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Casenote, Constitutional Law--Equal Protection--New York Statute Requiring Consent of Mother, But Not of Father, as Prerequisite to Adoption of Illegitimate Child Violates the Fourteenth Amendment Because It Draws Gender-Based Distinction Which Bears No Substantial Relation to State Interest in Encouraging Adoption of Illegitimate Children--*Caban v. Mohammed*, 441 U.S. 380 (1979)

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CONSTITUTIONAL LAW—EQUAL PROTECTION—NEW YORK STATUTE REQUIRING CONSENT OF MOTHER, BUT NOT OF FATHER, AS PREREQUISITE TO ADOPTION OF ILLEGITIMATE CHILD VIOLATES THE FOURTEENTH AMENDMENT BECAUSE IT DRAWS GENDER-BASED DISTINCTION WHICH BEARS NO SUBSTANTIAL RELATION TO STATE INTEREST IN ENCOURAGING ADOPTION OF ILLEGITIMATE CHILDREN—*Caban v. Mohammed*, 441 U.S. 380 (1979).

Appellant Abdiel Caban and appellee Maria Mohammed¹ lived together out of wedlock for several years in New York City.² Two children were born to Maria Mohammed during this time,³ and appellant was identified as the father on each child's birth certificate.⁴ Appellant lived with and supported the family until appellee left him, taking the children with her, and began residing with the man she later married.⁵ During the two following years, appellant remained in constant contact with the children.⁶ In January 1976, appellees filed a petition to adopt the children.⁷ Two months later,

¹ Appellees were Maria Mohammed and her husband Kazim Mohammed, who were married in January 1974. *Caban v. Mohammed*, 441 U.S. 380, 382 (1979).

² For a five-year period between September 1968 and December 1973, appellant Abdiel Caban and appellee Maria Mohammed represented themselves as husband and wife although they were never legally married. 441 U.S. at 382. In New York, cohabitation does not create a common-law marriage, and, in fact, that state's law does not recognize common-law marriages under any circumstances. *Rahill v. 645 Restaurant Corp.*, 59 App. Div. 2d 988, 399 N.Y.S.2d 342 (1977).

³ The two children were David Andrew Caban, who was born on July 16, 1969, and Denise Caban, who was born on March 12, 1971. 441 U.S. at 382.

⁴ *Id.*

⁵ *Id.* Appellee married Kazim Mohammed within a month after taking up residence with him. *Id.*

⁶ During the first nine months of her marriage, appellee took the children every week to see her mother who lived in the same building as appellant. Appellant visited with the children every time they came to see their grandmother. In September 1974, the grandmother, at appellee's request, took the children with her to live in Puerto Rico. Appellant was able to maintain contact with the children through his parents who also lived in Puerto Rico. Appellees maintained that they planned to join the children as soon as they had saved enough money to start a business in Puerto Rico. *Id.* at 382-83.

⁷ The appellees filed the petition under the New York Domestic Relations Law which provided in part that "[a]n adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse." N.Y. DOM. REL. LAW § 110 (McKinney 1977). 441 U.S. at 383.

appellant and his wife⁸ filed a cross-petition for adoption.⁹ The New York Surrogate granted the appellees' petition to adopt,¹⁰ basing his decision on a New York Domestic Relations Law which provided in part that the "consent to adoption shall be required . . . [only] of the mother . . . of a child born out of wedlock."¹¹ Because the natural mother withheld her consent, appellant was foreclosed from adopting the children.¹² The Surrogate's opinion was affirmed by the New York Supreme Court, Appellate Division,¹³ and the New York Court of Appeals.¹⁴ On certiorari, *held*, reversed. A state adoption law requiring that only the natural mother, but not the natural father, consent to the adoption of an illegitimate child violates the equal protection clause of the Four-

⁸ Appellant Caban married another woman subsequent to appellee's departure with the children and prior to the adoption proceedings. 441 U.S. at 383.

⁹ A hearing on the petition and cross-petition was held before a Law Assistant to a New York Surrogate in Kings County, New York, at which both appellant and appellees were permitted to present and cross-examine witnesses. *Id.*

¹⁰ *Id.* at 383-84.

¹¹ At the time of the proceedings before the Surrogate, New York law provided that consent to adoption was required of only the following individuals or agencies:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

N.Y. DOM. REL. LAW § 111 (McKinney 1977). As subsection (c) of the statute makes clear by omission, New York law did not require the consent of the natural father for the adoption by another of his illegitimate child. *Id.*

¹² Because the children were born out of wedlock, the consent of the natural mother alone was required for their adoption. The appellant, even though he was the natural father of the children, had no rights under New York law to adopt the children independent of the mother's consent. *See* note 11 *supra*.

¹³ *See In re David Andrew C.*, 56 App. Div. 2d 627, 391 N.Y.S.2d 846 (1977). In response to appellant's claim that the New York Domestic Relations Law was unconstitutional because it did not allow a father to object to the adoption by another of his illegitimate children, the court responded that such a claim had already been found to be without merit in *In re Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975), appeal dismissed for want of a substantial federal question *sub nom.* Orsini v. Blasi, 423 U.S. 1042 (1977). The *Malpica-Orsini* case is discussed at notes 68-82 *infra* and accompanying text.

¹⁴ *See In re David A.C.*, 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977). This court agreed with the New York Supreme Court, Appellate Division, that appellant's claim was only a restatement of a question which had been resolved previously. *See* note 13 *supra*.

teenth Amendment because it bears no substantial relation to the state's interest in facilitating the adoption of children born out of wedlock. *Caban v. Mohammed*, 441 U.S. 380 (1979).

Prior to 1972, the father of an illegitimate child had few, if any, rights in his child.¹⁵ State adoption statutes typically were silent regarding any interests the putative father might assert in his child,¹⁶ requiring neither that he consent nor that notice be given to him as a prerequisite for the adoption of his child by a third party.¹⁷ Those states which were willing to recognize parental rights in the putative father usually required that he establish his paternity through a judicial proceeding before acquiring even limited rights to control the fate of his child.¹⁸

¹⁵ For an overview of the rights of putative fathers as they existed prior to 1972, see Embick, *The Illegitimate Father*, 3 J. FAM. L. 321 (1963). The rights of putative fathers are basically an extension of the protection which historically has been provided by the United States Supreme Court to the family relationship. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court found that the equal protection clause of the Fourteenth Amendment covered marriage as one of the "basic civil rights of man." *Id.* at 541. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the due process clause of the Fourteenth Amendment was expanded to cover the rights "to marry, establish a home and bring up children . . ." *Id.* at 399. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a law prohibiting parents from sending their children to private schools was found to be an unconstitutional restraint on the due process right of parents to raise their children as they saw fit. The "private realm of family life which the state cannot enter" was recognized and respected in *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). In this case the Court stated, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . ." *Id.* This interest in the "companionship, care, custody, and management of his . . . children" subsequently was extended to putative fathers who had "sired and raised" their children in *Stanley v. Illinois*, 405 U.S. 645, 651 (1971). See generally Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 804-22 (1978).

¹⁶ See, e.g., MICH. STAT. ANN. § 25.235 (1957); N.Y. DOM. REL. LAW art. VII (McKinney 1966); ORE. REV. CODE § 109.326 (1967). The Oregon statute stated boldly the impact of these laws: "If the mother is dead or unknown, consent shall be obtained in the same manner as if such child had no living parent." *Id.*

¹⁷ See, e.g., ALASKA STAT. § 20.10.020(3) (1962); DEL. CODE ANN. tit. 13, § 908 (1953); FLA. STAT. ANN. § 72.14 (1964); GA. CODE ANN. § 74-403 (Supp. 1972); ILL. ANN. STAT. ch. 4, §§ 9.1-1, 9.1-8 (Smith-Hurd Supp. 1973); KY. REV. STAT. ANN. § 199.500 (1972); MASS. ANN. LAWS ch. 210, § 2 (Michie/Law Co-op Supp. 1972); N.Y. DOM. REL. LAW § 111 (McKinney Supp. 1973).

