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THE PARENTAL RIGHTS OF UNWED FATHERS: A DEVELOPMENTAL PERSPECTIVE

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Unwed fathers have traditionally been treated differently than either unwed or married mothers and fathers. This article will focus on situations in which the unwed father seeks parental rights after the mother relinquishes the child for adoption and discuss the present state of the law and its relationship to developmental psychology. While some courts allow the parental rights of unwed fathers to predominate over the interests of third parties, too many continue to place insufficient weight upon the parental rights of unwed fathers.

Courts treat unwed fathers inconsistently across jurisdictions, generally focusing on the existence and quality of the relationship between the unwed father and his child without consulting relevant social science literature. As a result, judges may be making decisions which are directly in conflict with the applicable developmental research. These decisions, relying on outdated or discredited literature, assume precedential value. By failing to consult the most relevant and current research, courts are foregoing the opportunity to improve the quality of their decision-making.

REVIEW OF THE LAW

Legitimate children historically were treated as property of their fathers;¹ illegitimate children were considered children of no one.² Illegitimate children eventually began to be regarded solely as the children of their mother.³ Statutes were enacted which granted mothers almost ex-

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1. See, e.g., 4 L. WARDLE, C. BLAKESLEY, & J. PARKER, *CONTEMPORARY FAMILY LAW: PRINCIPALS, POLICY AND PRACTICE* § 39.05 (1988); Note, *Shoecraft v. Catholic Social Services Bureau: For an Unwed Father, Five Days is Forever*, 20 CREIGHTON L. REV. 647, 648 (1987) [hereinafter *Shoecraft*]; Comment, *A Modern-Day Solomon's Dilemma: What of the Unwed Father's Rights?*, 66 U. DET. L. REV. 267, 269 (1989) [hereinafter *Dilemma*].

2. See, e.g., S. BRECKINRIDGE, *THE FAMILY AND THE STATE: SELECT DOCUMENTS* 415 (1972); *Shoecraft*, *supra* note 1.

3. See, e.g., S. BRECKINRIDGE, *supra* note 2; *Dilemma*, *supra* note 1; *Shoecraft*, *supra* note 1.

clusive rights to their children, both legitimate and illegitimate, in almost any dispute.⁴ Recently, fathers of legitimate children were given increased opportunity to obtain custody of their children in custody disputes;⁵ fathers of illegitimate children continued, in most jurisdictions, to have little or no rights to their children.⁶

In the past twenty years, unwed fathers have begun to employ the fourteenth amendment to challenge the automatic denial of their parental rights. The United States Supreme Court has decided a number of cases concerning this issue.⁷ In defining the legal rights of unwed fathers and the extent to which they are constitutionally protected, the cases have sometimes been unclear.⁸ As a result, states have developed a variety of statutory schemes to govern the termination of parental rights of unwed fathers.⁹ These statutes attempt both to facilitate adoption of children born out of wedlock and provide adequate protection for the due process and equal protection rights of unwed fathers.

The fourteenth amendment prohibits states from depriving a citizen of life, liberty, or property without due process of law and entitles all citizens to equal protection under state law.¹⁰ Both the Due Process and Equal Protection Clauses of the fourteenth amendment have been used to challenge state statutory schemes with respect to unwed fathers and their children.

The existence and nature of the constitutional rights of unwed fathers with respect to their children were considered by the Court in the watershed case of *Stanley v. Illinois*,¹¹ where an Illinois statute¹² denied an unwed father custody of his children upon the death of their mother. Under the statute, the rights of married fathers and unwed mothers could not be terminated absent judicial determination of unfitness.¹³ Stanley contended that the Illinois statute unconstitutionally denied him due process. The Court stated that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference, and, absent a powerful countervailing interest, protection The rights to conceive and to raise children have been deemed 'essential'."¹⁴

4. See, e.g., L. WARDLE, C. BLAKESLEY, & J. PARKER, *supra* note 1; Shoecraft, *supra* note 1.

5. See, e.g., L. WARDLE, C. BLAKESLEY, & J. PARKER, *supra* note 1 at § 39.06.

6. See, e.g., Marianne M. DeMarco, *Comments, Delineation of the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290, 296 (1985).

7. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1977); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983).

8. See *Shoecraft v. Catholic Social Serv. Bureau, Inc.*, 385 N.W.2d 448, 453 (Neb. 1986) (Krivosha, C.J. dissenting).

9. See *infra* notes 45 to 56 and accompanying text.

10. U.S. Const. amend. XIV.

11. 405 U.S. 645 (1972).

12. Ill. Rev. Stat. ch. 37, § 701-14 (1985).

13. *Id.*

14. *Stanley v. Illinois*, 405 U.S. 651 (1972).

While recognizing the state's interests in expediency and the protection of children born out of wedlock, the Court stated that "the Constitution recognizes higher values than speed and efficiency" and that the Due Process Clause, in particular, is designed to protect these higher values.¹⁵ The Illinois statute created a presumption that unwed fathers were unfit, ignoring "the determinative issues of competence and care."¹⁶ The Court concluded that the interest of Stanley in his children outweighed the state's interest in efficiency and speed.¹⁷ Furthermore, were Stanley found to be a fit parent, the state's interest in the welfare of children born out of wedlock would be served by allowing the children to remain in his custody.¹⁸ Accordingly, the Court held that the Illinois statute, in failing to provide the unwed father with a hearing before the state took custody of his children, violated the Due Process Clause.¹⁹

The Court in *Stanley* placed great emphasis on the fact that Stanley had a long-standing relationship with his children and had contributed to their support.²⁰ The Court used these factors to distinguish later cases from *Stanley*.²¹

The extent of unwed fathers' rights was next addressed in *Quilloin v. Walcott*²² where an unwed father sought to block the adoption of his eleven year old by the child's stepfather. The father challenged the constitutionality of a Georgia statute²³ which provided that an unwed father's consent was not required for the adoption of his child absent legitimation of the child. The father claimed that this provision violated his due process rights by terminating his parental rights without a hearing. Although affirming that the "relationship between parent and child is constitutionally protected," the Court upheld the statute with respect to the Due Process Clause.²⁴ In doing so, the Court relied upon the fact that in *Quilloin*, unlike in *Stanley*, the father did not regularly contribute to the support of his child.²⁵ In *Quilloin*, the unwed father had never sought actual or legal custody of his child."²⁶ The Court found that the state's interests outweighed those of the unwed father under the circumstances.²⁷

15. *Id.* at 656.

16. *Id.* at 657.

17. *Id.* at 656.

18. *Id.* at 652-653.

19. *Id.* at 657-658.

20. *Id.* at 655.

21. See *infra* notes 22 to 43 and accompanying text.

22. 434 U.S. 246 (1977).

23. GA. CODE ANN. § 74-403(3) (1975).

24. 434 U.S. at 255.

25. *Id.* at 251.

26. *Id.* at 255.

27. *Id.* at 244-55.

