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Deborah Davis Alleman

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NOTES

ADOPTION: THE CONSTITUTIONAL RIGHTS OF UNWED FATHERS

The biological mother and the stepfather of children born out of wedlock were granted a petition for adoption of the children without the consent of the father. New York Domestic Relations Law permitted an unwed mother, but not an unwed father, to block the adoption of their child simply by withholding consent.[1] On appeal, the United States Supreme Court *held* that the sex-based distinction in this provision violates the equal protection clause of the fourteenth amendment insofar as it discriminates against unwed fathers and is not substantially related to the state's interest in promoting the adoption of illegitimate children. *Caban v. Mohammed*, 99 S. Ct. 1760 (1979).

In its treatment of equal protection questions, the Supreme Court has developed what appears to be a three-tier approach consisting of different levels of judicial scrutiny: minimal, intermediate, and strict.[2] The minimal scrutiny approach is most often used in cases involving economic regulation[3] and requires the application of a "rational basis" test. The equal protection clause is violated only if the classification rests on grounds wholly unrelated to the achievement of the state's objective; the statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[4] In reviewing classifications which are "suspect"[5] or those

1. N.Y. DOM. REL. LAW § 111 (McKinney 1977) provides in part: "[C]onsent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother, whether adult or infant, of a child born out of wedlock . . . ." The statute makes parental consent unnecessary under certain circumstances; otherwise the unwed mother has authority to block the adoption of her child by withholding her consent. Only by showing that an adoption is not in the best interest of his child may an unwed father prevent the termination of his parental rights by adoption. Caban v. Mohammed, 99 S. Ct. 1760, 1765 (1979); Doe v. Department of Social Servs., 337 N.Y.S.2d 102, 107 (Sup. Ct. 1972).

2. *See* Craig v. Boren, 429 U.S. 190, 211 (1976) (Powell, J., concurring); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

3. *E.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425 (1961); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). *See* Bilbe, *Constitutionality of Sex-Based Differentiations in the Louisiana Community Property Regime*, 19 LOY. L. REV. 373, 377 (1973).

4. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

5. Racial and ethnic classifications are suspect. Regents of the University of

which interfere with "fundamental" rights,[6] the Court exercises strict scrutiny. Accordingly, a classification will not be upheld unless it promotes a compelling state interest and such interest cannot reasonably be accomplished through less drastic means.[7] An application of the intermediate level of scrutiny results in the validation of a classification if it is "reasonable, not arbitrary," and if it rests upon "some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[8]

Although all the members of the Court do not agree on the standard of review to be applied in gender-based discrimination cases,[9] an intermediate standard has been used most frequently in recent cases.[10] Using such a standard, the Court in *Reed v. Reed*[11] invalidated a state statute which gave a mandatory preference to males in the appointment of estate administrators.[12] Thus, *Reed* established that a state's interest in administrative convenience may not shield gender classifications from invalidation as it might in circumstances requiring only minimal scrutiny.[13] In *Craig v. Boren*[14] the majority, relying heavily on *Reed*, frankly embraced the new intermediate scrutiny test: "[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[15] The *Craig* Court uti-

California v. Bakke, 438 U.S. 265, 320 (1978). Traditionally a class may be designated as suspect if it is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

6. Fundamental rights generally are viewed as those "explicitly or implicitly guaranteed by the Constitution." San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

7. Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); Shapiro v. Thompson, 394 U.S. 618, 634, 637 (1969).

8. Reed v. Reed, 404 U.S. 71, 76 (1971), *quoting* S.F. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

9. *See* Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring); Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring).

10. *E.g.*, Orr v. Orr, 99 S. Ct. 1102 (1979); Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977). *But see* Parham v. Hughes, 99 S. Ct. 1742 (1979); Kahn v. Shevin, 416 U.S. 351 (1974).

11. 404 U.S. 71 (1971).

12. Although the Court purported to use the rational basis test, subsequent decisions have recognized *Reed* as a significant departure from this traditional test. *E.g.*, Craig v. Boren, 429 U.S. 190, 197-98 (1976); Frontiero v. Richardson, 411 U.S. 677, 688 (1973). *See* Note, *Gender-Based Discrimination and a Developing Standard of Equal Protection Analysis*, 46 U. CINN. L. REV. 572, 575-76 (1977).

13. 404 U.S. at 76; Note, *supra* note 12, at 578.

14. 429 U.S. 190 (1976).

15. *Id.* at 197. Justice Rehnquist opined that the Court's conclusion came out of

lized this standard to strike down an Oklahoma beer statute that allowed females to buy beer at an earlier age than males. No previous decision of the Court had applied an elevated level of scrutiny to invalidate a statutory discrimination operative against males.[16]

The Court has also relied upon the due process clause to protect individuals from legislation which creates arbitrary gender-based distinctions.[17] Once a finding has been made that the classification has resulted in the deprivation of life, liberty, or property, the Court requires that some procedural protection be afforded.[18] The kind of protection required is then determined by balancing the interest of the state against the degree of deprivation.[19]

Within the last decade the parental rights of unwed fathers have been afforded protection under both the equal protection and due process clauses of the fourteenth amendment.[20] That unwed fathers could have constitutionally protected relationships with their children was first proclaimed in *Stanley v. Illinois*.[21] Under the Illinois statutory scheme challenged in *Stanley*, the children of an unwed father, upon the death of their mother, automatically became wards of the state.[22] Using procedural due process language,[23] the

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thin air. 429 U.S. at 220 (Rehnquist, J., dissenting).