¹⁸ See, e.g., ARIZ. REV. STAT. ANN. §§ 8-106, 8-11 (Supp. 1970) (consent required of any putative father who had acknowledged his parentage under oath in a document filed with the court or state adoption agency; notice by personal service of the hearing on the adoption petition required to be given to such father); ARK. STAT. ANN. §§ 56-104, 56-106 (Supp.

In 1972, the Supreme Court addressed the issue of the rights of unwed fathers for the first time in *Stanley v. Illinois*.¹⁹ In that case, the Court examined an Illinois statute which stated that the only "parent" of an illegitimate child was the child's natural mother.²⁰ Petitioner Stanley had lived with a woman intermittently for eighteen years during which time he fathered, raised, and supported three children.²¹ When the children's mother died, they were declared wards of the state because, pursuant to Illinois law,²² they were considered no longer to have any living "parent."²³ Declaring that petitioner had no right to protest because he was not considered a "parent," the state placed the children with court-appointed guardians despite the natural father's objections.²⁴ Petitioner attacked the Illinois law on the ground that it denied him the protections granted to married fathers and unwed mothers who could not be deprived of their children unless they had been shown to be unfit parents.²⁵ The Supreme Court struck down the

1969) (consent required of putative father whose paternity has been established by court order; such father, along with all other persons whose consent is required, to be made defendant in adoption proceedings); IND. CODE ANN. § 3-120 (Burns Supp. 1970) (consent required of putative father whose paternity has been established by a court proceeding).

¹⁹ 405 U.S. 645 (1972).

²⁰ ILL. REV. STAT. ch. 37, § 701 (1966) provided in part: "'Parents' means the father and mother of a legitimate child, or the survivor of them, or *the natural mother of an illegitimate child*, and includes any adoptive parent." *Id.* (emphasis added).

²¹ 405 U.S. at 646.

²² See note 20 *supra* for the text of the relevant Illinois statute which, by omission, refused to recognize an unwed father as a legal parent.

²³ *In re Stanley*, 45 Ill. 2d 132, 133, 256 N.E.2d 814, 815 (1970).

²⁴ The Illinois Supreme Court suggested that Stanley could have become a legal parent of the children if he had applied for adoption or custody and control of the children. *Id.* at 135, 256 N.E.2d at 815-16. Stanley had made no attempt to gain recognition of himself either as the children's father through adoption, or as legal custodian of the children through a guardianship proceeding prior to the dependency hearing. When their mother died, he placed them in the care of the couple who later were appointed by the court to be the children's legal guardians. The state initiated the dependency proceeding when it became known that there was no one who had any legally enforceable obligation for the care of the children. Even at the dependency hearing, Stanley made no affirmative effort to take responsibility for the children himself. He merely objected to the designation of the couple as legal guardians and seemed concerned that he would no longer receive welfare payments after such designation. 405 U.S. at 667 (Burger, C.J., dissenting) (citing Tr. of Oral Arg. 19).

²⁵ Illinois law at that time provided that children were "dependent," and thus in need of legally-appointed guardians, if they were under eighteen years of age and had no living "parent," ILL. REV. STAT. ch. 37, § 702(5) (1967). The Illinois Supreme Court did not con-

Illinois statute as violative of the Fourteenth Amendment²⁶ and held that all parents, including unwed fathers, were constitutionally entitled to a hearing on their fitness as parents before their children could be removed from their custody.²⁷

Although Stanley appealed to the Supreme Court only on the ground that the Illinois statute denied him the equal protection afforded to unwed mothers and married fathers, the Court went on to find the statute to be in violation of the due process clause of the Fourteenth Amendment.²⁸ The majority intertwined the two bases for its decision, stating that,

as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection

sider Stanley's parental fitness an issue because, since he had not married the children's mother, he was not even considered a "parent" under the statute. *In re Stanley*, 45 Ill. 2d 132, 134, 256 N.E.2d 814, 815 (1970). See note 20 *supra* for the text of the relevant Illinois statute which did not recognize an unwed father as a "parent."

²⁶ The Fourteenth Amendment provides in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1.

²⁷ 405 U.S. at 658.

²⁸ *Id.* The commentators disagree whether the *Stanley* decision was based solely on equal protection grounds or on both due process and equal protection grounds. One writer believes that although the Court's opinion was primarily a discussion of procedural due process, the due process claim technically was not available to petitioner since he had pressed only his equal protection claim. Comment, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 518 n.12 (1973). Another student author argues that the Supreme Court struck down the Illinois statute on both grounds: the statute was violative of due process because it created a presumption of parental unfitness from the fact of illegitimacy, and also was invalid on equal protection grounds because it denied an unwed father the same hearing on parental fitness that would be given a married parent. Comment, *Illegitimacy and the Rights of Unwed Fathers in Adoption Proceedings after Quilloin v. Walcott*, 12 JOHN MARSHALL J. 383, 384-85 (1979) [hereinafter cited as Comment, JOHN MARSHALL J.]. Chief Justice Burger, in his dissenting opinion in *Stanley*, criticized the majority for analyzing the case on due process grounds when "[n]o due process issue was raised in the state courts; and no due process issue was decided by any state court." 405 U.S. at 659 (Burger, C.J., dissenting).

of the laws guaranteed by the Fourteenth Amendment.²⁹

The Court discussed the due process implications of *Stanley* in terms of balancing the state's interest in depriving the petitioner of the custody of his children against the petitioner's interest in maintaining the familial relationship he had already established with his children.³⁰ The Court found Stanley's private interest in retaining custody of his children to be both "cognizable and substantial,"³¹ while the state's interest in upholding the statute seemed grounded only in the efficacious handling of all cases involving illegitimate children.³² The Court concluded that Stanley's interest far outweighed that of the state and struck down the Illinois statute as violative of the due process clause because it precluded an individualized case-by-case determination and balancing of interests.³³

The Supreme Court in *Stanley* held merely that the father of an illegitimate child could not be deprived of the custody of his child without a hearing on his parental qualifications.³⁴ The Supreme Court did not hold that fathers of illegitimate children should always be presumed to be fit parents of their children; it only struck down a statute which created an irrebuttable presumption that all unwed fathers are unsuitable and neglectful parents.³⁵

Although the factual situation in *Stanley* involved a dependency and custody hearing,³⁶ the impact of the case was felt most

²⁹ 405 U.S. at 649.

³⁰ *Id.* at 651-52.

³¹ *Id.* at 652. The majority seemingly ignored the fact that Stanley was not the *actual* custodian of the children at the time of the dependency hearing. See note 24 *supra*.

³² The Court criticized the state's procedure of not allowing *any* unwed father *any* rights in his child as "procedure by presumption." 405 U.S. at 656. Administrative convenience, followed because it is "cheaper and easier than individualized determination," could not be exalted over a father's parental rights in his children. *Id.* at 656-57.

³³ *Id.* at 657-58.

³⁴ *Id.* at 658.

³⁵ *Id.* at 654.

³⁶ Immediately following *Stanley*, the Supreme Court remanded a similar custody case to the Illinois court for reconsideration in light of the *Stanley* decision. *Vanderlaan v. Vanderlaan*, 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970), *vacated and remanded*, 405 U.S. 1051 (1972), involved a ruling by an Illinois court which denied the custody of an illegitimate child to the putative father because the child's natural mother was alive and also wanted

strongly in the area of adoption³⁷ and the right of fathers of illegitimate children to prevent the adoption of their children by third parties.³⁸ The Supreme Court did not consider the rights of putative fathers in the context of an adoption case until 1978 in *Quilloin v. Walcott*.³⁹ The issue in *Quilloin* was the constitutionality of a Georgia adoption statute that effectively denied an unwed father the right to prevent the adoption of his illegitimate child by vesting all parental rights to an illegitimate child in the natural mother.⁴⁰

custody. The appellate court's earlier holding that the putative father had no right to the society of his illegitimate child was clearly contradictory to the holding in *Stanley*. See text accompanying notes 31-34 *supra*. On remand, the Illinois court decided that unwed fathers could no longer be considered automatically ineligible for custody. 9 Ill. App. 3d 260, 262, 292 N.E.2d 145, 146 (1972).