In *Lehr v. Robertson*,²⁸ the Court considered a contention that a New York statute's²⁹ provisions violated an unwed father's due process rights. Under the statute, in order for an unwed father to obtain the right to legal notice and hearing in an adoption proceeding, he must first register in a putative father registry.³⁰ At the time of the adoption proceeding, the unwed father had failed to register, even though two years had elapsed since the birth of his child. He had not contributed to the support of or established a relationship with the child. The Court responded to the father's action as follows:

[t]he significance of the biological connection is that it offers the natural father an *opportunity* that no other male possesses to develop a relationship with his offspring. . . . If he fails to do so, the Federal Constitution will not compel a State to listen to his opinion of where the child's best interests lie.³¹

The Court found that the state had a duty to adequately protect the unwed father's opportunity to form a relationship with his child; to fail to do so would be a denial of due process.³² In *Lehr*, the Court held that the New York statute adequately protected the father's opportunity, but the father had failed to exercise the opportunity.³³

The United States Supreme Court cases involving unwed fathers have dealt with equal protection arguments as well as due process claims. In *Stanley*, the unwed father contended that the Illinois statute, which made his children wards of the state after their mother's death, violated his equal protection rights. The Court struck down the statute on these grounds, as well as on due process grounds, because the statute rested on the assumption that unwed fathers were unfit parents while requiring hearings to determine the fitness of married fathers and unwed mothers.³⁴

Quilloin also presented an equal protection question. The Court held that the unwed father's "interests . . . [were] readily distinguishable from those of a separated or divorced father, and accordingly . . . the state could permissibly give the appellant [the unwed father] less veto authority than it provided to a married father."³⁵ The Court based the distinction on the fact that the unwed father had "never exercised actual or legal custody over his child and thus . . . [had] never shouldered any significant responsibility with respect to the daily supervision, education,

28. 463 U.S. 248 (1983).

29. N.Y. DOM. REL. LAW §§ 111-a(2), 111-a(3) (McKinney 1988 & Supp. 1990).

30. *Id.*

31. 463 U.S. at 262 (1983).

32. *Id.* at 262-66.

33. *Id.*

34. 405 U.S. at 658.

35. 434 U.S. at 256.

protection, or care of the child.”³⁶

In *Caban v. Mohammed*,³⁷ the Court struck down a New York statute³⁸ that provided that an unwed father’s consent was not required for the adoption of his child. The Court stated as follows: “such a statutory [gender-based] classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”³⁹ The Court, recognizing that “maternal and paternal roles are not invariably different in importance,” especially for children who are not newborns, held that the parents were similarly situated with respect to their children.⁴⁰ The children were older and had relationships with both of their parents. Since the statute failed to treat similarly situated parents equally, the Court held that the statute was unconstitutional.⁴¹

The natural parents need not have identical relationships with their child to be similarly situated under the *Caban* analysis. This conclusion becomes clear upon examining the equal protection analysis in *Lehr*. The Court in *Lehr* held that the natural parents were not similarly situated, as the parents in *Caban* were, because the father had not come forward to participate in the raising of his child.⁴² “If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according two parents different legal rights.”⁴³

Following these Supreme Court cases, both state legislatures and courts focused on the relationship between an unwed father and his child as an index of the father’s legal rights with respect to his child; however, a number of critical questions were left unresolved by the Supreme Court cases. What sort of opportunity to form a relationship with his child must an unwed father be afforded? How must an unwed father go about grasping such an opportunity? What are the proper criteria to examine in determining whether there is a relationship worthy of constitutional protection between an unwed father and his child? State legislatures and courts have taken widely varying positions on these questions, often without guidance from relevant developmental literature or based upon outdated or discredited assumptions.⁴⁴

36. *Id.*

37. 441 U.S. 380 (1979).

38. N.Y. DOM. REL. LAW § 111 (McKinney 1977).

39. *Caban v. Mohammed*, 441 U.S. 380, 391 (1979).

40. *Id.* at 389.

41. *Id.* at 382-389.

42. *Lehr v. Robertson*, 463 U.S. 248, 265-68 (1983).

43. *Id.* at 267-68.

44. See *infra* notes 60 to 88 and accompanying text.

State statutes vary considerably in their definition of unwed fathers' rights when their children are the subjects of adoption proceedings. States' approaches differ as to whether the unwed father's consent is necessary and whether he is entitled to notice.⁴⁵ Some states provide for notice of the proceedings under some circumstances but not consent to the adoption;⁴⁶ some provide for consent but not notice.⁴⁷ There are nearly as many mechanisms and criteria for notice and/or consent as there are states. Some statutes are ambiguous on the matter, stating that notice and/or consent is not required unless the unwed father has acknowledged the child.⁴⁸ Other statutes require inquiry into the relationship between the unwed father and his child.⁴⁹ Some statutes contain detailed criteria which, if met by the unwed father, entitle him to notice of the adoption proceedings, an opportunity to be heard at those proceedings, or both. Criteria include the presence of the father's name of the child's birth certificate,⁵⁰ the father's contact with the child,⁵¹ the father's financial contribution to the child⁵² or to the mother during her pregnancy,⁵³ and, quite commonly, some sort of measure designed to acknowledge the child.⁵⁴ This acknowledgement can take many forms, in-

45. Very few statutory schemes require unqualified consent of and notice to the unwed father. See, e.g., ARIZ. REV. STAT. ANN. §§ 8-106, 8-111 (1990); D.C. CODE ANN. §§ 16-304, 16-306 (1990). A few statutes completely foreclose participation by the unwed father. See, e.g., IOWA CODE ANN. §§ 600.7, 600.11 (West 1989); MISS. CODE ANN. § 93-17-5 (1990).

46. See, e.g., ALA. CODE § 26-10-3 (1986); ARK. STAT. ANN. §§ 9-9-206, 9-9-207, 9-9-224 (1987 & Supp. 1990); WIS. STAT. ANN. § 48.42 (West 1989-90).

47. See, e.g., DEL. CODE ANN. tit. 13 § 908 (1990); P.R. LAWS ANN. tit. 31, § 536 (1988); V.I. CODE ANN. tit. 16, §§ 142, 143 (1990).

48. See, e.g., OR. REV. STAT. § 109.092 (1989); VT. STAT. ANN. tit. 15, §§ 435, 441 (Supp. 1990).

49. See, e.g., HAW. REV. STAT. § 578-2 (1985 & Supp. 1990); N.Y. DOM. REL. LAW § 111 (1991); S.C. CODE ANN. § 20-7-1690 (Law. Co-op. Supp. 1991).

50. See, e.g., CAL. CIV. CODE § 7004 (West Supp. 1991); COLO. REV. STAT. § 19-4-105 (Supp. 1990); KAN. STAT. ANN. § 38-1114 (1990); N.Y. DOM. REL. LAW § 111-a (McKinney 1991); OHIO REV. CODE ANN. § 3107.06 (Baldwin 1991); OKLA. STAT. ANN. tit. 10, § 29.1 (West 1990); S.C. CODE ANN. § 20-7-1734 (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS § 25-6-1.1 (1991); TENN. CODE ANN. § 36-1-111 (Supp. 1990).

51. This includes situations in which the child is residing or has resided with the father or in which the father has maintained regular contact with the child. See, e.g., GA. CODE ANN. § 74-406 (Supp. 1989); N.M. STAT. ANN. § 40-7-35 (1991); N.Y. DOM. REL. LAW §§ 111, 111-a (McKinney 1991); OKLA. STAT. ANN. tit. 10, § 29.1 (West 1990); OR. REV. STAT. § 109.096 (1989); S.C. CODE ANN. §§ 20-7-1690, 20-7-1734 (Law. Co-op. Supp. 1991); TENN. CODE ANN. § 36-1-111 (Supp. 1990).

52. For the purposes of this discussion, only voluntary child support is considered. See, e.g., FLA. STAT. ANN. § 63.062 (West 1990); GA. CODE ANN. § 74-406 (Supp. 1989); N.Y. DOM. REL. LAW § 111 (McKinney 1991); OR. REV. STAT. § 109.096 (1989); S.C. CODE ANN. § 20-7-1690 (Law. Co-op. Supp. 1991).

