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The Putative Father's Parental Rights: A Focus on "Family": *Quilloin v. Walcott*, 434 U.S. 246 (1978)

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Note

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

I. INTRODUCTION

Traditionally, the father of an illegitimate child was viewed by the law as a virtual non-entity. Recently, however, putative fathers[1] have enjoyed a new standing as parents with enforceable rights. This recognition of the putative parent has brought with it a great deal of legislative and judicial activity which has attempted to define precisely the boundaries of these newly recognized rights.

Emerging as a part of this period of definition was the Supreme Court's decision in *Quilloin v. Walcott*.[2] This case considered the putative father's parental rights in the context of adoption. The primary contribution of *Quilloin* was that it established a boundary, albeit a narrow boundary, beyond which the parental rights of putative fathers will not extend. The basic theme of the Supreme Court's analysis in *Quilloin* was that the extent of commitment to the welfare of the child, as evidenced by the fulfillment of familial roles, is a prime factor to be considered in determining the parental rights of putative fathers.

A. Background

Biologically, the natural father of an illegitimate child is a parent in the same respect that the mother is, but the law for centuries has refused to recognize him as such. In England from time immemorial the law has viewed the illegitimate as a "child of nobody, that is to say, as the child of no known body except its mother."[3] The basis for this common law disregard of the putative

1. A "putative father" is defined as "[t]he alleged or reputed father of an illegitimate child." BLACKS LAW DICTIONARY 1402 (4th ed. 1951).
2. 434 U.S. 246 (1978).
3. *Re* M, [1955] 2 All E.R. 911, 912.

father was the fact that his identity was often uncertain[4] and that he was stereotyped as irresponsible and unconcerned about his child.[5]

The right to adopt children, however, was unknown to the common law; it exists in the United States only by statute.[6] In establishing this right of adoption, the various states generally followed the English view of the putative father by requiring only the mother's consent to the adoption.[7] This English view was forcefully articulated by the Oregon Legislature when it enacted the following statute: "The consent of the mother of the child is sufficient . . . and for all purposes relating to the adoption of the child the (putative) father of the child shall be disregarded just as if he were dead."[8] In the absence, moreover, of this authority to veto an adoption by withholding consent, many states also dispensed with the right to notice.[9]

In 1971, however, the United States Supreme Court broke away from the common law tradition with its decision in *Stanley v. Illinois*.[10] In *Stanley*, Joan and Peter Stanley had cohabited intermittently for eighteen years without benefit of marriage. Three children were born to the Stanleys during the course of their union. Upon the death of Joan Stanley, the State of Illinois instituted dependency proceedings.[11] Although there was no showing that Peter Stanley was an unfit parent, the children became wards of the state.[12] The children were then placed with a court-appointed guardian.[13] Peter Stanley appealed the trial court's decision to place the children with a guardian to the Illinois Supreme

4. *Id.* If, however, the father could be identified, English law gave him the obligation to pay for the child's maintenance. *Id.*
5. Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 231 (1971).
6. *In re* Adoption of Malpica-Orsini, 36 N.Y.2d 568, 570, 331 N.E.2d 486, 487, 370 N.Y.S.2d 511, 513 (1975), *appeal dismissed*, 423 U.S. 1042 (1976).
7. *E.g.*, CAL. CIV. CODE § 224 (1954) (current version at CAL. CIV. CODE § 224 (West Supp. 1978)); DEL. CODE ANN. tit. 13, § 908(2)(a) (1974) (current version at DEL. CODE ANN. tit. 13, § 908(2)(a) (Supp. 1978)); NEB. REV. STAT. § 43-104 (Reissue 1974) (current version at NEB. REV. STAT. § 43-104 (Cum. Supp. 1978)); TEX. REV. CIV. STAT. art. 46a, § 6(d) (Vernon 1969) (repealed ch. 543, § 3, 1973 Tex. Gen. Laws (effective Jan. 1, 1974)); WASH. REV. CODE ANN. § 26.32.030(3) (1961) (current version at WASH. REV. CODE ANN. § 26.32.030(2) (Supp. 1977)).
8. Ch. 710, § 8(1), 1957 Or. Laws (repealed ch. 640, § 6, 1975 Or. Laws).
9. Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1584 (1972).
10. 405 U.S. 645 (1972).
11. *Id.* at 646.
12. *Id.*
13. *Id.*

Court[14] and then to the United States Supreme Court. He found relief in that Court when it said:

> [A]s 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 and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.[15]

The *Stanley* decision was a dramatic break from previous case law.[16] Juxtaposed against centuries of non-recognition, this break "inevitably carrie[d] the potential for altering drastically the legal framework of the adoption process."[17] In response to *Stanley*, many states have changed their statutory adoption schemes to recognize at least a limited right in the putative father to veto the adoption of his child.[18]