³⁷ At the same time the Supreme Court remanded *Vanderlaan*, discussed at note 36 *supra*, for reconsideration in the light of *Stanley*, it also remanded a case involving the adoption of an illegitimate child. In *State ex rel. Lewis v. Lutheran Social Servs.*, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated and remanded sub nom. Rothstein v. Lutheran Social Servs.*, 405 U.S. 1051 (1972), an unwed father was denied both notice and a hearing prior to the adoption of his child. His petition for custody and control was denied by the Wisconsin Supreme Court, which held that the statute giving exclusive control of an illegitimate child to its mother did not deny the father equal protection of the laws under the Fourteenth Amendment. 47 Wis. 2d at 434, 178 N.W.2d at 63. On remand, the Wisconsin court held that the statute unconstitutionally denied the rights of unwed fathers because it did not provide these fathers with a hearing to determine their fitness as parents. In a subsequent hearing, however, the father was found to be unfit and the court approved the adoption which had already taken place. In doing so, the court affirmed the value of maintaining the family relationship that had been created by that adoption. *State ex rel. Lewis v. Lutheran Social Servs.*, 68 Wis. 2d 36, 42, 227 N.W.2d 643, 647 (1975).

³⁸ In the three years following *Stanley*, many states overturned adoption statutes that vested the rights to illegitimate children solely in their natural mothers. See, e.g., *Miller v. Miller*, 504 F.2d 1067 (9th Cir. 1974) (Oregon statute permitting adoption of illegitimate children upon the consent of natural mother alone held unconstitutional); *E. v. T.*, 124 N.J. Super. 535, 308 A.2d 41 (1973) (New Jersey statute which gave unwed mothers exclusive right to custody and control of their children overturned); *Hammack v. Wise*, 211 S.E.2d 118 (1975) (unwed fathers found to be entitled to benefits of law that a parent will not be denied custody of his child unless there is clear and convincing proof he is unfit). For discussions of the impact of *Stanley* on the issue of the rights of unwed fathers, see Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois*, 9 FAM. L.Q. 527 (1975); Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115 (1973); Comment, *The "Strange Boundaries" of Stanley: Providing Notice to the Unknown Putative Father*, 59 VA. L. REV. 517 (1973).

³⁹ 434 U.S. 246 (1978).

⁴⁰ The sections of the Georgia adoption statute at issue in this case were GA. CODE ANN.

Quilloin involved a petition for the adoption of an eleven-year-old child by the husband of the child's natural mother. In contrast to the factual situation in *Stanley*,⁴¹ the natural father in *Quilloin* had never established a home with the child's natural mother, nor was the child in the custody and control of his father at any time.⁴² It was not until the mother's husband filed a petition to adopt the child that the father even attempted to secure visitation rights.⁴³ After being notified that an adoption petition had been filed, appellant filed a petition to legitimate the child.⁴⁴ He subsequently amended his pleadings to claim that certain sections of the Georgia adoption statute were unconstitutional because they denied him the same rights granted to married fathers and unwed mothers and assumed unmarried fathers to be unfit as a matter of law.⁴⁵ The

§ 74-203 and § 74-403(3) (1975). Section 74-203 provided, "The mother of an illegitimate child shall be entitled to the possession of the child, unless the father shall legitimate him Being the only recognized parent, she may exercise all the paternal [sic] power." GA. CODE ANN. § 74-203 (1975). (The Georgia Supreme Court indicated in its *Quilloin* opinion that the word "paternal" in this statute was a misprint and was intended to be "parental." 238 Ga. 230, 231, 232 S.E.2d 246, 247 (1977)). Section 74-403(3), which related to the consent required for adoption, stated:

Illegitimate children.—If the child be illegitimate, the consent of the mother alone shall suffice. Such consent, however, shall not be required if the mother has surrendered all of her rights to said child to a licensed child-placing agency, or to the State Department of Family and Children Services.

GA. CODE ANN. § 74-403(3) (1975).

⁴¹ See text accompanying note 21 *supra*.

⁴² 238 Ga. 230, 231, 232 S.E.2d 246, 247 (1977). The child had lived with his maternal grandparents or mother all of his life. Although the father had visited him on occasion, the primary support for the child had come from his mother and maternal grandparents. *Id.*

⁴³ *Id.*

⁴⁴ The Georgia statute which was operative at the time stated:

A father of an illegitimate child may render the same legitimate by petitioning the superior court of the county of his residence, setting forth the name, age, and sex of such child, and also the name of the mother; and if he desires the name changed, stating the new name, and praying the legitimation of such child. Of this application the mother, if alive, shall have notice. Upon such application, presented and filed, the court may pass an order declaring said child to be legitimate, and capable of inheriting from the father in the same manner as if born in lawful wedlock, and the name by which he or she shall be known.

GA. CODE ANN. § 74-103 (1975). Appellant did not seek custody of the child nor did he object to the child's continuing to live with appellees, but rather sought only to block the adoption of the child by the mother's husband. His reasons for doing so were not stated in the record. 434 U.S. at 247, 249-50.

⁴⁵ 434 U.S. at 250.

superior court, considering both the legitimation and the adoption petitions in the same hearing,⁴⁶ examined several factors, including the father's sporadic support of the child, the stable condition of the mother's marriage, and the child's express desire to be adopted by and assume the surname of his stepfather.⁴⁷ The superior court concluded that legitimation was not in "the best interests of the child"⁴⁸ and granted the stepfather's petition for adoption. The Georgia Supreme Court affirmed.⁴⁹

The United States Supreme Court sought to give a more "complete answer to [appellant's] attack on the constitutionality"⁵⁰ of the Georgia adoption statute by examining whether the statute itself, in conjunction with the application of the "best interests of the child" standard, provided adequate protection of appellant's interests.⁵¹

The Court discussed the constitutionality of the statute in terms of both the due process and equal protection clauses of the Fourteenth Amendment.⁵² Focusing first on the due process issue, the Court found that the substantive due process rights⁵³ of the natu-

⁴⁶ Although such petitions are usually considered in separate hearings, the superior court allowed a concurrent hearing to permit the father to have "a right to be heard with respect to any issue or other thing upon which he desire[s] . . ." 434 U.S. at 250 (quoting *In re Walcott*, Adoption Case No. 8466 (Ga. Super. Ct., July 12, 1976), App. 70).

⁴⁷ 434 U.S. at 251. In Georgia, the consent of the child to be adopted was not required unless he or she was over 14 years of age. GA. CODE ANN. § 74-403(1) (1973). The child in the instant case was 11 years old at the time of these proceedings.

⁴⁸ The "best interests of the child" is the standard employed in many state adoption statutes and by many courts to measure the various issues in a child placement situation. The phrase is broad and may encompass financial, psychological, religious, and social factors. While some commentators approve of the retention of this phrase in adoption statutes, see Comment, *In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U. L. REV. 446 (1976), other writers have suggested replacing the vague standard with a more precise test, defined as "the least detrimental available alternative for safeguarding the child's growth and development." See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 53 (1973) [hereinafter cited as J. GOLDSTEIN].

⁴⁹ 238 Ga. 230, 232 S.E.2d 246 (1977). The Georgia Supreme Court stated that the fact that the father had taken no steps to legitimate or support the child during the 11 years preceding the adoption spoke strongly in favor of the adoption. *Id.* at 233, 232 S.E.2d at 248.