53. See, e.g., GA. CODE ANN. § 74-406 (Supp. 1989); N.Y. DOM. REL. LAW § 111 (McKinney 1991); OHIO REV. CODE ANN. § 3107.07 (Baldwin 1991); OKLA. STAT. ANN. tit. 10, §§ 60.5, 60.6 (West 1990); S.C. CODE ANN. § 20-7-1690 (Law. Co-op. Supp. 1991); WIS. STAT. ANN. § 48.415 (West 1990).

54. See, e.g., LA. REV. STAT. ANN. § 9-422.14 (West Supp. 1990); N.H. REV. STAT. ANN. §§ 170-B:5, 170-B:5-a (West 1990 & Supp. 1990); N.D. CENT. CODE § 14-17-04 (Supp. 1989).

cluding filing a paternity action⁵⁵ or registering as the child's father in a specialized registry.⁵⁶ Courts tend to become engaged in evaluating the nature of the relationship between father and child, either through explicit statutory language or constitutional challenge to the statute.

Often, courts focus primarily, or even exclusively, upon the father's financial relationship with the child and the child's mother. For example, in *Thorne v. Padgett*,⁵⁷ a Georgia appellate court held that "a simple finding of 'significant failure' to support is sufficient",⁵⁸ despite the fact that the unwed father had been imprisoned and had made considerable efforts to maintain contact with his child. Although later reversed by the Georgia Supreme Court⁵⁹, the appellate court's holding illustrates the emphasis placed upon financial support to the exclusion of other factors. This emphasis is shared by many courts.⁶⁰ While financial support may be a valuable indicator of a father's interest in his child in some circumstances, the tendency of courts to focus so extensively upon it may also be an indication of a stereotyped view of the father's role in the family and his parenting abilities.⁶¹

Another aspect of this archaic stereotype is the pervasive view that the

55. See, e.g., ALA. CODE § 26-10-3 (1990); ALASKA STAT. § 25.20.050 (1984 & Supp. 1990); FLA. STAT. ANN. § 63.062 (West 1990); KY. REV. STAT. ANN. § 199.500 (Baldwin 1991); MASS. GEN. LAWS ANN. ch. 210, § 4A (West 1987); N.Y. DOM. REL. LAW § 111-a (McKinney 1991); OHIO REV. CODE ANN. § 3107.06 (Baldwin 1991); OKLA. STAT. ANN. tit. 10, §§ 60.5, 60.6 (West 1990); OR. REV. STAT. § 109.092 (1989); S.D. CODIFIED LAWS § 25-6-1.1 (1991); W. VA. CODE §§ 48-4-1, 48-4-3 (1991); WYO. STAT. § 1-22-108 (1991).

56. See, e.g., COLO. REV. STAT. § 19-5-105 (Supp. 1990); FLA. STAT. ANN. § 63.062 (West 1990); IDAHO CODE § 16-1513 (Cum. Supp. 1990); MASS. GEN. LAWS ANN. ch. 210, § 4A (West 1987); MONT. CODE ANN. §§ 40-6-126, 40-6-127 (1990); NEV. REV. STAT. §§ 126.051, 127.040 (1989); N.Y. DOM. REL. LAW § 111-a (McKinney 1991); OKLA. STAT. ANN. tit. 10, § 29.1 (West 1990); OR. REV. STAT. § 109.092 (1989); TENN. CODE ANN. § 36-1-111 (Supp. 1990); WIS. STAT. ANN. § 48.025 (West 1989-90).

57. 383 S.E.2d 160 (Ga. App. 1989).

58. *Id.* at 161.

59. *Thorne v. Padgett*, 386 S.E.2d 155 (Ga. 1989).

60. See, e.g., *In re Adoption of Strawser*, 522 N.E.2d 1105 (Ohio App. 1987); *In re Horbatenko*, 531 N.E.2d 1011 (Ill. App. 1988); *Matter of Adoption of R.G.C.*, 742 P.2d 471 (Mont. 1987); *Matter of Estate of Becton*, 474 N.E.2d 1318 (Ill. App. 1985); *Swayne v. L.D.S. Social Services*, 761 P.2d 932 (Utah App. 1988).

61. See, e.g., *Adoption of G*, 529 A.2d 809 (Me. 1987). The continued prejudice against unwed fathers may be illustrated by both academic and popular sources. For example, Schwartz denigrates unwed fathers' motives for seeking parental rights, relying solely on limited anecdotal evidence. She suggests that the mothers are best able to judge the parental fitness of the fathers and their decisions should not be overridden. This approach would vest constitutional decision-making in unwed mothers who have already relinquished their parental rights. Schwartz, *Unwed Fathers and Adoption Custody Disputes*, 14 AMER. J. FAM. THERAPY 347 (1986). Writing from a feminist perspective, Pollock and Sutton view any consideration of unwed fathers' rights as a diminution of mothers' rights. In their view, mothers should have exclusive authority to determine the placement of their children. Pollock & Sutton, *Fathers' Rights, Women's Losses*, 8 WOMEN'S STUDIES INT'L FORUM 593 (1985). Attorneys involved in adoption cases may also harbor these prejudices. See, e.g., Transcript, *The Jane Wallace Show, Father's Birthrights in the Adoption Process*, Dec. 6, 1989 (available from LIFETIME Productions, Inc.).

man's relationship with his child can be determined to a large extent by whether he proposes marriage to the child's mother.⁶² In some jurisdictions, a mere proposal is insufficient to demonstrate interest in a child; the mother must accept the proposal and the couple must participate in a marriage ceremony.⁶³ Failure to marry the mother is often considered abandonment of the child.⁶⁴ Because abandonment of the child is grounds for termination in every jurisdiction,⁶⁵ a father's parental rights may be placed in the exclusive control of the mother through her acceptance or rejection of his proposal.

Many courts continue to place undue emphasis upon the father's financial contributions to the mother and/or the child as well as the father's relationship to the mother. A review of the developmental literature reveals information which the courts could utilize in modifying their views of the family and evaluating the relationship of the unwed father and his child.⁶⁶

The developmental literature also casts doubt upon the wisdom of filing options, particularly in states in which such options are the sole or primary means available for the unwed father to secure his parental rights.⁶⁷ While courts have upheld these filing statutes as constitutional in the abstract,⁶⁸ they are often forced to engage in examination of the father's relationship with his child on a case by case basis to determine whether the statute has been unconstitutionally applied.⁶⁹ The states with filing statutes provide particularly interesting examples of the confusing and often conflicting resolution of the parental rights of unwed fathers. Two states with strict filing requirements, Nebraska and Utah, are considered below.

Nebraska and Utah both have time-limited filing requirements as the sole means of preserving the parental rights of unwed fathers. Nebraska's statute requires filing within five days of the child's birth.⁷⁰

62. See, e.g., HAW. REV. STAT. § 578-2 (1985). See also *Sanchez v. L.D.S. Social Servs.*, 680 P.2d 753 (Utah 1984); *Adoption of Baby Girl S.*, 535 N.Y.S.2d 676, 141 Misc.2d 905 (Sur. Ct. 1988); *A.F. v. Spence Chapin Agency*, 537 N.Y.S.2d 752, 142 Misc.2d 412 (Fam. Ct. 1989).

