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Limiting the Boundaries of Stanley v. Illinois: Caban v. Mohammed

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LIMITING THE BOUNDARIES OF *STANLEY V. ILLINOIS*: *CABAN V. MOHAMMED*

INTRODUCTION

Prior to the Supreme Court's landmark decision in *Stanley v. Illinois*,[1] the rights of putative fathers in adoption proceedings were largely ignored. Generally, only the consent of the unmarried mother was required before the children could be adopted, whereas the putative father's consent was not required.[2] *Stanley* signified the first attempt by the Court to accord recognition to the rights of putative fathers. Since *Stanley*, the rights of putative fathers have received increasing attention and consequent constitutional protection.

The most recent Supreme Court decision exemplifying this change in attitude toward putative fathers is *Caban v. Mohammed*.[3] In *Caban*, the Court held that an adoption statute requiring the consent of an unmarried mother but not the consent of a putative father before their child could be adopted violated the equal protection clause of the United States Constitution.[4]

The *Caban* decision limited the boundaries of the constitutional protection that would be extended to putative fathers as first enunciated in *Stanley*. This comment will analyze the limited nature of this newly recognized right by tracing its development in *Stanley* to its refinement in *Caban*.

I. *CABAN V. MOHAMMED*

Abdiel Caban and Maria Mohammed had two children during the five years that they lived together unmarried.[5] Both parents contributed to the children's support, and Caban was identified as the father on the children's birth certificates.[6] After the couple separated, Maria married Kazim Mohammed, and they petitioned to adopt the children.[7] Caban filed a cross-petition to adopt the children.[8]

The New York statute[9] in question required the consent of both parents before adoption of a legitimate child, but required only the consent of the

1. 405 U.S. 645 (1972).

2. *See, e.g.*, Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1583-84 (1972). For a listing of state statutes regarding the putative father's consent to adoption shortly after *Stanley* was decided, *see* 61 CORNELL L. REV. 312, 312-13 n.4 (1976).

3. 99 S. Ct. 1760 (1979).

4. *Id.* at 1768-69.

5. *Id.* at 1763.

6. *Id.*

7. *Id.*

8. *Id.* at 1764.

9. N.Y. DOM. REL. LAW § 111(1)(b)-(c) (McKinney 1977). Section 111 was amended after the Surrogate Court proceedings. The amendment added § 111(2)(a) which provided that the consent of a parent or custodian would not be required if either evinced an intent to forego parental or custodial obligations for six months. Also added was § 111(6) which outlined conditions under which consent could be dispensed with in accordance with § 111(2)(a).

unmarried mother before adoption of an illegitimate child. Therefore, Caban could not block the adoption of his children by withholding his consent as all other classes of parents could. The Surrogate Court, granting the adoption to Maria and Kazim Mohammed, was affirmed by the New York Supreme Court, Appellate Division,[10] and the New York Court of Appeals.[11]

On appeal, the Supreme Court, with Justice Powell writing for the majority, struck down the statute on equal protection grounds due to the sex-based discrimination between unmarried mothers and putative fathers.[12] No procedural due process issue was raised.[13] The Court declined to pass on the substantive due process issue of whether parental rights could be terminated absent a fitness hearing, stating that it was unnecessary to reach this issue as the statute was struck down on equal protection grounds.[14]

Caban represented the third time the Supreme Court had addressed the issue of putative fathers' rights in custody and adoption proceedings. One cannot gain a true perspective of the constitutional protection extended to putative fathers by reading *Caban* in a vacuum. In order to determine the boundaries of this newly recognized right, *Caban* must be analyzed in light of the Supreme Court's two previous decisions in this area, *Stanley v. Illinois*[15] and *Quilloin v. Walcott*.[16] Only then can the limited nature of this right be fully comprehended.

II. Recognizing the Constitutional Rights of Putative Fathers: Historical Development

A. *The Initial Step:* Stanley v. Illinois

In *Stanley*,[17] an unmarried couple had three children during the eighteen years that they had lived together intermittently. Under Illinois law,[18] when the mother died, the putative father's illegitimate children became wards of the state. Stanley protested this action, claiming that it was a violation of equal protection, since all other classes of parents, *e.g.*, unmarried mothers and married parents, could not be deprived of the custody of their children unless they were found unfit.[19] Stanley, in contrast, simply because he was a putative father, could have his children taken away from him without a fitness hearing. The Supreme Court held that, as a matter of due process, Stanley was entitled to a hearing on his parental fitness before his children could be taken away from him.[20]

10. *In re* David Andrew C., 56 A.D.2d 622, 391 N.Y.S.2d 846 (1977) (mem.).
11. *In re* Adoption of David A.C., 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977) (mem.).
12. 99 S. Ct. at 1768-69.
13. *Id.* at 1764 n.3.
14. *Id.* at 1769 n.16.
15. 405 U.S. 645 (1972).
16. 434 U.S. 246 (1978).
17. 405 U.S. 645.
18. Ill. Ann. Stat. ch. 37, §§ 701-14, 702-1, 702-5 (Smith-Hurd Supp. 1978).
19. 405 U.S. at 646.
20. *Id.* at 658.