A major problem, however, faced by state legislatures in alter-

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14. *In re* Stanley, 45 Ill. 2d 132, 256 N.E.2d 814 (1970).
15. 405 U.S. at 649. The Court remanded Rothstein v. Lutheran Social Serv., 405 U.S. 1051 (1972), for reconsideration in light of *Stanley*. *Rothstein* involved the adoption of an illegitimate child without notice to, and over the objection of, the putative father. State v. Lutheran Social Serv., 47 Wis. 2d 420, 422, 178 N.W.2d 56, 57 (1970). The Wisconsin court stated that
    > the putative father of a child born out of wedlock does not have any parental rights; and . . . that the failure of the Wisconsin statutes to grant parental rights or notice of hearing to a putative father prior to termination of parental rights does not constitute a violation of the state or federal constitution.

    Id. at 434, 178 N.W.2d at 63.
16. *But see* Comment, *Protecting the Putative Father's Rights After* Stanley v. Illinois: *Problems in Implementation*, 13 J. FAM. L. 115 (1973-1974): "Prior to *Stanley*, at least three jurisdictions had been confronted with the putative father's rights: Michigan . . ., California . . ., and Minnesota . . . . The courts in each case granted the putative father the relief he sought, though a different justification was found in each state." *Id.* at 122 n.40 (citing *In re* Mark T., 8 Mich. App. 122, 154 N.W.2d 27 (1967); *In re* Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888 (1954); *In re* Brennan, 270 Minn. 455, 134 N.W.2d 126 (1965)).
17. Note, *The "Strange Boundaries" of* Stanley: *Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 518 (1973).
18. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-106 (West 1956) (current version at ARIZ. REV. STAT. ANN. § 8-106 (West Supp. 1978-1979)); CAL. CIV. CODE § 224 (1954) (current version at CAL. CIV. CODE § 224 (West Supp. 1978)); DEL. CODE ANN. tit. 13, § 908(2) (a) (1974) (current version at DEL. CODE ANN. tit. 13, § 908(2)(a) (Supp. 1978)); MINN. STAT. ANN. § 259.24(1)(a) (West 1971) (current version at MINN. STAT. ANN. § 259.24(1)(a) (West Supp. 1979)); 1957 Mont. Laws, ch. 240, § 5 (current version at MONT. REV. CODES ANN. § 61-205 (4 Cum. Supp., pt.1, 1977)); NEB. REV. STAT. § 43-104 (Reissue 1974) (current version at NEB. REV. STAT. § 43-104 (Cum. Supp. 1978)); TEX. REV. CIV. STAT. art. 46a, § 6(d) (Vernon 1969) (repealed ch. 543, § 3, 1973 Tex. Gen. Laws (effective Jan. 1, 1974)); WASH. REV. CODE ANN. § 26.32.030(3) (1961) (current version at WASH. REV. CODE ANN. § 26.32.030(2) (Supp. 1977)); WIS. STAT. ANN. § 48.84 (West 1957) (current version at WIS. STAT. ANN. § 48.84 (West Supp. 1978-1979)).

ing the law was whether *Stanley* should be interpreted narrowly, as applying to similar fact situations only, or whether it should be interpreted broadly as giving parental rights of putative fathers the full protection afforded all other classes of parents.[19] Generally, the substance of the statutory changes reflects a rather narrow view of *Stanley*,[20] *e.g.*, if something occurs[21] to eliminate or at least lessen the uncertainty as to the identity of the putative father and his interest in the child, then consent from that putative father will be required.[22] A change reflecting a broad view of *Stanley*, however, was made in Arizona law. This change apparently gave the putative father and the mother absolute equality regarding the right to veto the adoption of their illegitimate child.[23]

The issue of interpreting *Stanley* broadly or narrowly came squarely before the Georgia Supreme Court in *Quilloin v. Walcott*.[24] The court held to a narrow view of *Stanley* in permitting the adoption of the child over the objections of the putative father and without a showing of his unfitness as a parent,[25] and the

19. Comment, *supra* note 16, at 125.

20. A principle reason for viewing *Stanley* narrowly was articulated in *In re* Adoption of Malpica-Orsini, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975):

> To require the consent of fathers of children born out of wedlock . . . would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations. At the very least, the worthy process of adoption would be severely impeded.

Id. at 572, 331 N.E.2d at 489, 370 N.Y.S.2d at 516.

21. *E.g.*, ALASKA STAT. § 20.15.040 (1975) (legitimation of the child); CONN. GEN. STAT. ANN. § 45-61(d) (West Supp. 1978) (regular contribution to the support of the child); FLA. STAT. ANN. § 63.062 (West Supp. 1977) (acknowledgment of parentage); HAW. REV. STAT. § 578-2(a) (1976) (adjudication of parentage by a court, or demonstration of responsibility for and interest in the child's welfare).

22. *See, e.g.*, FLA. STAT. ANN. § 63.062(1)(b) (West Supp. 1977).