16. *See* 429 U.S. at 219 (Rehnquist, J., dissenting). Justice Rehnquist viewed *Stanley v. Illinois*, 405 U.S. 645 (1972), as the exception to this trend. 429 U.S. at 219 n.1 (Rehnquist, J., dissenting). See the Court's statement in *Stanley* at note 24, *infra*. This statement was made by the Court in its due process analysis and apparently was not intended as an equal protection standard.

17. *E.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

18. *See* Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 544-45 (1977) (White, J., dissenting); Mathews v. Eldridge, 424 U.S. 319 (1975).

19. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1975).

20. Traditionally an unwed father has had no rights with respect to his child, but he has had many responsibilities. He has been forced to contribute to the support and care of the child and the mother but not allowed to participate in decisions concerning the child's fate. R. ISSAC, ADOPTING A CHILD TODAY 51 (1965). In the adoption process, agencies have neglected him. R. BERNSTEIN, HELPING UNMARRIED MOTHERS 142 (1971). Generally, the attitude toward the unwed father can be described as punitive. NEWSWEEK, March 27, 1972, at 100.

21. 405 U.S. 645 (1972).

22. *Id.* at 646. State laws that govern the unwed father's rights classify parents by two methods: the legitimacy of the child and the sex of the parent. All other parents were afforded a hearing on parental fitness before the state assumed custody of their children; thus Stanley had fewer rights than the fathers of legitimate children and the mothers of all children. It was undisputed that Stanley was the father of the children, that he had supported them, and that he had lived with them all their lives. *Id.* at 650 n.4. Citing *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968), and *Glona v. American Guaranty & Liability Insurance Co.*, 391 U.S. 73, 75-76 (1968), the Court noted that family relationships not legitimated by marriage had previously been afforded constitutional protection. 405 U.S. at 651-52.

23. Although *Stanley* has been interpreted as imposing a procedural due process requirement, *see, e.g.*, Smith v. Organization of Foster Families for Equality and

Court balanced the state's interest in promoting the welfare of illegitimate children against the father's interest in retaining custody of his children;[24] it then determined that the father was entitled to a hearing on his parental fitness[25] before the state could assume custody of his children.[26] Additionally, the Illinois statutory scheme did not satisfy the requirements of the equal protection clause since it denied a properly focused hearing to unmarried fathers while granting such a hearing to all other Illinois parents.[27] Although *Stanley* afforded protection for the unwed father against direct action by the state, it left unresolved the degree of protection a state must afford the rights of unwed fathers in a situation in which the countervailing interests are more substantial.

The Court was faced with such a case in *Quilloin v. Walcott*,[28] in which the biological father sought to block the adoption of his child by the child's stepfather.[29] The biological father claimed that the Georgia statutes violated the equal protection and due process clauses by denying him an absolute veto over the adoption of his child in the absence of a finding that he was unfit as a parent.[30] The trial court found that Quilloin visited his child occasionally and ir-

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Reform, 431 U.S. 816, 843 (1977), the decision had a substantive impact on Illinois law. *See* Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1607-08 (1972).

24. The Court acknowledged the legitimacy of the state objectives, but emphasized that the interests "of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." 405 U.S. at 651.

25. The statute contained an irrebuttable presumption that unmarried fathers are unfit to raise their children. *Id.* at 658.

The parental fitness test focuses on the conduct of the parent, rather than the interests of the child. A finding of unfitness is usually premised on abuse, abandonment, or neglect of the child, and is required before involuntary termination of a biological parent's rights. *See, e.g.*, Wood v. Beard, 290 So. 2d 675 (La. 1974); Corey L. v. Martin L., 45 N.Y.2d 383, 389, 380 N.E.2d 266, 269, 408 N.Y.S.2d 439, 441-42 (1978). *See also* Griffiths v. Roy, 263 La. 712, 269 So. 2d 217 (1972). This test has been criticized for placing too much emphasis on the child's physical well-being and subordinating his psychological well-being to the parent's right to assert a biological tie. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 4 (1973).

26. 405 U.S. at 657-58.

27. *Id.* at 658. This equal protection holding was deduced from and dependent upon the due process holding since the Court had already determined that a hearing on fitness was necessary. One explanation for this alternative holding is found in Chief Justice Burger's dissenting opinion. He stated that the Court's jurisdiction was limited to the equal protection issue since no due process issue had been raised in or decided by the state courts. 405 U.S. at 659-60 (Burger, C.J., dissenting).

28. 434 U.S. 246 (1978).

29. Quilloin filed an application for a writ of habeas corpus seeking visitation rights, a petition for legitimation, and an objection to the adoption. *Id.* at 250.

30. *Id.* at 253.

regularly provided support, but the court did not make a finding of unfitness.[31] Nevertheless, the court determined that adoption by the stepfather, rather than legitimation or visitation by the natural father,[32] was in the "best interests of the child."[33] The Georgia Supreme Court affirmed the decision of the trial court, and Quilloin appealed to the United States Supreme Court, focusing his equal protection claim on the statutory distinction between married and unmarried fathers.[34] The claim that the statutes also made gender-based distinctions in violation of the equal protection clause was not considered.[35]

The Supreme Court ruled that Quilloin's substantive rights were not violated by the application of a "best interests of the child" standard, and that due process requirements were met.[36] Although recognizing that the biological parent/child relationship is constitutionally protected, the Court emphasized that the adoption would

31. *Id.* at 251.