63. See, e.g., CALIF. CIV. CODE § 7004 (West 1983); COLO. REV. STAT. § 19-6-105 (1986).

64. For example, the court in *Adoption of Hutto*, 777 S.W.2d 353 (Tenn. 1989) affirmed a trial court decision which granted the unwed father parental rights in part based upon his attempt to marry the mother. Some courts have taken an enlightened approach which differentiates the father's relationship with the mother from his relationship with his child. For instance, *Adoption of R.M.H.*, 538 So.2d 477, 479 (Fla. App. 1989) held "that a child must be born before it can be abandoned." Under this sound position, failure to propose marriage to the child's mother cannot be used as the sole basis for termination of the father's parental rights.

65. See, e.g., 3 L. WARDLE, C. BLAKESLEY, & J. PARKER, *supra* note 1, at § 28.08.

66. See *infra* notes 96 to 147 and accompanying text.

67. *Id.*

68. *Ellis v. Soc. Servs. Dept. of the Church of Jesus Christ of Latter Day Saints*, 615 P.2d 1250 (Utah 1980); *Shoecraft v. Catholic Soc. Serv. Bureau, Inc.*, 222 Neb. 574, 385 N.W.2d 448 (1986).

69. See *infra* notes 79 to 87 and accompanying text.

70. NEB. REV. STAT. § 43-104.02 (Reissue 1984).

Utah's statutes require that the father file prior to the child's relinquishment for adoption, regardless of how soon after the child's birth relinquishment occurs.⁷¹ Both states' supreme courts have upheld the statutes under constitutional challenge, finding them appropriate means of furthering the state interest of encouraging quick and certain adoptions.⁷² The statutes were held to provide an adequate opportunity for unwed fathers to assert their parental rights.⁷³ Yet, in both states, the courts have been forced to evaluate father-child relationships in individual cases in which the statutes were held to have unconstitutionally deprived the unwed fathers of their rights or opportunities to form relationships with their children.⁷⁴ Ironically, this continuing case-by-case analysis may create the very uncertainty the legislatures sought to avoid by requiring filing and may also frustrate the state's interest in rapid adoption.

In *Shoecraft v. Catholic Social Services*,⁷⁵ the Nebraska Supreme Court upheld the Nebraska statute under constitutional attack. The natural parents in *Shoecraft* had extensive discussions about the child before his birth. The father knew of the possibility that the mother would relinquish the child for adoption. He was not aware of the state's filing requirement and did not file until nine days after the child's birth, four days beyond the statutory filing limit. The court emphasized the state's compelling interest in encouraging adoption of children born out of wedlock.⁷⁶ The court was also concerned with the possibility that prospective adoptive parents would be unwilling to adopt if the unwed father's interests could not be ascertained quickly.⁷⁷ The court then examined the means by which the legislature sought to accommodate these interests. It supported the five-day period, saying that it was the standard length of time for the mother and child to remain in the hospital.⁷⁸

A year after the *Shoecraft* decision, the Nebraska court held that the statute was unconstitutionally applied to the specific factual situation in *In Re Application of S.R.S. and M.B.S.*⁷⁹ The court delved deeply into the nature of the relationship between the unwed father and his son, who

71. UTAH CODE ANN. §§ 78-30-4(3), 78-30-12 (1987).

72. See *supra* note 70.

73. *Ellis v. Social Serv. Dept.*, 615 P.2d 1250 (Utah 1980); *Shoecraft v. Catholic Social Serv. Bureau, Inc.*, 385 N.W.2d 448 (Neb. 1986).

74. See, e.g., *Wells v. Children's Aid Soc'y*, 681 P.2d 199 (Utah 1984); *In re Application of S.R.S. and M.B.S.*, 408 N.W.2d 272 (Neb. 1987); *Matter of K.B.E.*, 740 P.2d 292 (Utah App. 1987); *Swayne v. L.D.S. Soc. Servs.*, 761 P.2d 932 (Utah App. 1988); *T.R.F. v. Felan*, 760 P.2d 906 (Utah App. 1988).

75. 385 N.W.2d 448 (Neb. 1986).

76. *Id.* at 452.

77. *Id.*

78. *Id.*

79. 408 N.W.2d 272 (Neb. 1987).

was two years of age at the time he was placed for adoption.⁸⁰ While explicitly reaffirming the constitutionality of the statute in the abstract, the court held that it violated the equal protection clause in *S.R.S.*, where the unwed father had established a relationship with his child.⁸¹ A concurring opinion in *S.R.S.* pointed out the inherent conflicts created by *S.R.S.* and *Shoecraft* as follows:

To have the constitutionality of a law such as this depend in each instance upon the facts determined after the fact is to fly in the very face of the act's purpose. . . . [T]his court has now ruled. . . that if [a] child is removed, from the natural mother while in the hospital, thereby making it impossible for the natural father to establish a relationship with the child, the act will be held constitutional; but, if the natural mother delays. . . so that the natural father has an opportunity to develop a relationship with the child, the act will be declared unconstitutional. . . . Such uncertainty is bound to create much distress. . . . The scenario. . . will continue to repeat itself in future cases.⁸²

The holdings of these two cases taken in combination illustrate the potential increase in adoption litigation, expense, uncertainty, and delay under filing statutes.

The Utah Supreme Court has encountered the detrimental effects of case-by-case appellate analysis of the unwed father's relationship with his child. Utah trial courts frequently rely upon the filing statute to exclude the unwed father from his child's adoption proceeding, only to have their application of the statute reconsidered and, often, overturned by appellate courts.⁸³ The Utah Supreme Court continues to uphold the general constitutionality of the statute. It does so on the basis of its perception of the "state has a strong interest in speedily identifying those persons who will assume the parental role over such children, not just to assure immediate and continued physical care but also to facilitate early and uninterrupted bonding of a child to its parents."⁸⁴ This emphasis on *immediate* bonding is misplaced. The developmental literature, as discussed below, rejects the notion that immediate bonding is of crucial importance in parent-child relationships.⁸⁵

The Utah and Nebraska experiences illustrate the difficulty courts have in dealing with the issue of unwed fathers' rights. Underlying the decisions in these states are assumptions about bonding and unwed fathers that are in conflict with, placed in doubt by, or, at least, unsup-

80. *Id.* at 275-278.

81. *Id.* at 279.

82. *Id.*

83. See, e.g., *Wells v. Children's Aid Society*, 681 P.2d 199 (Utah 1984); *Sanchez v. LDS Social Services*, 680 P.2d 753 (Utah 1984); *In re Adoption of Baby Boy Doe*, 717 P.2d 686 (Utah 1986); *Matter of K.B.E.*, 740 P.2d 292 (Utah App. 1987); *T.R.F. v. Felan*, 760 P.2d 906 (Utah App. 1988).

84. *Wells v. Children's Aid Society*, 681 P.2d 199, 203 (Utah 1984).

85. See *infra* notes 99 to 104 and accompanying text.

ported by current developmental literature.⁸⁶

Judges have been trained to compare the facts of present cases with the facts of those resolved previously and to render decisions that maintain the integrity of those precedents, barring unusual circumstances.⁸⁷ Many cases relied upon as precedent, however, have failed to take advantage of the guidance provided by the developmental literature concerning parent-child relationships.⁸⁸ The overwhelming tangle of due process, equal protection, fundamental right to raise children, maternal preference, and best interest of the child has made applying strict precedence nearly impossible. Social scientists could aid legal decision-makers in their unenviable task by investigating the ability of each of the sexes to parent and the psychological ramifications of relationships between parents and children.

A number of assumptions continue to underlie decision-making in the context of unwed fathers' rights. While often not explicitly stated, these assumptions directly conflict with much of the developmental literature. These assumptions include the following: fathers are not as capable as mothers in childcare⁸⁹; unwed fathers are less capable than married or divorced fathers;⁹⁰ bonding of an infant to a parent occurs exclusively during the first month of a child's life⁹¹.

