The Feminist Dilemma Over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority

Nancy S. Erickson*

Introduction

The feminist community generally, but not unanimously, favors sex-neutral child custody rights for divorcing parents. This most common feminist view, which I will call the "mainstream" feminist view, is that fathers who know that courts will always prefer mothers have no incentive to share the childrearing responsibilities that women have always borne alone. "Mainstream" feminists envision a future non-sexist world in which parents share equally in their children's upbringing, thus allowing women to participate fully in the world of paid work from which they have so long been excluded. Although the future vision of feminists may coincide, our current viewpoints may not. To begin this discussion I briefly review the history of custody rights and current feminist perspectives on the issue. My focus then turns to unwed mothers' custody rights. I advocate legal recognition of the considerations that actually influence a pregnant unwed woman's decision whether to abort, to raise the child herself, or to surrender the child for adoption.

The earliest common law courts always granted custody of children to the divorced father.[1] Mothers gained the right simply to seek custody only in the mid-nineteenth century. But by the mid-twentieth century the flow of custody rights had swung in the mother's direction. Case law and statutes had estab-

* Professor, College of Law, Ohio State University; A.B., 1967, Vassar College; J.D., 1973, Brooklyn Law School; LL.M., 1979, Yale Law School. Many thanks are due to Elliot Fishman for his untiring efforts to assist with the research for this paper.

1. Michael Grossberg, *Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth Century America*, 9 Feminist Studies 235, 238-39 (1983); Jamil Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 Nw. U.L. Rev. 1038, 1052 (1979).

lished the "tender years presumption." This doctrine gave custodial preference to the mother. One version of the doctrine gave custody to the mother unless she was found to be unfit.[2] Another version of the doctrine gave a presumption to the mother only as a tiebreaking device, when all other factors were equal.[3] Currently, most states reject any version of the presumption.[4]

For differing reasons a few feminists argue for a return to the "tender years presumption." Some feminists cite evidence that the mother-child relationship is psychologically more important than the father-child relationship.[5] Other feminists note the convincing evidence that fathers have not assumed substantial responsibility for childcare burdens. They argue that in this context the absence of a tender years presumption allows men to oppress women in two ways. First, since nothing compels fathers to assume their rightful amount of childcare responsibility, women bear that burden. Second, even though fathers fail to share the burdens of parenthood, they still claim "equal" rights to the benefits, which include "equal" rights to custody upon divorce.[6] Finally, some feminists urge recognition of the physical and emotional dangers of childbearing.[7] These dangers are especially significant to the issue of custody rights when the mother either has experienced all the pregnancies her body can handle or is post-menopausal. In contrast to many mothers, most fathers will probably have the future ability to become a parent for many years.

In the divorce context the "mainstream" feminist view, however, appears to advocate formal sexual neutrality rather than preference for the mother. One author explains "mainstream" feminist opposition to the tender years presumption:

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2. *See, e.g.*, New York's tender years presumption, repudiated in State ex rel Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S. 2d 285 (N.Y. Fam. Ct. 1973). New York law is now sex neutral. N.Y. Dom. Rel. Law § 240 (McKinney 1983).

3. *See, e.g.*, Alaska's tender years presumption, repudiated in Johnson v. Johnson, 564 P.2d 71 (Alaska 1977).

4. A most recent survey of custody laws lists 38 states which have rejected the presumption, four states which retain the tiebreaker version, and eight states with doubtful or unique laws. Doris Freed & Henry Foster, *Divorce in Fifty States: An Overview as of August 1, 1981*, 7 Fam. L. Rep. 4049, 4063 (1981).

5. *See* Ramsay Klaff, *The Tender Years Doctrine: A Defense*, 70 Calif. L. Rev. 335, 343-46 (1982).

6. *Id.* at 346-47 (cites two studies of paternal interaction with their children, both of which found that fathers typically interacted with their children less than one minute per day); Rena Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 Harv. Women's L.J. 107 (1978).

7. Committee for Mother and Child Rights, Position Paper (1983). *See infra* notes 101-103 and accompanying text.

> The maternal presumption in divorce proceedings is anathema to most feminists. The legal presumption that children belong with their mothers absent maternal unfitness reinforces the enduring stereotype of women as instinctive child rearers, inherently unsuited for worldly pursuits. Abjured by those who also reject sex-role assignments in family life, the maternal presumption presupposes a societal order of stay-at-home mothers with fathers as sole economic providers.[8]

Even "mainstream" feminists would agree that formal sexual "equality" often *operates* to the detriment of women. Judges may prefer the parent with the most money, usually the father, rather than the parent with the closer relationship to the child.[9] Judges may view a calm, authoritarian father as a better potential custodian than a mother who appears emotionally shattered by the divorce.[10] Judges may be reluctant to award alimony and may view custodial responsibilities as detrimental to an ex-housewife's ability to support herself.[11] If the mother is employed, they may penalize her by a denial of custody for not being a full-time mother.[12] Judges may also be swayed to grant custody to a father if there is a new wife waiting in the wings to become the children's new mother.[13] Mainstream feminists would describe these scenarios simply as abuses of an otherwise fair system, a system they define as formal sexual equality in the law of child custody upon divorce.

To obliterate these abuses, many mainstream feminists would argue for a presumption in favor of the "primary caretaker parent."[14] Such a presumption, if applied properly, would operate to favor mothers in most custody cases. Mothers would benefit not by virtue of biology, but by virtue of their greater contribution to the child's welfare after birth. If the father ac-

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8. Uviller, *supra* note 6, at 108.

9. Nancy Polikoff, *Why are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determination*, 7 Women's Rts. L. Rep. 235, 237-39 (1982).

10. *Cf.* Lucy Katz, *The Maternal Preference and the Psychological Parent: Suggestions for Allocating the Burden of Proof in Custody Litigation*, 53 Conn. B.J. 343, 347 (1974).

11. This view may, in fact, covertly underlie judicial preference for the father in some cases where the reason given is the father's superior economic position. *See supra* note 9 and accompanying text.

12. Polikoff, *supra* note 9, at 239-41.

13. *Id.* at 241.

14. *Id.* at 241-43. At least three states currently have judicial precedent favoring the primary caretaker standard: Pennsylvania (Jordan v. Jordan, 8 Fam. L. Rep. 2596 (Pa. Super. Ct. 1982)); Oregon (Van Dyke v. Van Dyke, 48 Or. App. 965, 618 P.2d 465 (1980)); and West Virginia (Garska v. McCoy, 278 S.E. 2d 357 (W. Va. 1981)).

tually bore the greater childcare load, he would be "rewarded" by an award of custody.[15]

Even if the "primary caretaker parent" presumption became widely adopted in divorce custody cases and were applied properly and fairly, it would not help resolve all custody disputes between unwed parents. On this subject, the feminist community appears bitterly split.

Different reactions to three similar scenarios that involve unwed couples illustrate the various feminist views. In the first scenario, a woman and man have a sexual relationship. Neither intends for the relationship to lead to procreation but the woman accidentally gets pregnant. She decides on abortion, which the man opposes. He offers to pay her maternity expenses and to accept full responsibility for the child if she carries the pregnancy to term. She refuses and has an abortion. Virtually the whole feminist community believes that she has an absolute right to do so.[16]

In the second scenario the unwed couple conceive a child under similar circumstances. Although she had no intention to have a child, the woman decides to continue the pregnancy and to raise the child herself. Perhaps she always wanted children but never found a man she wanted to marry. Perhaps she is concerned about the "biological clock." Perhaps she knows she eventually wants children and decides it might as well be now. Perhaps she opposes abortion on moral grounds. Perhaps she fears that an abortion may leave her unable to bear further children. Whatever her reasons for continuing the initially unintended pregnancy, the woman does not want to marry the biological father, to live with him, or to have her life controlled in

15. The purpose of the primary caretaker parent presumption is not to reward a parent for caring for a child. The purpose of the presumption is to serve the best interests of the child by awarding custody to the parent who has had the most interaction with the child on a day-to-day basis. That parent is the person to whom the child is likely to be more psychologically connected, akin to the "psychological parent" of Joseph Goldstein, Anna Freud & Albert Solnit, Beyond the Best Interests of the Child (1973). Even though rewarding a "dutiful" parent is not the goal of the primary caretaker presumption, it has that effect and may, in fact, encourage men to take on more childcare responsibilities. Polikoff, *supra* note 9, at 242.