23. ARIZ. REV. STAT. ANN. § 8-106 (West Supp. 1977) provides: "No adoption shall be granted unless consent to adopt has been obtained and filed with the court from the following: 1. From both natural parents, if living, except in the following cases . . . ." Deleted from a former version of Section 8-106(1) by S.B. 1277, ch. 172, § 8-106(A)(1)(d), 1976 Ariz. Sess. Laws, was an exception which provided:

> Consent is not necessary from a father who was not married to the mother of the child both at the time of its conception and at the time of its birth, unless the father under oath has acknowledged parentage in a document filed with the court or with the agency or division at or prior to the time the petition is filed, or unless the parentage of the father has been previously established by judicial proceedings.

Id. at 863.

24. 238 Ga. 230, 232 S.E.2d 246 (1977), *aff'd*, 434 U.S. 246 (1978).

25. The natural father contends that the Georgia statutes take away his parental rights without due process of law. He relies on Stanley v.

United States Supreme Court affirmed.[26]

B. Facts of *Quilloin v. Walcott*

Darrell Webster Quilloin was born the illegitimate child of Ardell Williams and Leon Webster Quilloin in December, 1964.[27] Since the mother and the putative father did not marry or otherwise establish a home together,[28] the child lived in the custody and control of his mother.[29] The putative father, however, showed only a limited interest in the child. He consented to the entry of his name on the child's birth certificate, provided support on an irregular basis, gave the child toys and gifts from time to time, and allowed the child to visit with him on many occasions.[30] At no time, however, did he petition for legitimation[31] of the child prior to the commencement of the adoption proceedings involved in this case.[32]

When the child was less than three years old, the mother married Randall Walcott.[33] Ten and one half years later, Randall Walcott filed, with the consent of the mother, a petition for adoption of the child. Notice of the adoption proceedings was served on the putative father,[34] and he responded with an application for a writ of habeas corpus seeking visitation rights, a petition for legitimation, and an objection to the adoption.[35]

The petitions for adoption, legitimation, and writ of habeas corpus were consolidated for trial.[36] At the trial, the court did not

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> Illinois . . . . In *Stanley*, the Supreme Court held an Illinois statutory scheme unconstitutional which required a hearing and proof of unfitness before the state could assume custody of a child of married or divorced parents or unmarried mothers, yet required no such showing before separating a child from an unwed father. In *Stanley*, the father was a de facto member of the family unit, and the mother had died. Either of these factual differences would be sufficient to distinguish *Stanley* from the case before us. We find that *Stanley* is not controlling and that Code Ann. §§ 74-203 and 74-403(3) violate neither equal protection nor due process.

Id. at 233-34, 232 S.E.2d at 248-49 (footnote omitted).

26. 434 U.S. 246 (1978).
27. *Id.* at 247.
28. *Id.*
29. *Id.* From September 1967 until 1969, however, the child lived with his maternal grandmother. *Id.* n.1.
30. *Id.* at 249 n.6, 251.
31. The legitimation of children by putative fathers was provided for in GA. CODE ANN. § 74-103 (1973). For text of statute, see note 42 *infra*.
32. 434 U.S. at 249.
33. *Id.* at 247.
34. *Id.* at 250 n.7.
35. *Id.* at 250.
36. *Id.*

find the putative father to be an unfit parent.[37] Nevertheless, the court ruled that the putative father's petitions be denied in the "best interests of the child" and that the adoption be granted.[38] The putative father appealed the trial court's decision to the Georgia Supreme Court[39] and to the United States Supreme Court contending that he was entitled to recognition of and preservation of his parental rights absent a showing of his unfitness as a parent. Both courts affirmed the trial court's ruling.

II. DUE PROCESS ANALYSIS

A. A Family Role Focus

The *Quilloin* conflict centered on a Georgia statutory adoption scheme. These statutes provided, with certain exceptions,[40] that no adoption could occur without the consent of the child's living parents.[41] Within this scheme, however, treatment of the putative father was unique. Unless the putative father acted to legitimate the child,[42] he had no parental rights.[43] His consent was never es-

37. *Id.* at 251.
38. *Id.* at 252.
39. 238 Ga. 230, 232 S.E.2d 246 (1977).
40. GA. CODE ANN. § 74-403(2) (1973) provided:

> Exemption where child abandoned or parental custody terminated.—Consent of a parent shall not be required where a child has been abandoned by such parent, or where such parent of a child cannot be found after a diligent search has been made, or where such parent is insane or otherwise incapacitated from giving such consent and the court is of the opinion that the adoption is for the best interest of the child, or where such parent has surrendered all of his or her rights to said child to a licensed child-placing agency, or to a court of competent jurisdiction for adoption, or to the Department of Human Resources through its designated agents, or where such a parent has had his or her parental rights terminated by order of a juvenile or other court of competent jurisdiction, or where such parent is dead. Where a decree has been entered by a superior court of this State or any other court of competent jurisdiction of any other State ordering a parent to support a child and such parent has wantonly and wilfully failed to comply with the order for a period of 12 months or longer, the consent of such parent shall not be required and the consent of the other parent alone shall suffice in any proceedings for adoption relative to such child.