32. *Id.* The trial court could not have granted visitation rights to Quilloin in addition to the adoption by the stepfather. Since the petition for legitimation was denied, Quilloin lacked standing to object to the adoption. *Id.* at 251 n.11.

33. *Id.* at 251. Many state statutes relating to custody and adoption require that disposition of the child be made according to the "best interests of the child." *See, e.g.*, LA. R.S. 9:403 (Supp. 1956 & 1970), 9:432 (Supp. 1960); N.Y. DOM. REL. LAW § 70 (McKinney 1977). Often no criteria are provided by these statutes, and the court is guided by principles which reflect "considered social judgments in this society respecting the family and parenthood." Bennett v. Jeffreys, 40 N.Y.2d 543, 549, 356 N.E.2d 277, 283, 387 N.Y.S.2d 821, 827 (1976), *quoting* Matter of Spense-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 204, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 944 (1971). Some states have enacted "best interests" statutes. Criteria set forth in these statutes include: (1) the capacity and the disposition of the competing parties to provide for the material, emotional, and moral needs of the child; (2) the moral fitness and mental and physical health of the competing parties; (3) the existing relationship between the child and the competing parties; (4) the child's present environment; (5) the permanence, as a family unit, of the existing or prospective circumstances; (6) the reasonable preference of the child; and (7) other factors deemed relevant by the court. *See, e.g.*, MICH. COMP. LAWS § 722.23 (1970). It has been suggested that the psychological well-being of the child should be the focal point of the "best interests" determination and that the court must insist upon compiling all the facts, psychological and otherwise. Foster, *A "Bill of Rights" for Children*, 1 BULL. AM. ACAD. PSYCH. AND LAW 199, 208 (1973).

34. 434 U.S. at 253.

35. *Id.* at 253 n.13.

36. *Id.* at 255. This indicates that the stringent parental fitness test required by *Stanley* is not the standard to be used in all cases in which maintenance of parental rights is at issue. One writer suggests that the parental fitness determination is essential when a putative father has fulfilled a substantial parental role as was the case in *Stanley*. But when another man fills the parental void left by the manifestly disinterested biological father, the parental fitness protection surrounding the biological relationship can be regarded as waived in the "best interests of the child." Note, *The Putative Father's Parental Rights: A Focus on "Family,"* 58 NEB. L. REV. 610, 616-17 (1979).

give full recognition to an existing family relationship and that at no time had the unwed father been a de facto member of the child's family unit.[37]

In considering Quilloin's equal protection claim, the Court held that the state could recognize the difference in the extent of the commitment to the welfare of the child and could give unwed fathers less veto authority than it affords married or divorced fathers.[38] Although Quilloin had the same child support obligations as a divorced father, his parental interests were distinguishable on the basis that he had "never exercised actual or legal custody over his child . . . and thus . . . never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[39] Again, as in *Stanley*, the Supreme Court indicated that the extent of commitment to the welfare of the child, as evidenced by the fulfillment of familial roles, is a prime factor to be considered in determining the rights of unwed fathers.

In *Caban v. Mohammed*,[40] the mother and her husband, the Mohammeds, petitioned to adopt her children born out of wedlock; the biological father and his wife, the Cabans, cross-petitioned for adoption. Both parties were given an opportunity to be heard, but New York law prevented the Cabans from adopting the children since Mrs. Mohammed, the natural mother, had withheld her consent.[41] Caban could have blocked adoption by the Mohammeds only by showing that such adoption was not in the best interests of the

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37. 434 U.S. at 255. After weighing the interests of the state, the child, and the existing family (which included the psychological father and the natural mother) against those of the biological father, the Court subordinated the biological father's rights to those of the existing family. *Id.* This subordination promoted the family role policies recognized by the Court. These policies included the preservation of an existing family unit and the requirement that parental responsibilities be undertaken before parental rights can be asserted. *See* Note, *supra* note 36, at 616.

38. 434 U.S. at 256. This distinction was permissible "[u]nder any standard of review." *Id.*

39. *Id.*

40. 99 S. Ct. 1760 (1979).

41. N.Y. DOM. REL. LAW § 111 (McKinney 1977). See note 1, *supra*. The court has authority to dispense with consent to an adoption when it finds that the parent had abandoned the child. N.Y. DOM. REL. LAW § 111 (McKinney 1977). Evaluation of the best interests of the child is made only after the court has determined that the parent is unfit and that consent is no longer required. Corey L. v. Martin L., 45 N.Y.2d 383, 380 N.E.2d 266, 408 N.Y.S.2d 439 (1978). Since there were no grounds for terminating Mrs. Mohammed's rights, evaluation of the best interests of the children was restricted to a consideration of the benefits of adoption by the Mohammeds. By adoption the children would have been legitimated. N.Y. DOM. REL. LAW § 114 (McKinney 1977). Without adoption Caban could have retained his parental rights.

children.[42] After a full hearing the trial court granted the Mohammeds' petition, thereby terminating Caban's parental rights and obligations.[43]

On appeal to the United States Supreme Court, Caban claimed that the distinction drawn by the New York provision between the parental rights of unwed fathers and those of other parents violated the equal protection clause, and that the Court's decision in *Quilloin* recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they were unfit.[44] Applying the standard of review adopted in *Craig*,[45] the Court determined that the sex-based statutory distinction was not substantially related to the state's important objective of furthering the interests of illegitimate children.[46] The Court reasoned that some unwed fathers, if given the opportunity, may oppose adoption of their illegitimate children and wish to participate in decisions concerning their care, just as may unwed mothers.[47] Additionally, the statutory assumption that unwed fathers are invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children was ruled an overbroad generalization, unsupported by evidence of any universal difference between maternal and paternal relations at all stages of a child's development.[48]

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42. At the hearing Caban's evidence was considered only insofar as it reflected upon the Mohammeds' qualifications as parents. See note 1, *supra*.