16. The National Organization for Women and virtually every other feminist organization supports a woman's right to make the abortion decision without legal coercion by anyone, including the potential father. *See National Organization for Women Bill of Rights, 1968*, in Judith Hole & Ellen Levine, Rebirth of Feminism 441-42 (1971). *Accord*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

any way by him. She does not want him to have visitation rights. She does not intend to ask him for child support.

After the child is born, the father sues for custody; if he does not get custody, he wants visitation. The feminist community does not have a unanimous response to this issue. Some would deny custody to the father. They would argue that since the mother had the absolute right to decide to abort and decided to allow her body to be used to bear the child, she should have priority for custody.[17] Many feminists would allow the father visitation rights, even if such rights would be an imposition on the mother's freedom. Their reasoning seems to assume that the child benefits from the father's visitation and that this benefit justifies an imposition on the mother.[18]

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17. *See, e.g.*, Jessica Curtis, Single Mothers by Choice (forthcoming 1985) (Curtis helped found Single Mothers by Choice, 501 Twelfth St., Brooklyn, N.Y. 12215, a mutual support organization for single mothers and women contemplating single motherhood).

18. The visitation issue is rarely discussed, possibly because the custody issue is so much more important. The visitation issue does arise, however, when the custodial parent, usually the mother, wishes to relocate, and the non-custodial parent objects on the basis that exercise of his visitation rights requires that the custodial parent stay close to where he lives. At first glance, this argument seems to have some merit, until one realizes that (1) the custodial parent cannot require the non-custodial parent to visit, and many non-custodial parents in fact do not exercise their visitation rights fully, and (2) the custodial parent cannot prohibit the non-custodial parent from relocating to wherever he wishes. *See* Brigitte Bodenheimer, *Equal Rights, Visitation and the Right to Move*, 1 Fam. Advoc. 19 (1978); Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, 12 Rutgers L.J. 341 (1981); D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 365 A.2d 27 (N.J. Super. Ct. Ch. Div.), *aff'd*, 365 A.2d 716 (N.J. Super. Ct. App. Div. 1976).

The issue of unwed father visitation could get more complex if the mother was married to someone else at the conception or birth of the child. Most states still have a presumption that a child conceived or born in wedlock is the child of the husband. May the biological father sue to rebut that presumption? If the husband and wife are still married, a paternity suit might be very disruptive of the marriage. See the Cleveland case discussed *infra*, note 87.

If the husband and wife are in the process of divorce, the husband may wish to deny paternity to avoid child support payments. Many states allow the husband to do so, probably on the theory that he should not have to support a child who is not his child. *See, e.g.*, N.Y. Dom. Rel. Law § 175 (McKinney 1977). But some states do not allow the wife to compel submission to blood tests to disprove the husband's paternity, probably on the theory that if the husband will accept responsibility for the child, that will benefit the state which otherwise might have to support the child on public assistance. Such a rule would benefit the taxpayers but not necessarily the mother or the child. *See* Caton v. Caton, No. 83-716 (Okla. Ct. App. March 15, 1983), *cert. denied*, 52 U.S.L.W. 3510 (U.S. Jan. 10, 1984) (No. 83-716).

Consider further the constitutionality of a law permitting the mother to assert that her husband is not the father but denying the biological father the right to assert paternity. *See* Cunningham v. Golden, No. 83-357 (Tenn. Ct. App. Feb. 24, 1983), *appeal dismissed*, 104 S. Ct. 2336 (1984).

Again in the third scenario, a couple conceive a child under similar circumstances. The woman decides, probably on religious grounds, against an abortion. But she wants the best possible home and parents for the baby. She does not believe the biological father will be the right kind of parent for the child. She decides to place the child for adoption. The father objects and sues for custody. On this issue the feminist community has two distinct viewpoints.

One view supports the unwed father, saying: "If the mother doesn't want the child, the father should have priority over strangers. After all, he is the child's father."[19] The other view supports the unwed mother, saying: "She had all the responsibilities and by not getting custody herself gains no benefits. She should have all the decisionmaking rights."[20]

In *Kirkpatrick v. Christian Homes of Abilene, Inc.*,[21] these two opposing viewpoints clashed for the first time in a judicial context. The dispute in the *Kirkpatrick* case involved a mother's interest in having the baby adopted and a father's interest in gaining custody. The child's unwed parents were residents of a small Nebraska town. They began a sexual relationship when Ms. S. was fourteen years old and Mr. Kirkpatrick was twenty-two years old.[22] The couple unintentionally conceived the child when Ms. S. was fifteen years old.[23] Even though the conception of a child between a minor and an adult was evidence of statutory rape,[24] the local authorities did not indict the father.

Upon learning of her unwanted pregnancy, Ms. S. consulted with her parents and decided to place the child for adoption.[25] Having been adopted herself she realized the advantages of adoption and had great concern for the stigma attached to a child born out of wedlock in a small town. She went to Texas, to the Christian Homes of Abilene, a home for

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19. *See* Brief for Petitioner at 26-30, Kirkpatrick v. Christian Homes of Abilene, Inc., 103 S. Ct. 1760 (1983).

20. *See* Brief of Nancy S. Erickson, The National Center on Women & Family Law, Inc., and the Committee for Mother and Child Rights, as Amicus Curiae On Behalf of Unwed Mothers, Kirkpatrick v. Christian Homes of Abilene, Inc., 103 S.Ct. 1760 (1983). [hereinafter cited as Unwed Mothers' Amicus Brief].

21. 103 S. Ct. 1760 (1983) (vacated and remanded for determination of an issue of state law: whether under Texas law Kirkpatrick could have and still may obtain a decree designating him the father of the child).

22. Joint Appendix at 172a, Kirkpatrick v. Christian Homes of Abilene, Inc., 103 S. Ct. 1760 (1983).

23. Joint Appendix at 32a-33a, *Kirkpatrick*.

24. Neb. Rev. Stat. §§ 28-318, 28-319, 28-105 (1979).

25. Joint Appendix at 151a-52a, 173a-75a, 177a-79a, *Kirkpatrick*.

unwed mothers. She stayed there until she gave birth to Baby Girl S. on January 11, 1981.[26]

Mr. Kirkpatrick's interest in custody of the child varied throughout the pregnancy.[27] He asked Ms. S. to marry him, but she refused because she felt she was too young.[28] He then initially agreed to the adoption[29] and offered to pay the mother's maternity expenses while she stayed at the unwed mothers' home.[30] He actually paid only $70 of her expenses, which exceeded $4,000.[31]

Following the birth of Baby Girl S. and the initiation of adoption proceedings by the Christian Homes of Abilene, Mr. Kirkpatrick petitioned for voluntary legitimation under Texas law.[32] Texas law provides that an unwed mother may surrender a child for adoption shortly after birth without the consent of a biological father who has not legitimated the child.[33] Whether the child has been legitimated or not, fathers are given notice of adoption proceedings.[34] A biological father who legitimates the child obtains the right to veto an adoption.[35] He may legitimate the child if the mother consents.[36] If she refuses to consent, the court may override her refusal if it finds that to do so would be in the best interests of the child.[37] Thus a successful petition effectively blocks the adoption proceeding.[38]

Based on a determination of the child's best interests, the trial court denied Mr. Kirkpatrick's petition, and pending appeal, placed the child with a foster family.[39] Mr. Kirkpatrick ap-

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26. *Id.* at 109a.