REVIEW OF THE DEVELOPMENTAL LITERATURE

The timing of attachment formation is particularly relevant to the issue at hand. State court decisions, by insisting that attachments are formed almost from birth, are greatly lagging behind social science research.⁹² In many court cases, Goldstein, Freud, and Solnit⁹³ or Klaus and Kennell⁹⁴ are cited or indirectly relied upon.⁹⁵ These works empha-

86. *Id.*

87. As Monahan and Walker have discussed, social science evidence that is accepted by courts becomes binding precedent. Future research which is more complete may alter the state of this evidence. Courts have difficulty responding to these changes in social science literature. Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986).

88. See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979). The Court discussed the nature of maternal and paternal relationships with children without benefit of scientific research.

89. Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L. J. 313 (1984); Weitzman, *Child Custody: From Maternal Preference to Joint Custody?*, in *THE DIVORCE REVOLUTION* 215 (1985).

90. Buchanan, *supra* note 89.

91. See, e.g., *Wells v. Children's Aid Soc'y*, 681 P.2d 199 (Utah 1984); *Erickson v. Doe*, 547 N.Y.S.2d 807, 145 Misc.2d 557 (Fam. Ct. 1989).

92. 681 P.2d at 203.

93. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979); J. GOLDSTEIN, A. FREUD, A. SOLNIT, & S. GOLDSTEIN, *IN THE BEST INTEREST OF THE CHILD* (1986).

94. M. KLAUS & J. KENNEL, *PARENT-INFANT BONDING* (2d ed. 1982).

size the formation of bonds within the first weeks of life and the inflexibility of these bonds.⁹⁶ These works are insufficient because they fail to consider current research, which demonstrates that children do not exhibit signs of attachment prior to six months of age.⁹⁷

Researchers have generally found that measures of attachment do not yield positive findings before babies are six to eight months of age.⁹⁸ Before that age, infants do not appear to exhibit attachment behaviors to any particular person.⁹⁹ This may be attributed to the fact that prior to six months of age, infants have not achieved object permanence.¹⁰⁰ Despite the results of numerous studies, the general public continues to believe in the concept of early parent-infant bonding.¹⁰¹ Based upon an examination of cases and statutes, it would seem that judges, legislators, and attorneys share this misconception.¹⁰²

A second category of relevant developmental research explores whether there are any important differences in attachments to mothers and fathers. Twenty-five years ago, the developmental community believed either that attachments to fathers did not occur or that any attachments to fathers were of trivial importance.¹⁰³ As a consequence, very little was written on the attachment of infants to fathers. This situation has been rectified in the past quarter century, with numerous scientists delving into the relationship of infants to their fathers.¹⁰⁴ The clear result of extensive research is that infants do form attachments to their male caregivers.¹⁰⁵

95. See, e.g., *Patzer v. Glaser*, 396 N.W.2d 740 (N.D. 1986); *Johnson v. Sullivan*, 545 So.2d 1169 (La.App. 1989).

96. BEYOND THE BEST INTERESTS, *supra* note 93 at 18; BEFORE THE BEST INTERESTS, *supra* note 93 at 11.

97. See e.g. Lamb, *Father-Infant and Mother-Infant Interaction in the First Year of Life*, 48 CHILD DEVELOPMENT 167 (1977); Parke, *Perspectives on Father-Infant Interaction*, in HANDBOOK OF INFANT DEVELOPMENT 549 (J. Osofsky ed. 1979); Lamb, *The Development of Parent-Infant Attachments in the First Two Years of Life*, in THE FATHER-INFANT RELATIONSHIP: OBSERVATIONAL STUDIES IN THE FAMILY SETTING 21 (F. Pedersen ed. 1980).

98. See e.g. Lamb, *Father-Infant and Mother-Infant Interaction*, *supra* note 97; Lamb, *The Development of Parent-Infant Attachments*, *supra* note 97.

99. *Id.*

100. Parke, *Perspectives*, *supra* note 97.

101. Palkovitz, *Sources of Father-Infant Bonding Beliefs: Implications for Childbirth Educators*, 17 MATERNAL-CHILD NURSING JOURNAL 101 (1988).

102. See, e.g., *Jermstad v. McNelis*, 210 Cal.App.3d 528, 258 Cal.Rptr. 519 (1989).

103. Ricks, *Father-Infant Interactions: A Review of Empirical Research*, 34 FAM. REL. 505 (1985).

104. Pedersen, Yarrow, Anderson, & Cain, *Conceptualization of Father Influences in the Infancy Period*, in THE CHILD AND ITS FAMILY 45 (M. Lewis & L. Rosenblum eds. 1979); Radin, *The Influence of Fathers on Their Sons and Daughters*, 8 SOCIAL WORK IN EDUCATION 77 (1986).

105. See, e.g., P. ADAMS, J. MILNER, & N. SCHREFF, *FATHERLESS CHILDREN* (1984); Jones, *Father-Infant Relationships in the First Year of Life*, in DIMENSIONS OF FATHERHOOD 92 (S. Hanson & F. Bozett eds. 1985); Ricks, *Father-Infant Interactions: A Review of Empirical Research*, 34 FAM. REL. 505 (1985); Russell & Russell, *Mother-Child and Father-Child Relationships in Middle Childhood*, 58 CHILD DEV. 1573 (1987); Hanson & Bozett, *Fatherhood: A Review and Resources*, 36

Young children may express their attachments to their male and female parents in different ways. A very common method of assessing attachment consists of exposing the child to potential stress, frequently in the very unusual situation of being left alone for a short period of time in an unfamiliar laboratory room with a stranger.¹⁰⁶ When the child's parents return to the room, the child's behavior serves as a measure of attachment. When distressed in these peculiar circumstances, children often show preference for their mothers.¹⁰⁷ Lamb suggested, however, that this preference may reflect enhanced attachment to the primary caregiver in times of stress, rather than to the female parent.¹⁰⁸ Continued change in the delegation of child care duties might impact upon these results.¹⁰⁹ When the children are not distressed, they approach their fathers more than their mothers, presumably to engage in playful behavior.¹¹⁰

There are clearly discernable differences between parents in certain areas of parent-infant interaction. Perhaps the greatest distinction is that mothers spend significantly more time with their children than do fathers.¹¹¹ Mothers tend to spend more overall time engaged in play with their babies.¹¹² Fathers, however, spend a significantly higher proportion of time engaged in play.¹¹³ Another difference between mothers and fathers is that babies display more affiliative behaviors toward their fathers

FAM. REL. 333 (1987); Kaitz, Good, Rokem, & Eidelman, *Mothers' and Fathers' Recognition of their Newborns' Photographs During the Postpartum Period*, 9 DEV'L AND BEHAV'L PEDIATRICS 223 (1988).

106. M. AINSWORTH, M. BLEHAR, E. WATERS, & S. WALL, PATTERNS OF ATTACHMENT (1978).

107. Bridges, Connell, & Belsky, *Similarities and Differences in Infant-Mother and Infant-Father Interaction in the Strange Situation: A Component Process Analysis*, 24 DEV'L PSYCHOLOGY 92 (1988).

108. Lamb, *The Development of Parent-Infant Attachments*, *supra* note 97; Lamb, *Fathers and Child Development: An Integrative Overview*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (1981).