41. *Id.* § 74-403(1) established the general rule that "no adoption shall be permitted except with the written consent of the living parents of a child."
42. *Id.* § 74-103 provided in full:

> A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child

sential for the adoption of the child, nor was his objection to the adoption ever relevant.[44]

As applied to the particular facts of *Quilloin*, the Court ruled as a matter of due process that this statutory scheme was proper: "Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, was in the 'best interests of the child.' "[45]

The "best interests of the child" standard articulated by the Court is no magic criterion for settling adoption disputes.[46] Indeed, such a standard lacks precise meaning or substance.[47] In *Quilloin*, it served as a mere general label for the family role policies that were applied to defeat Leon Quilloin's parental rights.[48] These policies include (1) the preservation of an existing family unit, and (2) the requirement that parental responsibility be undertaken before parental rights can be asserted. The significance of the Supreme Court's upholding a "best interests of the child" test is that *Stanley*'s much more stringent "parental unfitness" standard[49] was not absolute. Certainly, where the putative father

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to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known.

43. "[U]nless and until the child is legitimated, the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives, § 74-203." Quilloin v. Walcott, 434 U.S. at 249.

44. GA. CODE ANN. § 74-403(3) (1973), which operated as an exception to the general rule stated in Section 74-403(1), *see* note 41 *supra*, provided: "If the child be illegitimate, the consent of the mother alone shall suffice. Such consent, however, shall not be required if the mother has surrendered all of her rights to said child to a licensed child-placing agency, or to the Department of Human Resources."

45. 434 U.S. at 255.

46. "We have little doubt that the Due Process Clause would be offended '(i)f a State were to attempt to force the breakup of a natural family . . . for the sole reason that to do so was thought to be in the children's best interest.' " *Id.*

47. "In determining the issue of the child's welfare and best interests the court is vested with broad discretionary powers." 2 C.J.S. *Adoption of Persons* § 90, at 520 (1972).

48. "Under the circumstances of this case appellant's substantive rights were not violated by application of *a* 'best interests of the child' standard." 434 U.S. at 254 (emphasis added). *See also* Bennett v. Jeffreys, 40 N.Y.2d 543, 549, 387 N.Y.S.2d 821, 826, 356 N.E.2d 277, 283 (1976) ("[I]n ascertaining the child's best interest, the court is guided by principles which reflect 'considered social judgments in this society respecting the family and parenthood.' ").

49. The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. [Illinois] insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.

has fulfilled a substantial parental role, as was the case in *Stanley*, the unfitness determination is essential. But when a man fills the parental void left by a manifestly disinterested putative father, the "parental unfitness" protection surrounding the biological relationship can be regarded as waived in the "best interests of the child."

Although the due process ruling was very narrow in *Quilloin*, a number of limitations on the newly created parental rights of putative fathers were manifested. The first limitation was that a putative father's failure to show a substantial interest in his child's welfare and to employ methods provided by state law for solidifying his parental rights, *e.g.*, legitimation, will remove from him the full constitutional protection afforded the parental rights of other classes of parents.[50] Second, the parental rights of a demonstrably disinterested putative father may be subordinated when in conflict with the interests of an existing, recognized family unit of which his child is a member.[51] This subordination may occur even without the *Stanley* procedural requirement of a judicial determination of parental unfitness.

Limiting the holding in *Quilloin*, however, is the uncertainty of an unusual fact situation. Certainly, the determination of a child's legal father is not typically postponed until the child is eleven years old. Thus, the *Quilloin* time factor alone could have attributed a special, or even unique, significance to the lack of interest shown by Leon Quilloin and to the family unit's existence. Indeed, the Court considered itself constrained to limit *Quilloin* to the facts of the case.[52] A number of basic questions, therefore, remain,[53] *e.g.*, whether the *Quilloin* ruling is merely exceptional, and whether the policies evidenced in the opinion are central to

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405 U.S. at 657-58.

50. 434 U.S. at 254-55.

51. The *Quilloin* Court specified that parental rights are constitutionally protected. This protection, however, did not extend to Leon Quilloin:

> [T]his is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant.

Id. at 255.

52. *Id.* at 254.

53. These questions, however, may soon be clarified by the United States Supreme Court. Presently before the Supreme Court is a case with factual circumstances similar to those in *Quilloin*. The pending case, Caban v. Mohammed, *cert. granted*, 436 U.S. 903 (1978) (No. 77-6431), involved the objection of a putative father to the adoption of his children by their natural mother and her new husband. In a lower court decision the adoption petition was granted. This decision was affirmed by the New York appellate courts.

the consideration of putative fathers' parental rights in all cases. Thus, the *Quilloin* ruling adds little certainty to the boundaries of putative fathers' parental rights.

