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Protecting the Opportunity Interest of the Unwed Fathers of Newborn Infants Placed for Adoption: Does California's Statute Go Far Enough?

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Protecting the Opportunity Interest of the Unwed Fathers of Newborn Infants Placed for Adoption: Does California's Statute Go Far Enough?

An adoption creates a new legal relationship between the adopting parents and the adopted child.[1] It requires terminating the child's relationship with his or her natural parents.[2]

In some cases, the child's natural parents may be deceased, and there is no previous relationship to terminate. In other cases, a court may find that the parents' rights should be terminated involuntarily, such as when the parents have abandoned or neglected the child.[3] In all other cases, one or both parents must consent before their child can be adopted.[4]

Traditionally, when a married couple gives up their child for adoption, the court requires the consent of both parents,[5] but when an unmarried mother wishes to give up her child, only her consent is required.[6] This is because the unwed father[7] is generally considered to have no legal claim upon his child.[8]

In recent years, courts have begun to grant unwed fathers more rights. Since 1972, the United States Supreme Court has issued four decisions greatly expanding the rights of unwed fathers in the adoption of their children.[9] The U.S. Supreme Court has stated

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1. H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 602 (1968).

2. *Id.* Of course, when a child who has previously been adopted is being adopted again, it is the rights of the previous adoptive parents, and not the natural parents, that must be terminated.

3. *Id.* at 629.

4. *Id.* at 623-26. In a step-parent adoption, only one parent is losing his or her parental rights, so only the consent of that one parent is needed.

5. *Id.* at 623.

6. *Id.* at 625.

7. The term "unwed father" will be used to refer to any father who has never been married to the mother of the child or children in question. Such an "unwed father" could be married to someone else.

8. H. CLARK, *supra* note 1, at 625.

9. Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983).

These decisions are well known and have been widely written about. *See* Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robinson*, 45 OHIO ST. L.J. 313 (1984); Note, *Adoption: The Rights of the Putative Father*, 37 OKLA. L. REV. 583 (1984); Note, *Delineation of the Boundaries of Putative Fathers' Rights: a Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290 (1985); Comment, *Domestic Relations—Parental Rights of the Putative Father: Equal Protection and Due Process Considerations*, 14 MEM. ST. U.L. REV. 259 (1984); Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries are Defined*, 19 J. FAM. L. 445 (1980-81); Comment, *Caban v.*

that every father has a unique opportunity that no other male possesses to develop a relationship with his child.[10] This has been called his "opportunity interest."[11]

The California Supreme Court considered the issue of an unwed father's opportunity interest in the 1984 case of *In re Baby Girl M.*[12] It held that where a father "pursue[s] custodial responsibility," and strangers seek to adopt the child, the father can not be denied custody, unless it is shown that placing the child with him would be a detriment to the child.[13] However, this decision was based primarily on the court's interpretation of California statutes, rather than on federal constitutional grounds.[14]

In response, the California legislature amended the applicable statute,[15] thereby effectively overruling *Baby Girl M.*[16] California Civil Code Section 7017(d)(2) now states that an illegitimate child can be adopted over the objections of his or her father[17] if the adoption is in the best interests of the child.[18]

The change in the California statute does not directly contra-

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Mohammed: Extending the Rights of Unwed Fathers, 46 BROOKLYN L. REV. 95 (1979); Note, *Limiting the Boundaries of Stanley v. Illinois: Caban v. Mohammed,* 57 DEN. L.J. 671 (1980); *Supreme Court Review—Caban v. Mohammed, Parham v. Hughes,* 7 HASTINGS CONST. L.Q. 445, 459 (1980); Note, *Putative Fathers: Unwed, but No Longer Unprotected,* 8 HOFSTRA L. REV. 425 (1980); Note, *Equal Protection and the Putative Father: An Analysis of Parham v. Hughes and Caban v. Mohammed,* 34 SW. L.J. 717 (1980); Note, *The Rights of Fathers of Non-Marital Children to Custody, Visitation, and to Consent to Adoption,* 12 U.C. DAVIS L. REV. 412 (1979); Note, *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations,* 1979 WASH. U.L.Q. 1029; Note, *Constitutional Law—Equal Protection—Caban v. Mohammed,* 29 EMORY L.J. 833 (1980).

10. Lehr v. Robertson, 463 U.S. 248, 262 (1983).

11. Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson,* 45 OHIO ST. L.J. 313, 351-82 (1984). *See also* Baby Girl M. v. Edward M., 37 Cal. 3d 65, 74, 688 P.2d 918, 925, 207 Cal. Rptr. 309, 315 (1984).

12. *Baby Girl M.*, 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984). This case should not be confused with the famous New Jersey case with a similar name that dealt with surrogate motherhood, *In re* Baby M., 109 N.J. 396, 537 A.2d 1227 (1988).

13. *Baby Girl M.*, 37 Cal. 3d at 69-70, 688 P.2d at 921, 207 Cal. Rptr. at 312.

14. *Id.* at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311. *See infra* notes 53-56 and accompanying text.

15. CAL. CIV. CODE § 7017(d) (West 1987).

16. After the *Baby Girl M.* decision held that the section 4600 detriment standard applies to section 7017 adoption hearings, the legislature amended section 7017 to read, "[s]ection 4600 does not apply to this proceeding." (CAL. CIV. CODE, § 7017(d)(2).) *See infra* notes 53-56 & 88-90 and accompanying text.

17. Unless the father is legally a "presumed father." *See infra* notes 20-29 and accompanying text.

18. If the natural father . . . claims parental rights, the court shall determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. . . . If the court finds that . . . it is in the child's best interest that an adoption be allowed to proceed, it shall order that [the father's] consent is not required for an adoption; such a finding terminates all parental rights and responsibilities with respect to the child.

CAL. CIV. CODE § 7017(d)(2).

dict any of the four U.S. Supreme Court decisions on the subject.[19] However, dicta in the Supreme Court decisions suggests that the Court might require more protection for an unwed father's opportunity interest than the California statute grants. The purpose of this Comment is to analyze the constitutionality of the California statute and to evaluate the alternatives the California legislature has available in view of the statute's possible unconstitutionality. Section One discusses the current rights of unwed fathers in California by both statute and case law. Section Two examines the Supreme Court case law on the constitutional rights of unwed fathers. Section Three compares the statutory rights of unwed fathers in California to the rights those fathers have under Supreme Court decisions. Finally, Section Four discusses the alternatives available to the legislature and the courts if a conflict arises between the California statutes and the United States Supreme Court decisions.

I. THE CURRENT RIGHTS OF UNWED FATHERS IN CALIFORNIA

A. California's Distinction Between "Natural" and "Presumed" Fathers

In 1975, California enacted the Uniform Parentage Act.[20] One of the goals of this act was to eliminate the distinction between legitimate and illegitimate children.[21] California Civil Code Section 7002 states that: "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."[22]

However, the act does make a distinction between "presumed" fathers and "natural" fathers, which is similar to the distinction between fathers of legitimate children and fathers of illegitimate children.[23] Presumed fathers[24] include any man who is or was

19. *See supra* note 9.

20. CAL. CIV. CODE §§ 7000-21 (West 1987). This statute was passed in 1975 and took effect on January 1, 1976.

21. *Baby Girl M.*, 37 Cal. 3d at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.