27. *Id.* at 136a-37a, 160a-61a, 163a, 167a, 284a, 288a.

28. *Id.* at 178a.

29. *Id.* at 136a-37a.

30. *Id.* at 224a-25a.

31. *Id.* at 354a, 194a. Mr. Kirkpatrick began sending $100 per month to the court for Baby Girl S. only after the filing of the petition for voluntary legitimation and on the advice of his attorney. *Id.* at 216a-17a.

32. Tex. Fam. Code Ann. § 13.21 (Vernon Supp. 1984).

33. Tex. Fam. Code Ann. §§ 12.01, 12.02, 15.03(b)(7)(C), and 16.03(d) (Vernon 1975 & Supp. 1984). *Cf.* Tex. Fam. Code Ann. § 13.21(b)(1) (Vernon Supp. 1984).

34. *See* Tex. Fam. Code Ann. § 15.04(b)(4)(D) (Vernon Supp. 1984).

35. *See infra* note 38 and Tex. Fam. Code Ann. § 16.03(b) (Vernon Supp. 1984).

36. Tex. Fam. Code Ann. § 13.21(b)(3) (Vernon Supp. 1984).

37. *Id.* at § 13.21(c).

38. Legitimation, in effect, gives father and child all the rights and obligations that would have accrued if the parents had married. Tex. Fam. Code Ann. §§ 13.09, 13.21 (Vernon Supp. 1984).

39. Joint Appendix at 84a, *Kirkpatrick* (the opinion of the trial court is unreported).

pealed to the Texas Court of Civil Appeals, which affirmed the lower court's decision.[40] The child was then placed with an adoptive family.[41] Mr. Kirkpatrick next successfully petitioned the United States Supreme Court for a writ of certiorari.[42]

After an apparently bitter internal dispute, the American Civil Liberties Union (ACLU) decided to represent Mr. Kirkpatrick during his appeal to the Supreme Court.[43] Attorneys representing both the Women's Rights Project and the Children's Rights Project of the ACLU were named on the brief. Because Ms. S. was not a party to the suit, and therefore unrepresented except insofar as the views of the adoption agency happened to coincide with hers, three amici submitted a brief on behalf of unwed mothers.[44]

Unwed mothers in *Kirkpatrick*-type situations argue that agreement of both mother and father should be necessary for a biological father to obtain custody rights regarding a child. Such agreement may be expressed by (1) marriage, as long as the marriage continues in fact, not just in law, at least until some reasonable time after the child's birth; (2) cohabitation by the mother and father with the father participating in the

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40. In re Baby Girl S., 628 S.W.2d 261 (Tex. Civ. App. 1982), *cert. granted sub nom.* Kirkpatrick v. Christian Homes of Abilene, Inc., 103 S. Ct. 784 (1982), *vacated and remanded*, 103 S. Ct. 1760 (1983).

41. The Brief for Respondent stated:

> Baby Girl S. was placed in the adoptive couple's home in September of 1982 by Christian Homes of Abilene, Inc. Even though there remained the possibility that Petitioner would seek review of the Texas Court's decision by This Honorable Court, it was felt, at that time, that the possibility of such review was remote because of This Honorable Court's refusal to grant Writ of Certiorari in *In the Interest of T.E.T.* in 1980 (603 S.W.2d 793 [Tex.] cert. denied 450 U.S. 1025) and because it was felt that this Court's decision in *Caban v. Mohammed* (441 U.S. 380) was factually distinguishable because the present case involved a newborn child with whom the unwed father had established no substantial relationship. In light of legal precedent which was applicable to Baby Girl S., the decision was made to place the child with the intended adoptive couple because of the emotional and psychological ties which Baby Girl S. was developing daily with her foster family. It was felt that if Baby Girl S. continued to be raised by her foster family, a later disruption of that relationship would not be in her best interest. Even though she remains unadopted, she is establishing a growing relationship with the couple who desires to adopt her.

Brief for Respondent at 3 n.1, Kirkpatrick v. Christian Homes of Abilene, Inc., 103 S. Ct. 1760 (1983).

42. Kirkpatrick v. Christian Homes of Abilene, Inc., 103 S. Ct. 784 (1982).

43. Telephone interviews with ACLU members (Sept.-Nov. 1982).

44. Unwed Mothers' Amicus Brief, *supra* note 20. As author of the brief, I was severely criticized by some feminists who alleged that the brief was anti-feminist and declined to lend their support.

child's care; or (3) agreement between the parties to share parental rights, even if not married or cohabiting.

For a man, by virtue of an accidental pregnancy, to get parental rights over the objection of the pregnant woman in effect means that a woman who accidentally gets pregnant is deemed married to the source of the sperm for purposes of decisions regarding the child. Under such a rule, the woman's only alternative would be to have an abortion, an alternative possibly contrary to her beliefs, moral principles, or health concerns.

Our desires, as feminists, to see men assume the parental duties that in the past they have abandoned to women should not prevent us from recognizing that a legal rule granting an unwed father exactly the same rights as an unwed mother could lead to extreme oppression of women.

Our concern, as feminists, that each woman be free to decide, on the basis of her own views rather than the views of the state, whether or not to bear a child, should also not blind us to the fact that for many women abortion is not an alternative. The law must protect these women too. A legal rule should not be supported if it would force a woman to violate her religious or moral views just because bearing the child would result in the father's obtaining rights concerning that child.[45]

Men should be encouraged to take on the parental roles that women have been forced to shoulder alone. Men's parental rights and responsibilities, however, should not be gained at the expense of women's oppression. A man who wants parental rights has many ways to accomplish that goal. He can get married, he can find a woman who wants to live with him and raise children with him, he can adopt a child, or he can find a woman who wishes to share the care of a child with him

45. *See* Unwed Father v. Unwed Mother, 179 Ind. App. 237, 379 N.E.2d 467 (1978). The mother decided not to have an abortion, relying on an oral agreement of the father that he would consent to adoption by others. Thereafter, in the seventh month of pregnancy, he refused to give his consent to adoption. *Id.* at 239, 379 N.E.2d. at 469. The mother fled to another state, where she gave birth and placed the child for adoption. *Id.* at 241-42, 379 N.E.2d at 470. The father brought a paternity action against the mother. The trial court held that he was estopped from withholding his consent. *Id.* at 241, 379 N.E.2d at 470. The appeals court held he was not estopped and remanded to the trial court for a determination of the custody issue, instructing the trial court to consider the best interests of the child, including the fact that the child had been with the adoptive family for two years. *Id.* at 244-45, 379 N.E.2d at 471-72. The appeals court also hinted that it would be difficult to enforce an order giving custody to the father, since the child's whereabouts were unknown! On remand, the father's family circumstances had changed and he decided not to pursue the matter further. Telephone interview with Patrick E. Donoghue, the unwed father's attorney (April 25, 1984).

whether or not they are married or living together. A man should not be permitted to use a woman's body to obtain a child for himself over her objections.

The following is an abstract of the *Kirkpatrick* amicus brief on behalf of unwed mothers. Because the United States Supreme Court remanded the *Kirkpatrick* case for further proceedings dealing with issues of Texas law, the debate about the rights of unwed mothers is very much alive. The feminist reader should decide what position is most consistent with feminist principles.