43. By adoption, the natural parents are made legal strangers to the adoptive children. However, the children's rights to distribution of property under the natural parent's will are not affected. N.Y. DOM. REL. LAW § 117 (McKinney 1977).

44. 99 S. Ct. at 1764.

45. See text at note 15, *supra*.

46. 99 S. Ct. at 1768. Application of an intermediate standard of review continues the trend of analyzing gender-based classifications with heightened scrutiny. See cases cited at note 10, *supra*. It also indicates that the unwed father's parental rights, although not "fundamental," deserve more protection than economic interests. See text at notes 3-7, *supra*. *Cf.* Parham v. Hughes, 99 S. Ct. 1742 (1979) (analyzing with minimal scrutiny a Georgia statute that precluded a father who had not legitimated his child from suing for the child's wrongful death).

47. 99 S. Ct. at 1768. This determination recognized that termination of the natural parent's rights and substitution of a new parent through adoption is not always in the best interests of the child. Many legitimate children are not adopted by their stepparents because the consent of a legitimate parent is withheld. Problems that would be created by requiring the unwed father's consent are similar to those now present when the divorced father's consent is required. Some of these problems are solved by termination of parental rights through statutory provisions on abandonment and neglect. Assuming that a parent will not arbitrarily withhold consent to an adoption in the best interests of the child, a scheme such as this provides a large measure of protection to the child. But there is a problem of determining what the best interests of the child are, and who will make that determination.

48. *Id.* at 1766-67. This language suggests that there may be a difference between maternal and paternal relations at a certain phase of a child's life that would justify a

The circumstances of the case demonstrated that an unwed father may have a relationship with his children fully comparable to that of the mother.[49] Caban manifested a "significant paternal interest" in the children, forming a "substantial relationship" with them.[50] Thus, in some situations the state must afford a degree of protection to the unwed father's paternal rights equal to that afforded to the unwed mother.[51]

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distinction based on sex. See text at notes 53-55, *infra*. The Court determined that the parents were similarly situated. 99 S. Ct. at 1772 (Stewart, J., dissenting). See notes 11-13, *supra*, and accompanying text. Neither parent could unilaterally legitimate the children.

In *Parham v. Hughes*, 99 S. Ct. 1742 (1979), the Georgia statute in question precluded any father who had not legitimated his child from suing for the wrongful death of the child, but allowed all mothers to do so. In upholding the statute, the Court concluded that mothers and fathers of illegitimate children were not similarly situated because only the father could unilaterally legitimate the child under Georgia law. Failure to exercise this ability allowed the state to treat mothers and fathers of illegitimate children differently for the purposes of a wrongful death action. *Id.* at 1746-47. The ability of the father to change his status for purposes of the statute was said to distinguish the case from *Caban*, decided the same day. *Id.* at 1748 n.9. This distinction between *Caban* and *Parham* is inconsistent with the Court's remark in *Quilloin*: "We would hesitate to rest decision on . . . [Quilloin's failure to petition for legitimation] . . . but we need not go that far . . . ." 434 U.S. at 254. Furthermore, in *Parham* Justice White stated that *Caban* did not suggest that failure to establish paternity prior to the adoption proceeding might justify discrimination against the father on the basis of presumed differences in maternal and paternal relations. 99 S. Ct. at 1754 n.15 (White, J., dissenting). Under an equal protection analysis, it would be illogical to penalize an unwed Georgia father for failure to resort to an available statutory procedure to assert his parental rights, but afford an unwed New York father full protection of his parental rights because such a proceeding is not available. Perhaps the two cases may be distinguished more satisfactorily on the grounds of the nature of the rights asserted by the respective fathers. In *Caban* the father sought protection of an existing parent/child relationship; the father in *Parham* sought recognition of an economic interest. Since economic interests have traditionally received less judicial solicitude, see text at note 3, *supra*, it is not surprising that the Court would treat the withholding of a cash benefit from a father after the death of his illegitimate child less favorably than the discouragement or preclusion of a relationship between the two while living. This difference is emphasized by the Court's application of a different standard of review in each case. See note 46, *supra*.

49. 99 S. Ct. at 1766. In this respect the decision is consistent with *Quilloin* and *Stanley*. The pivotal point in each case seems to be the father's role in the child's family unit.

50. *Id.* at 1769. Caban was identified as the father on the children's birth certificates and had lived with the children and their mother until she left taking the children with her. Afterwards he maintained contact with the children through relatives.

51. The Court objected to the undifferentiated distinction of the statute, which was applicable in all circumstances. *Id.* at 1768 n.13 & 1769. However, the decision does not require that both parents who have formed a substantial relationship with their child be given veto authority over their child's adoption. *But see* 99 S. Ct. at 1779 (Stevens, J., dissenting).