22. CAL. CIV. CODE § 7002 (West 1987).

23. The definition given in the code actually distinguishes between a man who "is presumed to be the natural father" and the other fathers. CAL. CIV. CODE § 7004(a). Case law has established "natural" fathers and "presumed" fathers as two separate classes. *See infra* note 27. Some sections of the code now use the terms "natural" father and "presumed" fathers to refer to these separate classes. *See, e.g.*, CAL. CIV. CODE § 7017(a)(1) and § 7017(d)(1).

24. The term "presumed father" does not denote a presumption in an evidentiary sense. Even a man who can show indisputably that he is the biological father of a child may not be a presumed father. W.E.J. v. Superior Court of Los Angeles, 100 Cal. App. 3d 303, 308, 160 Cal. Rptr. 862, 865 (1980).

married to the child's mother,[25] as well as men who have never been married to the child's mother but who have "entered into some family relationship with the mother and child."[26] Natural fathers are those fathers who have not entered into such a relationship.[27]

A presumed father has as much right to custody of his child as the child's mother does, but a natural father does not have this same right.[28] Similarly, in an adoption, a presumed father has the same right to veto the adoption that the mother has, but a natural father does not have this veto power.[29]

The conditions a man must meet to become a presumed father are set forth in California Civil Code Section 7004.[30] Of the four

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25. CAL. CIV. CODE § 7004(a)(1).

26. *W.E.J.*, 100 Cal. App. 3d at 311, 160 Cal. Rptr. at 867. *See also* CAL. CIV. CODE § 7004(a).

27. *W.E.J.*, 100 Cal. App. 3d at 311, 160 Cal. Rptr. at 867. Logically, presumed fathers are one subcategory of natural fathers. The term "natural father" could be used to include both fathers who are presumed fathers, and those who are not presumed fathers. However, the courts use the terms "natural" father and "presumed" father for two different, mutually exclusive, classes of fathers. That is, those fathers who are presumed fathers are not natural fathers, and *vice versa*. This Comment will follow the courts' convention. *See, e.g., Baby Girl M.*, 37 Cal. 3d at 72 n.5, 688 P.2d at 923, 207 Cal. Rptr. at 314; Adoption of Marie R., 79 Cal. App. 3d 624, 629, 145 Cal. Rptr. 122, 125 (1978); Michael U. v. Jamie B., 39 Cal. 3d 787, 790 n.1, 705 P.2d 362, 364, 218 Cal. Rptr. 39, 41 (1985). In at least one case, the term "biological" father is used instead of "natural" father to denote a father who is not a presumed father. *See* W.E.J. v. Superior Court of Los Angeles, 100 Cal. App. 3d 303, 305, 160 Cal. Rptr. 862, 863-64 (1980).

28. *Baby Girl M.*, 37 Cal. 3d at 72, 688 P.2d at 923, 207 Cal. Rptr. at 314.

29. *Id.*

30. CAL. CIV. CODE § 7004(a) (West 1987) states in part:

> A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following paragraphs:
>
> (1) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a decree of separation is entered by a court.
>
> (2) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with the law, although the attempted marriage is or could be declared invalid, and,
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> (i) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or
>
> (ii) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation.
>
> (3) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and
>
> (i) With his consent, he is named as the child's father on the child's birth certificate, or
>
> (ii) He is obligated to support the child under a written voluntary promise or by court order.
>
> (4) He receives the child into his home and openly holds out the child as his natural child.

possible ways a man can become a presumed father, only three require that he marry the child's mother.[31] The only way for a man to become a presumed father without marrying the mother[32] is by "receiv[ing] the child into his home and openly hold[ing] out the child as his natural child."[33]

When the mother has custody of a child, the mother may prevent the child's father from becoming a presumed father by refusing to marry the father and refusing to allow the father to take the child into his home.[34] A California court has found that the mother may legally do this.[35]

B. The Rights of Unwed Fathers Under California Statutes and California Court Decisions

One of the most important cases in California regarding the rights of natural fathers, *In re Baby Girl M.*, was decided by the California Supreme Court in 1984.[36]

In this case, Edward, the baby's father, had dated the baby's mother in the fall of 1980.[37] Their relationship ended in November, before either of them knew that the mother had conceived a child. The mother never let Edward know she was pregnant.[38] The baby girl was born on July 18, 1981.[39] The mother first placed the baby in a foster home, and then formally relinquished her for adoption on August 5th.[40]

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(5) If the child was born and resides in a nation with which the United States engages in an Orderly Departure Program or successor program, he acknowledges that he is the child's father in a declaration under penalty of perjury, as specified in Section 2015.5 of the Code of Civil Procedure.

This paragraph [(5)] shall remain in effect only until January 1, 1997, and on that date shall become inoperative.

CAL. CIV. CODE § 7004(1)(5) (West Supp. 1988).

For situations covered by new subsection (5), the arguments made in this Comment do not apply. However, because this subsection by its terms applies only to a very limited situation, for a limited period of time, it does not have any general application to the problem presented in this Comment.

31. If the father marries the mother in a wedding "solemnized in apparent compliance with law," but that marriage is later found invalid, this can still be enough to establish that the father is a presumed father, notwithstanding the fact that the mother and father were never technically married. CAL. CIV. CODE § 7004(a) (1)-(3).

32. Or attempting to marry the mother in a ceremony later found invalid. *See supra* note 30.

33. CAL. CIV. CODE § 7004(a)(4).

34. Adoption of Marie R., 79 Cal. App. 3d 624, 630, 145 Cal. Rptr. 122, 126 (1978).

35. *Id.*

36. 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

37. *Id.* at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.

38. *Id.*

39. *Id.*

40. *Id.*

Edward first found out about the child on August 1st.[41] He immediately contacted the Department of Social Welfare. On August 17th he visited the child at the agency offices and requested that he be granted custody.[42] Instead, the child was placed with prospective adoptive parents on August 24th.[43]

The following December, a hearing was held to determine whether Edward's parental rights should be terminated. The trial court found that Edward was the biological father, and that he could provide a good, loving home for his child.[44] The court specifically found that it would not be detrimental to the child to place her with Edward.[45] Nevertheless, the court held that it was in the best interests of the child for her to remain with her adoptive parents,[46] and so the court terminated Edward's rights.[47]

The hearing to determine whether Edward's parental rights should be terminated was held pursuant to Section 7017.[48] This section defines a father's rights when the mother relinquishes his child for adoption. Until it was amended in 1987,[49] this section contained little language protecting natural fathers' rights. Section 7017 (d) stated, in relevant part:

If the natural father or a man representing himself to be the

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41. *Id.*

42. *Id.* The dissent points out that Edward was not as eager for custody as the majority would make it appear. The first time Edward met with a social worker about the child, he stated he did not want custody of the child, but suggested that she be adopted by a family he knew. Then on August 10th, the day a petition was filed to terminate Edward's rights, he met with the social worker again, and still did not express any desire for custody. *Id.* at 76, 688 P.2d at 926, 207 Cal. Rptr. at 317 (Mosk, J., dissenting).

Still, Edward expressed an interest in the child from the first time he found out she existed, and requested custody less than a month after the child was born. Edward's initial hesitation did not play any role in the majority's decision. Even the dissent did not attach great legal significance to it. For that reason, this Comment will treat the situation in *Baby Girl M.* as one where the father took every reasonable legal action available to preserve his rights as the child's father.

43. *Id.* at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.