109. Lamb, *The Development of Father-Infant Relationships*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 459 (1981); Lamb, *The Changing Roles of Fathers*, in THE FATHER'S ROLE: APPLIED PERSPECTIVES 3 (1986); Hwang, *Behavior of Swedish Primary and Secondary Caretaking Fathers, in Relation to Mother's Presence*, 22 DEV'L PSYCHOLOGY 749 (1986); Thompson, *Fathers and the Child's "Best Interest": Judicial Decision Making in Custody Disputes*, in THE FATHER'S ROLE: APPLIED PERSPECTIVES 61 (M. Lamb ed. 1986).

110. Hanson & Bozett, *supra* note 105; Bridges, Connell, & Belsky, *supra* at note 107.

111. Parke & Tinsley, *The Father's Role in Infancy: Determinants of Involvement in Caregiving and Play*, in THE ROLE OF FATHER IN CHILD DEVELOPMENT 429 (M. Lamb ed. 1981); Santrock & Warshak, *Development, Relationships, and Legal/Clinical Considerations in Father-Custody Families*, in THE FATHER'S ROLE: APPLIED PERSPECTIVES 135 (M. Lamb ed. 1986); Levy-Shiff, Sharir, & Mogilner, *Mother- and Father-Preterm Infant Relationship in the Hospital Preterm Nursery*, 60 CHILD DEV. 93 (1989).

112. Hanson & Bozett, *supra* note 105.

113. Clarke-Stewart, *The Father's Contribution to Children's Cognitive and Social Development in Early Childhood*, in THE FATHER-INFANT RELATIONSHIP: OBSERVATIONAL STUDIES IN THE FAMILY SETTING 111 (F. Pedersen ed. 1980); Lamb, *Fathers and Child Development*, *supra* note 108; Bronstein, *Differences in Mothers' and Fathers' Behaviors Toward Children: A Cross-Cultural*

than toward their mothers.¹¹⁴ Clarke-Stewart suggested that fathers display a more engaging style of play, which makes them more salient playmates to their children.¹¹⁵

Fathers engage in a more physical form of play, whereas mothers use more vocal play patterns, physical contact and toys.¹¹⁶ Mothers typically incorporate more smiling, more imitative grimaces, and high-pitched imitative vocalizations into their playtimes.¹¹⁷ Fathers who are primary caregivers also exhibit these characteristics.¹¹⁸ Very recent research would suggest that the setting greatly influences the form of play adopted by a parent. Fathers in playrooms stocked with books and other quiet toys utilize a more maternal form of play whereas mothers play in a typically paternal way in settings conducive to a physical and active play style.¹¹⁹ Similarly, each parent alters his or her characteristic speech pattern to emulate the pattern used by the other parent in the appropriate play context.¹²⁰ Both in the amount of play and the style of play, mothers and fathers are easily differentiated, but the differences may be diminished by context. Fathers and mothers readily adapt to the needs of their children and the demands of the situation.¹²¹

Parke and Tinsley demonstrated that fathers rock their infants in their arms more so than do mothers.¹²² They concluded that fathers are just as involved in interaction with their young infants as mothers, when they are given the opportunity to be so involved. Fathers have been found to spend less time than mothers in the context of feeding their newborns but are equally sensitive and responsive to cues displayed by their infants during feeding.¹²³ There are no differences in measures of affection, re-

Comparison, 20 DEV'L PSYCHOLOGY 995 (1984); Hanson & Bozett, *supra* note 105; Russell & Russell, *supra* note 105; Levy-Shiff, Sharir, & Mogilner, *Mother- and Father-Preterm*, *supra* note 111.

114. Lamb, *Effects of Stress and Cohort on Mother- and Father-Infant Interaction*, 12 DEV'L PSYCHOLOGY 435 (1976); Lamb, *The Development of Parent-Infant Attachments*, *supra* note 97; P. ADAMS, J. MILNER, & N. SCHREFF, *supra* note 105.

115. Clarke-Stewart, *The Father's Contribution*, *supra* note 113.

116. Clarke-Stewart, *And Daddy Makes Three*, in READINGS ON INFANCY 204 (J. Belsky ed. 1982); Ricks, *supra* note 103; Radin, *Influence of Fathers*, *supra* note 104; Teti, Bond, & Gibbs, *Mothers, Fathers, and Siblings: A Comparison of Play Styles and Their Influence upon Infant Cognitive Level*, 11 INT'L J. OF BEHAV. DEV. 415 (1988).

117. Hwang, *supra* note 109.

118. Thompson, *The Father's Case in Child Custody Disputes: The Contributions of Psychological Research*, in FATHERHOOD AND FAMILY POLICY 53 (M. Lamb & A. Sagi eds. 1983); Hwang, *supra* note 109.

119. Ross & Taylor, *Do Boys Prefer Daddy or His Physical Style of Play?*, 20 SEX ROLES 23 (1989).

120. Lewis & Gregory, *Parents' Talk to Their Infants: The Importance of Context*, 7 FIRST LANGUAGE 201 (1987).

121. Steavenson, Leavitt, Thompson, & Roach, *A Social Relations Model Analysis of Parent and Child Play*, 24 DEV'L PSYCHOLOGY 101 (1988); Ross & Taylor, *supra* note 119.

122. Parke & Tinsley, *supra* note 111.

123. Parke & Sawin, *The Father's Role in Infancy: A Re-Evaluation*, 25 THE FAMILY COORDINATOR 365 (1976); Parke, *Perspectives*, *supra* note 97.

sponsiveness, or effectiveness.¹²⁴

Mothers tend to vocalize more to their infants than do fathers.¹²⁵ Their vocalization patterns also differ, in that mothers use repetitive patterns more often than fathers, who in turn use more rhythmic touching patterns than do mothers.¹²⁶ Despite differences in speech patterns, both parents are sensitive to contextual cues of the infants in regulating these speech patterns.¹²⁷

A number of recent studies have compared techniques used by fathers and mothers in teaching skills to their infants. Fathers tend to use more imperative speech and their utterances are longer than those used by mothers.¹²⁸ Fathers also ask more questions of their children during instruction than do mothers.¹²⁹ The men in these studies were secondary caretakers, suggesting that they may have been less aware of the capabilities of their children. Their relative unfamiliarity with their children's abilities may have spawned more complete instructions and more frequent requests for feedback. Ninio and colleague found that fathers underestimate the developmental capabilities of their children.¹³⁰ There is ample evidence to refute any suggestion that the low verbal involvement displayed by most fathers denotes a general pattern of low paternal involvement with the child.¹³¹

Although popularly considered as the lesser parent in terms of socialization and caregiving,¹³² fathers appear to significantly influence a number of facets of their infants' lives. The impact of fathers upon their children has been found to be especially great in the areas of social competence and social responsibility.¹³³ Fathers also seem to foster sex role

124. Lamb, *The Development of Father-Infant Relationships*, *supra* note 109; Lamb, *Fathers and Child Development*, *supra* note 108; Clarke-Stewart, *And Daddy Makes Three*, *supra* note 116; Crummette, Thompson, & Beale, *Father-Infant Interaction Program: Preparation for Parenthood*, 6 *INFANT MENTAL HEALTH* J. 89 (1985); Kaitz, Good, Rokem, & Eidelman, *supra* 105.

125. Hwang, *supra* note 109; Pedersen, Yarrow, Anderson, & Cain, *supra* note 104.

126. Yogman, *Observations on the Father-Infant Relationship*, in *FATHER AND CHILD: DEVELOPMENT AND CLINICAL PERSPECTIVES* 101 (S. Cath, A. Gurwitt, & J. Ross eds. 1982).

127. Parke & Tinsley, *supra* note 111.

128. Brachfeld-Child, Simpson, & Izenson, *Mothers' and Fathers' Speech to Infants in a Teaching Situation*, 9 *INFANT MENTAL HEALTH* J. 173 (1988).