The Court acknowledged the possibility that unwed mothers as a class are closer than unwed fathers to their newborn infants, but rejected it as a basis for the legislative distinction in a case such as this in which the children are older.[52] Additionally, the Court noted that means other than inflexible gender-based distinctions are available to encourage newborn adoptions.[53] This raises the possibility that a legislative gender-based distinction regarding the adoption of newborns would not violate equal protection,[54] but the opinion leaves many questions unanswered regarding adoptions of this nature. Consideration of how a mother and father are situated at birth provides some guidance with respect to resolution of these questions.

Although the mother will form biological and perhaps emotional ties with the child throughout pregnancy and at birth, the father may also feel emotionally attached to the child during this period, especially if he maintains a relationship with the mother. Requiring only the mother's consent to an adoption prevents the father from forming a "substantial relationship"[55] with his child and is inconsistent with the Court's reasoning in *Caban*.[56] The Court seemingly would allow the state to withhold the privilege of vetoing the child's adoption when the father has never *come forward* to participate in the rearing of his child.[57] To the extent actual participation in rear-

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52. 99 S. Ct. at 1766 & 1768. At the time proceedings were instituted, the children were ages two and four.

53. *Id.* at 1768. Facially, a statute requiring only the consent of the parent with custody appears consistent with equal protection. However, custody determinations are often slanted in favor of the mother. Assuming the fitness of the mother of an illegitimate child, she will ordinarily be granted custody of the child in a contest between herself and the putative father. 2 H. FOSTER & D. FREED, LAW AND THE FAMILY —NEW YORK § 29.6 (Supp. 1979). Therefore, it is possible that the equal protection clause might be violated in the administration of a gender-neutral statute otherwise constitutional.

54. The majority expressed no view as to whether difficulty in locating and identifying unwed fathers at birth would justify such a distinction. 99 S. Ct. at 1768. The dissenting justices would have allowed the distinction on the basis of the physical reality that it is the mother who carries and bears the child, as well as on the legal reality that she alone may decide whether to bear the child and will have custody of the child at birth. 99 S. Ct. at 1775 (Stevens, J., dissenting); 99 S. Ct. at 1772 (Stewart, J., dissenting).

55. The Court did not define this term, but clearly living with an "older child," as Caban did, falls within the definition. The father's relationship with his child in *Quilloin* was probably not considered "substantial."

56. In its discussion of the New York statute, the Court criticized the effect it may have in allowing some alienated mothers to cut off arbitrarily the parental right of fathers. 99 S. Ct. at 1769. *Cf.* LA. R.S. 9:402 (1950), 9:404 (1950 & Supp. 1958) (allowing the mother of an illegitimate child, who has not been formally acknowledged or legitimated by the father, to surrender the child to an agency for adoption, terminating all parental rights).

57. 99 S. Ct. at 1768. In *Quilloin*, the Court distinguished the case from one in which the unwed father had or sought actual or legal custody of his child, indicating

ing the child is required, it is possible that the mother may be forced to allow the father to participate if he wishes and is found fit to do so.[58] Perhaps the father need only manifest a "significant paternal interest" in the child when it is not possible to establish a "substantial relationship," in order to acquire parental rights equivalent to those of the mother. Forming a "substantial relationship" with an unborn child would be difficult, but a father could show at least some paternal interest in his child before birth, or even a "significant paternal interest."[59] Definition of these ambiguous terms is necessary to determine in which circumstances an unwed father has parental rights concerning his newborn child.[60]

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that actual participation is not required. 434 U.S. at 255. Even if the father has not come forward, he may be statutorily entitled to notice of the adoption procedure. *See, e.g.*, UNIFORM PARENTAGE ACT § 24; N.Y. DOM. REL. LAW § 111-a (McKinney 1978) (requiring notice to any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father, and to any person who has been identified as the child's father by the mother in a written, sworn statement).

Notice to an absent father could invade the mother's privacy. 99 S. Ct. at 1776-77 (Stevens, J., dissenting). The Georgia Code provides that the biological mother, when surrendering her parental rights, shall execute an affidavit setting forth the identity and last known address of the biological father of her child and whether or not he has lived with the child, contributed to his support, provided for the mother's support (including medical care) during her pregnancy or during her hospitalization for the birth of the child, or made an attempt to legitimate the child. She shall have the right not to disclose the name and address of the father, but should she decline to provide such information, she may be required to appear in court to explain her refusal or her name may be used in connection with the publication of notice to the putative father. GA. CODE § 74-404 (1978).

58. *See generally In re* Tricia M., 74 Cal. App. 3d 125, 141 Cal. Rptr. 554 (1977), *cert. denied*, 435 U.S. 996 (1978). Under California law, a child with a "presumed father" cannot be adopted without the father's consent. CAL. CIV. CODE § 7004(a)(4) (West 1978). A man is presumed to be the natural father of a child when he receives the child into his home and openly holds him out as his own natural child. CAL. CIV. CODE § 7004 (West 1978). In *In re Tricia M.*, 74 Cal. App. 3d 125, 144 Cal. Rptr. 554 (1977), *cert. denied*, 435 U.S. 996 (1978), the California court held that where the mother has frustrated the efforts of the natural father to hold his child out as his own, the court may, if the father demonstrates his fitness to assume custody, first grant him custody, then allow him to complete the conduct necessary to establish himself as the "presumed father," and then order that his consent is necessary for the child's adoption. 74 Cal. App. 3d at 134, 141 Cal. Rptr. at 560.