44. *Id.*

45. *Id.*

46. It is not clear why the court reached this conclusion. The dissent says that "[t]he mother signed the relinquishment only on condition that custody be transferred to the two parent family," and that the welfare department "implied that it would permit her to withdraw her consent if this condition [were] not fulfilled." *Id.* at 77, 688 P.2d at 926, 207 Cal. Rptr. at 317 (Mosk, J., dissenting). The majority merely states that the mother "wished the child [be] placed with a family neither [she nor Edward] knew." *Id.* at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311. Neither the dissent nor the majority explain whether the mother would have been allowed to withdraw her consent at this time, or for this reason.

There are other possible reasons why the court did not award the child to Edward. Perhaps the court did not wish to move the child from the home where she had already lived for several months, or perhaps the court preferred two-parent families. The records from the higher courts do not include this information.

47. *Baby Girl M.*, 37 Cal. 3d at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311.

48. *Id.*

49. *Id.*

> natural father, claims custodial rights, the court shall proceed to determine parentage and custodial rights in whatever order the court deems proper. If the court finds that the man representing himself to be the natural father is a presumed father under subdivision (a) of section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that *only the mother's consent shall be required* for the adoption of the child.[50]

Prior to 1984, courts did not require any special standard for terminating a natural father's parental rights.[51] The courts did not require this because the statutory language clearly stated that "only the mother's consent shall be required."[52]

In *Baby Girl M.*, the California Supreme Court held that the parental rights of a natural father cannot be terminated unless the court finds that placing the child with him would be a detriment to the child.[53] It reached this decision by applying the rule of section 4600, which applies to custody hearings, to section 7017(d).[54] Section 4600 states that the court may not give custody of a child to a nonparent unless it has found that placing the child with a parent would be detrimental to the child.[55] On the basis of section 4600, the California Supreme Court reversed and remanded the case of *Baby Girl M.*, with instructions that Edward's parental rights could be terminated only if it were found that placing the child with him would be a detriment to the child.[56]

This decision was a victory for unwed fathers who wanted to develop a relationship with their children. Although the parental rights of such fathers were still less than the rights of the children's mothers,[57] at least these fathers were protected.[58] If the

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50. CAL. CIV. CODE § 7017(d) (as amended, 1987) (emphasis added).

51. *Baby Girl M.*, 37 Cal. 3d at 72, 688 P.2d at 923, 207 Cal. Rptr. at 314 (disapproving such language in W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 305, 160 Cal. Rptr. 862, 863-64 (1980)).

52. CAL. CIV. CODE § 7017(d) (as amended, 1987).

53. *Baby Girl M.*, 37 Cal. 3d at 75, 688 P.2d at 925, 207 Cal. Rptr. at 316.

54. *Id.*

55. CAL. CIV. CODE § 4600(c). This section states, in relevant part, that:

> Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.

56. *Baby Girl M.*, 37 Cal. 3d at 76, 688 P.2d at 926, 207 Cal. Rptr. at 317. On remand, the trial court found that, although the father was not unfit, it would still be a detriment to the child to remove her at the age of five from the only family she had ever known. *Baby Girl M.*, 191 Cal. App. 3d 786, 789-90, 236 Cal. Rptr. 660, 662-63 (1987). The father appealed again, and the appellate court affirmed. *Id.* at 795, 236 Cal. Rptr. 666. This appellate court opinion was ordered unpublished.

57. For example, "if the father is merely a natural father and not a presumed father, the mother alone is entitled to the child's custody." *Baby Girl M.*, 37 Cal. 3d at 72, 688 P.2d at 923, 207 Cal. Rptr. at 314.

58. *Id.* at 75, 688 P.2d at 925, 207 Cal. Rptr. at 316.

mother did not want the child, and the father was not so unfit as to be a detriment to the child, then the father would be entitled to custody.[59]

However, this decision seems strained for two reasons. First, as the dissent in that case pointed out: "[S]ection 7017, subdivision (d), is inconsistent with section 4600, subdivision (c). While the former provides that the consent of the natural father to an adoption is not required, the latter states that a father's consent to the adoption is necessary unless the court makes a finding of detriment."[60] There seems to be no reason for preferring section 4600 over section 7017. Section 4600 is the older statute, passed in 1969, as part of a title dealing primarily with marriage and divorce.[61] Section 7017 was passed in 1975 as part of the Uniform Parentage Act, and deals precisely with the matter in question. The majority justified its decision by referring to the legislative history, where it claimed that "the Legislature has declined its opportunity to disprove application of the section 4600 standard to section 7017 hearings."[62] The dissent stated that the conclusion of the majority, "can only be reached by disregarding the critical provisions of section 7017. This is precisely what the majority cavalierly do."[63]

The second reason this decision seems strained is that it gave a natural father the same veto power over an adoption that a presumed father has.[64] The majority conceded that the legislature intended to differentiate between the veto power given to mothers and presumed fathers, and the lesser rights given to natural fathers.[65] The majority stated that it was not giving the natural father a veto over the adoption of his child, because his rights could be terminated if it would be detrimental for the child to be placed with him.[66] The dissent noted that a mother or a presumed father

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59. *Id.*

60. *Id.* at 81, 688 P.2d at 929, 207 Cal. Rptr. at 320 (Mosk, J., dissenting).

61. Section 4600 is part of Title 4, Part 5, "The Family Law Act." The first five titles of this part are: "Marriage," "General Provisions," "Judicial Determination of Void or Voidable Marriage," "Dissolution of Marriage," and "Custody of Children."

62. A bill introduced in the assembly had declared that the "parental preference" in section 4600 would not apply to alleged fathers seeking custody under section 7017. This bill was passed by both houses, but the Governor vetoed it because of certain financial provisions in it. This language was later amended into another bill, but after discussion it was amended out again. *Baby Girl M.*, 37 Cal. 3d at 71, 688 P.2d at 922, 207 Cal. Rptr. at 313.

63. *Id.* at 77, 688 P.2d at 926, 207 Cal. Rptr. at 317 (Mosk, J., dissenting).

64. *Id.* at 78, 688 P.2d at 927, 207 Cal. Rptr. at 318 (Mosk, J., dissenting).

65. *Id.* at 72, 688 P.2d at 923, 207 Cal. Rptr. at 314.

66. *Id.* at 72-73, 688 P.2d at 923, 207 Cal. Rptr. at 314.

would similarly have their rights terminated if placing the child with them would be a detriment to the child.[67] Thus, the majority's decision makes all three situations essentially identical.

The California Supreme Court retreated somewhat from the *Baby Girl M.* decision the next year in the case of *Michael U. v. Jamie B.*[68] This was another case where a mother wished to place her baby for adoption, but the father wanted custody of the child himself.[69]

The father in that case, Michael U., was only 16 years old at the time the baby was conceived,[70] and the mother, Jamie B., was only 12.[71] Michael testified that he wanted to keep the baby from the moment he knew Jamie was pregnant.[72] Both before and after the baby's birth, Michael and his mother repeatedly indicated to Jamie and her mother that they wanted to raise the child.[73]

The court held that Michael "is entitled to the parental preference established by Civil Code section 4600, and to custody unless such an award would be detrimental to the child."[74] However, the court awarded the child to the adoptive parents.[75] The court considered that it would be a detriment to remove the baby from the home where he had lived for five months, because the baby had established an emotional attachment to the adoptive parents.[76] The court also considered Michael's personal characteristics, noting that he was "an unemployed high school student whose social and sexual relationships and academic record demonstrate his lack of maturity and judgment."[77] The court stated that even if

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67. *Id.* at 78, 688 P.2d at 927, 207 Cal. Rptr. at 318 (Mosk, J., dissenting).