⁵⁰ 434 U.S. at 254.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See note 15 *supra* for a discussion of the cases in which this right was developed.

ral father were not violated by the Georgia court's application of the "best interests of the child" standard.⁵⁴ The Court noted that the father's due process rights would have been violated had the court broken up an already existing family unit over the objections of the parents and the children without some showing of parental unfitness.⁵⁵ In contrast, the effect of the adoption in this case was to "give full recognition to a family unit already in existence"⁵⁶ The Court indicated that a putative father who, like the appellant, had never had nor sought actual or legal custody of his child was not entitled to the same due process rights as those accorded to the putative father in *Stanley* who had shown some tangible interest in his child.⁵⁷ Justice Marshall, writing for the majority, therefore distinguished *Quilloin* from *Stanley* because *Quilloin* had never established the relationship with his child that the putative father had established with his children in *Stanley*.⁵⁸

Quilloin's equal protection argument was based on the conten-

⁵⁴ 434 U.S. at 254. The Court refused to base its decision solely on the ground that the appellant had made no attempt to legitimate the child during the preceding 11 years, primarily because the appellant apparently had not been aware of the existence of the legitimation procedure. *Id.* Nonetheless, the Court was clearly influenced by the fact that the appellant had never "had, or sought, actual or legal custody of the child." *Id.* at 255.

⁵⁵ *Id.* The Court contrasted the case at bar with a situation in which an existing family unit was to be dissolved and the child was to be placed with a new set of parents. In such a case, the Court implied, fitness would be an issue. *Id.* See generally Note, *Consent of "Unfit" Parents Needed For Adoption—Unless Their Rights Are First Terminated*, 28 MERCER L. REV. 553 (1977).

⁵⁶ 434 U.S. at 255.

⁵⁷ *Id.*

⁵⁸ Justice Marshall said:

In *Stanley v. Illinois*, . . . this Court held that the State of Illinois was barred, as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particularized finding that the father was an unfit parent. The Court concluded, on the one hand, that a father's interest in the "companionship, care, custody, and management" of his children is "cognizable and substantial" . . . , and, on the other hand, that the State's interest in caring for the children is "*de minimis*" if the father is in fact a fit parent *Stanley* left unresolved the degree of protection a State must afford to the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial.

Id. at 247-48. The "countervailing interests" here included the fact that the child had lived in a familial relationship with his stepfather for several years preceding the adoption and that the natural father had not sought to support or legitimate the child during that time. *Id.* at 247, 255.

tion that the Georgia adoption statute did not entitle him to the same veto power regarding the adoption of his child as was provided to married parents, divorced parents, and unwed mothers.⁵⁹ The Supreme Court addressed this issue only as it pertained to the disparate treatment of unwed fathers and married, separated, or divorced fathers.⁶⁰ The Court concluded that the discriminatory treatment of unwed as opposed to wed fathers was valid because wed fathers willingly took on the full responsibility for the rearing of their children during the course of the marriage.⁶¹ The Court held that allowing a qualified veto power to an unwed father was justified because the state recognized that married, divorced, or separated fathers were generally more committed to the welfare of their children than were unwed fathers.⁶² According to the Court, the legitimate state interest in encouraging the welfare of the children outweighed appellant's allegation that he was denied equal protection of the laws.⁶³

It has been said that *Quilloin* clarified the breadth of the holding in *Stanley*.⁶⁴ *Stanley* essentially held that an unwed father could not be deprived of the custody of his children without a hearing on his fitness as a parent.⁶⁵ The *Stanley* decision was taken by some judges and legislators to mean that all unwed fathers, not merely those who lived with their children, were entitled to the same rights as unwed mothers and married parents in any case involving the custody or adoption of their children.⁶⁶ *Quilloin*

⁵⁹ *Id.* at 252.

⁶⁰ The Court stated in a footnote that it refused to consider *Quilloin*'s claim that the statute also made gender-based distinctions in violation of the equal protection clause because appellant did not present this claim in his jurisdictional statement. *Id.* at 253 n.13.

⁶¹ *Id.* at 256. The Court again noted that *Quilloin* was not even seeking to take on this responsibility with the legitimation petition, and was not complaining "of his exemption from these responsibilities." *Id.*

⁶² *Id.* The Court noted that "even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage." *Id.*

⁶³ *Id.*

⁶⁴ See Comment, JOHN MARSHALL J., *supra* note 28, at 384.

⁶⁵ See notes 21-30 *supra* and accompanying text.

⁶⁶ See, e.g., the dissenting opinion in *Quilloin v. Walcott*, 238 Ga. 230, 234-35, 232 S.E.2d 246, 249-50 (1977) (Undercoffer, J., dissenting). Also illustrative of this broad interpretation of *Stanley* were the amendments to the Illinois adoption statutes following that

limited *Stanley* by emphasizing that the presence of a de facto family relationship between the unwed father and his illegitimate children was a prerequisite without which the *Stanley* tenets would not be applied.⁶⁷ Neither case, however, addressed whether adoption statutes which discriminate between unwed fathers and unwed mothers violate the equal protection clause of the Fourteenth Amendment. In *Stanley*, the children's mother had died, so the appellant was not competing with her for the custody of their children. In *Quilloin*, the father had not established any familial

case. Under the revised statutes, the state must either procure the consent of an unwed father or terminate his parental rights through a neglect proceeding before allowing the adoption of his child. ILL. REV. STAT. ch. 40, § 1510 (1977). The obvious result of this rule would be to impede severely the adoption of illegitimate children whose fathers could not be identified or located.

⁶⁷ See notes 52-58 *supra* and accompanying text for a discussion of the lack of a de facto family relationship in *Quilloin*. State courts have responded to the Supreme Court holdings in *Stanley* and *Quilloin* in a variety of ways. The Kansas Court of Appeals, for example, sought to compromise between the holdings in the two cases by requiring only maternal consent for the adoption of an illegitimate child, while at the same time stating that the putative father has a paramount custody right to his illegitimate child in contests with third parties. See *In re Lathrop*, 2 Kan. App. 2d 90, 575 P.2d 894 (1978). For a discussion of this case, see Note, *Parental Rights: The Putative Father*, 18 WASHBURN L.J. 174 (1978). The Louisiana Court of Appeals, on the other hand, seemingly ignored the United States Supreme Court's de facto family theory in *In re Martin*, 357 So. 2d 893 (La. App. 1978). In that case, the court held that the putative father's consent to the adoption of his child was not required even though he had lived with and supported his child for seventeen months. The court denied the father power to veto the adoption merely because he had failed to sign the child's birth certificate. Even though the certificate bore his name, the court found that, without the signature, the father had not formally acknowledged the child as his own. 357 So. 2d at 894. The Supreme Court of Alaska took a somewhat more moderate approach in *Adoption of L.A.H.*, 597 P.2d 513 (Alaska 1979). The Alaska court agreed with the Louisiana court that a putative father would not be allowed to object to the adoption of his child unless he had formally acknowledged the child as his own. The Alaska court, however, relaxed the rigid time regulations surrounding the formalities of the acknowledgement by allowing the father to file the acknowledgement at any time before the final entry of the adoption decree. *Id.* at 517. The District Court of Appeal of Florida, in a case decided prior to the Supreme Court's decision in *Quilloin* but after *Stanley*, clearly delineated a standard which based the putative father's rights in an adoption hearing on the theory of the de facto family relationship. In *Department of Health and Rehabilitative Servs. v. Herzog*, 317 So. 2d 865 (Fla. Dist. Ct. App. 1975), the court stated that the putative father's rights in an adoption hearing depended upon whether "the child has been living with the father or . . . the father has contributed to its support or given any other tangible indication of an interest in the child . . ." *Id.* at 867. The exact wording of this court's holding was adopted by the legislature of a neighboring state, Georgia, in the 1977 revision of its adoption laws. See GA. CODE ANN. § 74-406(b) (1977).

bonds with his children, so the contest was not between the mother and the father, but between a parent who had had custody of and supported the child and one who had not. The question left open after *Stanley* and *Quilloin* concerned the rights of two parents who were on relatively equal footing, each of whom desired custody of the child born to them out of wedlock.