I. Substantive Due Process

A. Unwed Fathers' Substantive Due Process Rights Regarding an At-Birth Adoption

The right to privacy includes the right to decide, without undue governmental interference, "whether to bear or beget a child."[46] In this case, the state has not interfered with Mr. Kirkpatrick's decision to beget a child because Mr. Kirkpatrick never decided to be a parent. This child was accidentally conceived against the wishes of the unwed individuals. Mr. Kirkpatrick had no expectation of enjoying parental rights. His only expectation was enjoyment of a sexual relationship.[47] Thus, the Texas statutes do not interfere with any constitutionally protected decision to beget a child.

The right to privacy also encompasses "freedom of personal choice in matters of family life."[48] The Court has indicated in many cases that the interest of natural parents in the care, custody, and management of their child is a fundamental liberty interest. Mr. Kirkpatrick argued that this liberty interest applies to all "natural parents" by virtue of their biological relationship to the child.

Even if that is so, the Court has never declared that right to be absolute. The state may impinge on a fundamental right if there is a compelling state interest and no less burdensome

46. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

47. Ms. S. originally had the same expectation. Pregnancy, however, altered that expectation. Thereafter, she had to take on parental duties unless she decided to abort. Along with those parental duties, she would get parental rights.

48. Santosky v. Kramer, 445 U.S. 745, 753 (1982), citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

alternative.[49] These compelling interests and the lack of less burdensome alternatives are delineated below.

Mr. Kirkpatrick took his argument based on being a natural parent one step further. He quoted the following language from *Smith v. Organization of Foster Families*[50] and argued that the due process clause would be violated "[i]f a State were to attempt the breakup of a normal family, over the objection of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest."[51]

Mr. Kirkpatrick erroneously claimed that this language applies to the facts of his case. The Supreme Court has applied that language in *Quilloin v. Walcott*.[52] As the Supreme Court held that the language did not apply to the facts in *Quilloin*,[53] it similarly does not apply to the facts in this case.

Here the natural family is mother and child. The unwed biological parents did not agree to marry and, therefore, if the mother kept the child, Mr. Kirkpatrick would never become part of the child's family. He has a biological connection to the child that may deserve recognition. If a court permitted visitation Mr. Kirkpatrick might develop a relationship with the child, but he would never become part of the child's family as one who lives or has lived with the family on a day-to-day basis. It is that definition of family that the Supreme Court had in mind in *Quilloin*[54] or in an earlier unwed father case, *Stanley v. Illinois*.[55] Peter Stanley, for example, lived with his children and their mother for many years as a family.[56]

Mr. Kirkpatrick claimed that he wanted the opportunity to establish a family. However, *the state is under no obligation to create a family that the biological parents have not created for themselves*. Mr. Kirkpatrick and Ms. S. were not married, and unlike Joan and Peter Stanley, never lived together as a de facto family unit.

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49. Zablocki v. Redhail, 434 U.S. 374 (1978).

50. 431 U.S. 816 (1977).

51. Quilloin v. Walcott, 434 U.S. 246, 255 (1978), quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring).

52. 434 U.S. 246 (1978).

53. *Id.* at 255.

54. *Id.* at 256.

55. 405 U.S. 645 (1972).

56. *Id.* at 646.

B. The Texas Laws Serve Compelling State Interests

The Texas statutory scheme permits the mother to place the child for adoption over the objection of the biological father unless a court finds legitimation by the father to be in the child's best interests.[57] This statutory scheme serves at least four compelling state interests.

First, the state has a compelling interest in promoting the best interests of the child. The Texas statutes ensure an unmarried, pregnant woman that if she carries the pregnancy to term she will have full control over decisions concerning the child unless such decisions are not in the child's best interests. As the Texas Court of Civil Appeals stated in this case:

> [T]he State has a legitimate interest in protecting the children who are born as a result of pre-marital sexual activity. The mother, by virtue of her pregnancy, is automatically responsible for the child. She has the physical burdens and responsibilities of the pregnancy. She can choose to abort the child or she may carry it full term. The state has a substantial interest in encouraging the unwed mother to properly care for the child by assuring her that her wishes as to the disposition of the child will not, absent her consent or a finding of the child's best interest, be subject to the absolute veto of the biological father.[58]

No study has ever documented the effects a paternal adoption veto has on the unwed mother. Statutes of several states give the right to veto an adoption to those unwed fathers who have either established their biological paternity or whose paternity is undisputed. Many states enacted such statutes in reaction to *Stanley v. Illinois*,[59] but with only ten years elapsing since the *Stanley* decision no statistics exist on the effects of paternal vetoes. Ms. S. testified that if a paternal adoption veto existed she would reconsider her surrender of the child[60] because the child would be better off with her than with Mr. Kirkpatrick.[61]

Other unwed mothers have voiced their concerns regarding what effect such a veto had or would have had on their decisionmaking.[62] D.H. writes from a state that requires the

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57. *See supra* notes 32-37 and accompanying text.

58. In re Baby Girl S., 628 S.W.2d 261, 264 (Tex. Civ. App. 1982).

59. 405 U.S. 645 (1972) (statute held unconstitutional that declared children of unmarried fathers dependents of the state upon the death of the mother without any hearing on the parental fitness of the father).

60. Joint Appendix at 186a, *Kirkpatrick*.

61. *Id.*

62. For the brief abstracted here, I solicited letters from actual unwed mothers asking them to tell the Supreme Court, in their own words, why it was

biological father's consent:

> I was married to the father of my first child, but he left us a few months after she was born. At the time of our divorce he was ordered by the judge to pay $100.00 a month in child support. To this date, I have received $60.00 total for the four years. . . . He has also refused to relinquish his parental right. . . .
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> I do not have at the present time a home, a car, or a job. Therefore, I am unable to provide even the basics of life. Motherhood has been a constant struggle for me. I do not want to bring another child into this type of "hand to mouth" existence. If the father will not give his consent, I will be *forced* to keep this child despite my feelings that it would be in the child's best interest to be adopted.
>
> In my opinion, for our situation, adoption would be the "ultimate love." I think I deserve the opportunity to make this decision of love for my child.[63]

S.S. states:

> Should the father have contested my decision to place the baby for adoption, and should he have had the legal right to do so, I believe my ultimate decision could have been drastically different. As little as he was involved in the pregnancy, I believe I can question what his commitment as a father would have been. Although it's hard to predict how I'd have reacted if he had threatened the adoption, I believe I would have fought for custody myself to raise the baby.
>
> The possibilities of that father's right raises fear in me now. It concerns me so, because, in my case, I was not ready then to be a mother, much less a single mother. I might later have resented my child, who would certainly not have been at fault, for causing me to drop out of college, etc. And, most importantly, my child might not have been raised in a secure family environment of acceptance and love that every child needs and deserves.[64]

As these letters illustrate, the decision to permit adoption is often a mature[65] decision and the one most conducive to the

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important to them to have the adoption alternative available and what effect it would have had on their decision-making processes if the father's consent had been necessary for adoption. Because I assured anonymity to these unwed mothers, initials (not the real initials) are used.

63. Unwed Mothers' Amicus Brief, *supra* note 20, at 23-24.

64. *Id.* at 24-25.