68. 39 Cal. 3d 780, 798, 705 P.2d 362, 369, 218 Cal. Rptr. 39, 46 (1985) (Reynoso, J., dissenting).

69. *Id.* at 790, 705 P.2d at 364, 218 Cal. Rptr. at 40. The proceeding was initially about temporary custody of the child, but the court recognized that if the father got temporary custody, this would probably determine the outcome of the entire case, because he would then qualify as a presumed father (*see supra* notes 30-33 and accompanying text). *Id.* at 791, 705 P.2d at 364, 218 Cal. Rptr. at 41.

70. *Id.* at 790, 705 P.2d at 364, 218 Cal. Rptr. at 40.

71. *Id.*

72. *Id.* at 799, 705 P.2d at 370, 218 Cal. Rptr. at 47 (Reynoso, J., dissenting).

73. *Id.* Michael took a community college course in child development. *Id.* at 794, 705 P.2d at 367, 218 Cal. Rptr. at 43. There was conflicting evidence as to whether Michael and his family offered to pay for the expenses of Jamie's delivery. Jamie's mother testified that there were no expenses, because the entire delivery was covered by their existing Kaiser insurance. *Id.* at 799, 705 P.2d at 370, 218 Cal. Rptr. at 47. (Reynoso, J., dissenting.)

74. *Id.* at 795, 705 P.2d at 368, 218 Cal. Rptr. at 44.

75. *Id.* at 795-56, 705 P.2d at 368, 218 Cal. Rptr. at 44.

76. *Id.* at 795, 705 P.2d at 367, 218 Cal. Rptr. at 44.

77. *Id.* at 796, 705 P.2d at 368, 218 Cal. Rptr. at 44. The record did show that Michael had serious problems. This included having sex with at least three teen-age and pre-teen girls, smoking marijuana, and fighting at school. *Id.* at 793-94, 705 P.2d at 366, 218 Cal. Rptr. at 43. Michael did not have enough school credits to graduate from high

Michael and his mother could jointly provide a good home for the baby, Michael would be entitled to leave home when he became an adult, and take the baby with him, which might inflict further harm on the baby.[78]

In a footnote, the court stated:

> We do not imply that Michael is "unfit" in the sense that, if he received custody of [the baby], the state would have grounds to intervene and remove the child. . . . [I]t might also be detrimental to place [a child] with a parent who is not unfit, depending upon the child's current circumstances and the available placement alternatives.[79]

Although the court claimed to use the "detriment" standard, it gave lower courts considerable freedom in deciding what a detriment was.

Two concurring opinions favored abandoning the detriment standard altogether. Justice Kaus thought the court should "rectify the mistake" of *Baby Girl M.*,[80] and apply "the standard which ought to govern—'what disposition is in the best interest of the child?' "[81] Justice Mosk stated that "[w]e should reconsider the *Baby Girl M.* decision,"[82] and "return to the traditional rule,"[83] and that the court should "consider only the best interest of the child."[84]

A dissent by Justice Reynoso, in which Chief Justice Bird joined, reiterated the *Baby Girl M.* holding,[85] and stated that: "[t]he natural father's opportunity to establish a protected relationship with his child must prevail in the absence of his unfitness."[86] This opinion further stated that the majority decision weakened the *Baby Girl M.* guidelines, which was "unfortunate."[87]

Whether or not the guidelines of *Baby Girl M.* were "weakened," the California Supreme Court twice stated that unwed fathers were entitled to the parental preference of section 4600.[88]

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school with his class, and was attempting to acquire sufficient credits through a home study program. *Id.* at 794, 705 P.2d at 366, 218 Cal. Rptr. at 43.

78. *Id.* at 796, 705 P.2d at 368, 218 Cal. Rptr. at 44.

79. *Id.* at 796, 705 P.2d at 368, 218 Cal. Rptr. at 45 n.8.

80. *Id.* at 797, 705 P.2d at 368, 218 Cal. Rptr. at 45 (Kaus, J., concurring).

81. *Id.*

82. *Id.* at 797, 705 P.2d at 369, 218 Cal. Rptr. at 46 (Mosk, J., concurring).

83. *Id.*

84. *Id.*

85. *Id.* at 800, 705 P.2d at 371, 218 Cal. Rptr. at 48 (Reynoso, J., dissenting).

86. *Id.* (quoting *Baby Girl M.*, 37 Cal. 3d at 75, 688 P.2d at 925, 207 Cal. Rptr. at 316, which in turn was quoting Buchanan, *supra* note 11, at 373 (brackets and quotation marks omitted)).

87. *Id.* at 798, 705 P.2d at 369, 218 Cal. Rptr. at 46 (Reynoso, J., dissenting).

88. *Baby Girl M.*, 37 Cal. 3d at 68, 688 P.2d at 920, 207 Cal. Rptr. at 311; Michael U. v. Jamie B., 39 Cal. 3d 780, 795, 705 P.2d 362, 368, 218 Cal. Rptr. 39, 44 (1985).

The Legislature responded to the California Supreme Court's decisions by amending section 7017, so that section 4600 specifically does not apply to it.[89] Section 7017 (d) (2), as amended in 1986, now states:

> If the natural father . . . claims parental rights, the court shall determine . . . if it is in the best interest of the child that the father retain his parental rights, or that an adoption . . . be allowed to proceed. The court, in making the determination, may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement on the child. . . . *[S]ection 4600 does not apply to this proceeding.* Nothing in this section changes the rights of a presumed father.[90]

This amendment terminated the rights granted to natural fathers by the California Supreme Court's *Baby Girl M.* decision. In factual situations similar to *Baby Girl M.*, trial courts can once again use their own judgment as to whether it is better for the child to be with his or her father, or be adopted by other persons.

II. Decisions By the United States Supreme Court Regarding the Rights of Unwed Fathers

In addition to the rights that unwed fathers have under state law, unwed fathers in California also have the rights that the United States Constitution grants to all Americans. The United States Supreme Court has decided four cases defining the consitutional rights of unwed fathers where the state seeks to terminate their relationships with their children.[91] None of these cases had a fact situation like the one in *Baby Girl M.*, where a father of a newborn baby had taken every reasonable step to preserve his rights.

The first of the four cases, *Stanley v. Illinois*,[92] was decided in 1972. In this case, Peter Stanley lived with the mother of his three children intermittently for 18 years.[93] Stanley claimed that he "loved, cared for, and supported [his] children from the time of their birth until the death of their mother."[94] After the mother died, the state of Illinois initiated a dependency proceeding where the children[95] were declared wards of the state and placed with

89. Cal. Civ. Code § 7017(d)(2).
90. *Id.* (emphasis added).
91. Buchanan, *supra* note 11, at 319.
92. 405 U.S. 645 (1972).
93. *Id.* at 646.
94. *Id.* at 666 (Burger, C.J., dissenting).
95. Only two of the three children were involved in this case. *Id.* at 646. The oldest of the children had already been made a ward of the state pursuant to a neglect proceeding, at a time when the juvenile court mistakenly believed that Stanley was married to the

court-appointed guardians.[96] Stanley appealed on the grounds that his children had been taken from him[97] without any finding that he was an unfit parent.[98] Such a finding would have been required under Illinois law to take children from a married parent or an unwed mother.[99]

The U.S. Supreme Court considered whether the taking of his children was a violation of Stanley's fourteenth amendment right to due process.[100] It held that Stanley had a "cognizable and substantial" interest in retaining custody of his children.[101] The Court held that, "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him."[102]

The Court also considered whether this finding violated Stanley's fourteenth amendment right to equal protection.[103] It noted that Illinois did not treat all parents equally because it denied a hearing to unwed fathers, while granting one to all other parents where custody of their children was challenged.[104] It found that such unequal treatment was unconstitutional.[105]

The *Stanley* case left three important questions unanswered: (1) was Stanley merely entitled to a hearing, using whatever standard the state might choose? (2) was Stanley entitled to be heard using the same standard applied to a married parent? and (3) did this right to a hearing apply to all unmarried fathers, or just to those who had custody of their children?[106]

More light was shed on these questions when the Supreme Court decided *Quilloin v. Walcott*.[107] In that case, the father, Leon Quilloin, had never lived with his illegitimate child, nor with the child's mother.[108] He visited his child on many occasions, but provided support for his child only on an irregular basis.[109] The

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child's mother. *Id.* at 667 n.5 (Burger, C.J., dissenting).

