124] Likewise, the universal policy of serving the best interests of the illegitimate is frustrated by judicial adherence to a maternal preference rule and its presumption-tied procedures which foreclose examination of the unwed father's qualifications and prevent selection of the more qualified parent as custodian. Therefore, New York's concern for expediency merits no greater consideration than that given in *Stanley* to Illinois' reliance on this factor.[125]

Even if unwed fathers were seldom as fit as the mother to care for the illegitimate child, the state's argument of administrative inconvenience in discarding presumption for the procedural mechanism necessary to disclose the "unusual" father would be unavailing. The *Stanley* Court stated:

> [T]he Bill of Rights . . . and the Due Process Clause . . . were designed to protect the fragile values of a vulnerable citizenry from [government's] overbearing conern for efficiency. . . . Procedure by presumption is always cheaper and easier than individualized determination. But when . . . the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly [jeopardizes] important interests of both parent and child. It therefore cannot stand.[126]

Furthermore, the increased burden on the state's judicial machinery would be minimal. The number of hearings should not increase; a slight change in the format of the hearing should be all that is necessary. When the putative father contests custody, he is already before the court and the necessary information concerning his suitability may be readily ascertained and examined concurrent with the court's investigation of the mother's fitness.[127] Rejection of the presumption of "less fitness" will not require as

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121 See text accompanying notes 32-34 supra.

122 405 U.S. at 652. See text accompanying notes 35, 80 supra.

123 See text accompanying notes 38, 76-77 supra.

124 See text accompanying notes 38-39 supra.

125 The court in Baker v. Baker, 81 N.J.Eq. 135, 136, 85 A. 816, 817 (1913), in the context of visitation privileges, expressed sympathy for the position of the putative father and the illegitimate and proposed that the State should take greater care to assure the welfare of an illegitimate than it would with a legitimate child:

> [I]t may well be that the right of this court to interfere would be a stronger right in case of illegitimate children of parties living separate than in the case of legitimate children known and acknowledged to be such, who might be expected possibly to have greater care than might be exercised in the case of the illegitimate.

Baker thus suggests a strong state interest in a procedure which assures that, particularly for illegitimates, the more suitable parent prevail; procedure by presumption only for the out-of-wedlock child is inimical to this goal.

126 405 U.S. at 656-57. See also Reed v. Reed, 404 U.S. 71, 76 (1971):

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.

127 E.g., Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967) wherein the father's custodial qualifications were before the court, but, once the mother was adjudicated fit, were considered only as to the question of visitation privileges.

great a change in New York judicial procedure as the reformation of the Illinois scheme mandated by *Stanley*.

Even if the procedural changes themselves or increased litigation by putative fathers encouraged by recognition of their rights under the new procedures resulted in a large increment in the number of hearings, the arguments of state inconvenience would still be unconvincing. There are vast numbers of hearings for legitimate children since custody is generally in issue; yet the courts take the time to examine both parents in individualized proceedings. To insist upon expediency only for illegitimates is to continue and sanction society's cavalier approach to its out-of-wedlock population and the atavistic reasoning which once made filius populi the rule.[128]

Therefore, the procedures intrinsic in a strict maternal preference rule do not comport with the due process requirements enunciated by the Supreme Court in *Stanley*. And, it is submitted, under the Court's reasoning in that decision, the putative father's rights in custody proceedings between the unwed parents warrant the protection of the due process clause. Thus, as with the Illinois scheme, the strict maternal perference rule, illustrated in New York by the *Cornell* line of cases, cannot stand under the *Stanley* mandate.

Applying the *Stanley* reasoning, once it is established that the strict maternal preference rule is a denial of due process, it follows that the implementation of such a preference is also a denial of equal protection in that the putative father is deprived of the due process accorded all other parents in custody determinations.[129] However, any straightforward equal protection analysis of the maternal preference rule would present much of the same difficulties which seem to have made the *Stanley* Court reluctant to engage in more traditional equal protection analysis.[130] Under the "rational basis" test, the identification, natural bonds of affection, social value of legally-sanctioned families, and surmountable barrier factors raised by the Chief Justice's dissent[131] would combine with additional factors such as the Tender Years Doctrine, visitation problems, and moral reprehensibility of the unwed father,[132] to provide a reasonable basis to uphold the strict maternal preference rule.[133] On the other hand, while it is

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128 See text accompanying notes 10-11 supra.

129 See text accompanying note 45 supra. See also Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 169-70 (1972) where the Supreme Court states that not only the complete denial of a right, but also the relegation to a less favorable position in regard to that right on the basis of illegitimacy may be violative of the equal protection clause. There, the Court found no rational basis for a law which disadvantaged illegitimate offspring in workmen's compensation recoveries. Id. at 175-76.