59. The father could manifest a paternal interest in his unborn child in many ways, but how "significant" it would be is questionable. For example, he could provide prenatal care, support the mother financially and/or emotionally, prepare for the child's birth, or make arrangements for the child's future.

60. Even assuming that the courts eventually supply a workable definition of "substantial relationship" or "significant paternal interest," an investigation is likely to be necessary in every case to determine the extent of the father's relationship with the child prior to the adoption, and such investigations would not be without borderline situations of interpretative difficulty.

Although the Court acknowledged that the best interests of some illegitimate children may require their adoption into new families who will give them the stability of a normal, two-parent home and also remove the stigma of illegitimacy,[61] it was unwilling to balance these interests, as well as those of the state and the unwed mother, against the interests of the unwed father.[62] The majority chose to frame the issue presented in this case solely in equal protection terms even though the dissenting justices considered the due process challenge more substantial.[63] Had a due process balancing approach been taken, the Court would have weighed the right of the father to a determination of unfitness against the interest of the mother in maintaining her relationship with the child, the interests of the children, the state's interest in the existence of a legitimate family unit, and possibly the right of the family, as a unit, to remain together.[64]

A majority of the present Court would probably be willing, as a matter of substantive due process, to allow the state, applying a sex-neutral rule, to terminate the parental rights of a father such as Caban without a determination of unfitness in order to allow an adoption that is in the best interests of the child.[65] It is the undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, that is objected to by the *Caban* Court.[66] The majority opinion in *Caban* does not require that both parents who have formed a substantial relationship with their child be given veto authority over their child's adoption.[67] Similarly, the four dissenting justices

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61. Although marriage surely increases the chances that a child's parents will stay together, it is no guarantee that a child will have a normal, two-parent home. One might question how "normal" a two-parent home is today. Because of the current divorce rate, the adoption of children by single persons, and unwed mothers who choose to keep their children, the number of single-parent homes is increasing. NATIONAL COUNCIL ON ILLEGITIMACY, ILLEGITIMACY: TODAY'S REALITIES 1 (1971). Thus, the mere fact of being reared by one's mother alone is not likely to result in an assumption that a child is illegitimate. Even if the child's status is known, the child may bear no stigma of illegitimacy since non-marital pregnancy is becoming more socially acceptable. *Id.*

62. 99 S. Ct. at 1767-68.

63. 99 S. Ct. at 1779 (Stevens, J., dissenting). Caban claimed that he was denied substantive due process when New York terminated his parental rights without first finding him to be an unfit parent, but the Court expressed no view on this issue. 99 S. Ct. at 1769 n.16.

64. See note 37, *supra*.

65. If this is allowed, criteria for establishing that best interests of the child should be provided by state legislatures. See note 33, *supra*, and accompanying text.

66. 99 S. Ct. at 1768 n.13 & 1769.

67. *But see* 99 S. Ct. at 1779 (Stevens, J., dissenting).

are willing to allow termination of an unwed father's parental rights without a finding of unfitness. Justice Stewart finds the absence of a legal tie with the mother an appropriate basis for limiting the unwed father's substantive rights when his wishes and those of the mother are in conflict and resolution in favor of the mother serves the child's best interests.[68] Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, would allow the adoption when the natural family unit has already been destroyed, the father has not previously taken steps to legitimate the child, and a further requirement of a showing of unfitness would entirely deprive the child and the state of the benefits of adoption.[69]

In light of *Caban*, reevaluation by the states of their respective adoption schemes may be necessary. *Caban* is of particular significance to Louisiana for its adoption statutes are similar to those of New York which were invalidated in the instant case. In Louisiana, consent of a child's legitimate parents is required for adoption unless the child has been legally surrendered or declared abandoned.[70] For purposes of an agency adoption, any parent may surrender permanent custody of a child, after which the agency acts in lieu of the

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68. 99 S. Ct. at 1771 (Stewart, J., dissenting).

69. 99 S. Ct. at 1780 (Stevens, J., dissenting). These opinions are consistent with the views of legislatures and courts of several states. For example, some states have statutes which require the unwed father's consent unless his identity or whereabouts are unknown or he withholds his consent to an adoption found to be in the best interests of the child. Under this type of provision the child's rights are paramount, and particular cases and individual circumstances are taken into consideration to assure promotion of the child's best interests. If promotion of the child's welfare is deemed paramount in custody and adoption determinations, society will benefit greatly in the long run. In addition, it will be the parents, rather than the unadopted child, who suffer the consequences of the situation they have created by having their parental rights terminated. These statutes seem to provide the best method for furthering adoption of illegitimate children. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-106 (1976); VA. CODE § 63.1-225 (1978). The Code of Virginia provides:

> Consent shall be executed . . . [b]y the parents or surviving parent of a child born out of wedlock. The consent of the father of a child born to an unmarried woman shall not be required (i) if the identity of the father is not reasonably ascertainable, or (ii) if identity of such father is ascertainable and his whereabouts are known, such father is given notice of the adoption proceeding by registered or certified mail to his last known address and such father fails to object to the adoption proceeding within twenty-one days of the mailing of such notice . . . . If after hearing evidence the court finds that the valid consent of any person or agency whose consent is hereinabove required is withheld contrary to the best interests of the child or is unobtainable, the court may grant the petition without such consent.

VA. CODE § 63.1-225 (1978).