96. *Id.* at 646.

97. Actually, the children were not physically taken from him. Shortly after the death of the mother, Stanley had placed the children in the care of a married couple he knew. *Id.* at 667 (Burger, C.J., dissenting). The dissent suggests that Stanley's main concern was that he would lose his welfare payments if someone else was designated as the children's guardian. *Id.* at 667 (Burger, C.J., dissenting).

98. *Id.* at 646.

99. *Id.*

100. *Id.* at 657-58.

101. *Id.* at 652.

102. *Id.* at 649.

103. *Id.*

104. *Id.* at 658.

105. *Id.*

106. Buchanan, *supra* note 11, at 330.

107. 434 U.S. 246 (1978).

108. *Id.* at 247.

109. *Id.* at 251.

mother later married another man. When the child was eleven years old, the mother wished to have the step-father adopt the child.[110] Quilloin attempted to prevent the step-father from adopting the child.[111] The Georgia court did not find Quilloin to be an unfit parent, but nevertheless granted the adoption.[112]

Quilloin's appeal to the U.S. Supreme Court was based on a claim that his right to equal protection had been violated because he was not given the same treatment as a married father.[113] He asserted that his interests in his child were the same as the interests of a father who had been married to the child's mother but was divorced.[114] Under Georgia law, a divorced father would have been granted an absolute veto over the adoption of his child, unless he were found to be unfit.[115]

In a unanimous decision, the U.S. Supreme Court found that Quilloin's interests were readily distinguishable from those of a separated or divorced father, and therefore the state was not required to give him the same veto power it granted to divorced or separated fathers.[116] The Court noted that Quilloin

> has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child.[117]

The Court found that legal custody of children is a central aspect of marriage, and therefore every married father takes full responsibility for the care of his child.[118] For this reason, the state is allowed to draw a distinction between fathers who had never married, and fathers who were formerly married; based on their commitment to the welfare of the child.[119] Thus *Quilloin* clearly shows that not all unmarried fathers are entitled to be heard using the same standard that would apply to fathers who had been married to the mother of their child.

The third case was *Caban v. Mohammed*.[120] This case held that the "undifferentiated distinction between unwed mothers and un-

110. *Id.* at 247.
111. *Id.*
112. *Id.*
113. *Id.* at 253.
114. *Id.* at 256.
115. *Id.* at 253.
116. *Id.* at 255-56.
117. *Id.* at 256.
118. *Id.*
119. *Id.*
120. 441 U.S. 380 (1979).

wed fathers," in all adoption cases, denied fathers their right to equal protection.[121]

In *Caban*, Abdiel Caban lived with the mother of his children during the years his children were born and contributed to the children's support.[122] Later, Caban separated from the children's mother; but while Caban, the mother, and the children were all living in New York, Caban was still able to see the children regularly.[123] Then the children went to live with their maternal grandmother in Puerto Rico.[124] Caban physically obtained the children from the grandmother by claiming that he would only be visiting them for a few days.[125] Caban then took the children with him to New York and kept them there.[126] The mother tried to retrieve the children, but Caban would not return them to her.[127]

The mother, together with her new husband, Kazim Mohammed, filed a petition to adopt the children.[128] Caban and his new wife filed a cross-petition to adopt the children themselves.[129] The trial court found that Caban was foreclosed from adopting the children because, under New York law, the mother's consent was required, and the mother withheld her consent.[130] On the other hand, an unwed father's consent was not required. The court gave Caban an opportunity to be heard, but only to challenge the Mohammeds' qualifications.[131] The New York courts allowed the Mohammeds to adopt the children, thus terminating Caban's parental rights.[132]

The U.S. Supreme Court treated *Caban* as a sex-discrimination case. It ruled the New York statute was unconstitutional in requiring the mother's consent but not the father's in a case such as this.[133] Justice Powell, writing for the Court, stated: "Gender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Pro-

121. *Id.* at 394.
122. *Id.* at 382.
123. *Id.*
124. *Id.*
125. *Id.* at 383.
126. *Id.*
127. *Id.*
128. *Id.* It may seem strange that the mother was adopting her own child, but in a footnote the Court explained that a New York statute allowed a husband and wife together to adopt the child of either of them. That statute allowed a natural mother to adopt her own illegitimate child. *Id.* at 383 n.1.
129. *Id.* at 383.
130. *Id.* at 384.
131. *Id.*
132. *Id.* at 383-84.
133. *Id.* at 382.

tection Clause."[134] In a case such as this, where the father has "a relationship fully comparable to that of the mother,"[135] the distinction between the father and the mother does not bear a substantial relation to the state's interests.[136]

As the majority admitted, and Justice Steven's dissent emphasized, this decision applies to the special case of older children who have a substantial relationship with their father.[137] Because a newborn infant does not have a substantial relationship with its father, the same reasoning might not apply.

The most recent of the four cases, *Lehr v. Robertson*,[138] dealt with a newborn infant. This case held that where one parent has established a legal relationship with the child, and the other parent has not, the state may treat the two parents differently.[139]

In *Lehr*, the father, Jonathan Lehr, lived with the mother before their child was born, and visited the mother and child every day at the hospital following the child's birth.[140] For the next two years, the mother tried to hide herself and the baby from Lehr, but Lehr continually tried to locate them.[141] On those occasions when Lehr was able to find them, he visited with them to the extent the mother permitted.[142] Finally, the mother threatened to have Lehr arrested unless he stayed away.[143]

In December 1979, shortly after the child's second birthday, Lehr hired an attorney and threatened the mother with legal action if she would not let him visit the child.[144] Later that same month, the mother and her new husband filed a petition to have the step-father adopt the child.[145] The next month, Lehr, who had no notice of the mother's petition, filed his own paternity petition, which included a request for visitation privileges and an order of support.[146] The mother's attorney then received notice of Lehr's petition, and informed the court in the jurisdiction where the mother's petition was filed.[147] That court proceeded to grant the mother's petition and ordered the child adopted, in spite of Lehr's

134. *Id.* at 388 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).
135. *Id.* at 389.
136. *Id.* at 391.
137. *Id.* at 392-93 and *id.* at 416 (Stevens, J., dissenting).
138. 463 U.S. 248 (1983).
139. *Id.* at 267-68.
140. *Id.* at 268-69 (White, J., dissenting).
141. *Id.* at 269 (White, J., dissenting).
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 252.
147. *Id.* at 252-53.

pending paternity action.[148] The court did not give Lehr any notice prior to the entry of that order.[149]

The U.S. Supreme Court affirmed the trial court's decision.[150] The trial court was not required to give Lehr notice because he did not fall into any of the statutory categories of fathers who were to be given notice.[151] Furthermore, it had been entirely within Lehr's control to become a member of at least one of these classes; if he had simply mailed a post card to New York's putative father registry, he would have been given notice of any proceeding to adopt his child.[152] It was irrelevant that Lehr may have failed to mail such a post card because he was ignorant of the law.[153] The Court found that "[t]he constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumably capable of asserting and protecting their own rights."[154]

The Supreme Court considered whether New York had violated Lehr's right to due process.[155] The Court noted that the Constitution does protect certain family relationships.[156] However, it also stated that "the rights of the parents are a counterpart of the responsibilities they have assumed."[157] "Parental rights do not spring full-blown from the biological connection between parent and child."[158] Lehr did not merit a fully protected relationship with his child merely by being the child's biological father.[159]

This does not mean that Lehr's biological relationship to his

148. *Id.* at 253.