65. Several studies have shown that unwed mothers who choose adoption rank as relatively mature on scales of psychological adjustment. *See, e.g.*, Robert Blum & Michael Resnick, *Adolescent Sexual Decision-Making: Contraception, Pregnancy, Abortion, Motherhood*, 11:10 Pediatric Annals 797 (1982); Lucille Grow, *Today's Unmarried Mothers: The Choices Have Changed*, 58 Child Welfare 363 (1979). Birth mothers who choose adoption cannot be stereotyped as selfish and immature individuals who want to rid themselves quickly of undesired responsibilities by handing over their children to others. Rather, it appears that in most cases they agonize over the decision and try to decide in

best interests of the child.

Allowing the pregnant woman to make the choice she believes is in the child's best interests also serves the child's interests by contributing to the woman's peace of mind during her pregnancy. Medical research documents that stress suffered by a pregnant woman may have serious detrimental effects on the fetus.[66]

The state has a second compelling state interest, the interest in preserving the woman's fundamental right to choose whether or not to bear a child.[67] The Court stated in *Roe v. Wade* that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[68] If the woman has this decision-making right, then the state must have the power to preserve the purity of her decision-making process. The state must have the power to prevent her from being coerced in one direction or the other, especially for the private interests of one individual.

The state may assert an interest to assure that a pregnant woman is not pressured into having an abortion out of fear of losing the child to the potential father or fear that her adoption plans for the child will be thwarted by him. S.J., residing in an unwed mothers' home in Texas, wrote:

> [A]lthough the choice would have been extremely difficult, I would have had to consider abortion. I don't think I could go through a full-term pregnancy on my own, knowing I never could provide [via adoption] the kind of life I want for [the child].[69]

Not even a pregnant woman's husband may demand that a fetus be either aborted or carried to term over the objection of the pregnant woman herself.[70] Surely then an unwed potential father must also lack any such right.

In making the decision whether or not to abort, the pregnant woman needs to know that if she foregoes the constitutionally-protected right to abort, the state will enforce her plans

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the child's best interests. The state has a compelling interest in encouraging them to do so.

66. *See, e.g.*, Richard Gorsuch & Martha Key, *Abnormalities of Pregnancy as a Function of Anxiety and Life Stress*, 36 Psychosom. Med. 352 (1974); Thomas Picone et al., *Pregnancy Outcome in North American Women II: Effects of Diet, Cigarette Smoking, Stress, and Weight Gain on Placentas, and on Neonatal Physical and Behavioral Characteristics*, 36 Am. J. Clin. Nutr. 1214 (1982).

67. *Baby Girl S.*, 628 S.W.2d at 264.

68. 410 U.S. 113, 153 (1973).

69. Unwed Mothers' Amicus Brief, *supra* note 20, at 28.

70. Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

for the child's future unless they are not in the best interests of the child. That is precisely what the Texas law does.

The third compelling state interest is the interest in safeguarding the unwed mother's fundamental right to anonymity and her right not to have a relationship with the child if she decides to give it up for adoption. In *Whalen v. Roe*, the Court stated:

> The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.[71]

For brevity, we will respectively call these the "non-disclosure" interest and the "liberty" interest.

At least two courts have found that a birth mother's right to anonymity stems from the liberty interest. In *Margaret S. v. Edwards*,[72] the court identified the right of privacy of the birth mother who has given up a child for adoption as a fundamental liberty interest, citing *Massey v. Parker*.[73] The liberty interest included this right because if a woman has a right to choose to abort, her decision to bear the child and give it up for adoption should be given the same level of protection. Further, the choice to place the child for adoption, a choice no one except a parent may make, is an exercise of the parental right to control the care, custody, and upbringing of the child.[74] In a marital setting, or in a setting such as in *Stanley v. Illinois*,[75] or *Caban v. Mohammed*,[76] where the unwed parents have lived together and raised their children together, both parents have that custodial right. In other contexts the unwed mother alone has that custodial right.[77] She is not only the "primary caretaker par-

71. 429 U.S. 589, 598-600 (1977).

72. 488 F. Supp. 181, 189 n.16 (E.D. La. 1980) (dictum).

73. 362 So. 2d 1195, 1199 (La. Ct. App. 1978), *writ granted*, 363 So. 2d 1385 (La. 1978) (Schott, J., dissenting).

74. *See* Stanley v. Illinois, 405 U.S. 645 (1972), Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923).

75. 405 U.S. 645, 646 (1972).

76. 441 U.S. 380, 382-83 (1979).

77. *See* Tex. Fam. Code Ann. § 12.01, 12.04, 15.03, 16.03(d) (Vernon 1975 & Supp. 1984). A similar custodial right is the right to name the child. Traditionally, unwed mothers have the exclusive right to name their children based on having the care, custody, and control of the children as legal parents. This is still the law in most jurisdictions, and custodial mothers of marital children are now seeking the same right. *See* In re Marriage of Schiffman, 28 Cal. 3d 640, 169 Cal. Rptr. 918, 620 P.2d 579 (1980) (Mosk, J., concurring). Statutory provisions giving unwed fathers superior naming rights to mothers have been invalidated as unconstitutional. Roe v. Conn., 417 F. Supp. 769 (M.D. Ala. 1976); Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981).

ent,"[78] she is the only caretaker parent.

Other courts have found the non-disclosure interest to be the source of the birth parent's anonymity right. The Supreme Court first discussed the non-disclosure privacy interest in *Whalen v. Roe*.[79] The Court reaffirmed its existence in *Nixon v. Administrator of General Services*.[80] In *Nixon*, the Court found that the individual interest in avoiding disclosure of personal matters is an element of the right of privacy.[81] The Second Circuit found such a non-disclosure privacy interest in *Alma Society v. Mellon*,[82] in which it upheld the validity of a New York statute requiring the sealing of adoption records.

Even if the right of non-disclosure in the adoption context were not a fundamental right, a state would have a compelling interest in protecting that right if it chose to do so. In *Catholic Charities of the Archdiocese of Dubuque v. Zalesky*,[83] the Iowa Supreme Court recognized just such a state interest in protecting the confidentiality of adoption proceedings and the privacy of unwed mothers.[84]

Letters from several birth mothers indicate the importance of the confidentiality that adoption affords. R.T. writes:

> The reason why it is important to have the alternative of adoption available to me is because at a young age I will need time to live my life the right way and not the wrong way . . . [C]onfidentiality is important to me because I really think this [pregnancy] is a mistake and not something I want everyone knowing because I have a life to live and need all the time to get over this and I don't want all my friends to know. . . .[85]

Indeed, confidentiality is often a most critical factor for a pregnant woman deciding whether to proceed with an adoption

78. Garska v. McCoy, 278 S.E.2d 357, 362-64 (W. Va. 1981) (court recognized a presumption in favor of the primary caretaker parent in child custody disputes). *See supra* notes 14-15 and accompanying text.

79. 429 U.S. 589, 599 n.25 (1977), citing Stanley v. Georgia, 394 U.S. 557 (1969) and Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

80. 433 U.S. 425 (1977).

81. *Id.* at 457.

82. 601 F.2d 1225 (2d Cir. 1979), *cert. denied*, 444 U.S. 995 (1979).

83. 232 N.W.2d 539 (Iowa 1975).

84. *Id.* at 548-49. *See also* Linda F.M. v. Department of Health, 52 N.Y.2d 236, 239, 437 N.Y.S. 2d 283, 284, 418 N.E.2d 1302, 1303 (1981) (natural parents retain a potentially strong interest in maintaining their anonymity); In the Matter of the Adoption of E.W.C., 89 Misc. 2d 64, 67-68, 389 N.Y.S. 2d 743, 746 (Fam. Ct. 1976) (unwed mothers' threatened loss of privacy may lead to socially undesirable routes to the placing of children); and Mills v. Atlantic City Dept. of Vital Statistics, 148 N.J. Super. 302, 311-14, 372 A.2d 646, 651 (1977) (statutes mandating confidentiality of sealed adoption records are constitutional).