B. Ramifications for Psychological Parenthood

Nevertheless, a broad significance may be found in the fact that the Court recognized as the child's legal father the man who had no biological relationship to the child. This subordination of the biological father's parental rights can be seen as a tacit recognition of a psychological parenthood theory. A "psychological parent" has been defined as[54]

> one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological . . ., adoptive, foster . . . parent, or any other person.[55]
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> . . . .
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> . . . [F]or the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment. . . . An absent biological parent will remain, or tend to become, a stranger.[56]

Central to the psychological relationship, moreover, is the child's

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See In re Adoption of Denise C., 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977).

On November 6, 1978, the Supreme Court heard oral arguments in *Caban* on whether the provisions of N.Y. DOM. REL. LAW § 111 (McKinney 1977) violated due process and equal protection standards. Section 111 provides that consent from the mother of an illegitimate child is a prerequisite to the adoption of that child, whereas consent from that child's natural father is not needed for the adoption to occur.

Counsel for the putative father argued that his client's interest was precisely the same as that of the father in *Stanley* who had raised his child and thus greater than that of the natural father in *Quilloin* whose relationship with his child was "wispy" at best. Moreover, appellant argued that section 111 impermissibly drew a line on the basis of sex—preferential treatment was given to mothers of illegitimate children over putative fathers. 5 FAM. L. REP. (BNA) 2035 (1978).

Counsel for the adopting parents agreed that the illegitimates' mother received preferential treatment over the putative father, but contended that New York had the right to make such a distinction. The basis for this distinction was stated to be that in "the experience of mankind," the mother has been the more dependable parent. Furthermore, the father is not in a protected class; therefore, the best interests of the child test is sufficient to protect his interests. Respondent also contended that, contrary to appellant's assertion, there was no substance to the putative father's relationship with the children. *Id.*

54. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).
55. *Id.* at 98. For the purposes of this casenote, however, the psychological relationship will include no biological ties.
56. *Id.* at 17.

sense of being wanted, *i.e.*, that he or she is an essential figure in the parent's emotional life.[57] Without such a perception the child will not develop a proper self-appreciation or proper regard for others.[58]

The United States Supreme Court considered the psychological parenthood theory offered by Goldstein, Freud and Solnit in *Smith v. Organization of Foster Families for Equality & Reform*[59] (*OFFER*). In *OFFER*, the foster parents had relied to some extent on the Goldstein, Freud and Solnit psychological parenthood theory.[60] In response to this reliance, the Supreme Court specified that

> this case turns not on the disputed validity of any particular psychological theory, but on the legal consequences of the undisputed fact that the emotional ties between foster parent and foster child are in many cases quite close, and undoubtedly in some as close as those existing in biological families.[61]

Thus, the Supreme Court refused to adopt the psychological parenthood theory.[62]

OFFER involved a challenge by individual foster parents and a foster parent organization against procedures used under New York State and New York City law for removing foster children from foster homes. This challenge involved a request for declaratory and injunctive relief under 42 U.S.C. § 1983.[63] The district court granted relief, declaring that the pre-removal procedures

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57. *Id.* at 20.

58. *Id.* Being wanted, however, is not always beneficial to the child:

> To be wanted ceases to be beneficial to the degree that "wanting" the child is not based on reciprocity of feelings and on recognition of the child's own personal characteristics. The child is placed in jeopardy whenever the adults' claim for him is based solely or predominantly on motives such as the wish to gain some financial advantage; to score over a warring partner after divorce; to force a reluctant sexual partner into marriage; to cement an insecure marital relationship; or to replace a child lost by death.
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> To be wanted also ceases to be beneficial if the adults' need for the child and valuation of him are excessive and if no or too little return from his side is expected.

Id. at 21.

59. 431 U.S. 816 (1977).

60. *See* Organization of Foster Families v. Dumpson, 418 F. Supp. 277 (S.D.N.Y. 1976), *rev'd*, 431 U.S. 816 (1977).

61. 431 U.S. at 845 n.52.

62. Goldstein, Freud and Solnit, moreover, have been severely criticized for ignoring empirical research about parental deprivation which throws doubt on their assumptions and for failing to assess the costs as well as the benefits of their proposals. *See* Katkin, Bullington & Levine, *Above and Beyond the Best Interests of the Child: An Inquiry Into the Relationship Between Social Science and Social Action*, 8 LAW & SOC'Y REV. 669 (1974). *See also* Strauss & Strauss, Book Review, 74 COLUM. L. REV. 996 (1974).

63. (1976).

were defective.[64] The United States Supreme Court, however, reversed.[65] The Supreme Court did not decide whether the foster family psychological relationship constituted a due process liberty interest. Rather, it ruled that, even assuming such an interest did exist in the foster relationship, the procedures used were adequate to protect that interest.