130 See text accompanying notes 48-75 supra.

131 See text accompanying notes 57-61 supra.

132 See text accompanying notes 142-60 infra for a discussion of the role of these factors in New York custody decisions. Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 489-500 (1967) posits the uncertainty of paternity, the desire to discourage promiscuity, protection of the legally sanctioned family unit, the tenuous family relationship between the illegitimate and putative father, the father's opportunity to eradicate any disadvantages by legitimating the child and societal prejudice as the unstated rationales underlying laws dealing with illegitimacy.

133 See, e.g., Lewis v. Lutheran Social Services, 47 Wis.2d 420, 178 N.W.2d 56 (1970), vacated sub nom. Rothstein v. Lutheran Social Services, 92 S.Ct. 1488 (1972) (remanded to state courts for reconsideration in light of *Stanley*). See also note 63 supra for a discussion of the Supreme Court's treatment of related issues.

An examination of decisions such as Cornell v. Hartley, 54 Misc. 2d 732, 734, 283 N.Y.S.2d 318, 320 (Fam. Ct. 1967), demonstrates the reliance of New York judges on these factors to justify different rules for custody determinations involving illegitimates.

> [S]pecial attention is given to the fact that the continued relationship of the child to parents who were never married involves different considerations than those with respect to children of parents . . . once married. . . .

People v. Ivanova, 14 App. Div. 2d 317, 320, 221 N.Y.S.2d 75, 79 (1st Dep't 1961) (Breitel, J., dissenting).

clear that the putative father would fare better if the "compelling interest" test were applicable to his situation,[134] the Supreme Court in *Stanley* specifically declined to bring preservation of the family unit within the ambit of strict scrutiny.[135]

Most probably the newly enunciated test in *Weber v. Aetna Casualty & Surety Co.*[136] provides the only means for invalidating the maternal preference rule under a strictly equal protection analysis. However, the state interests and social considerations involved in custody determinations are far more complex than those involved in the context of the workmen's compensation benefits which were at issue in *Weber.*[137] This complexity, plus the present lack of judicial precedent employing the new standard, make the outcome of the application of the *Weber* test to the maternal preference rule impossible to predict.

B. Should the Putative Father Be Put on a Par with the Unwed Mother

Given the fact that the strict maternal preference rule as epitomized by *Cornell v. Hartley*[138] does not comport with *Stanley*, two other approaches remain possible: the complete equality advocated by *Godinez v. Russo*,[139] or the modified maternal preference rule exemplified by *Lewisohn v. Spear.*[140] Since the Supreme Court in *Stanley* did not require the elimination of all presumptions, but only that such presumptions as exist do not preclude adjudication of the factors determinative of the rights in issue,[141] both *Godinez* and *Lewisohn* comply with the *Stanley* mandate. An examination of the presumption of "less fitness" which is preserved in *Lewisohn*, albeit in a moderate form, is in order before evaluating the relative merits of these two approaches.

The weakness of the presumption that a putative father is less fit is revealed by an examination of the pseudo-sociological reasoning most often used to justify it. The most important and prevalent justification given is the Tender Years Doctrine.[142] Based upon the traditional notions of woman as mother and homemaker,[143] this doctrine, in its most common formulation, is stated as:

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134 See Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. Fam. Law 1, 40-42 (1971). The putative father would most likely prevail in an equal protection argument, as did the soldier in Carrington v. Rash, 380 U.S. 89 (1965), if the "compelling interest" test were employed.

135 See text accompanying notes 64-75 supra.

136 406 U.S. 164 (1972).

137 See text accompanying notes 71-75 supra.

138 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967). See text accompanying notes 90-93, 117-19 supra.

139 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. 1966). See text accompanying notes 98-104 supra. Another approach, expanding that taken in *Godinez*, is the nullification of illegitimacy as a legal status. Only Arizona, Ariz. Rev. Stat. Ann. § 14-206(A) (1956), and Oregon, Ore. Rev. Stat. § 109.060 (1957), have enacted such statutes, Lippert, The Need for a Clarification of the Putative Father's Legal Rights, 8 J. Fam. Law 398, 401 (1968), and, at least in Oregon, they have not resulted in the equality of treatment which would be expected. Embick, The Illegitimate Father, 3 J. Fam. Law 321 (1963).

140 174 Misc. 178, 20 N.Y.S.2d 249 (Sup. Ct. 1940). See text accompanying notes 95-97 supra.

141 405 U.S. at 655, 656-58.

142 E.g., Norcia v. Richard, 32 App. Div. 2d 656, 300 N.Y.S.2d 608 (2d Dep't 1969), aff'd sub nom. Anonymous v. Anonymous, 26 N.Y.2d 740, ___N.E.2d ___, 309 N.Y.S.2d 40 (1970); Meredith v. Meredith, 272 App. Div. 79, 69 N.Y.S.2d 462 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947); Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967).

143 E.g., Gluckstern v. Gluckstern, 17 Misc. 2d 83, 158 N.Y.S.2d 504 (Sup. Ct. 1956), aff'd, 4 N.Y.2d 699, 151 N.E.2d 897, 171 N.Y.S.2d 90 (1958).