85. Unwed Mothers' Amicus Brief, *supra* note 20, at 34.

through legal channels rather than pursue some other course, legal or illegal, that she would not consider in her own best interest or in the best interest of the child. Permitting a paternal adoption veto will undoubtedly discourage women and make them fearful of placing their children for adoption. Indeed the inescapable lesson will be that unless a woman can successfully conceal the father's identity,[86] she can only protect the privacy and anonymity of her circumstances by choosing what may be for her an undesirable option. She may decide to abort even though she wishes to carry the fetus to term. She may attempt black market adoption. Or she may keep the child even when she knows that would not be in the best interest of the child. When unprepared young girls keep their children the state loses resources, both human and economic. The girls often drop out of school, they diminish their job prospects, and their children often require public assistance for basic needs.

The fourth compelling state interest served by the Texas statutory scheme is the interest in preventing the exploitation of women as unwilling breeders of babies for men who desire children but have not found women who are able and willing to bear children with or for them. At least one reported case shows that this is a realistic concern. In *W.E.J. v. Superior Court of Los Angeles County*,[87] the unwed mother, Ms. G., released her baby for adoption. The biological father, Mr. L., appeared at the adoption hearing.[88] He testified that he was, at

86. C.K. writes: "[If the father could veto adoption] I [and others] would lie like crazy . . . [although the bad result would be that] these babies' biological backgrounds would be hazy messes." *Id.* at 35.

87. 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979). In a similar unreported case in Cleveland, a married man sought visitation rights to his biological child born to a woman married to another man (case settled out of court).

See also People *ex rel* Irby v. Dubois, 41 Ill. App. 3d 609, 354 N.E. 2d 562 (1976) where the unwed father married another woman when the children (twins) were nine months old, took them for a few hours of visitation three days later, never returned them, and sought to have custody transferred to himself and his new wife. *Id.* at 610, 354 N.E.2d at 564. The court granted him custody on the ground that since he was married, the children would have a "more stable environment and family life," and on the ground that he was employed, while the mother was on welfare, so that he could provide the children with more "material advantages." *Id.* at 614-15, 354 N.E.2d at 567. The *Irby* case is not a clear case of a man exploiting a woman to get a child for his childless marriage because there is no evidence of premeditation on his part and also no evidence as to whether his new wife could have had children. Nonetheless, it is a clear case of exploitation in the sense that the woman who bore the children for nine months and raised them for another nine months lost them to a father who had never demonstrated any responsibility toward them or their mother until he took them from her by deception.

88. *W.E.J.*, 314 U.S. at 306, 160 Cal. Rptr. at 864.

the time of the conception and at the time of the hearing, married to a woman other than Ms. G.,[89] and that his wife was unable to bear children.[90] He also testified that at the time the child was conceived, Ms. G. agreed that Mr. and Mrs. L. would raise the child and that Mr. L. would support Ms. G. during the pregnancy and postpartum period.[91] He testified that he lived up to his part of the bargain, but she did not. The trial court granted him custody on a mistaken view that California law[92] required it because he was without question the biological parent.[93]

The appeals court held the alleged agreement immaterial, stating that an agreement between parents respecting custody does not limit the power of the court.[94] Because Mr. L. was not a "presumed father" under California law, the court further held he was not entitled to veto the adoption and not entitled to custody,[95] although the court on remand would have to consider whether custody to him would be in the best interests of the child.[96]

In the course of its opinion, the *W.E.J.* court quoted the warning of a noted legal scholar:

> The extreme view that all unmarried fathers are to be accorded equal custody rights with the mother (and on a par with married fathers) would have disastrous consequences for the child. Every unmarried father would then have the power to block an adoption by withholding consent, and would be in a position to remove the child from the mother. It is one thing to recognize the father's custodial rights when father and mother are living together as a de facto family, or when the children live with the father. California law accords the father custody rights under such circumstances. It is quite another matter to extend equality of custody to the father who is a stranger to the child.[97]

The scholar's concerns about "disastrous consequences for the child" are well-founded. There could also be disastrous consequences for the mother. In the *W.E.J.* case the biological father claimed there had been an agreement between him and the

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89. *Id.*
90. *Id.* at 330 (dissent), 160 Cal. Rptr. at 879.
91. *Id.* at 306 n.2, 330, 160 Cal. Rptr. at 864 n.2, 879.
92. Cal. Civ. Code § 7004 (West 1983).
93. *W.E.J.* at 308-11, 160 Cal. Rptr. at 865-67.
94. *Id.* at 306 n.2, 160 Cal. Rptr. at 864 n.2.
95. *Id.* at 305, 160 Cal. Rptr. at 864.
96. *Id.* at 311, 315, 160 Cal. Rptr. at 867, 870.
97. Brigitte Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. Cal. L. Rev. 10, 57-58 (1975), quoted in *W.E.J.*, 314 U.S. at 310, 160 Cal. Rptr. at 866.

mother, but the actual facts underlying *W.E.J.* could just as easily be either of the following. First, knowing of his wife's inability to have children, Mr. L. could have had a sexual relationship with Ms. G. for the purpose, unknown to her, of eventually gaining a child. This would give Mr. L. the benefits of a surrogate mother with little expense. Second, desiring to have an extramarital affair with Ms. G., Mr. L. could have accidentally contributed to the pregnancy. When the pregnancy became known, he could have decided to take advantage of the situation to gain custody of the child for his childless marriage.

In each of these two scenarios the unwed mother suffers the same amount of oppression. In each case the mother suffers severe detriment from the pregnancy and childbirth while each father reaps the benefit of a newborn child for his childless home. Additionally, if the baby was born with any defects, the father could simply make no claim to it and burden the mother with planning the child's future.

In *Roe v. Wade*,[98] the Court enumerated the detriments that may flow from childbearing, including physical and mental health damages.[99] Those detriments still remain. In an age of advanced medical technology, we tend to block out the fact that, for women, pregnancy and childbirth are still physically hazardous and sometimes fatal.[100] The mortality rate during birth for women of Ms. S.'s age is many times greater than the mortality rate for women having a first trimester abortion.[101] A woman of Ms. S.'s age who foregoes her right to abort drastically increases her risk of death. Serious complications of pregnancy are also far more common than one would hope.[102] In addition, there are what physicians sometimes call the "minor" complaints of pregnancy,[103] which are not minor to persons undergoing them.

For a woman whose religious or moral beliefs preclude abortion, and for women who do not realize they are pregnant or who deny it until the pregnancy is quite advanced, preg-

98. 410 U.S. 113 (1973).

99. *Id.* at 153.

100. For example, the plaintiff in an important Supreme Court sex discrimination case was a father whose wife died in childbirth. Weinberger v. Wiesenfeld, 420 U.S. 636, 639 (1975).

101. Scott Lebolt, David Grimes & Willard Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?* 248 J. A.M.A. 188, 189-91 (1982).

102. *See, e.g.*, Jack Pritchard & Paul MacDonald, Williams Obstetrics 487-549, 665-704, 893-922 (16th ed. 1980).

103. *Id.* at 322-26.

nancy and childbirth are physically dangerous and emotionally wrenching experiences. Adding the stress and pain of knowing that the biological father has a right to the child even when the mother and a court would both agree that the child's best interests lie elsewhere would put an unconscionable burden on the pregnant woman. As E.M. states: "I am the person who is carrying this child. Not he. I am the person whose mental and physical health take risks. Not his. [sic]"[104]

Serious physical and psychological stresses that accompany the pregnancy and childbirth resulting from an accidental and unwanted conception would become even more oppressive if also caused by the premeditated *plans* of a man bent on using the woman—or girl—as a surrogate mother without her consent. The courts should not countenance a rule giving a biological father the right to veto an adoption of a child that would be in the child's best interest. Such a right could be used for, and probably would encourage, the oppression of women, especially young, naive, and inexperienced women such as Ms. S.