In spite of the fact that the foster parents were frustrated in *OFFER*, dicta in that opinion indicates that the Court is inclined to recognize a liberty interest in psychological parent-child relationships.[66] The *OFFER* opinion quoted the statement from *Prince v. Massachusetts*[67] that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[68] With reference to this statement in *Prince*, the Court in *OFFER* specified that "[t]he scope of these rights extends beyond natural parents."[69] Moreover, the *OFFER* Court recognized a basic principle from the psychological parenthood theory that the concept of family relationships, to which constitutional rights attach, is not limited to biological ties:

> [T]he usual understanding of "family" implies biological relationships, and most decisions treating the relation between parent and child have stressed this element. . . .
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> . . . But biological relationships are not exclusive determination of the existence of a family. . . .
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> . . . [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association . . . as well as from the fact of blood relationship.[70]

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64. In Organization of Foster Families v. Dumpson, 418 F. Supp. 277, 282 (S.D.N.Y. 1976), *rev'd*, 431 U.S. 816 (1977), however, the district court refused to recognize a liberty interest in psychological parent-child relationships, stating that "[w]e need not and should not . . . reach out to decide such novel questions when narrower grounds exist to support our decision." *Id.* at 282.
65. 431 U.S. 816 (1977).
66. Three justices, however, in a concurring opinion, stated specifically that the foster parents in *OFFER* had no liberty interest in their psychological family relationships:
> In these circumstances, I cannot understand why the Court thinks itself obliged to decide these cases on the assumption that either foster parents or foster children in New York have some sort of "liberty" interest in the continuation of their relationship. Rather than tiptoeing around this central issue, I would squarely hold that the interests asserted by the appellees are not of a kind that the Due Process Clause of the Fourteenth Amendment protects.

431 U.S. at 857-58 (Stewart, J., concurring).
67. 321 U.S. 158 (1944).
68. *Id.* at 166.
69. 431 U.S. at 843 n.49.
70. *Id.* at 843.

Thus, the United States Supreme Court has articulated a theoretical basis for recognizing a liberty interest in the psychological parent-child relationship which falls under the protection of the fourteenth amendment.

In light of this theoretical basis, *Quilloin* takes on special significance. The *Quilloin* Court recognized that biological parents have a constitutionally protected interest in their children. Nevertheless, the Court subordinated the biological father's rights to those of the psycholgical father.[71] This subordination may be seen as a recognition by the United States Supreme Court of a liberty interest in the psychological parent-child relationship.[72]

Assuming that such a liberty interest was recognized by *Quilloin*, the question arises as to when that interest vests in the psychological relationship. *Quilloin* clearly indicated that it could not vest until the rights of the competing biological relationship had diminished: "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. . . . But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child."[73] A similar indication was given by the *OFFER* Court. In *OFFER* the natural parents, like Leon Quilloin, had failed to establish a relationship with their children and a psychological parent-child relationship had arisen in the foster family. Thus, the rights of the natural parents appeared to be diminished. The Court indicated, however, that the natural parents continued to have legal rights in the child that would possibly preclude the vesting of a liberty interest in the psychological relationship.[74] These legal rights were based upon the facts that the state, an essential partner in the foster relationship, recognized a legal interest in the natural parents and that the natural parents had initially given up the child only on the express contractual understanding that the child would be returned upon the occurrence of specific conditions.[75]

Goldstein, Freud and Solnit also recognized that the mere existence of a psychological relationship does not necessarily vest in

71. The fact, however, that the child's natural mother was a member of the *Quilloin* protected family unit was certainly not an unimportant factor in defeating Leon Quilloin's parental rights. It should be noted in contrast that in *Stanley* the natural mother was not alive to assert her rights against the putative father whose rights withstood all other challenges.

72. Granted, *Quilloin* involved the biological parent asserting his rights, rather than the psychological parent as in *OFFER*. Moreover, the psychological parent in *Quilloin* did not ask that a psychological right be recognized. Nevertheless, the *Quilloin* Court articulated its reasoning in terms of protecting an existing family unit of which a psychological parent was a member.

73. 434 U.S. at 255.

74. 431 U.S. at 845-47.