In *In re Malpica-Orsini*,⁶⁸ the New York Court of Appeals was faced with such a situation: two unwed parents, who opposed each other in an adoption proceeding, had both lived with and supported their illegitimate child. Appellant had lived with his illegitimate child and her mother for two years following the child's birth, when he was forced to leave by the child's mother.⁶⁹ He continued to make support payments even after he left, and, in a judicial proceeding, admitted paternity of the child.⁷⁰ The mother subsequently married the respondent, who then petitioned to adopt the child.⁷¹ When notified of the adoption proceedings, the child's natural father moved to dismiss the respondent's petition.⁷² Opposing the petition, appellant alleged that the New York Domestic Relations Law, which required the consent of the natural mother alone for the adoption of an illegitimate child and consequently gave the natural father no power to veto the adoption,⁷³ was violative of the due process and equal protection clauses of the Fourteenth Amendment.⁷⁴

The New York Court of Appeals summarily dismissed appellant's due process argument by observing that appellant had been given notice, the right to object, and the right to a full hearing with representation by an attorney on the issue of whether the adoption

⁶⁸ 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975), *appeal dismissed for want of a substantial federal question sub nom.* Orsini v. Blasi, 423 U.S. 1042 (1977).

⁶⁹ *Id.* at 540, 331 N.E.2d at 501, 370 N.Y.S.2d at 532.

⁷⁰ *Id.* When the mother moved to a new address, however, she refused to accept further support payments from the father and did not allow him to visit his daughter. *Id.*

⁷¹ New York law approves step-parent adoptions of illegitimate children. See note 7 *supra* and accompanying text.

⁷² 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.

⁷³ N.Y. DOM. REL. LAW (McKinney 1977) § 111. See note 11 *supra* for the text of this law.

⁷⁴ 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.

was in the best interests of the child.⁷⁵ Addressing appellant's equal protection challenge, the court examined whether the state's reasons for making the broad gender-based statutory distinction between unwed fathers and unwed mothers were "reasonable, not arbitrary" and bore "a fair substantial relation to the object of the legislation."⁷⁶ The New York court found that the statute did not violate the equal protection clause because the disparate treatment of unwed fathers and unwed mothers was justified by the state's interest in promoting the welfare of children.⁷⁷ Among the reasons why granting veto power in adoption proceedings to unwed fathers would be harmful to the well-being of potential adoptees, the court cited the great difficulty and expense that would be encountered if every putative father had to be located to ascertain his willingness to consent,⁷⁸ and the fact that many couples would be dissuaded from adopting children out of fear of having the adoption later overturned by fathers who could not be located prior to the adoption proceedings.⁷⁹ The court also noted the possibility that some fathers might use this veto power to free themselves from the burden of support or as a means of revenge against the child's

⁷⁵ *Id.* at 577, 331 N.E.2d at 492, 370 N.Y.S.2d at 520. One member of the New York Court of Appeals disagreed that these rights met the threshold of due process. In his dissent, Judge Jones contended that the *Stanley* decision mandated not only that an unwed father be granted the right to participate in the hearing, but also that he be granted the right to prevent the adoption. *Id.* at 578, 331 N.E.2d at 494, 370 N.Y.S.2d at 522 (Jones, J., dissenting).

⁷⁶ *Id.* at 571, 331 N.E.2d at 488, 370 N.Y.S.2d at 515. The New York court cited *Reed v. Reed*, 404 U.S. 71 (1971), as authority for its use of this standard in analyzing an equal protection claim. 36 N.Y.2d at 571, 331 N.E.2d at 489, 370 N.Y.S.2d at 515. Judge Jones, in his dissent, criticized the majority for not using the traditional "two-tiered" approach to equal protection problems and called the majority's standard "little more than language of result engrafted on a rational basis test." *Id.* at 580, 331 N.E.2d at 495, 370 N.Y.S.2d at 523 (Jones, J. dissenting). Judge Jones felt that the stricter two-tiered approach, or the "compelling governmental interest" test, should be applied. *Id.* at 581, 331 N.E.2d at 495, 370 N.Y.S.2d at 524 (Jones, J., dissenting). Under this standard, laws which discriminate between persons similarly situated can be justified only by a showing that the discriminatory treatment is necessary to promote a compelling state interest and that the statutory scheme represents the least restrictive alternative appropriate to the relief sought. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

⁷⁷ 36 N.Y.2d at 577, 331 N.E.2d at 493, 370 N.Y.S.2d at 520.

⁷⁸ *Id.* at 572, 331 N.E.2d at 489, 370 N.Y.S.2d at 516.

⁷⁹ *Id.* at 572, 331 N.E.2d at 489, 370 N.Y.S.2d at 516.

mother,⁸⁰ and the probability that marriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a situation where they could not adopt their wives' children.⁸¹ The New York Court of Appeals concluded that the state's interest in promoting a normal home life for all children justified its denial of a veto power in adoption proceedings to *all* unwed fathers, regardless of whether they had acknowledged paternity or contributed to the support of the illegitimate child.⁸²

The United States Supreme Court in its recent decision in *Caban v. Mohammed*⁸³ disagreed with the New York Court of Appeals, holding that the New York Domestic Relations Law⁸⁴ which denied an unwed father the power to oppose his child's adoption violated the equal protection clause of the Fourteenth Amendment.⁸⁵ The fact situation in *Caban*⁸⁶ was similar to that in both

⁸⁰ *Id.* at 573, 331 N.E.2d at 490, 370 N.Y.S.2d at 517-18. The Georgia Supreme Court voiced the same apprehension in its opinion in *Quilloin v. Walcott*, 238 Ga. 230, 233, 232 S.E.2d 246, 248 (1977). The court expressed the fear that "there would be very real danger of profit seeking by the father in order to secure his consent to the adoption." *Id.*, 232 S.E.2d at 248.

⁸¹ 36 N.Y.2d at 573, 331 N.E.2d at 490, 370 N.Y.S.2d at 517.

⁸² In this context, the court noted:

To contend that at least some of the fathers of children born out of wedlock should be accorded the option or veto of consent is meaningless as far as ameliorating the problem. To grant this right to those who acknowledge paternity would require a most difficult search and constant inquiry. To extend it to those who have contributed to the support of the child would be an excursion into relative values difficult of proof. To allow it for fathers adjudicated to be such in compulsory proceedings would not alleviate the situation measurably since they are likely to be resentful and their legally enforced nexus with the child bears no relationship to their entitlement. The mere possibility of a presently existing right on the part of even some fathers, or one that might be acquired at a later date, no matter how restrictive the group to whom the right granted may be, is enough to discourage a wide range of prospective placements and adoptions.

Id. at 576, 331 N.E.2d at 492, 370 N.Y.S.2d at 519.

⁸³ 441 U.S. 380 (1979).

⁸⁴ See note 11 *supra* for the text of this law.

⁸⁵ Unlike its approach in the preceding decisions of *Stanley*, discussed at notes 19-35 *supra* and accompanying text, and *Quilloin*, discussed at notes 39-63 *supra* and accompanying text, the Supreme Court in *Caban* did not discuss appellant's due process claim but rather limited its focus to the claim of gender-based discrimination under the equal protection clause. 441 U.S. at 394 n.16. In a footnote, the *Caban* Court dismissed the *Stanley*-based due process claim. Because the majority found the New York statute to be unconstitutional under the equal protection clause, the Court saw no need to express a view on

*Stanley*⁸⁷ and *Malpica-Orsini*.⁸⁸ In each case the unwed father not only had lived for some time with his illegitimate children⁸⁹ and had acknowledged his paternity, but also by his actions had created a de facto family relationship which went beyond the mere biological fact that he was their natural father.⁹⁰ In *Caban*, however, the two contesting parents were each married,⁹¹ both were capable of providing the children with a stable home environment, and both were petitioning to adopt the children.⁹² The New York

"whether a State is constitutionally barred from ordering adoption in the absence of a determination that the parent whose rights are being terminated is unfit." *Id.* In his dissenting opinion, Justice Stevens also rejected appellant's due process claim, but disagreed with the majority's reason for doing so. In Justice Stevens' view, the fact that the father previously had taken no steps to legitimate the child overcame any protection the due process clause otherwise would have provided him on the basis of the former relationship he had had with the child. *Id.* at 414-15 (Stevens, J., dissenting). The Court also stated in a footnote that it would express no view concerning the distinction made by the New York statute between married and unmarried fathers since it had already resolved the case on the grounds of sex-based discrimination. *Id.* at 394 n.16.