C. There are no Less Intrusive Alternatives to the Current Texas Statutory Scheme; In Fact, Texas Gives Unwed Fathers Far More Rights than the Constitution Requires

Even assuming that Mr. Kirkpatrick has a substantive due process interest in a child who is connected to him by biology alone, this interest may be overcome by a showing that a statute impinging on that right is necessary to the achievement of the compelling state interests above. A statute is "necessary" to achievement of a compelling state interest if no less intrusive means are available.[105] Here, no less intrusive alternative to the Texas statutory scheme is available to cover cases such as the one at bar.[106] Mr. Kirkpatrick suggested none.

Mr. Kirkpatrick urges a requirement that the biological father be proven unfit before disallowing legitimation.[107] An un-

104. Unwed Mothers' Amicus Brief, *supra* note 20, at 42.

105. Zablocki v. Redhail, 434 U.S. 374, 388-90 (1978).

106. The Texas law may have constitutional defects as to fathers such as Peter Stanley, Stanley v. Illinois, 405 U.S. 645, 646 (1972), and Abdiel Caban, Caban v. Mohammed, 441 U.S. 380, 382 (1979) with whom the mothers of the children at issue had entered into family relationships, but Mr. Kirkpatrick is not similarly situated to them and so may not complain of this. *See* Broaderick v. Oklahoma, 413 U.S. 601, 610 (1973).

107. Brief for Petitioner at 34-38, *Kirkpatrick*.

fitness standard would not achieve the state's compelling state interests. It would not serve the state's interest in protecting freedom of choice because a hearing on unfitness could not be conducted within the time constraints for a safe abortion. An unfitness standard would also not serve the state's interest in preventing the exploitation of women as unwilling breeders of babies for men. In most cases, such a hidden motive for causing pregnancy would be impossible to prove.

In fact, the Texas law gives the unwed father more rights than he is constitutionally entitled to receive. Texas could bar an unwed potential father from asserting any custodial rights unless he filed a notice of intent to legitimate the child within, for example, ten days from the time when he knew or should have known of a possible pregnancy. The state has the constitutional authority to require this even if the pregnant woman never informs him of the pregnancy.

The state could constitutionally pass such a law for the following reasons. It is more than reasonable to assume that unwed men have sexual relationships for recreation, not procreation. Those men who do not intend to procreate should not receive any parental rights. An unwed man who has sex for procreation can be assumed to know the name and address of the woman he is attempting to procreate with and the dates on which they had sexual relations. If he is sincere about wanting to procreate, he can simply file a notice of intent to legitimate the child within ten days of every sexual act. If he does not, it is no one's fault but his own if he is given no rights to the child who may result from his sexual acts.

No state currently has the hypothetical law just described,[108] but if a state did enact such a law, the Supreme

108. There are state laws with some similarities, however. The New York statute (N.Y. Dom. Rel. Law § 111-a(2)(c) (McKinney 1977)) considered by the Supreme Court in Lehr v. Robertson, 103 S. Ct. 2985 (1983), requiring a potential father to sign a "putative fathers' registry," is more generous to the unwed father than the hypothetical statute. The New York statute was upheld.

Although the *Lehr* case involved the question of notice of an adoption proceeding and not the question of what standard had to be applied to a father who had been given notice, many of the Court's comments in the *Lehr* case are significant for the issues in a *Kirkpatrick*-type case. Some of the Court's comments could be used in favor of Mr. Kirpatrick and some could be used against him. For example, in denying Mr. Lehr's equal protection claim, the Court stated that Jonathan Lehr and Lorraine Robertson, parents of Jessica, were not similarly situated:

> Whereas [Lorraine] had a continuous custodial responsibility for Jessica, [Jonathan] never established any custodial, personal, or financial relationship with her. If one parent has an established custodial relationship with the child and the other parent has either

Court could uphold it. Such a statute would not violate the un-

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> abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights.

Lehr, 103 S. Ct. at 2996-97.

Kirkpatrick could claim that he *did* demonstrate a full commitment to the responsibilities of parenthood by "coming forward to participate in the rearing of his child." *Id.* at 2993, citing *Caban*, 441 U.S. at 392. He could say that he did grasp the opportunity to develop a relationship with his offspring and accept some measure of responsibility for the child's future. *Lehr*, 103 S. Ct. at 2993. He could claim that he established the only kind of relationship that he could establish with Baby Girl S., which was a financial relationship. He could claim that he attempted to establish a custodial and personal relationship with the child.

Against Kirkpatrick, Ms. S. could claim that some of the language in the *Lehr* case would support the Texas statute that permits a child to be adopted over the objection of the putative father when a court and the mother deem it to be in the child's best interest. For example, the mother could quote footnote 16 of the *Lehr* case in which the Court, quoting from Justice Stewart's dissent in *Caban*, 441 U.S. at 397, stated:

> [H]ere we are concerned with the rights the unwed father may have when his wishes and those of the mother are in conflict, and the child's best interests are served by a resolution in favor of the mother. It seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children.

Lehr, 203 S. Ct. at 2993 n.16.

Ms. S. could also point out that, factually, Mr. Lehr had much more of a relationship with his child than Mr. Kirkpatrick had with his child. Mr. Lehr had visited with the child in the hospital, had sought to track down the mother and child, and had visited with the child on several occasions. *Id.* at 2997 (White, J., dissenting). However, the Supreme Court said Lehr never had a "significant custodial, personal, or financial relationship" with the child. *Id.* at 2994. If Lehr's relationship with his child was not significant, Kirkpatrick's relationship with his child was even less so.

The *Lehr* case indicates that if the state statute is written properly, and an adoption proceeding is commenced before a legitimation or paternity proceeding, the adoption court may proceed without acknowledging that the legitimation or paternity proceeding is taking place. In a sense, this makes it a race to the courthouse and it seems improper to make substantive rights dependent upon such a race, but in a case where a young child's interests are involved, children cannot wait for years and years until adults finally make up their minds what to do.

The Court stated in *Lehr*:

> If this scheme [putative father registry] were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica.

Id. at 2994-95. This implies that a Michigan-type statute might even be held constitutional, so that unwed fathers' rights could be resolved at an earlier stage. *See infra* note 121.

The Court states in *Lehr* that the substantive due process liberty interest

wed potential father's substantive due process rights because the state has a compelling state interest in protecting a woman's right to choose to abort or bear the child. To protect this right the woman must know of any potential claims to the child before the time to abort safely passes.

This hypothetical law also would not violate the potential father's procedural due process rights. In essence, it is a notice of claim requirement[109] with a short statute of limitations. Since he knows that a child might result from any act of intercourse, and since a short statute of limitations is necessary to achieve the state's compelling state interests, it would not violate his procedural due process rights. The law does not require the pregnant woman to notify him of the pregnancy because the sexual act that created the pregnancy notifies him.

The Texas law gives an unwed father-to-be greater rights than our hypothetical statute. Texas law provides no means by which the pregnant woman can unilaterally cut off all of his rights to notice and a hearing on the best interests of the child before the birth of the child. The Texas law requires no notice of claim by him within a short period of time after intercourse or, indeed, at any time before receipt of notice that the mother intends to place the child for adoption. Like the statute upheld in *Quilloin*,[110] which also contains a "best interests" standard, the Texas statute permits a legitimation action long after the child's birth. Finally, the Texas law affords an unwed father a best interests hearing after the birth under all circumstances, even though he has no constitutional right to a hearing of any sort unless he requested one early in the pregnancy. Because the Texas law affords the unwed father far more than is constitutionally required, it must be upheld.