129. McGillicuddy-DeLisi, *Sex Differences in Parental Teaching Behaviors*, 34 *MERRILL-PALMER Q.* 147 (1988).

130. Ninio, *The Effects of Cultural Background, Sex, and Parenthood on Beliefs About the Timetable of Cognitive Development in Infancy*, 34 *MERRILL-PALMER Q.* 369 (1988); Ninio & Rinott, *Fathers' Involvement in the Care of Their Infants and Their Attributions of Cognitive Competence to Infants*, 59 *CHILD DEV.* 652 (1988).

131. Parke, *Perspectives*, *supra* note 97.

132. Crummette, Thompson, & Beale, *supra* note 125; Vinovskis, *Young Fathers and Their Children: Some Historical and Policy Perspectives*, in *ADOLESCENT FATHERHOOD* 171 (A. Elster & M. Lamb eds. 1986).

133. Parke, *Perspectives*, *supra* note 97; Clark-Stewart, *The Father's Contribution*, *supra* note 113; Lamb, *The Development of Parent-Infant Attachments*, *supra* note 97; Radin, *Influence of Fa-*

development in their children.¹³⁴ There is some evidence that both cognitive growth¹³⁵ and the development of an internal locus of control are associated with paternal involvement.¹³⁶ Similarly, Bridges reported results which suggest that the father-child relationship strongly influences the child's relationships with non-family members.¹³⁷

A scant number of studies have been devoted to fathers as sole caregivers. The majority of the available studies consist of self-reports or involve a self-selected sample; the results cannot be considered to be generalizable to all unwed fathers.¹³⁸ Especially pertinent this paper is the fact that none of these studies focused solely upon men who had assumed the role of fatherhood outside of marriage. Indeed, many did not have any fathers of illegitimate children included in their samples of single fathers. Therefore, as reiterated throughout the literature, caution must be exercised in any attempt to generalize the findings from these studies of doubtful methodological validity to a sample of unwed fathers who are similar in some ways but vastly different in others.¹³⁹ With this warning firmly in mind, the father as sole caregiver will be explored.

The issue of the father's competency takes on increased salience when considering him as the sole caregiver. The current literature unanimously confirms that men are quite capable of raising their children by themselves.¹⁴⁰

thers, *supra* note 104; Thompson, *Child's "Best Interest"*, *supra* note 109; Dickstein & Parke, *Social Referencing in Infancy: A Glance at Fathers and Marriage*, 59 CHILD DEV. 506 (1988).

134. Lamb, *Fathers and Child Development*, *supra* note 108; Lamb, *Paternal Influences and the Father's Role: A Personal Perspective*, in *SOCIALIZATION AND PERSONALITY DEVELOPMENT* 281 (E. Zigler, M. Lamb, & I. Child eds. 1982); Radin, *Influence of Fathers*, *supra* note 104.

135. Parke, *Perspectives*, *supra* note 97; Lamb, *Fathers and Child Development*, *supra* note 108; Radin, *The Role of the Father in Cognitive, Academic, and Intellectual Development*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 379 (M. Lamb ed. 1981); Thompson, *The Father's Case*, *supra* note 118; Radin, *Influence of Fathers*, *supra* note 104; Bridges, Connell, & Belsky, *supra* note 107.

136. Lamb, *The Development of Father-Infant Relationships*, *supra* note 109; RADIN, *PRIMARY CAREGIVING AND ROLE-SHARING FATHERS IN NONTRADITIONAL FAMILIES* 173 (M. Lamb ed. 1982); Lamb, *Changing Roles*, *supra* note 109.

137. Bridges, Connell, & Belsky, *supra* note 107.

138. Berry, *The Male Single Parent*, in *CHILDREN OF SEPARATION AND DIVORCE* 34 (I. Stuart & L. Abt eds. 1981); Hipgrave, *Lone Fatherhood: A Problematic Status*, in *THE FATHER FIGURE* 171 (L. McKee & M. O'Brien eds. 1982); Thompson, *The Father's Case*, *supra* note 118.

139. Gunsberg, *Selected Critical Review of Psychological Investigations of the Early Father-Infant Relationship*, in *FATHER AND CHILD IN DEVELOPMENTAL PERSPECTIVES* 65 (S. Cath, A. Gurwitt, & J. Ross eds. 1982).

140. Gasser & Taylor, *Role Adjustment of Single Parent Fathers with Dependent Children*, 25 THE FAM. COORDINATOR 397 (1976); Katz, *Lone Fathers: Perspectives and Implications for Family Policy*, 28 THE FAM. COORDINATOR 521 (1979); Parke, *Perspectives*, *supra* note 97; R. PARKE, *FATHERS* (1981); Smith & Smith, *Child-Rearing and Single-Parent Fathers*, 30 FAM. REL. 411 (1981); Hipgrave, *supra* note 138; Thompson, *The Father's Case*, *supra* note 118; G. GREIF, *SINGLE FATHERS* (1985); Hetherington & Hagan, *Divorced Fathers: Stress, Coping, and Adjustment*, in *THE FATHER'S ROLE: APPLIED PERSPECTIVES* 103 (M. Lamb ed. 1986); Thompson, *Child's "Best Interest"*, *supra* note 109.

When fathers assume sole responsibility for their children, they seem to develop a style which straddles the more physically playful mode of secondary caregiving fathers and the gentle, affectionate manner used by mothers.¹⁴¹ Children raised by single fathers appear to thrive in this arrangement, at least as well as children raised by single mothers.¹⁴² As Cashmore so eloquently stated, "one good parent is sufficient for a child's upbringing and men are able to fill the bill as adequately as most women, 'maternal instinct' or not."¹⁴³

Those fathers who choose to be primary or sole caregivers adjust very well to this role.¹⁴⁴ Because of the obstacles unwed fathers must overcome to participate in any way in decision-making regarding their children, they are probably deeply committed to the role of fatherhood.

Virtually no research has compared married and divorced fathers to unwed fathers. Thus, there is no support for the proposition that unwed fathers are somehow less capable than other fathers. Courts often appear to be motivated by a sense that unwed fathers should be punished for their status as unwed fathers.¹⁴⁵

A fair summary of the results of numerous studies is that mothers and fathers do not differ much in caregiving ability. None of the studies of the differences between parents in play or vocalizations have led researchers to conclude that either parent is clearly best suited as the primary caregiver. Instead, most researchers and commentators have explained that there is a great overlap of child care style between mothers and fathers and that individualized characteristics unrelated to the sex of the parent account for the majority of the variation in parenting behavior.¹⁴⁶ The most prevalent conclusion regarding sex differences and parenting is that both males and females are equally capable of nurturing children.¹⁴⁷

141. Hwang, *supra* note 109; Thompson, Child's "Best Interest", *supra* note 109.

142. Berry, *supra* note 138; Hetherington & Hagan, *supra* note 140; Jacobs, *Fatherhood and Divorce: A Review of the Psychiatric Literature*, in *DIVORCE AND FATHERHOOD: THE STRUGGLE FOR PARENTAL IDENTITY* 2 (1986); Risman, *Can Men "Mother"? Life as a Single Father*, 35 *Fam. Rel.* 95 (1986); Guttman, *The Divorced Father: A Review of the Issues and the Research*, 20 *J. OF THE COMP. FAM. STUD.* 247 (1989).