> [T]he mother may have been in fault and the father blameless, and yet the age or condition of the child may require a mother's care.... The child at tender age is entitled to have such care, love and discipline as only a good and devoted mother can usually give.[144]

The fact that the "fit" mother is not necessarily "a good and devoted mother," especially where the standards for a finding of unsuitability are strict,[145] is overlooked. Often it is not the father, but the unwed mother who abandons the home, with or without the couple's child,[146] or otherwise spurns the mate's attempts to fulfill his obligations to her and the child.[147] Additionally, the traditional role of mother as homemaker is undergoing rapid transformation as more and more women, whether by choice or necessity, pursue employment. Financial need makes this trend particularly prevalent among mothers who are separated from their mates. Thus, an award of custody to the mother does not assure the presence of daytime parental supervision for the child.[148]

A second and related justification for the presumption of less fitness is found in the "natural bonds of affection" perceived between the mother and child.[149] These bonds are considered so important that "[n]othing short of circumstances most unusual"[150] may permit adjudication to terminate completely the mother-child relation. An award of custody to the father with visitation privileges to the mother has often been viewed as an inadequate means of preserving the maternal relationship to the extent desired.[151] However, many cases contain dicta indicating a belief in the

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144 Ullman v. Ullman, 151 App. Div. 419, 424, 135 N.Y.S. 1080, 1083 (2d Dep't 1912).

145 For example, maternal fitness has been found despite proof that the unwed mother left the family unit three times and occasionally took the young illegitimate to bars, Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967), and evidence pointing to the mother's amorous affairs and use of narcotics, Norcia v. Richard, 32 App. Div. 2d 656, 300 N.Y.S.2d 608 (2d Dep't 1969), aff'd sub nom. Anonymous v. Anonymous, 26 N.Y.2d 740, ___N.E.2d ___, 309 N.Y.S.2d 40 (1970).

146 Meredith v. Meredith, 272 App. Div. 79, 69 N.Y.S.2d 462 (2nd Dep't) aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947); Application of Virginia Norman, 26 Misc. 2d 700, 205 N.Y.S.2d 260 (Sup. Ct. 1960); Kessler v. Wehnert, 114 N.Y.S.2d 598 (Sup. Ct. 1952); Mahoff v. Matsoui, 139 Misc. 21, 247 N.Y.S. 112 (Sup. Ct. 1931); Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967). See also Lavell v. Adoption Institute, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960).

147 Guardianship of LaRocca, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964); In Re Mark T, 8 Mich. App. 122, 154 N.W.2d 27 (1967); In Re Brennan, 270 Minn. 455, 135 N.W.2d 126 (1965); Anonymous v. Anonymous, 34 App. Div. 2d 942, 312 N.Y.S.2d 348 (1st Dep't 1970). Cf. Gwiszcz Appeal. 206 Pa. Super. 397, 213 A.2d 155 (1965).

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> Although the proposed living arrangement described by Mr. S would not have the organization one would expect in a home where there is both a mother and a father, as it would be necessary to hire housekeepers and to rely on family members for daytime supervision, this is not much different than the arrangement which prevails in many households where the mother works.... A home is not rendered unsuitable merely because there is not a permanent mother, or, for that matter, father figure in residence throughout the day.

In Re Mark T, 8 Mich. App. 122, 150-51, 154 N.W.2d 27, 41 (1967).

149 Cf. People v. Ivanova, 14 App. Div. 2d 317, 318, 221 N.Y.S.2d 75, 77 (1st Dep't 1961) (Breitel, J., dissenting); In Re Hawthorne, 146 Pa. Super. 20, 21 A.2d 521 (1941). But see cases cited in notes 152-55, 165-70 infra which postulate the existence of bonds of affection between the putative father and his child.

150 Mahoff v. Matsoui, 139 Misc. 21, 25, 247 N.Y.S. 112, 117 (Sup. Ct. 1931).

151 E.g., People v. Ivanova, 14 App. Div. 2d 317, 321, 221 N.Y.S.2d 75, 79 (1st Dep't 1961) (Breitel, J., dissenting); Golembewski v. Stanley, 205 Pa. Super. 101, 208 A.2d 49 (1965). Contra, Gwiszcz Appeal, 206 Pa. Super. 397, 213 A.2d 155 (1965), which overruled *Golembewski.* Gwiszcz Appeal is cited with approval by Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S.2d 792 (Fam. Ct. 1968).

Note that in practice when the unwed mother is being considered for visitation rights, she is not held to the high standard of fitness required of the putative father to be accorded this

value of the putative father-child relationship for the illegitimate.[152] Such a belief is inherent in the *Stanley* opinion.[153] *In Re Mark T*[154] notes the absence of any sociological data which would justify the assumption that an out-of-wedlock father is less able than the legitimate father to provide his child with a proper upbringing.[155] Yet, only the unwed father is subjected to a prejudicial presumption.