⁸⁶ See notes 1-9 *supra* and accompanying text for the facts in *Caban*.

⁸⁷ See notes 19-25 *supra* and accompanying text for a discussion of the facts in *Stanley*.

⁸⁸ See notes 68-74 *supra* and accompanying text for a discussion of the facts in *Malpica-Orsini*.

⁸⁹ Caban had lived with his older child for four and one half years and with his younger child for two years before their mother took them with her to live with her new husband. 441 U.S. at 382. Stanley had lived with a woman for eighteen years during which time he had fathered and supported three children. 405 U.S. at 646. The father in *Malpica-Orsini* had lived with and supported his child for at least two years before the mother forced him to leave. 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.

⁹⁰ The major factual distinction between the *Stanley* and *Malpica-Orsini* cases and *Quilloin* was the fact that Mr. Quilloin had at no point, through any voluntary actions, lived with or contributed to the support of his child to the extent necessary to create a de facto family relationship. See note 42 *supra* and accompanying text. Much of the rationale of the Supreme Court's decision in *Quilloin* rests on this factual distinction. See 434 U.S. at 247-48.

⁹¹ Appellant Abdiel Caban married another woman subsequent to the departure of the children with their mother. Appellee Maria Mohammed married Kazim Mohammed within a month after she left appellant. 441 U.S. at 382. The records do not indicate that either of the fathers in *Stanley* or *Malpica-Orsini* were married at the time they attempted to veto the adoptions.

⁹² *Id.* at 383. In *Stanley*, the petitioner sought neither the custody nor the adoption of the child himself but wished only to block the state from appointing guardians for his children. 45 Ill. 2d at 133, 256 N.E.2d at 815, discussed at note 24 *supra* and accompanying text. In *Malpica-Orsini* the child's father had made no petition to adopt his child himself; he merely sought to prevent the child's adoption by the mother's husband. 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513, discussed at note 72 *supra* and accompanying text.

statute, however, automatically precluded the father from adopting his children⁹³ and from preventing their adoption by their mother's husband.⁹⁴

Justice Powell, writing for the majority,⁹⁵ began his examination of the New York law by noting that it clearly treated unmarried parents differently on the basis of their sex.⁹⁶ The Court then turned to the appellees' claim that the statute did not violate the equal protection clause because it was substantially related to valid governmental objectives.⁹⁷ The appellees asserted that the statutory distinction between unwed fathers and unwed mothers was justified by a fundamental difference between maternal and paternal relationships. The distinction, the appellees argued, was that

⁹³ The New York adoption statute required the natural mother's consent for the adoption of her illegitimate child. N.Y. DOM. REL. LAW § 111 (McKinney 1977). See note 11 *supra* for the text of this law. Since the mother's husband was also seeking to adopt the child, it is fairly certain that the mother would not consent to the adoption by the child's father.

⁹⁴ Because the statute required only the mother's consent for the adoption of an illegitimate child, the natural father had no power to veto the child's adoption by withholding his own consent. See N.Y. DOM. REL. LAW § 111 (McKinney 1977).

⁹⁵ Justice Powell's majority opinion was joined by Justices Brennan, White, Marshall, and Blackmun. Justices Stewart and Stevens filed separate dissenting opinions. Justice Stevens was joined in his dissent by Chief Justice Burger and Justice Rehnquist.

⁹⁶ 441 U.S. at 385. Appellees argued that the New York statute did not discriminate against unwed fathers because the standard that controlled the adoption was the "best interests of the child" rather than the consent of the parents. Appellees contended that the consent requirement was a "mere formality" because the court's adoption decision would be based solely on the child's best interests, *regardless* of whose consent had or had not been received. *Id.* at 387. This argument was rejected by the Supreme Court on the basis of a recent New York decision, *Corey L. v. Marlin L.*, 45 N.Y.2d 383, 408 N.Y.S.2d 439, 380 N.E.2d 266 (1978), in which it was held that the question of consent was entirely separate from and equally as influential as the question of the child's best interests. In an article written after the Supreme Court's decision, appellant's counsel in *Caban*, Robert H. Silk, referred to *Corey L.* as "manna from heaven" because it demonstrated decisively that the "best interests of the child" standard, coupled with the consent requirement, worked against unwed fathers. See Silk, *Adoptions—Making the Unwed Father Equal*, 65 WOMEN LAW. J. 5, 8-9 (1979).

⁹⁷ The majority did not employ the traditional "two-tiered" approach in its analysis of appellant's equal protection claim, but rather stated that "[g]ender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives . . .'" 441 U.S. at 388 (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)). This approach is the same as that used by the majority in *In re Malpica-Orsini*, 36 N.Y.2d at 571, 331 N.E.2d at 488-89, 370 N.Y.S.2d at 515, discussed at note 76 *supra* and accompanying text.

"a natural mother, absent special circumstances, bears a closer relationship with her child . . . than a father does."⁹⁸ While the Court was willing to assume that unwed mothers as a rule are closer to their newborn infants than are unwed fathers,⁹⁹ the majority noted that "this generalization . . . become[s] less acceptable as a basis for legislative distinctions as the age of the child increase[s]."¹⁰⁰ In the Court's view, the facts in *Caban*, in which a de facto family relationship existed between the unwed father and his illegitimate children, demonstrated that an unwed father "may have a relationship with his children fully comparable to that of the mother."¹⁰¹ In a footnote, the Court contrasted *Caban*'s situation with that of the putative father in *Quilloin* who had never lived with nor assumed any responsibility for his illegitimate child.¹⁰² The majority concluded that the broad gender-based discrimination in the New York statute was not "required by any universal difference between maternal and paternal relations at every phase of the child's development."¹⁰³

The Court next considered appellees' contention, based on the New York Court of Appeals' reasoning in *Malpica-Orsini*,¹⁰⁴ that the distinction between unwed fathers and unwed mothers was substantially related to New York's interest in promoting the adoption of illegitimate children.¹⁰⁵ The Supreme Court agreed that the state's interest was an important one, observing that adoption is often a preferable alternative for children born out of wedlock because it not only provides these children with the stabil-

⁹⁸ 441 U.S. at 388 (quoting Tr. of Oral Arg., at 41).

⁹⁹ *Id.* at 389. This is one point on which the majority and the two dissents seemed to be in agreement. See notes 120 and 125 *infra* and accompanying text.

¹⁰⁰ 441 U.S. at 389.

¹⁰¹ *Id.*

¹⁰² *Id.* at 389 n.7. The Court evidently noticed no inconsistency in the fact that it had upheld the constitutionality of a Georgia statute in *Quilloin* which has essentially the same consent requirements as the New York statute it would now strike down as unconstitutional in *Caban*. See notes 39-60 *supra* and accompanying text. The Court noted only that the gender-based distinction in the Georgia statute had not been discussed because the question had not been properly presented in *Quilloin*. 441 U.S. at 389 n.7.

¹⁰³ 441 U.S. at 389.

¹⁰⁴ The *Malpica-Orsini* case is discussed at notes 68-82 *supra* and accompanying text.