143. Cashmore, *Men Alone*, in *HAVING TO: THE WORLD OF ONEPARENT FAMILIES* 245, 247 (1985).

144. Thompson, *The Father's Case*, *supra* note 118; Pruett, *Oedipal Configurations in Young Father-Raised Children*, 40 *PSYCHOANALYTIC STUDY OF THE CHILD* 435 (1985).

145. See, e.g., *Adoption of G.*, 529 A.2d 809 (Me. 1987); *Shoecraft v. Catholic Social Services Bureau, Inc.*, 222 Neb. 574, 385 N.W.2d 448 (1986).

146. Field, *Interaction Behaviors of Primary and Secondary Caretaker Fathers*, 14 *DEV'L PSYCHOLOGY* 183 (1978); Sawin, *Fathers' Interactions with Infants*, in *INFANTS: THEIR SOCIAL ENVIRONMENTS* 147 (B. Weissbourd & J. Musicl eds. 1981); RADIN, *PRIMARY CAREGIVING*, *supra* note 136; G. RUSSELL, *THE CHANGING ROLE OF FATHERS?* (1983); Ricks, *supra* note 105; Levy-Shiff & Israelashvili, *Antecedents of Fathering: Some Further Exploration*, 24 *DEV'L PSYCHOLOGY* 434 (1988); Teti, Bond, & Gibbs, *supra* note 116.

147. Pedersen, *Overview: Answers and Reformulated Questions*, in *THE FATHER-INFANT RELA-*

CONCLUSION

Denial of parental rights to unwed fathers on the basis of sex alone is not supported by the social science literature. Mechanisms must be developed whereby unwed fathers are judged on their fitness to parent, just as are other parents. Many of the current systems for determining paternal rights place undue stress on status and outmoded views of fathers' abilities. A preferable system would consist of reasonable efforts to ascertain the identity of the father, notification of the identified father when adoption proceedings are pending, and opportunity for the father to present his concerns at the proceeding. Because the right to raise one's children is fundamental,¹⁴⁸ when there are disputes between parties seeking custody of children born out of wedlock, unwed fathers should prevail over third parties, barring paternal unfitness. Although this rule may initially result in instances in which children are returned to their fathers after the formation of attachments to adoptive parents, fundamental fairness demands that unwed fathers' rights be protected. Once unwed fathers' rights are considered as a matter of course before placement for adoption, these unfortunate occurrences will be significantly diminished. Consideration of unwed fathers' rights need not require placement of the child with the father in every case. As with other parents, a judicial finding of an unwed father's unfitness would be sufficient to terminate his parental rights.¹⁴⁹

Cases of retroactive removal of children from adoptive homes will undoubtedly generate protests that the potential harm to these children necessitates the denial of unwed fathers' rights in these cases. Commentators may assert that when a child has already formed attachments to adoptive parents, the child should remain in the custody of these parents regardless of the court's determination that the unwed father's rights were violated. Under this view, protection of unwed fathers' rights would be restricted to future cases; however, such an approach disregards the fundamental nature of parental rights. The lengthy appeals process would promote the formation of attachment to adoptive parents to the detriment of unwed fathers, effectively denying the majority of them their fundamental rights.¹⁵⁰ Restriction to prospective cases

TIONSHIP: OBSERVATIONAL STUDIES IN THE FAMILY SETTING 147 (1980); Clarke-Stewart, *The Father's Contribution*, *supra* note 113; Lewis, *The Observation of Father-Infant Relationships: An 'Attachment' to Outmoded Concepts in THE FATHER FIGURE* 120 (L. McKee & M. O'Brien eds. 1982); G. RUSSELL, *THE CHANGING ROLE OF FATHERS?* (1983); Thompson, *Child's "Best Interest"*, *supra* note 109; Lamb & Elster, *Parental Behavior of Adolescent Mothers and Fathers*, in *ADOLESCENT FATHERHOOD* (1986); Jacobs, *supra* note 142.

148. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

149. See, e.g., 3 L. WARDLE, C. BLAKESLEY, & J. PARKER, *supra* note 1 at § 28.08.

150. See, e.g., *Adoption of G.*, 529 A.2d 809 (Me. 1987); *State v. S.O.*, 725 S.W.2d 601 (Mo. App. 1986).

is, therefore, insufficient protection for unwed fathers; retrospective removal of children from adoptive homes is essential.

Courts often support their decisions by stating that the disposition is in the best interest of the child.¹⁵¹ The best interest standard makes the welfare of the child the primary consideration, but provides few specific guidelines.¹⁵² The paucity of guidance confers unfettered discretion upon judges who have little choice but to render decisions based upon personal biases. Therefore, to maximize the quality of judicial decision-making, the best interest standard should only be applied when more definite standards are unavailable. When fit parties seeking custody have comparable rights with respect to the child, the best interest standard is appropriate. This standard is not appropriate in determining the parental rights of fit natural parents as against third parties.¹⁵³ In such cases, the natural parent should prevail. Marital status and gender should not alter this result. Generally, fit unwed mothers are not subjected to the best interest standard in custody disputes with third parties. Unwed fathers should be accorded comparable treatment.

Certain jurisdictions already place great weight on the protection of unwed fathers' rights in adoption proceedings.¹⁵⁴ For example, in granting an unwed father custody of his child, the Louisiana Supreme Court stated the following:

[n]o one would argue that the weight of a mother's right to the custody of her child should be reduced simply because she is not married to the child's father and has not performed a formal act of legitimation.

There may be a misguided tendency to view the situation in a different light when the parent whose right is at stake is the father, but this is so only because of a failure to distinguish between the right which flows from the fact of parenthood . . . and the possibility of a subsequent forfeiture of parenthood through abandonment or neglect.¹⁵⁵

Unfortunately, numerous courts continue to require unwed fathers to meet a higher standard of responsibility for their children in order to trigger recognition of their parental rights. The assumptions which seem

151. See, e.g., *Dilemma*, *supra* note 1; 4 L. WARDLE, C. BLAKESLEY, & J. PARKER, *supra* note 1 at § 39.06.

152. See, e.g., 4 L. WARDLE, C. BLAKESLEY, & J. PARKER, *supra* note 1 at § 39.06 ("[T]he best interest of the child standard is inherently indeterminate. It is doubtful that guidelines or lists of factors are really workable, if they are designed to control judicial discretion; certainly the judges utilize their own consciences, shaped by the values of the culture and mores in which they function. Neither statutes nor case law generally specify the relative weight the various factors . . . are to have, so it remains . . . amorphous and subject to the discretion of the judge.").

153. See, e.g., *Brooks v. Carson*, 390 S.E.2d 859 (Ga. App. 1990).

154. See, e.g., *In re. Hutto*, 777 S.W.2d 353 (Tenn. App. 1989); *In re. R.M.H.*, 538 So.2d 477 (Fla. 1989) (opinion of Campbell, C.J., concurring in part and dissenting in part); *Baby Girl Eason*, 257 Ga. 292, 358 S.E.2d 459 (1987); *Deville v. LaGrange*, 388 So.2d 696 (La. 1980); *Kambitch v. Ederle*, 642 S.W.2d 690 (1982); *Vanlue v. Collins*, 779 P.2d 163 (Or. App. 1989).

155. *Deville v. LaGrange*, 388 So.2d 696, 698 (La. 1980).

to be relied upon by judges and legislators in their decisions concerning the rights of unwed fathers are not borne out by the developmental literature. Statutes should be altered to take research into consideration. The legal profession should be educated as to the relevant research and its limitations. Social scientists should be made aware of the conflicting rights implicated by the legal resolution of disputes involving unwed fathers. Until these issues are addressed, children, adoptive parents, and natural parents will face uncertainty and disruptive legal battles.