Third, there is a feeling among many judges that the putative father is more reprehensible than the unwed mother.[156] Thus one judge, in refusing visitation privileges to the putative father, spoke of subjecting the mother to "enforced continuance of [an immoral] relationship between the *unwilling* mother and the father."[157] Some judges feel that if the unwed father were accorded the same parental rights as the married father, "the flouting of public morality would be encouraged."[158] Illogically, the mother's voluntary participation in the "socially unacceptable" liaison is ignored, and, more importantly, the father is deprived of an equal opportunity to "atone for his sins" by actively meeting his responsibilities toward the child he has sired.

A final rationale postulated to support the presumption that the putative father is less fit is the valued position which lawful marital unions occupy in our society. Chief Justice Berger would have upheld the Illinois presumption in *Stanley* on this basis.[159] Some New York judges agree that the legal sanctity of the conjugal unit is a valid criterion for determining whether a father and mother should be treated equally in custody disputes.[160] However, the out-of-wedlock union is a social reality[161] and, in view of rising illegitimacy rates,[162] a growing phenomenon. Additionally, marriage today, as shown by the high divorce rates,[163] is no longer the stable, protective citadel

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privilege. E.g., Meredith v. Meredith, 272 App. Div. 79, 69 N.Y.S.2d 462 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947), wherein the mother was found unfit but nevertheless granted extensive visitation privileges.

[152] E.g., In Re Mark T, 8 Mich. App. 122, 154 N.W.2d 27 (1967); In Re Brennan, 270 Minn. 455, 134 N.W2d 126 (1965); Application of Virginia Norman, 26 Misc. 2d 700, 205 N.Y.S.2d 260 (Sup. Ct. 1960); Such dicta often arise in the context of a grant of visitation privileges to the putative father where the court discusses the love and values which the father may instill in the child. E.g., Baker v. Baker, 81 N.J.Eq. 135, 85 A. 816 (1913); Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S.2d 792 (Fam. Ct. 1968); Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967); Gwiszcz Appeal, 206 Pa. Super. 397, 213 A.2d 155 (1965).

[153] See note 38 supra.

[154] 8 Mich. App. 122, 154 N.W.2d 27 (1967), cited in *Stanley*, 405 U.S. at 654 n.7.

[155] Id. at 146, 154 N.W.2d at 39.

[156] Cf. id.

[157] People v. Ivanova, 14 App. Div. 2d 317, 321, 221 N.Y.S.2d 75, 79 (1st Dep't 1961) (dissenting opinion) (emphasis added).

[158] Meredith v. Meredith, 272 App. Div. 79, 89, 69 N.Y.S.2d 462, 472 (2d Dep't) (dissenting opinion), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947). Contra, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75 (1968).

[159] See text accompanying note 59 supra.

[160] See, e.g., People v. Ivanova, 14 App. Div. 2d 317, 320, 221 N.Y.S.2d 75, 79 (1st Dep't 1961) (dissenting opinion) and Cornell v. Hartley, 54 Misc. 2d 732, 734, 283 N.Y.S.2d 318, 320 (Fam. Ct. 1967), quoted at notes 133 and 93 supra respectively.

[161] In Re Mark T, 8 Mich. App. 122, 146, 154 N.W.2d 26, 39 (1967).

[162] See note 2 supra.

[163] In 1970 the divorce and marriage rates were 3.5 and 10.7 per thousand respectively. U.S. Census Bureau, Statistical Abstract of the U.S., 45, 48, Table 57 (1971). In other words, more than one in three marriages would fail, and the proportion of broken marriages is rising. Note that the Census Bureau statistic for divorce rate includes only divorces and annulments, and not separations.

> Substantial increases occurred for divorces in 1970. The provisional estimated annual total of divorces and annulments granted in the United States in 1970 was 715,000 and the divorce rate was 3.5 per 1000, representing an increase of 12% over the estimated number granted in 1969....

for raising children which it was once thought to be. In terms of permanance and assumption of conjugal duties, the difference between the lawful and "illicit" liaison may be merely a matter of compliance with legal ceremony.[164] To base maintenance of a presumption on this distinction is to rest it on quicksand.

Society is not yet ready to concede instinctive "natural bonds of affection" between putative father and child,[165] but there is some judicial acknowledgment that such ties are developed by contact in a family-like situation even if the parents are unmarried.[166] The United States Supreme Court has recognized substantial constitutional rights arising from both the legitimized[167] and unlegitimized[168] family. The *In Re Mark T* court, which noted in a survey of the law of custody that an "established family relationship is ordinarily to be preferred and protected,"[169] stated:

> The relationship of the child born out-of-wedlock with those who assume the parental role, putative father or otherwise, could well be the most important relationship in his life.... [I]t should not be subject to termination at the judicially unreviewable fiat of the mother and a placement agency.[170]

The court there was discussing the reviewability of a mother's unilateral release of an illegitimate child for adoption; the language is equally applicable to the present question, for a finding of maternal fitness creates a barrier to the putative father just as impenetrable as the "fiat of the mother."