149. *Id.*

150. *Id.* at 268.

151. *Id.* at 265. At the time the adoption order was entered in this case, the applicable New York law required that notice be given to those who had been adjudicated to be the father; those who had been identified as the father on the child's birth certificate; those who had lived openly with the child and the child's mother and who held themselves out to be the father; those who had been identified as the father by the mother in a sworn written statement; those who were married to the child's mother before the child was six months old; and fathers who had demonstrated to the putative father registry their intent to claim paternity of a child born out of wedlock. *Id.* at 250-51.

152. *Id.* at 264.

153. *Id.*

154. *Id.* at 265.

155. *Id.* at 256. It stated:

> [T]he Fourteenth Amendment provides that no State shall deprive any person of life, liberty, or property without due process of law. When that Clause is invoked in a novel context, it is our practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State.

156. *Id.* at 257.

157. *Id.*

158. *Id.* at 260 (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

159. *Id.* at 261.

child is without significance.[160] The Court stated that: "The natural father [has] an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship."[161]

This opportunity for a father to develop a relationship with his child has since been labelled the father's "opportunity interest."[162] When the Court considered whether Lehr's right to due process had been violated, the question was whether New York had adequately protected his opportunity interest to form a relationship with his child.[163]

The right to receive notice was entirely within Lehr's control, because he could have sent a post card to the putative father registry.[164] The Court implies that if Lehr had mailed in a post card, this would have not only given Lehr the right to notice, but would have also established a protected relationship.[165] The Court found that "the New York statute adequately protected [Lehr's] inchoate interest in establishing a relationship" with his child.[166]

The Court also considered Lehr's claim that he was denied equal protection.[167] The Court reiterated the *Caban* rule that statutes which require an unmarried mother's consent for adoption, but not an unmarried father's consent, are unconstitutional where the mother and father are similarly situated.[168] However, the Court also cited its *Quilloin* decision, holding that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parents and the best interests of the child."[169]

Lehr had attempted to establish a relationship with his child, by, among other things, petitioning the court to order him to support the child.[170] However, Lehr did not take the one additional step that would have legally demonstrated his intent to claim paternity, which was sending a post card to the state's putative fa-

160. *Id.* at 262.
161. *Id.*
162. Buchanan, *supra* note 11, at 352. *See also Baby Girl M.*, 37 Cal. 3d 65, 74, 688 P.2d 918, 924, 207 Cal. Rptr. 309, 315 (1984).
163. *Lehr*, 463 U.S. at 264.
164. *Id.* at 264.
165. *Id.* at 264-65.
166. *Id.* at 265.
167. *Id.*
168. *Id.* at 267.
169. *Id.* at 266-67.
170. *Id.* at 252.

ther registry.[171] Because Lehr had not established a legal relationship with the child, and because the mother did have a legal relationship with the child, the state had a right to treat the child's parents differently.[172]

In summary, the U.S. Supreme Court has greatly clarified the rights of unwed fathers in the last sixteen years. The Court has held that in some cases, an unwed father's relationship with his children is entitled to due process protection,[173] but that an unwed father is not always entitled to the same protection as a father who has married the children's mother.[174] It has also held that a state cannot arbitrarily grant an unwed father less protection than an unwed mother,[175] but that a state can treat unwed mothers and unwed fathers differently when the father does not take the steps necessary to establish a legal relationship with his child.[176] But the Supreme Court has still not ruled on whether the unwed father of a newborn infant has a constitutionally protected right *to form* a relationship with his child.

III. AN ANALYSIS OF CALIFORNIA'S PROTECTION OF THE OPPORTUNITY INTEREST OF UNWED FATHERS IN VIEW OF RECENT UNITED STATES SUPREME COURT DECISIONS

A. A Comparison of the Results Reached Under California Statutes and Under United States Supreme Court Guidelines

In general, the California statutes grant an unmarried father the same rights as in the U.S. Supreme Court cases discussed above. When a father takes his child into his home and holds the child out as his own, California considers him to be a presumed father,[177] and gives him the same rights as the mother in an adoption proceeding.[178] In *Stanley* and *Caban*, the fathers had lived with their children.[179] Thus, if these cases had arisen in California, the California courts would have granted these fathers the same rights as the mothers; they would have received at least as much protection as the U.S. Supreme Court granted.[180]

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171. *Id.* at 250-52.
172. *Id.* at 267-68.
173. *Stanley*, 405 U.S. at 649.
174. Quilloin v. Walcott, 434 U.S. 246, 256 (1978).
175. Caban v. Mohammed, 441 U.S. 380, 382 (1979).
176. *Lehr*, 463 U.S. at 267-68.
177. CAL. CIV. CODE § 7004(a)(4).
178. CAL. CIV. CODE § 7017(a)(1) and (2).
179. *Stanley*, 405 U.S. at 646; *Caban*, 441 U.S. at 382.
180. *See Stanley*, 405 U.S. at 658, where the Supreme Court merely ordered that Stanley be given a hearing as to his fitness before the children were removed from his

In cases such as *Quilloin* and *Lehr*, where the fathers were found to have no protected relationship with their children,[181] a California court would find these fathers not to be presumed fathers, but only natural fathers. California law would require that such a father be given notice of a proceeding,[182] but his parental rights would be terminated if it were in the best interest of the child.[183] This meets the minimum standards set forth by the Supreme Court in these cases, which do not require that unwed fathers always be given the right to veto the adoption of their children.[184]

The possible problem arises in cases where a father has taken every reasonable step to establish a relationship with his child, but has been prevented from doing so. It is possible that such a father would have a legally-protected "opportunity interest" in developing a relationship with his child.[185]

California makes little effort to protect this opportunity interest. The natural father has a right to notice,[186] but if the court feels it is in the child's best interest for another man to become the child's father, the natural father's rights are terminated.[187] The United States Supreme Court has not specifically addressed the father's opportunity interest, but some of the language used in the Supreme Court decisions suggests that California's statute does not go far enough.

B. The Father's Opportunity Interest and Equal Protection

Because California statutes do not give natural fathers the same rights as mothers, there is a possibility that California's statute may be discriminatory. In reviewing sexual discrimination cases, the U.S. Supreme Court has held that a gender-based distinction must not only "serve important governmental objectives,"[188] but must also "be substantially related to achievement of those

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custody; and *Caban*, 441 U.S. at 382, which denied the states the right to make an undifferentiated distinction between unwed mothers and unwed fathers.

181. *See supra* notes 116-19 & 171-72 and accompanying text.