(which the Court has termed a privacy interest) in raising one's child is not created by a mere biological link. *Id.* at 2993. Kirkpatrick's argument was that the biological link between himself and Baby Girl S. gave him the right to veto the adoption and to have custody of her unless the court terminated his parental rights for unfitness. Following *Lehr's* implications, the Court would reject this argument.

See also *In Re* N., 10 FAM. L. REP. 1219 (Or. Ct. App. 1983) in which a court upheld as constitutional, relying on *Lehr*, a statute that dispenses with the requirement of notice of adoption to the putative father unless he (1) establishes his paternity, (2) commences a filiation proceeding, (3) lives with the child some time during the 60 days prior to initiation of adoption proceedings, or (4) supports or attempts to support the child during the year prior to initiation of adoption proceedings.

109. *Cf.*, N.Y. Gen. Mun. Law § 50-e (McKinney 1977 & Supp. 1983-84) (notice of claim must be served on defendant within 90 days of tort).

110. 434 U.S. 246, 249, 254 (1978).

II. Equal Protection

Mr. Kirkpatrick has argued that the Texas statutory scheme incorporates an impermissible gender bias. This argument has no merit. The proponent of a facially sex-based statute must bear the burden delineated in *Craig v. Boren* of demonstrating that the statute is substantially related to an important governmental objective.[111] Here the state of Texas has met that burden. As we have demonstrated above, the Texas statutory scheme is necessary to the achievement of compelling state interests. If it passes the higher "strict scrutiny" test, it automatically passes the *Craig* intermediate level of scrutiny.

The Texas statutory scheme contains no sexual stereotypes that portray men as incapable of good parenting. There is no conclusive evidence that men are inherently less capable than women of raising children.[112] Petitioner does not need myriad citations[113] to prove that point. Texas nowhere denies it.

Factually, this is an anomalous case in which to make such a claim. When asked about care for the child, Mr. Kirkpatrick always referred to his mother, who would have to quit her job to do so,[114] his sister,[115] or his grandmother.[116] It apparently never occurred to him that he—not the women in his family—would be ultimately responsible for the child's care. It apparently never occurred to him that perhaps a time might come when all of the women in his family might be engaged in other pursuits and he might have to hire a babysitter or quit his own job to take care of the child. His sole testimony on the issue of his own care of the child was as follows:

> Q. Will you take care of the child at night?
> A. Yes.
> Q. Do you understand that taking care of a child is a lot of work?
> A. Yes, I do.[117]

Such perfunctory answers, together with the rest of his testi-

111. Craig v. Boren, 429 U.S. 190, 197 (1976). The *Craig* test has been followed (at least nominally) in all later Supreme Court equal protection sex discrimination cases, including Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), and Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).

112. With the exception of breastfeeding. *But see* studies cited in Klaff, *supra* note 5.

113. Brief for Petitioner at 71 n.1, *Kirkpatrick*.

114. Joint Appendix at 202a; 213a; 264a, *Kirkpatrick*.

115. *Id.* at 202a.

116. *Id.* at 209a-210a.

117. *Id.* at 202a-203a.

mony, hardly indicate that he put much thought into the question of his care of the child. His mother never testified that, on his own, Mr. Kirkpatrick would be capable of caring for the child.[118]

It is not argued that just because an unwed father's childcare plans include relatives, the plans are inadequate. It is admirable and healthy for relatives to assist each other. On the record in this case, however, a judge would be compelled to conclude that Mr. Kirkpatrick was planning to take virtually no personal responsibility for the care of his child, and that an award of custody to him would really be an award of custody to his mother or sister, who has no legally enforceable right to such custody.

Via the petitioner's brief,[119] we are now informed that Mr. Kirkpatrick has married, and that his wife is expecting a child in July, 1983. "Mrs. Kirkpatrick is a full-time homemaker and joins in her husband's desire to raise the daughter."[120] Yet another woman appears to take over the childcare responsibilities! Petitioner seems to be arguing that awarding custody to fathers will contribute to the breakdown of sex-role stereotyping. That will be true only if the father truly performs the primary nurturing function. If his mother, sister, grandmother, or new wife performs that function, traditional sex roles will remain intact.

III. The "Best Interests of the Child" Test

The "best interests of the child" test is not perfect. It is not a mathematical formula that can be applied to reach a sure result. But it functions. All over the country judges use it daily to determine custody matters between divorcing parents. Many states, like Texas, use it in a context such as this.[121] For

118. *Id.* at 253a.

119. Brief for Petitioner at 17, n.1, *Kirkpatrick*.

120. *Id.* There are obvious similarities between the *Kirkpatrick* case and *Irby*, discussed *supra* in note 87.

121. Petitioner states in his appendix that "forty-one jurisdictions apply the same standard as they do to other parents, where the unwed father demonstrates the degree of interest and support petitioner Kirkpatrick has in this case." Brief for Petitioner at 7, *Kirkpatrick*. This implies that Mr. Kirkpatrick would win legitimation of Baby Girl S. in those 41 jurisdictions, except in the six of those using a best interests standard for both parents, leaving 35 jurisdictions. But petitioner is wrong as to some of those 35 and in others the precise standard is unclear. For example, petitioner is wrong about Alaska. *See* Alaska Stat. § 25.23.180(c)(2) (1983). The situation in California is unclear, but most likely Mr. Kirkpatrick would not be able to legitimate Baby Girl S. there under these circumstances. *See* W.E.J. v. Superior Court of Los Angeles County, 101

the reasons explained above, an unfitness standard would not serve the compelling state interests involved here.

Finally, it should be noted that this is not a case in which the possibility of adoption is at all doubtful and in which failure to legitimate the child would result in the child's being placed in foster care. It is true, as Mr. Kirkpatrick alleges, that the trial judge did not have before him the specific adoptive parents, in order to put them on the stand. This would destroy the anonymity of the adoption process. But the judge had testimony from the unwed mother both that she did not think Mr. Kirkpatrick would be as good a parent as she herself and also that her wishes were to place the child for adoption.[122] As the child's genetic parent, the person who went through the pregnancy and childbirth, and the child's guardian, the mother has a substantive due process right to have her wishes considered. Additionally, the Christian Homes of Abilene, Inc., is a licensed child-placement agency, held by the state of Texas to high standards of investigation of prospective adoptive parents.

Conclusion

Listen carefully to the voices of the young unwed mothers whose interests have not yet been represented.

P.K. writes:

> Please before a decision is made put yourself in our place. Also, if you have [a] daughter or younger sister what place would this put her in? Thank you and think hard about this before deciding.

On a more philosophical level, S.S. writes:

> We are a very strange society. In our very efforts to promote "freedom" and "openness" and "equality" we may find ourselves harming the very structures and institutions, in this case family and adoption, which we seek to protect and strengthen.[123]

Cal. App. 3d 303, 160 Cal. Rptr. 862 (1979). The situation in Michigan is also unclear because Ms. S. would have had the right to cut off his rights by serving him with a notice before the birth. Mich. Comp. Laws Ann. § 710.34 (West Supp. 1983-84). The recently enacted (eff. June 29, 1982) Ohio law is also unclear. Compare Ohio Rev. Code Ann. § 2105.18 (Page Supp. 1982) (best interests test) with § 3111.01 et seq. (best interests test implied but not stated).

122. Joint Appendix at 186a, *Kirkpatrick*.

123. Unwed Mothers' Amicus Brief, *supra* note 20, at 61.