Some New York proceedings, applying the rule adopted by *Godinez v. Russo*,[171] grant unwed parents the equality of treatment generally reserved for married couples. Even in the *Lewisohn v. Spear*[172] line of cases[173] the degree to which the "illicit" family relationships approximated that of the conventional family was an important factor: in evaluating sub silentio the putative father's suitability concurrently with and relative to that of the mother, the nature of the father-child relationship, the quality of the homelife and the stability which the father might afford the child was weighed in making a custody determination.[174]

> The upward trend in divorces began in 1963 with substantial gains since 1967.... Since 1967 the divorce rate has increased by 30%.

The World Almanac 86 (1972).

164 See Laugenour V. Fogg, 48 Cal. App. 2d 848, 120 P.2d 690 (1942); Baker v. Baker, 81 N.J.Eq. 135, 85 A. 816 (1913) (mother and father had two children, one born before the parents entered into a legally sanctioned marriage and the other afterward); In re Anonymous, 12 Misc. 2d 211, 172 N.Y.S.2d 186 (Sup. Ct. 1961); Mahoff v. Matsoui, 139 Misc. 21, 247 N.Y.S. 112 (Sup. Ct. 1931) (unclear whether or not a valid common law marriage had been established). Cf. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (decedent and the woman with whom he lived cared for decedent's four legitimate and one illegitimate children).

165 Contra, In Re Brennan, 270 Minn. 455, 462, 134 N.W.2d 126, 131 (1965) ("Sincere concern which springs from a sense of responsibility to his own flesh and blood"). See Comment, Conflicting Custody Decrees: In Whose Best Interests?, 7 Duquesne L. Rev. 262, 265 (1968).

166 See In Re Mark T, 8 Mich. App. 122, 154, 154 N.W.2d 27, 43 (1967) and Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. Fam. Law 1, 42 (1971), both proposing a different legal status for the putative father who has established a stable family relationship with his child. But see Anonymous v. Anonymous, 56 Misc. 2d 711, 714, 289 N.Y.S.2d 792, 795 (Fam. Ct. 1968), which recognized that a putative father, just as a legitimate father, may have strong feeling for his child without such prolonged contact.

167 E.g., Griswold v. Connecticut, 381 U.S. 479 (1965).

168 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); *Stanley*; Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

169 8 Mich. App. 122, 141, 154 N.W.2d 27, 36 (1967).

170 Id. at 147, 154 N.W.2d at 39.

171 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. 1966).

172 174 Misc. 178, 20 N.Y.S.2d 249 (Sup. Ct. 1940).

173 See text accompanying notes 95-97, 109 supra.

174 Meredith v. Meredith, 272 App. Div. 79, 69 N.Y.S.2d 462 (2d Dep't), aff'd mem., 297 N.Y. 692, 77 N.E.2d 8 (1947); Application of Virginia Norman, 26 Misc. 2d 700, 205 N.Y.S.2d

Apart from *Godinez*, which approaches the issue from the vantage point of the child rather than the parent,[175] the clearest legal recognition of the quasi-conventional family grouping is Section 230 of the California Civil Code.[176] This statute permits adoption of an illegitimate child by its putative father where a de facto parent-child relationship has been established; viewed otherwise, the statute recognizes a common law marriage only as it relates to the parent-child affiliation. The statute's three requirements, public acknowledgment by the father of paternity,[177] acceptance of the child into his family,[178] and treatment of the child as if it were legitimate,[179] have been construed liberally.

In sum, an examination of the sociological assumptions used to support the presumption against the putative father in custody dispositions reveals their weaknesses and lack of universal application. The out-of-wedlock father may compare favorably with all other custodians in terms of the care which he may afford his child. It is time for recognition of the putative father's possible custodial suitability to emerge from the labyrinth of dicta and conflicting legal decisions and become settled law.

C. Suggested Reform of the Maternal Preference Rule

The unsanctioned conjugal unit is a social reality which cannot be ignored by the law. The rising rate of illegitimacy[180] portends increasing numbers of inter-parental custody disputes involving out-of-wedlock children. Lest society stagnate in a modern day version of the doctrine of filius populi,[181] a fair and rational method for handling custody contests between unwed parents must be developed. Not only the implications of *Stanley* but also social reality and sensitivity to the plight of the putative father demand modification of the maternal preference rule.[182]

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260 (Sup. Ct. 1960) (stability is second only to love in a parent-child relationship); Kessler v. Wehnert, 114 N.Y.S.2d 598 (Sup. Ct. 1952); Mahoff v. Matsoui, 139 Misc. 21, 247 N.Y.S. 112 (Sup. Ct. 1931). Additionally, in New York the establishment of an informal family relationship has been enunciated as a key factor in awarding visitation privileges to the unwed father. E.g., Anonymous v. Anonymous, 56 Misc. 2d 711, 714, 289 N.Y.S.2d 792, 795 (Fam. Ct. 1968). See also Baker v. Baker, 81 N.J.Eq. 135, 85 A. 816 (1913). The court in In re Anonymous, 12 Misc.2d 211, 213, 172 N.Y.S.2d 186, 188 (Sup. Ct. 1958) stated:

> [Where the father has] acted as and lived with these children in the relationship of their father, supporting them in accordance with his means, ... there seems to be no reason why ... he should be deprived of at least seeing the two children toward whom he has undoubtedly demonstrated a great deal of love and attention.