¹⁰⁵ 36 N.Y.2d at 572-74, 331 N.E.2d at 489-91, 370 N.Y.S.2d at 515-17, discussed at 441 U.S. at 389-90.

ity of a two-parent home, but also helps to remove the stigma of illegitimacy.¹⁰⁶ Nonetheless, the Court objected to the arbitrary statutory presumption that unmarried fathers always impede the adoption of their children.¹⁰⁷ The majority noted that unwed fathers are no more likely to object to the adoption of their children than unwed mothers. Consequently, the Court found that an undifferentiated gender-based discrimination could not be justified on this ground.¹⁰⁸

The Court also addressed the argument raised previously in *Malpica-Orsini*¹⁰⁹ that a requirement of the consent of unwed fathers would impede adoptions because putative fathers are often difficult to locate and identify.¹¹⁰ The majority conceded that these difficulties may justify a legislative distinction between the mothers and fathers of newborns,¹¹¹ but stated that such an inflexible distinction was not justified in the adoption of older children.¹¹² The Court suggested that adoption statutes should be structured to give consent and veto powers only to those parents, both male and female, who had shown some tangible interest in and had taken responsibility for the care and rearing of the child.¹¹³ The Court observed that the overbroad discrimination in the New York law had the effect of excluding fathers who had manifested a significant interest in the child from participating in the adoption of the child, while at the same time possibly enabling some alienated, uncaring mothers to cut off the father's rights arbi-

¹⁰⁶ 441 U.S. at 391.

¹⁰⁷ *Id.* at 391-92. The Court cited the proposition that a statutory classification "must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation . . ." *Id.* at 391 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

¹⁰⁸ *Id.* at 391-92.

¹⁰⁹ See notes 68-82 *supra* and accompanying text.

¹¹⁰ 441 U.S. at 392-93.

¹¹¹ *Id.* at 392. After expressing this view, the Court noted that, because the question was not properly before it, it would "express no view" whether a strict gender-based discrimination would be justified in a statute pertaining solely to newborns. *Id.* at 392 n.11.

¹¹² *Id.* at 392.

¹¹³ The Court stated that "nothing in the Equal Protection Clause precludes the State from withholding . . . the privilege of vetoing the adoption of a child" from a father who "never has come forward or has abandoned the child." *Id.*

trarily.¹¹⁴ Accordingly, the Supreme Court struck down the New York adoption law as unconstitutional. The majority held that the undifferentiated distinction made between unwed fathers and unwed mothers in all circumstances, including those where the father had established a relationship with the child, violated the equal protection clause of the Fourteenth Amendment.¹¹⁵

Justices Stewart and Stevens separately dissented in *Caban*.¹¹⁶ Both opinions tracked the reasoning of the New York Court of Appeals in *Malpica-Orsini* that the state's interest in promoting the welfare of its illegitimate children justified the gender-based discrimination in the New York adoption law. Both justices focused their discussions on the best interests of the illegitimate children, rather than on the interests of unwed fathers.¹¹⁷

Justice Stewart observed that if the consent of both parents were required for every adoption, most illegitimate children would remain illegitimate due to the time and expense often involved in locating both parents.¹¹⁸ Consequently, he reasoned, both humane and practical considerations demanded that the consent of only one parent be required for the adoption of children born out of wedlock.¹¹⁹ Justice Stewart concluded that the mother was the natural choice for the consenting parent, since it was she who carried and bore the child and whose parental relationship was more easily identifiable.¹²⁰ Justice Stewart found this to be an adequate justification for the gender-based distinction in the statute.¹²¹ He added that adoption statutes which utilize the "best interests of the child" standard¹²² would preclude the automatic termination of a

¹¹⁴ *Id.* at 394.

¹¹⁵ *Id.*

¹¹⁶ See notes 117-29 *infra* and accompanying text.

¹¹⁷ Justice Stewart correctly pointed out that "there are not two, but three interests at stake: the mother's, the father's and the children's." 441 U.S. at 400 (Stewart, J., dissenting).

¹¹⁸ *Id.* (Stewart, J., dissenting). Justice Stevens noted that illegitimate births accounted for approximately 15% of all the births in the United States in 1976-77 and that 70% of the adoptions in 1975 were of illegitimate children. *Id.* at 402 n.2 (Stevens, J., dissenting).

¹¹⁹ *Id.* at 400 (Stewart, J., dissenting).

¹²⁰ *Id.* at 399 (Stewart, J., dissenting).

¹²¹ *Id.* (Stewart, J., dissenting).

¹²² See note 48 *supra* for a discussion of the "best interests of the child" standard.

familial relationship between father and child, such as those established in *Stanley* and *Caban*, because the child's best interests might well be promoted by the continuation of the family unit already in existence.¹²³

A substantial portion of Justice Stevens' dissent, on the other hand, was devoted to the problems surrounding the adoption of newborn illegitimate children.¹²⁴ He agreed with the majority that the special relationship between a mother and her newborn infant justifies some differential treatment of the unwed mother and father at this point in the child's existence.¹²⁵ Elaborating on the need for statutes requiring only the mother's consent for the adoption of newborns, Justice Stevens noted that the absence of such a rule "would remove the mother's freedom of choice in her own and the child's behalf without also relieving her of her unshakable responsibility for the care of the child."¹²⁶ Justice Stevens used these remarks as a preface for his major contention that, although he did not agree with the majority in *Caban*, the decision was one which would have only a limited effect on future adoption proceedings.¹²⁷ Recognizing the possibility that an overly broad reading might be given to the Court's holding in *Caban*, Justice Stevens emphasized that the decision should be applied only to cases where the adoption of an older child is sought and where the father has established a substantial relationship with the child.¹²⁸ Justice Stevens predicted that "State legislatures will no doubt promptly revise their adoption laws to comply with the rule of this case," but expressed the hope that the "wisdom of the judges" in the state courts would "forestall any widespread harm" by construing the holding in *Caban* to apply only to this narrow factual situation.¹²⁹

Justice Stevens' dissenting opinion accurately pinpointed the

¹²³ 441 U.S. at 400 (Stewart, J., dissenting).

¹²⁴ *Id.* at 401 (Stevens, J., dissenting).

¹²⁵ *Id.* at 406-07 (Stevens, J., dissenting). For the majority's comments on the relationship between an unwed parent and a newborn infant, see note 99 *supra* and accompanying text.

¹²⁶ 441 U.S. at 408 (Stevens, J., dissenting).

¹²⁷ *Id.* at 416-17 (Stevens, J., dissenting).

¹²⁸ *Id.* at 416 (Stevens, J., dissenting).

¹²⁹ *Id.* at 416-17 (Stevens, J., dissenting).

major danger in the *Caban* decision: the possibility that state legislatures and courts will overlook the limiting factors in the case and use *Caban* as a mandate for the blanket abolition of all adoption consent statutes which differentiate between unwed fathers and unwed mothers. Such an overly broad interpretation of the case would result from a focus only on the result of the decision, rather than on its rationale. Although the Court struck down the New York statute as an unconstitutional denial of equal protection to unwed fathers on the basis of their sex, the majority did provide some concrete suggestions for the kind of statute that would be acceptable in its place. First, the Court intimated that a gender-based classification in an adoption statute probably would be justified if the distinction related solely to the adoption of newborns.¹³⁰ Second, the Court indicated that an unwed father's rights in his child do not spring solely from the biological fact of his parentage, but rather from his willingness to admit his paternity and express some tangible interest in the child.¹³¹ The Court noted that the presence of a de facto family relationship was the distinguishing factor between *Caban* and *Quilloin*, in which an adoption statute similar to the New York statute was upheld. Suggesting that adoption statutes should anticipate familial relationships between an unwed father and his child, the Court stated that the equal protection clause does not preclude a state from withholding veto powers from a father who has never come forward to participate in the rearing of his child.¹³² Therefore, it appears that the majority in *Caban* did not intend to promote totally "neutral" adoption statutes that make no gender-based distinctions at all, but rather ones that do not favor unwed mothers over unwed fathers who have established a relationship with their children.

A few states have anticipated the Court's holding in *Caban* by adopting a statute that makes distinctions not between unwed mothers and unwed fathers but between different classes of unwed fathers. The Uniform Parentage Act distinguishes a "presumed father" as one who has either married the child's mother or who has

¹³⁰ See notes 99 *supra* and accompanying text.

¹³¹ See notes 100-02 *supra* and accompanying text.

¹³² 441 U.S. at 392.