182. CAL. CIV. CODE § 7017(d)(1).

183. CAL. CIV. CODE § 7017(d)(2).

184. *See Quilloin*, 434 U.S. at 256, finding that Quilloin had not been deprived of his rights under the due process or equal protection clauses; and *Lehr*, 463 U.S. at 268, holding that the equal protection clause does not prevent a state from according the two parents different legal rights.

185. *See supra* notes 160-63 and accompanying text.

186. CAL. CIV. CODE § 7017(d)(1).

187. CAL. CIV. CODE § 7017(d)(2).

188. Caban v. Mohammed, 441 U.S. 380, 388 (1979) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

objectives."[189]

The Supreme Court has stated that "providing for the well-being of illegitimate children is an important" state interest.[190] However, treating a child's father different than a child's mother is not necessarily related to achieving that objective.[191] For example, in the *Caban* case, where the children were older and had been cared for by both parents, the Court found that the state's distinction between the mother and father did not bear any relation to the state's interest.[192]

In *Caban*, Justice Stewart stated in his dissenting opinion that "[w]hen men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated,"[193] and "[w]ith respect to a large group of adoptions—those of newborn children and infants—unwed mothers and unwed fathers are simply not similarly situated."[194]

The majority explicitly refused to express a view as to the equal protection rights of a father of a newborn baby.[195] The Court left open the possibility that a statute which granted mothers greater rights than fathers in adoptions would be acceptable if it set forth "more stringent requirements concerning the acknowledgment of paternity or a stricter definition of abandonment."[196]

Perhaps California's distinction between presumed fathers and natural fathers would be construed as merely a stringent requirement for determining which fathers have properly acknowledged their children.[197] Seen in this way, California's statute is a proper way to determine which fathers have rights equal to the mother's in vetoing an adoption, and which fathers do not have this right. But this is not accurate because where the court finds a man to be the natural father of a child, and that man has made every effort to care for his child, he can still be denied the rights of a presumed father.[198] As long as such fathers are not given the same rights as the mother, the possibility remains that California's stat-

189. *Id.* This standard is stricter than the minimal scrutiny given to ordinary statutes, but not as strict as the strict scrutiny given to a statute which involves a "suspect class" (such as race or national origin), or which impinge on a fundamental right. Comment, *Caban v. Mohammed: Extending the Rights of Unwed Fathers*, *supra* note 9, at 105-08.

190. *Caban*, 441 U.S. at 391.

191. *Id.* at 391.

192. *Id.*

193. *Id.* at 388 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

194. *Id.* at 398-99 (Stewart, J., dissenting).

195. *Id.* at 392 n.11.

196. *Id.*

197. For a discussion of California's distinction between presumed fathers and natural fathers, *see supra* notes 20-29 and accompanying text.

198. *See supra* notes 30-35 and accompanying text.

ute may be a violation of the father's constitutional right to equal protection under the fourteenth amendment.

C. *The Father's Opportunity Interest and Due Process*

The U.S. Supreme Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected."[199] If and when a relationship between a father and his natural child develops, that relationship is entitled to protection against arbitrary state action as a matter of due process.[200] But the Court has not yet decided exactly how much protection courts must give to the father's opportunity interest.

The U.S. Supreme Court has held that the biological connection between a parent and child is not enough to justify full constitutional protection.[201] According to the Court, the significance of the biological connection is that it offers the natural father an opportunity he may grasp.[202] If the father uses this opportunity to establish a relationship, and accepts responsibility, this will create a constitutionally-protected parent-child relationship.[203]

In *Quilloin*, the U.S. Supreme Court justified terminating the father's rights because it was "not a case in which the unwed father at any time had, or sought, actual or legal custody of his child."[204] Quilloin had "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[205] In other words, he had failed to grasp the opportunity to establish a relationship.

But it is not enough for a father to *attempt* to establish a relationship. In *Lehr*, the father was clearly attempting to establish a relationship with his child.[206] The Court ruled that because he did not send a post card to the putative father registry, Lehr had not taken the steps required by law for him to receive notice.[207] But more than failing to preserve his right to notice, the Court found

199. *Quillion*, 434 U.S. at 255.

200. *Caban*, 441 U.S. at 414 (Stevens, J., dissenting) (quoted with approval by the majority opinion in *Lehr*, 463 U.S. at 260).

201. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting) (quoted with approval by the majority opinion in *Lehr*, 463 U.S. at 260). But not all of the Justices have agreed with this. In his dissent, which Justices Marshall and Blackmun joined, Justice White stated, "[a] 'mere biological relationship' is not as unimportant in determining the nature of liberty interests as the majority suggests . . . . The 'biological connection' is itself a relationship that creates a protected interest." *Lehr*, 463 U.S. at 272 (White, J., dissenting).

202. *Lehr*, 463 U.S. at 262-68.

203. *Id.*

204. Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

205. *Id.* at 256.

206. The judge who granted the step-father's adoption had actual knowledge that the father's paternity petition was pending. *Lehr*, 463 U.S. at 252.

207. *Id.* at 250-51.

that Lehr had failed to establish a legal relationship with his child.[208] The Court particularly emphasized that this step was completely within Lehr's control.[209]

In California, there are no means within the father's control to become a presumed father.[210] A natural father cannot establish a relationship with his child or become a presumed father without the mother's consent.[211] The Court stated in *Lehr*, "[s]ince the New York statutes adequately protected [the father's] interest in establishing a relationship with [his child], we find no merit in the claim that his constitutional rights were offended."[212]

Do the California statutes also adequately protect the father's interest in establishing a relationship with his child? The statutes do provide that a natural father shall be given notice,[213] and his rights will be terminated only if it is in the best interest of the child to do so.[214] The trial court may consider all relevant evidence, including the efforts made by the father to obtain custody.[215] No U.S. Supreme Court decision has explicitly held that the father of a newborn is entitled to any greater rights than those mentioned above.

A California Court of Appeal, however, held that a father has a due process right, under the United States Constitution, which requires the application of the parental preference doctrine of section 4600 to cases where a mother wishes to place a newborn child for adoption and the unwed father wants custody.[216] The court stated that where the mother does not want physical custody herself, the father "may not be denied custody of his child or have his parental rights terminated except upon a finding that leaving custody with [adoptive parents] is necessary to avert harm to the child."[217]

In *Baby Girl M.*, the California Supreme Court also indicated that a natural father is entitled to a higher level of protection.[218] Although the court ostensibly based its conclusion on California statutes,[219] it included a discussion of U.S. Supreme Court deci-

208. *See supra* notes 164-66 and accompanying text.
209. *Lehr*, 463 U.S. at 264.
210. *See supra* notes 30-35 and accompanying text.
211. *See supra* notes 34-35 and accompanying text.
212. *Lehr*, 463 U.S. at 265.
213. CAL. CIV. CODE § 7017(d)(1).
214. CAL. CIV. CODE § 7017(d)(2).
215. CAL. CIV. CODE § 7017(d)(2).
216. *Adoption of Baby Boy D.*, 159 Cal. App. 3d 8, 22, 205 Cal. Rptr. 361, 369 (1984).
217. *Id.*
218. *Baby Girl M.*, 37 Cal. 3d 65, 75, 688 P.2d 918, 925, 207 Cal. Rptr. 309, 316 (1984). *See also supra* notes 51-59 and accompanying text.
219. *See supra* notes 53-56 and accompanying text.

sions regarding the rights of unwed fathers.[220] In particular, it quoted at length from a law review article analyzing those decisions, which said:

> Recognition of an opportunity interest in unwed fathers requires a conclusion that if the two elements of a constitutionally protected parent-child relationship are the biological link and commitment to and exercise of custodial responsibility, the state may not deny biological parents the opportunity to establish a protected custodial relationship.[221]

The California Supreme Court concluded its discussion of the article by quoting the conclusion which stated that, where a child is being adopted by strangers, and the father has attempted to pursue custodial responsibility, "the father's opportunity to establish a protected relationship must prevail in the absence of his unfitness."[222]

This may explain why the California Supreme Court reached the decision it did.[223] Its interpretation of the California statutes seemed to be forced.[224] But if this decision was actually an attempt to protect the opportunity interests of unwed fathers on constitutional grounds, then it makes more sense. By claiming to base its decision on independent state grounds, the California Supreme Court prevented the U.S. Supreme Court from hearing the case on appeal.[225]

The California Supreme Court, by nominally basing its decision on California statutes, risked that the California legislature might change the law by amending the relevant statute. This amendment was exactly what happened.[226] Now a child may once again be adopted without his natural father's consent if a court finds it is in the child's best interest to do so.[227]

In addition to the legislature's response, the lower courts also took further action on the *Baby Girl M.* case. On remand, the trial court once again decided against the natural father, and the

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220. *Baby Girl M.*, 37 Cal. 3d at 74-75, 688 P.2d at 924-25, 207 Cal. Rptr. at 315-16.

221. *Id.* at 74, 688 P.2d at 924, 207 Cal. Rptr. at 315 (quoting Buchanan, *supra* note 11, at 351).

222. Buchanan, *supra* note 11, at 373.

223. The dissent noted, "[t]he majority strain mightily to support their untenable result by an erroneous evaluation of United States Supreme Court decisions relating to natural fathers." *Baby Girl M.*, 37 Cal. 3d at 81, 688 P.2d at 929, 207 Cal. Rptr. at 320 (Mosk, J., dissenting).

224. *See supra* notes 60-67 and accompanying text.

225. The United States Supreme Court will not review cases decided by state courts if the decision of the state court is based on adequate and independent state grounds. Herb v. Pitcairn, 324 U.S. 117, 125 (1945).

226. *See supra* notes 88-89 and accompanying text.

227. CAL. CIV. CODE § 7017(d).

court of appeal affirmed.[228] This decision was ordered unpublished.[229]

In the unpublished appellate decision, the concurring opinion stated unequivocally, "an unwed father has a constitutionally-protected, special, opportunity interest to *establish* a familial relationship with his child."[230] The concurring opinion claimed that even the county, which opposed the father's right to veto the adoption, now conceded that the father originally "had a constitutional right to develop an opportunity interest."[231] No reason was given for ordering the decision unpublished, but perhaps it was to prevent language such as this from becoming precedent.[232]

IV. Conclusions Regarding the Constitutionality of California's Protection of the Natural Father's Opportunity Interest

The United States Supreme Court has agreed to hear the case of *Baby Girl M.*[233] There are strong arguments that the natural father's opportunity interest is constitutionally protected,[234] but there are also strong counter-arguments that a natural father is entitled to nothing more than the notice which California law already provides.[235] If the U.S. Supreme Court finds the natural father's opportunity interest is constitutionally protected, the California legislature has two options.

The first is to return the law to the way it was immediately

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228. *Baby Girl M.*, 191 Cal. App. 3d 786, 795, 236 Cal. Rptr. 660, 666 (1987). *See supra* note 56.

229. *See supra* note 56.

230. *Baby Girl M.*, 191 Cal. App. 3d at 796, 236 Cal. Rptr. at 667. (Work, J., concurring) (emphasis in the original). The majority did not address this precise issue.

231. *Id.* at 798, 236 Cal. Rptr. at 668. (Work, J., concurring).

232. Rule 976(b) of the California Rules of Court states:

> No opinion of a Court of Appeal or an appellate department of the superior court may be published in the Official Reports unless the opinion: (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule; (2) resolves or creates an apparent conflict in the law; (3) involves a legal issue of continuing public interest; or (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

233. *Baby Girl M.*, 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr 309 (1984), *hearing granted sub nom.* McNamara v. County of San Diego, No. 87-5840 (April 18, 1988).

234. *See supra* notes 216-17 and accompanying text. *See also* Justice White's dissenting opinion in *Lehr*, 463 U.S. at 272, mentioned *supra* at note 201.

235. "It is impossible to read the court's opinion in Lehr v. Robertson, and not recognize that due process requires nothing more than notification to the natural father that his rights may be terminated." *Baby Girl M.*, 37 Cal. 3d at 81, 688 P.2d at 929, 207 Cal. Rptr. at 320 (Mosk, J., dissenting) (citation omitted).

following the California Supreme Court's *Baby Girl M.* ruling.[236] In *Baby Girl M.*, the California Supreme Court gave a natural father the right to veto the adoption of his child when he wished to have custody of the child himself, unless the court found that placing the child with the father would be a detriment to the child. Because this is essentially the same standard that applies to the child's mother, this ruling gave the natural father at least as much protection as the U.S. Supreme Court would require, and probably more. However, this was not the result the legislature desired.[237] The legislature quickly changed the law, taking back a significant part of the protection the court had given natural fathers.[238] Apparently the legislature wanted to provide more protection for the illegitimate children, because the law now states that the best interest of the child is controlling.[239]

The second alternative is to enlarge the definition of "presumed father," so that it would be within a natural father's control to become a presumed father. One way to do this would be to create a "putative father registry," similar to the New York system referred to in *Lehr*.[240] By registering with such an agency, a father would have a means within his control of establishing a relationship with his child. This would satisfy the Supreme Court guidelines.[241]

Another way to give natural fathers the power to create a protected relationship with their children, which is more in keeping with the spirit of California's distinction between "natural" and "presumed" fathers, would be to add an additional way to become presumed fathers based on the father's relationship with his child, or his attempt to establish such a relationship.[242] For example, a natural father might qualify if he openly acknowledges his paternity, and attempts to support the child and form a personal relationship with the child to the extent permitted by the child's mother or guardian, and is willing to have custody of the child.

When the appellate court in *Baby Girl M.* awarded custody of the child to the adoptive parents, it said, "while the rights of parents are important, our society is committed to the judgment that

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236. 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984).

237. *See supra* notes 88-89 and accompanying text.

238. *See supra* notes 89-90 and accompanying text.

239. "If the court finds that the man claiming parental rights is not the father, or that if he is the father *it is in the child's best interest* that an adoption be allowed to proceed, it shall order that that person's consent is not required for an adoption." CAL. CIV. CODE § 7017(d)(2) (emphasis added).

240. Lehr v. Robertson, 463 U.S. 248, 250-51 (1983).

241. *Id.* at 263-64.

242. For the current way to become a presumed father, *see supra* note 30.

the interests of children predominate."[243] Yet it is only the natural father whose rights can be terminated merely because it is in the best interest of the child to do so.[244] Natural mothers and presumed fathers are given greater protection.[245] California statutes still deny natural fathers the rights granted to all other parents. It remains to be seen whether this is constitutional.

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243. *Baby Girl M.*, 191 Cal. App. 3d 786, 794, 236 Cal. Rptr. 660, 666 (1987). This is an unpublished decision. *See supra* note 56.

244. CAL. CIV. CODE § 7017.

245. Their children may be adopted without their consent only where an award of custody to the parents would be detrimental to the child. CAL. CIV. CODE § 4600(c). *See supra* notes 64-67 and accompanying text.

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