175 49 Misc. 2d 66, 68, 266 N.Y.S.2d 636, 639 (Fam. Ct. 1966), quoted in part in text accompanying note 101 supra.

176 Cal. Civ. Code Ann. § 230 (West Supp. 1969).

177 In re Baird's Estate, 193 Cal. 336, 223 P. 974 (1924); In re Estate of Abate, 166 Cal. App. 2d 282, 333 P.2d 200 (1959).

178 In re Jones' Estates, 166 Cal. 108, 135 P. 288 (1913); In re Gird's Estate, 157 Cal. 534, 108 P. 499 (1910); Laugenour v. Fogg, 48 Cal. App. 2d 848, 120 P.2d 690 (1942).

179 This requirement is considered satisfied if the other two are fulfilled. Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. Fam. Law 1, 34 (1971).

180 See note 2 supra.

181 See text accompanying notes 10-11 supra.

182 The court in In Re Mark T, 8 Mich. App. 122, 146-47, 154 N.W.2d 27, 39 (1967) stated:

> [M]en and women ... live together as husband and wife without ceremonial marriage and have and raise children. The interests of these children and of fathers ... may not be ignored as if these people simply do not exist. The legal system of a society which ... [rejects] making all illegitimate children wards of the State both in law and in fact ... must expect to be confronted with custody disputes concerning such children and should have the capacity to decide such disputes on their merits.

The solution herein submitted is that the states specifically legislate applicability of the custody rule for legitimate children, exemplified by Section 70 of the New York Domestic Relations Law,[183] to custody disputes involving out-of-wedlock children. The pertinent portion of section 70 states:

> In all cases there shall be no prima facie right to the custody of the child in either parent, but the Court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

Many states already have comparable statutes for legitimate children,[184] and, as in New York, only enactment of an amendment defining "children" to encompass "all children regardless of manner of birth"[185] is necessary.

The suggested rule has been enunciated, independent of legislation, through courtroom initiative, notably in *Mahoff v. Matsoui*[186] and *Godinez v. Russo*.[187] However, the judicial experience has revealed that legislative action is needed. Sporadic and uncoordinated court attempts to liberalize custody rules for putative fathers have not been sufficient to establish lasting reform. The principle of parity for married and unmarried parents lay dormant during the thirty-five years between the *Mahoff* and *Godinez* decisions.[188] Moreover, the recent decisions in *Cornell v. Hartley*[189] and its progeny[190] demonstrate the resiliency of the maternal preference rule. Only legislation will effectively eradicate the ill-considered presumption of "less fitness" and assure the grant of procedural safeguards required by the due process clause.

Enactment of a constructive adoption statute for illegitimate parents, such as Section 230 of the California Civil Code[191] could, for the qualifying fathers, achieve the same results as modification of Section 70 of the New York Domestic Relations Law.[192] However, there are several serious disadvantages to this solution. For example, in the California scheme, the availability to the putative father of this statutory remedy may be frustrated by the mother. In *Adoption of Irby*[193] and *Guardianship of Truschke*[194] maternal refusal to continue association with the putative father precluded him from complying with the prerequisites to exercise the rights afforded by section 230. Also, such a statute would introduce an additional element of contention into the controversy: whether or not constructive adoption had been effected.[195] Eliminating the issue of effectuation of constructive adoption by prescribing definite

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183 N.Y. Dom. Rel. Law § 70 (McKinney 1964).

184 Cal. Civ. Code Ann. § 197 (West 1960); Mass Gen. Laws Ann. ch. 208 § 31 (1958); Mich. Comp. Laws Ann. § 722.24-.25 (Supp. 1972); Minn. Stat. Ann. § 518.17 (Supp. 1972); N.J. Stat. Ann. § 9:2-4 (1960); Ohio Rev. Code Ann. § 3109.03-.04 (Page's 1953); Pa. Stat. Ann. Tit. 48 § 92 (Purdon's 1953). Cf. Conn. Gen. Stat. Ann. § 46-24 (1958); Ill. Ann. Stat. ch. 40 § 19 (Smith-Hurd Supp. 1972).

185 Cf. De Sylva v. Ballentine, 351 U.S. 570, 581-82 (1955); the Arizona and Oregon statutes nullifying illegitimacy as a legal status discussed at note 139 supra.

186 139 Misc. 21, 247 N.Y.S. 112 (Sup. Ct. 1931).

187 49 Misc. 2d 66, 266 N.Y.S.2d 636 (Fam. Ct. 1966).

188 See text accompanying notes 105-06 supra.

189 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967).