75. *Id.*

that relationship a right superior to that of the biological relationship:

> The process through which a new child-parent status emerges is too complex and subject to too many individual variations for the law to provide a rigid statutory timetable. For the purposes of declaring a child eligible for adoption or of acknowledging the existence of a common-law adoptive relationship,[76] abandonment in law would have taken place by the time the parents' absence has caused the child to feel no longer wanted by them. It would be that time when the child, having felt helpless and abandoned, has reached out to establish a new relationship with an adult who is to become *or has become* his psychological parent.[77]

A liberty interest recognized in psychological relationships, therefore, can only be a limited one, subject to the rights of biological parents who have fulfilled a parental role. Thus, such a recognition, though certainly an expansion of traditional law, is not a radical departure from the basic concepts of family law: "[R]ejected is the notion . . . that third-party custodians may acquire some sort of squatter's rights in another's child. Third-party custodians acquire 'rights' . . . only after, as the cases have always held, the parent's rights and responsibilities have been displaced."[78]

III. EQUAL PROTECTION ANALYSIS

A. A Family Role Focus

In *Quilloin*, the Supreme Court indicated that a substantial difference in the extent of commitment to the welfare of the illegitimate child, as evidenced by the fulfillment of familial roles, is a sufficient constitutional basis for granting greater parental rights to one parent than to another.[79] Leon Quilloin had argued that his parental rights were indistinguishable from those of any married father and particularly from those of a divorced father. The Court, however, disagreed and ruled that the state could permissively give Leon Quilloin less veto authority than it provided a married or divorced father. The basis for this distinction was the fact that Quilloin had never "shouldered any significant responsibility [ac-

76. The term "common-law adoptive parent" is not currently in use in law. We use the term to designate those psychological parent-child relationships which develop outside of either placement by formal adoption or by the initial assignment of a child to his biological parents. Such relationships may develop when a parent, without resort to any legal process, leaves his or her child with a friend or relative for an extended period of time.

J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 54, at 27.

77. *Id.* at 48 (emphasis added).

78. Bennett v. Jeffreys, 40 N.Y.2d 543, 552 n.2, 356 N.E.2d 277, 285 n.2, 387 N.Y.S.2d 821, 829 n.2 (1976).

79. 434 U.S. at 256.

tual or legal] with respect to the daily supervision, education, protection, or care of the child,"[80] whereas even a divorced father will have at least borne full legal responsibility for the rearing of his children during the period of the marriage. The Court specified that "*[u]nder any standard of review*, the State was not foreclosed from recognizing this difference . . . ."[81]

A corollary to this equal protection ruling is found in *Mathews v. Lucas*.[82] *Mathews* considered the constitutionality of the Social Security Act provision allowing dependent children to receive benefits upon the death of a parent.[83] Under this Act, legitimate and legitimated[84] children were presumed dependent. Illegitimate children, on the other hand, could receive benefits only upon the demonstration of a significant indication of the likelihood of actual dependency. This statutory scheme was upheld.[85] Thus, the lack of family relationships between the father and his illegitimate child was a sufficient justification for denying the children rights in their putative father. It does not seem entirely unreasonable, therefore, for the same lack of familial relationships to be adequate justification for denying the putative father rights in his illegitimate children, regardless of the rights possessed by other classes of parents.

Other cases also demonstrate a family focus in the law regarding illegitimates. In *Levy v. Louisiana*,[86] for example, illegitimate children sought recovery for the wrongful death of their mother. The Court granted recovery, stating that the children "were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would. We conclude that it is invidious to discriminate against them . . . ."[87]

Another example is found in *Weber v. Aetna Casualty & Surety Co.*[88] *Weber* involved legitimate children (the man's by a prior

80. *Id.*
81. *Id.* (emphasis added).
82. 427 U.S. 495 (1976).
83. *Id.* at 497.
84. For factors that qualify a child as legitimated, see 427 U.S. at 499.
85. *Id.* at 516.
86. 391 U.S. 68 (1968).
87. *Id.* at 72.

> [T]he mother . . . gave birth to these five illegitimate children and . . . they lived with her; . . . she treated them as a parent would treat any other child; . . . she worked as a domestic servant to support them, taking them to church every Sunday and enrolling them, at her own expense, in a parochial school.
>
> . . . .
>
> . . . . The rights asserted here involve the intimate, familial relationship between a child and his own mother.

Id. at 70-71.
88. 406 U.S. 164 (1972).

marriage) and illegitimate children living in the same household with parents who were not married to each other. When the man died, the legitimate children received workmen's compensation benefits from his death, but the illegitimate children received no such benefits. The Court held that the illegitimate children were also entitled to receive benefits because their affinity for and dependence upon their putative father was as great as that of the legitimate children.[89]

In *Stanley*, moreover, the Court emphasized that Stanley's constitutionally protected interest was "in the children he has sired [illegitimately] *and raised*."[90] Without the family role distinction between *Stanley* and *Quilloin*, the two cases would be difficult to reconcile.[91] Thus, the family focus is and has been an essential factor in determining parental rights in illegitimate children.

B. Implications For Sex Discrimination

Although the Supreme Court in *Quilloin* did not see fit to discuss the issue of sex discrimination,[92] the *Quilloin* ruling allowed a statutory scheme to stand which appears to discriminate against men: "The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him . . . . Being the only recognized parent, she may exercise all the paternal [*sic*] power."[93] Thus, the Court implicitly established putative fathers as a special class of parents that may be treated differently under certain circumstances from mothers of illegitimate children.