"receive[d] the child into his home and openly holds out the child as his natural child."¹³³ A "presumed father" may prevent his child's adoption by a third party, while a merely biological father may not.¹³⁴

In contrast to the classification of unwed fathers in the Uniform Parentage Act, the post-*Caban* adoption decisions in New York reflect only the ultimate result in the Supreme Court's decision—that *all* unwed fathers must not be discriminated against solely on the basis of their gender.¹³⁵ The reaction of the New York courts to *Caban* serves to justify Justice Stevens' fear that some states would interpret that ruling too broadly. In attempting to apply the *Caban* mandates in the absence of a statute, a New York court concluded in a recent case¹³⁶ that the *Caban* decision requires comparable treatment of unwed fathers and unwed mothers. Thus, the court held that an unwed father must be served with the same notice that an unwed mother would be entitled to receive even if his identity and whereabouts are unknown.¹³⁷ The court noted that "this wasteful impediment on the conclusion of the adoption process to the prejudice of children in need of adoption [from] being incorporated into permanent family units is a socially unacceptable circumstance that cries out for the commencement of a quest for a better way."¹³⁸ The New York court obviously found that what it deemed to be the mandate of *Caban* would impose a tremendous burden on the entire adoption system. It urged the New York legislature to enact an adoption statute that would distinguish between interested fathers and "fleeting disinterested impregnators who are not available when the mother is executing her

¹³³ UNIFORM PARENTAGE ACT § 7004. This Act has been adopted in six states. See CAL. CIV. CODE § 7004 (West 1975); COLO. REV. STAT. §§ 19-6-101 to -129 (1978); HAWAII REV. STAT. §§ 584-1 to -26 (1976); MONT. CODE ANN. §§ 40-6-101 to -303 (1979); N.D. CENT. CODE ch. 14-17 (Supp. 1977); WASH. REV. CODE ANN. ch. 26-26 (Supp. 1981). For a detailed discussion of this Act, see Comment, *The Uniform Parentage Act: What It Will Mean for the Putative Father in California*, 28 HASTINGS L.J. 191 (1977).

¹³⁴ UNIFORM PARENTAGE ACT § 7017.

¹³⁵ See note 115 *supra* and accompanying text.

¹³⁶ *In re Cecilie Ann T.*, 101 Misc. 2d 472, 421 N.Y.S.2d 167 (1979).

¹³⁷ *Id.* at 477, 421 N.Y.S.2d at 170-71.

¹³⁸ *Id.*, 421 N.Y.S.2d at 171.

surrender of the child or consent to adoption."¹³⁹

Even if the courts and legislatures follow the "narrow" view of *Caban* by distinguishing between unwed fathers who have established a relationship with their children and those who have not, one fact pattern would continue to present problems concerning the potential veto power of unwed fathers. The unaddressed situation is the case in which the unwed mother conceals the existence of a child from the child's biological father until after an adoption of the child has been completed.¹⁴⁰ A broad interpretation of *Caban* would preclude the child's adoption without the consent of the child's father. A narrow reading of *Caban* would deny veto power to a father who has never been afforded an opportunity to take an interest in his child. If the child is adopted as an infant, the newborn exception discussed by the Court,¹⁴¹ which allows gender-based discrimination favoring unwed mothers because they are so uniquely close to their infants, probably would justify requiring only the mother's consent for the adoption. If the child is older, however, the problems posed by the Court's ambiguous holding in *Caban* become evident. The issue in this situation would be whether an unwed father can be denied the right to object to the adoption of a child with whom he has never had the chance to form a *de facto* family relationship. A case of this sort would force the Supreme Court to clarify exactly which interpretation it in-

¹³⁹ *Id.* at 478, 421 N.Y.S.2d at 171.

¹⁴⁰ This problem has emerged recently in *In re Joseph Ryan Riggs*, ___ Tenn. App. ___, ___ S.W.2d ___, *cert. denied*, ___ Tenn. ___, ___ S.W.2d ___ (1980), *cert. denied*, 49 U.S.L.W. 3618 (1981). In this case, an unmarried mother, who refused to marry the father of her soon to be born child, fled to another state where she gave birth to the baby and signed the birth certificate using an assumed name. Soon after his birth, the baby was given up for adoption by the mother who claimed on the surrender documents that the father was "unknown" to her. The baby was adopted by a couple who had taken care of him since the third day of his life. It was not until after the final adoption decree had been granted that the natural father was able to locate the child. The father was successful in having the adoption decree rendered nugatory. Although he had never established any relationship with the child, the court, citing *Caban*, found him to be "the birth father, the *de facto* father and the *de jure* father of the minor child" whose consent was thus necessary before the child could be adopted. ___ Tenn. App. at ___, ___ S.W.2d at ___.

¹⁴¹ See note 99 *supra* and accompanying text for a discussion of this exception. The court in *In re Joseph Ryan Riggs*, discussed at note 140 *supra*, apparently gave no consideration to this exception.

tended to be given to *Caban*.¹⁴²

Until such clarification is made by the Supreme Court, state legislatures should not act too quickly to abolish all gender-based distinctions in their adoption statutes. The consequence of such statutory modification would be to impede or totally block the adoption of many illegitimate children whose putative fathers either cannot be found or who have refused to establish any relationship with them. A better approach would be to replace the gender-based distinctions with the model suggested by the Uniform Parentage Act,¹⁴³ which distinguishes between a natural father who has exhibited some tangible interest in his child and one who has not. In addition, states should not limit the focus of the adoption statutes to the rights of the parents of the child.¹⁴⁴ A standard such as or similar to the "best interests of the child" standard¹⁴⁵ should be incorporated into each statute. Although criticized by some as too broad and too vague,¹⁴⁶ such a standard would provide guidance for judges in cases in which an examination of the rights of unwed parents may be inadequate.¹⁴⁷ Finally, each state statute should provide for the appointment of an independent attorney or guardian ad litem to represent the child in adoption proceedings.¹⁴⁸

¹⁴² The United States Supreme Court denied certiorari in the case of *In re Joseph Ryan Riggs*, discussed at note 140 *supra*. 49 U.S.L.W. 3618 (1981).

¹⁴³ See notes 133-34 *supra* and accompanying text for a discussion of the distinctions suggested by the Uniform Parentage Act.

¹⁴⁴ In his dissenting opinion in *Caban*, Justice Stewart suggested that the interest of the child must not be forgotten in an adoption battle between the child's natural parents. 441 U.S. at 400 (Stewart, J., dissenting). See note 117 *supra*.

¹⁴⁵ See note 48 *supra* for a discussion of the "best interests of the child" standard.

¹⁴⁶ See note 48 *supra*.

¹⁴⁷ For example, in *In re Joseph Ryan Riggs*, discussed at note 140 *supra*, the court's broad interpretation of *Caban* and consequent avoidance of the adoption decree was based solely on an examination of the competing rights of the natural parents. The court did not consider the fact that the child had been living with his adoptive parents since he was three days old. It is questionable whether it was in the child's "best interests" to separate him from the only parents he had ever known.

¹⁴⁸ The suggestion that children have a right to counsel in all cases pertaining to their custody or placement has been made by both legal practitioners and experts in child psychology. In Inker & Perretta, *A Child's Right to Counsel in Custody Cases*, in ABA SECTION OF FAMILY LAW, THE YOUNGEST MINORITY 32 (S. Katz ed. 1974), the authors state that both the due process clause and the equal protection clause of the Fifth and Fourteenth Amendments require that a child receive independent representation in cases such as adoption and custody hearings in which the child's welfare is at stake. *Id.* at 40-43. Other authors suggest

The presence of an advocate for the child would help not only to ensure that a thorough investigation has been made to discover whether either or both of the child's parents have expressed any tangible interest in the child, but also to facilitate the adoption of the child when such a parent has not been found. The child's representative would be able to give objective evidence of the true "best interests" of the child so that the various controversies concerning the rights of both the natural and adoptive parents would not overshadow what should be the ultimate concern of any adoption proceeding: the welfare of the child.

MARY F. RADFORD

that the child should be made an indispensable party in any case involving his placement and should have the right to representation by counsel. J. GOLDSTEIN, *supra* note 48, at 65-67.