190 E.g., Roe v. Doe, 58 Misc. 2d 757, 296 N.Y.S.2d 865 (Fam. Ct. 1968).

191 Cal. Civ. Code Ann. § 230 (West Supp. 1969). See text accompanying notes 176-79 supra.

192 Note that a statute such as this would have ramifications in matters such as inheritance rights. However, these issues are beyond the scope of this Note and are separable enough from the question of custody to warrant independent consideration by the legislature.

193 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964).

194 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965).

195 Compare Lavell v. Adoption Institute, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960) with Guardianship of Truschke, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965) and Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964).

standards would sacrifice valuable flexibility; avoiding the question by setting standards so vague that any parent claiming under the statute could comply would render the statute meaningless. In sum, while the California statute marks an admirable advance in the law, the recommended approach is not only less complex to implement, but also more akin to existing statutes.[196]

The approach represented by the *Lewisohn v. Spear*[197] line of cases is also unsatisfactory. While these cases do sub silentio accord the unwed father simultaneity of consideration, they also subject him to an extremely heavy burden in that he must demonstrate the necessary superiority to the mother to be awarded custody. Although such a scheme is permitted under *Stanley* so long as it does not preclude the safeguards mandated by the due process clause, its solidification into a rule of law would appear unduly harsh and unnecessary. It is probable that, because of the individual prejudices and preferences of the judges which influence their determination of the parents' relative fitness, this burden will continue to disadvantage the unwed father even under the equality of the proposed section 70-type rule.[198] Also, the retention in the *Lewisohn* approach of the rhetoric of maternal preference presents the danger of subtle regression to the principles of strict maternal preference.

Aside from these advantages, the proposed modification of Section 70 of the New York Domestic Relations Law would entail the additional advantage of compliance with even the most stringent interpretation of the equal protection clause of the fourteenth amendment. The equal protection issues raised by the maternal preference rule concern the illegitimate vis-a-vis the legitimate child, the unwed versus the married father, and the putative father vis-a-vis the unwed mother. The unwed father is disadvantaged by presumption-tied legal handicaps not made applicable by the law to the married father or out-of-wedlock mother.[199] The illegitimate child is subject to discrimination in that his welfare is often sacrificed to preserve the unwed mother's prima facie right to custody, while only the legitimate child's best interests are considered in making a custody determination.[200] The unfairness to the out-of-wedlock child of impeding the selection of the more suitable custodian by adherence to out-dated presumptions was noted by the court in *Godinez v. Russo*.[201] The questions of discrimination on the basis of sex and illegitimate status, and indeed, the proper standard to be used in equal protection analysis itself have commanded the recent attention of the United States Supreme Court, and the portents of change are present.[202] Prior to *Stanley*, equal protection analysis in the areas of sex and illegitimacy had been strictly in terms of "rational basis", under which both the maternal preference rule[203] and the proposed rule would most probably be upheld. In contrast to the maternal preference rule, the validity of which is dubious should the new equal protection test of *Weber v. Aetna Casualty & Surety Co.*[204] be applied, or strict scrutiny be extended to the private interest in preservation of the family unit,[205] the suggested modification of section 70 classifies neither children nor parents on the basis of sex or illegitimate status, and is therefore immune from equal protection attack.

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196 See text accompanying note 184 supra.

197 174 Misc. 178, 20 N.Y.S.2d 249 (Sup. Ct. 1940). See text accompanying notes 95-97 supra.

198 See text accompanying notes 206-208 infra.

199 The married father is placed in parity with the mother by N.Y. Dom. Rel. Law § 70 (McKinney 1964), the pertinent parts of which are quoted in the text accompanying note 183 supra, and similar laws in other states; see statutes cited in note 184 supra. The unwed mother enjoys a prima facie right to custody of the child.

200 See text accompanying notes 5-21 supra.

201 49 Misc. 2d 66, 68, 266 N.Y.S.2d 636, 639 (Fam. Ct. 1966).

202 See text accompanying notes 48-75 supra.

203 See text accompanying notes 129-37 supra.

204 406 U.S. 164 (1972). See text accompanying note 75 supra.

205 See text accompanying notes 64-70 supra.

It must be conceded that the outcome in few custody suits would be affected by extending due process guarantees to putative fathers under the proposed rule. The suggested modification of section 70 guarantees only concurrent assessment of the relative qualifications of the unwed parents, free from prima facie rights in either parent. The strongly entrenched attitudes noted by Chief Justice Burger in the *Stanley* dissent,[206] as well as the Tender Years Doctrine and the disdain with which the unwed father is viewed,[207] will continue to weigh heavily in favor of a finding for the mother. Indeed, these safeguards will merely place the putative father in procedural parity with the married father, who, without laboring under the procedural presumptions or severe moral censure directed towards the out-of-wedlock father, is awarded custody in less than 10 per cent of the cases.[208]

Despite such skewed results, the standards for evaluating the relative fitness of parents must remain vague. Parental concern cannot be quantified into strict guidelines; nor should factors which can be so quantified, such as wealth, take preference over love and dedication. Undefined criteria do allow the judge to interject personal values. However, the trial judge must be afforded the flexibility to consider intangibles and intuition in exercising his discretion for the child's best interests.[209] It is he who has the opportunity to view the parents and evaluate them in light of the information obtained through the court's investigatory powers.[210] The appellate courts are aware of the advantages the trial judge has in making a custody determination and are reluctant to infringe upon his discretion.[211] A section 70-type reformation of the present law preserves this flexibility in the context of both due process requirements and a more humane consideration of the putative father's interests.