70. LA. R.S. 9:425 (1950 & Supp. 1976), 9:427 (1950); Moreland v. Craft, 244 So. 2d 37 (La. App. 2d Cir.), *cert. denied*, 258 La. 348, 246 So. 2d 197 (1971).

parent in subsequent adoption proceedings.[71] Notice of subsequent proceedings need not be served on the parent.[72] A surrender by the mother of a child born out of wedlock, who has not been formally acknowledged or legitimated by the father, terminates all parental rights, including those of the father.[73] Thus, in Louisiana an unwed mother may arbitrarily terminate an unwed father's parental rights even if the father has formed a substantial relationship with the child or has come forward to care for the child.[74] Since notice to the unwed father is not required, he may be unaware of the surrender and a subsequent adoption.

For purposes of a private adoption in Louisiana, any parent may surrender custody of a child to a person or couple qualified to petition for adoption.[75] The surrender must be made by the mother and the father indicated on the child's birth certificate.[76] If the father is not indicated, the mother alone may make the surrender.[77] This surrender terminates all parental rights, except the right to revoke consent to the surrender within thirty days.[78] Revocation may be made only by the parents indicated on the child's birth certificate or by a parent not so indicated but who has formally legitimated or acknowledged the child prior to the adoption decree.[79] As with the agency adoption, the mother can unilaterally terminate the father's parental rights if he does not take steps to assert those rights.

Louisiana's adoption provisions are probably unconstitutional insofar as they discriminate against the unwed father on the basis of sex and marital status.[80] Both parents of a legitimate child and the

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71. LA. R.S. 9:402 (1950).

72. LA. R.S. 9:425 (1950 & Supp. 1976).

73. LA. R.S. 9:404 (1950 & Supp. 1958); Golz v. Children's Bureau of New Orleans, Inc., 326 So. 2d 865, 870 (La.), *appeal dismissed*, 426 U.S. 901 (1976).

74. This was one basis for the Court's objection to the New York provision invalidated in *Caban*. 99 S. Ct. at 1769.

75. LA. R.S. 9:422.3, 422.5 (Supp. 1979).

76. LA. R.S. 9:422.4 (Supp. 1979).

77. *Id.*

78. LA. R.S. 9:422.8, 422.10 (Supp. 1979).

79. LA. R.S. 9:422.10 (Supp. 1979).

80. *But see* Collins v. Division of Foster Servs., No. 10,065 (La. App. 4th Cir. Sept. 11, 1979). *Collins* upheld the constitutionality of Revised Statutes 9:404, which provides:

> A surrender by the mother of a child born out of wedlock who has not been formally acknowledged or legitimated by the father terminates all parental rights except those pertaining to property. The same shall be true as to a court order of abandonment. However, no surrender or court order of abandonment as to only one living parent of a legitimate child shall be binding upon the other living parent.

The fourth circuit concluded that the statute discriminates only against unwed fathers who have not identified themselves by acknowledgment or legitimation and thus does

mother of an illegitimate child must surrender the child for adoption or otherwise consent to an adoption. The unwed father alone is ignored. Only by taking formal steps to acknowledge or legitimate his child may an unwed father assert his parental rights, including the right to notice and veto authority over adoption.[81] The constitutionality of such a requirement of formal action is questionable. In *Quilloin* Justice Marshall, speaking for the Court, remarked: "We would hesitate to rest decision on . . . [Quilloin's failure to petition for legitimation] . . . ."[82] Justice White, who participated in the majority opinion in *Caban*, has stated that *Caban* did not suggest that failure to establish paternity prior to the adoption proceeding might justify discrimination against the father on the basis of presumed differences in maternal and paternal relations.[83] Thus, failure to comply with requirements of formal action should not preclude assertion of parental rights.

The disparate treatment under the Louisiana provisions might be justified by a determination that unwed mothers and fathers are not similarly situated in particular circumstances,[84] but the sex-based distinction must be substantially related to an important state objective. Presumably the purpose of the distinction is to further the interests of illegitimate children, but the means for doing so seem inappropriate.[85] Louisiana's scheme is underinclusive[86] in that it prevents an interested unwed father from asserting his parental rights by allowing surrender by the mother before he has the oppor-

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not invidiously discriminate on the basis of sex. Collins v. Division of Foster Servs., No. 10,065, slip op. at 5 (La. App. 4th Cir. Sept. 11, 1979).

81. In *Collins*, the court stated that the father of an illegitimate child never acquires parental rights if he fails to legitimate his child and thus does not affirmatively indicate his intention to assume parental responsibilities. No. 10,065, slip op. at 6 (La. App. 4th Cir. Sept. 11, 1979).

82. 434 U.S. at 254.

83. Parham v. Hughes, 99 S. Ct. at 1754 n.15 (White, J., dissenting).

84. The *Collins* court determined that "[m]others and fathers of illegitimate children, from a realistic standpoint, are not similarly situated" because maternal and paternal identification for illegitimate children vary vastly in degree of difficulty. No. 10,065, slip op. at 4 (La. App. 4th Cir. Sept. 11, 1979).

85. According to the Fourth Circuit Court of Appeal, Revised Statutes 9:404 is a rational solution to the problem of identification of the father of an illegitimate child for such purposes as support and adoption. Furthermore, it promotes legitimacy by giving a father an incentive to accept his parental responsibility and by penalizing him for arbitrarily denying his child the benefits of legitimacy. *Id.* at 7.