The family role policy specified in *Quilloin* for treating putative fathers differently than married fathers involved a difference in past relationships between the parent and child. This policy seems to be much more appropriate when applied to mothers of illegitimate children than to divorced fathers.[94] The mother, dur-

89. *Id.* at 169-70.
90. 405 U.S. at 651 (emphasis added).
91. *Stanley* required a determination of the putative father's unfitness before terminating his parental rights; whereas, *Quilloin* dispensed with that prerequisite.
92. Although appellant's brief stated that "[t]he challenged Georgia statutes are . . . gender based distinctions and . . . are out of touch with the equal protection clause of the Fourteenth Amendment," Brief for Appellant at 23, the Court brushed aside the sex discrimination issue on the technicality that it was not specifically included in the jurisdictional statement. 434 U.S. at 253 n.13.
93. GA. CODE ANN. § 74-203 (1973). The Georgia Supreme Court indicated that the word "paternal" in this section is the result of a misprint, and was instead intended to read "parental." *See* Quilloin v. Walcott, 238 Ga. 230, 231, 232 S.E.2d 246, 247 (1977).
94. It is not difficult to conceive of a fact situation in which the divorced father's

ing the period of pregnancy, bears actual responsibility with respect to the daily supervision, protection, and care of the child in a very thorough sense. Indeed, she shoulders actual responsibility during pregnancy to an extent at least equal to that of any divorced father. The United States Supreme Court, moreover, has determined that the ultimate legal authority over the child during pregnancy resides in the mother alone.[95] Thus, the mother's parental rights at the child's birth are deserving of the highest constitutional protection.

The putative fathers' parental rights, on the other hand, do not arise in such a spontaneous manner. To protect his rights in most states the putative father must utilize statutory procedures for establishing his parental rights in his child[96] (this may be accomplished even before the child's birth) or demonstrate in a variety of non-legal ways a substantial commitment to the child's welfare.[97] The absence of such affirmative action places his parental rights in a position inferior to those of the mother under state law at the birth of the child.[98] Thus, the Supreme Court in *Quilloin v. Walcott* has established a basis for allowing in certain circum-

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relationship, both actual and legal, to his legitimate child is quite attenuated. Differing standards of review do not foreclose such a comparison because *Quilloin* specified that "[u]nder any standard of review," 434 U.S. at 256, this policy was significant.

95. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court held that a state may not give a man the legal authority to veto his wife's decision to abort her child. In determining whose consent was necessary to authorize the abortion, a primary difficulty apparently involved the relevance of a marriage relationship. The Court devoted a significant portion of its opinion to this factor. Thus, in the context of illegitimacy, this factor is totally irrelevant and the woman's legal authority over the unborn child is even stronger than that of the woman in *Danforth*.

96. *See, e.g.*, ALASKA STAT. § 20.15.040 (1975) (legitimation of the child); CONN. GEN. STAT. ANN § 45-61(d) (West Supp. 1978) (regular contribution to the support of the child); FLA. STAT. ANN. § 63.062 (West Supp. 1977) (acknowledgment of parentage); HAW. REV. STAT. § 578-2(a) (1976) (adjudication of parentage by a court, or demonstration of responsibility for an interest in the child's welfare).

97. The *Quilloin* case gives an example of a commitment that is not sufficient.

98. *Quilloin* suggested, however, that a failure to utilize statutory procedures over a period of time for protecting parental rights could be sufficient in itself (even if a substantial interest in the child's welfare had been demonstrated) to defeat a putative father's parental rights. The Court stated that "[w]e would hesitate to rest decision on this ground [*i.e.*, that Leon Quilloin did not petition for legitimation until the child was nearly twelve years old]. . . . But in any event we need not go that far . . . ." 434 U.S. at 254. The primary reason given for this hesitancy was "that appellant was not aware of the legitimation procedure until after the adoption petition was filed." *Id.* Thus, although the decision did not turn on Leon Quilloin's failure to act, the Court clearly indicated that such a failure placed his parental rights in jeopardy.

stances a mother to have parental rights to an illegitimate child superior to those of the child's father.

IV. CONCLUSION

The articulated rationale for the *Quilloin* holding was rather abrupt. Rather than discussing at length the theoretical underpinnings of this holding, the *Quilloin* opinion dwelled particularly on the facts of the case and dealt with policy considerations only briefly.[99] The precise boundaries of the putative father's parental rights, although narrowly clarified in *Quilloin*, remain uncertain. Undoubtedly, the extent of these parental rights will be the subject of considerable debate in the near future.[100]

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99. *E.g.*, the Court devoted seven pages to the factual background of the case and only three pages to the due process and equal protection rationale.

100. *See, e.g.*, Caban v. Mohammed, *cert. granted*, 436 U.S. 903 (1978) (No. 77-6431); note 53 *supra*.