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206 See text accompanying notes 57-61 supra.

207 See text accompanying notes 142-64 supra.

208 Marcus, Equal Protection: The Custody of the Illegitimate Child, 11 J. Fam. Law 1, 7 (1971). In Re Mark T, 8 Mich. App. 122, 139, 154 N.W.2d 27, 35 (1967), stated:

> [T]he mother normally assumes or is awarded custody in preference to the father, irrespective of whether the child is legitimate.

The court in Bemis v. Bemis, 89 Cal. App. 2d 80, 90, 200 P.2d 84, 90 (1948) noted:

> We have not found in our reported cases a single instance in which the custody of young children has been awarded to their father upon evidence that the mother was a fit and proper person to have their custody and was able to give them advantages equal to those that they would enjoy in the home of their father.

209 See the *Lewisohn* line of cases where such judicial discretion was exercised in an attempt to mitigate the harsh consequences of strict adherence to the maternal preference rule. See text accompanying notes 95-97 supra.

210 See note 104 supra.

211 E.g., Strong v. Owens, 91 Cal. App. 2d 336, 205 P.2d 48 (1949); State v. Noble, 70 Iowa 174, 30 N.W. 396 (1886); Veach v. Veach, 122 Mont. 47, 195 P.2d 697 (1948); Bunim v. Bunim, 298 N.Y. 392, 83 N.E.2d 848 (1949) (dissenting opinion); People v. Ivanova, 14 App. Div. 2d 317, 221 N.Y.S.2d 75 (1st Dep't 1961); Davenport v. Kling, 6 Barb. 366 (N.Y. Sup. Ct. Gen. Term 1849); 26 Albany L. Rev. 335, 339 (1962).

V. CONCLUSION

Stanley v. Illinois invalidated on due process and equal protection grounds an Illinois statutory scheme which permitted putative fathers exercising sole custody of their out-of-wedlock children to be perfunctorily deprived of that custody without a hearing on their fitness. The key to the decision lies in its due process analysis; procedure by presumption which abridges a constitutionally protected interest without a hearing on the determinative factors upon which the state bases its power to delimit that interest cannot stand under the due process clause. The importance of the decision is not merely its reaffirmance of this constitutional rule previously enunciated in *Bell v. Burson*,[212] but rather its application of the doctrine to the emerging constitutional issues of illegitimacy and sexual discrimination.[213]

In examining the implications of the *Stanley* decision, this Note has explored only a very narrow and parallel question — the rights of the putative father who comes forward to contest custody with the unwed mother. Admittedly, the case has relevance for the rights of the more passive out-of-wedlock father and also for the issues of the unwed mother's unilateral control over adoption[214] and abortion of the child. However, the *Stanley* majority's observation that there is no constitutional obstacle to extending due process protection to some situations in which the putative father is disadvantaged while not reaching the question in regard to others[215] provides some justification for this delimitation of scope.

It is herein contended that the maternal preference rule as exemplified by the New York case of *Cornell v. Hartley*[216] will not withstand the scrutiny of *Stanley* and should be eliminated by extending to contests between unwed parents the parity of consideration afforded married mothers and fathers in inter-parental custody disputes. Although the experience of legitimate fathers shows that procedural equality for parents in custody determinations will not eradicate an informal preference for the mother, such practical realities should not deter the legal system from assuring that each person is fully accorded his constitutionally protected rights. This is especially true where, as here, affording the putative father procedural safeguards will correlatively benefit the innocent illegitimate whose best interests will no longer be forced to compete with the prima facie rights of the mother to custody. Ill-considered presumptions resting on societal prejudice only obscure the truism that to the out-of-wedlock father endeavoring to be a responsible parent and "to the illegitimate child, the father is not putative."[217]

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212 402 U.S. 535 (1971).

213 See text accompanying notes 44-70, 199-205 supra.

214 See notes 22, 85 supra.

215 Extending opportunity for hearing to unwed fathers who desire and claim competence to care for their children creates no constitutional or precedural obstacle to foreclosing those unwed fathers who are not so inclined.

405 U.S. at 657 n.9.

216 54 Misc. 2d 732, 283 N.Y.S.2d 318 (Fam. Ct. 1967).

217 Gwiszcz Appeal, 206 Pa. Super. 397, 402, 213 A.2d 155, 157 (1965).