86. The law must seek to bring within a classification all similarly situated so far as means will allow. Skinner v. Oklahoma, 316 U.S. 535 (1942). If the state has selected for special treatment a small group from among those similarly situated, the classification is underinclusive. Dandridge v. Williams, 397 U.S. at 527 (Marshall, J., dissenting).

tunity to do so.[87] In addition, the scheme is overinclusive[88] since it allows an unwed father who has no relationship with his child and has not previously manifested an interest in the child to legitimate or acknowledge and acquire the right to protection of his "parental rights."

The *Caban* decision is a positive step toward equalizing the treatment of men and women with respect to their parental rights.

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87. Even if it is entirely within the father's power to remove himself from the disability imposed by the statute, the mother may surrender the child, terminating any rights the father may have had, before he has the opportunity to acknowledge or legitimate his child. Additionally, restrictive provisions now prevent fathers in certain situations from legitimating their children. *See* LA. CIV. CODE art. 200; LA. R.S. 9:391 (Supp. 1979). Although Act 607 of 1979 apparently removed all impediments to formal acknowledgement, previously a father might be unable to formally acknowledge or legitimate his child, and thus he would be precluded from asserting his parental rights. For example, in the *Collins* case, the biological father was a married man with two legitimate offspring. Transcript of Proceedings Before Twenty-Fourth Judicial District Court, Affidavit at 17, Collins v. Division of Foster Servs., No. 10,065 (La. App. 4th Cir. Sept. 11, 1979). Consequently, he could neither formally acknowledge nor legitimate his adulterous child. The child was surrendered to an agency by her mother, over Collins' objections. He then *sought custody* of the child, but the trial court ruled that the surrender by the mother, pursuant to Revised Statutes 9:404, had terminated his parental rights. The fourth circuit affirmed the decision. No. 10,065 (La. App. 4th Cir. Sept. 11, 1979). The court distinguished Revised Statutes 9:404 from the New York provision held unconstitutional in *Caban* because of a father's ability to change his status for purposes of the statute. Yet the court ignored the reality that Collins was powerless to change his status, and did not consider the constitutionality of the prohibition of Civil Code articles 200 and 204 against legitimation or acknowledgement because Collins did not attempt to legitimate or acknowledge before the surrender. *Id.* at 5 n.3. (Collins did execute an authentic act acknowledging the child after suit was filed.) Although a father such as Collins may now formally acknowledge his child, he must do so before a surrender by the mother.

The *Collins* court cited *Quilloin*, noting that the Supreme Court upheld a Georgia statute which denied veto authority over an adoption to a natural father who had not legitimated his child. *Id.* at 6 n.4. The facts of *Collins* seem to fit more closely the cases the Court distinguished in *Quilloin*. Although neither Quilloin nor Collins was ever a de facto member of their child's family unit, in *Quilloin* the Court explicitly stated that it was not dealing with a case in which the father had ever *sought custody*, and that the proposed adoption would give recognition to an existing family unit. Collins sought custody of his child, and from the record it appears that the child, who was less than a year old, was still with the agency. Furthermore, *Quilloin* held that the father's due process rights were not violated by application of a "best interests of the child" standard. The court in *Collins* did not even consider the best interests of the child, but simply concluded that the father had not "shown any basis for entitlement to a cognizable parental right which should be protected by due process considerations." *Id.* at 8. Collins' biological connection and his attempt to accept responsibility for his child should constitute such a basis.

88. If the classification extends to those not included in the group the statute was intended to affect, it is overinclusive. Dandridge v. Williams, 397 U.S. at 527 (Marshall, J., dissenting).

States may require the consent of the unwed father, as well as the unwed mother, for adoption. Apparently, state legislatures may, in the alternative, dispense with the requirement of parental consent for adoption and make the "best interests of the child" the controlling standard. According to *Caban* the equal protection clause requires only that the parental rights of unwed fathers be afforded the same degree of protection maternal rights receive. The decision thus gives adequate protection to the unwed father who is interested in his child.

Since the constitutionality of many state adoption statutes is now at least questionable, legislatures should consider a statutory scheme that would serve the state interest in maintaining an efficient adoption program, protect the rights of all concerned parents, and promote the best interests of the child. In *Caban* the Court gives little guidance in this area. By sidestepping the due process issue, the Court avoided deciding whether the child's rights are paramount to those of the parents. The Court could have provided greater protection for children by expressly stating that parental rights may be involuntarily terminated where necessary to allow an adoption in the child's best interests.[89] If the state requires a finding of unfitness before termination of parental rights, the parent's rights, rather than the interests of the child, would be the paramount consideration in adoption proceedings. Instead, the welfare of the child should be paramount, and it seems that parental rights may fairly be predicated on parental responsibility and concern. The parental right is sacred, but it is no more so than the welfare of the child.[90]

Deborah Davis Alleman

Thrasher v. Leggett: JUDICIAL RESTRAINT IN THE IMPOSITION OF LIQUOR VENDOR LIABILITY

The defendant served liquor to the plaintiff, a highly intoxicated patron, in violation of the Alcoholic Beverage Control Law.[1] After

89. *Stanley* presumably would not allow termination of parental rights without a finding of unfitness where a stranger sought adoption. See text at notes 24-26, *supra*, and accompanying text. But where one having a parent relationship with the child seeks adoption, the best interests of the child should be the controlling factor in the adoption determination.

90. *The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Persons*, 25 LA. L. REV. 291, 301 (1965).

1. LA. R.S. 26:88(2) (1950). This statute provides: "No person holding a retail dealer's permit and no agent, associate, employee, representative, or servant of any