Stanley was decided primarily on procedural due process grounds[21] and is classified as an irrebuttable presumption case.[22] The basis of the Court's rationale was that a state could not presume that all putative fathers were unfit to raise their children upon the mother's death. Since a constitutionally protected liberty interest was involved, that of a "man in the children he has sired and raised,"[23] Stanley was entitled to procedural due process protection. The administrative convenience in presuming that all putative fathers were unfit without giving them a hearing on their fitness was not a sufficient state interest to justify this irrebuttable presumption.[24]

Stanley held that a putative father who had actual custody of his children could not be deprived of legal custody without a fitness hearing; but *Stanley* left unresolved the extent of constitutional protection that would be afforded to putative fathers. Chief Justice Burger commented in his dissent that the majority opinion, by invalidating the Illinois statute, had embarked "on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible."[25]

The "strange boundaries" the Chief Justice referred to turn on whether *Stanley* is interpreted narrowly as a procedural due process case or whether *Stanley* is read broadly as a substantive due process case[26] as well. The difference in result is substantial.

If putative fathers are only afforded *procedural* protection before their parental rights are terminated, then they are entitled to notice and a "properly focused"[27] hearing. Under this interpretation, a "properly focused" hearing may consist of a hearing solely on the best interests of the child and not on the putative father's fitness. If so, then the putative father's rights can

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21. The case was also decided on equal protection grounds although the equal protection holding was derived from the due process analysis. After the Court held that Stanley was entitled to a fitness hearing, the Court further held that "[I]t follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." *Id.*

22. *See, e.g.*, G. GUNTHER, CASES & MATERIALS ON CONSTITUTIONAL LAW 888-95 (1975).

23. 405 U.S. at 651.

24. *Id.* at 656-58. The Court noted that the cost of offering interested putative fathers a fitness hearing was minimal. *Id.* at 657 n.9.

25. *Id.* at 668 (Burger, C.J., dissenting).

26. *Stanley* contained language suggesting that the Court was declaring the putative father's interest in his child to be a fundamental right. As such, it could not be terminated without his consent absent unfitness. The relevant language is as follows:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children . . . . [is cognizable and substantial].
>
> . . .The rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man' . . . .

Id. at 651-52 (citations omitted). The Court also noted that constitutional protection extends to family relationships involving unmarried couples. *Id.* at 651.

27. Part of the confusion that has arisen in interpreting *Stanley* can be attributed to footnote nine. In this important footnote, the Court notes that a state must give fathers like Stanley a "properly focused hearing in a custody or adoption proceeding." *Id.* at 657 n.9. The Court failed to define what type of hearing constitutes a "properly focused" hearing. To add to the confusion, the Court also indicated in this footnote that the cost of a fitness hearing to the state would be minimal, implying that a "properly focused" hearing is a fitness hearing. *Quilloin*, however, intimates that a "properly focused" hearing may also be a hearing on the child's best interests. *See* 434 U.S. at 255.

be terminated even though he is not found unfit and has not consented to the adoption—if the adoption is in the child's best interests.

If *Stanley* grants a putative father *substantive* rights, then the hearing must be on the father's fitness, and the father must be found unfit before his parental rights can be terminated. If he is fit, then his consent will be required for adoption. Consequently, the functional effect of interpreting *Stanley* as a substantive due process case is to give putative fathers the same constitutional protection accorded to all other classes of parents.

Moreover, the Court has repeatedly emphasized that the interest of a parent in his or her child is a fundamental right.[28] As such, any state interference with a fundamental right will be subjected to the strict scrutiny standard of review requiring the state to show a compelling state interest to justify the interference with the fundamental right.[29] As applied to adoption proceedings, this rule requires a state to first find a parent unfit before the state can terminate parental rights unless the parent consents to the adoption.

Giving *Stanley* a substantive due process interpretation could seriously hinder the adoption process because a child could only be adopted if his putative father were found unfit or had consented. The putative father would have a strong veto authority over the adoption which might be exercised adversely to the child's best interests even though the putative father may not have assumed the full parental responsibilities and obligations normally borne by all other parents. This rationale was the basis for the Court's refusal in *Quilloin* and *Caban* to interpret *Stanley* as extending substantive rights to putative fathers equal to the rights enjoyed by all other parents.

As will be shown, the Court in *Quilloin* and *Caban* limited the broad boundaries of *Stanley*; therefore, *Stanley* should be read narrowly as a procedural due process case[30] providing notice and a "properly focused" hearing before a putative father's rights can be terminated. The type of hearing provided will depend on the nature of the relationship between the putative father and his child as illustrated in *Quilloin*.

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28. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). "The custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). There is a fundamental right to privacy in matters relating to marriage and family life. Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). The right to have a family is a fundamental right. Moore v. City of East Cleveland, 431 U.S. 494 (1977). *See* Comment, *Termination of Parental Rights in Adoption Cases: Focusing on the Child*, 14 J. FAM. L. 547, 548-49 (1975-1976).

29. Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

30. For the view that *Stanley* is a substantive due process case, *see* Comment, *The Unwed Father's Rights in Adoption Proceedings: A Case Study and Legislative Critique*, 40 ALB. L. REV. 543, 547-53 (1976). Note, however, that this comment was published before *Quilloin* and *Caban* were decided. For the view that *Stanley* did not grant a fundamental right to putative fathers after *Quilloin* was decided, see Disanto & Podolski, *The Right to Privacy and Trilateral Balancing—Implications for the Family*, 13 FAM. L.Q. 183, 216 (1979) [hereinafter cited as Disanto & Podolski]; Note, *Constitutional Law—The Rights of an Unwed Father in an Adoption Proceeding*, 27 KAN. L. REV. 483, 488 (1979).

Shortly after *Stanley* was decided, the Supreme Court remanded two cases for reconsideration in light of *Stanley*.[31] These cases merit attention because they aid in defining *Stanley's* boundaries. *Rothstein v. Lutheran Social Services*[32] concerned an adoption proceeding, illustrating that *Stanley* is not limited to custody cases but extends to adoption cases as well. *Vanderlaan v. Vanderlaan*[33] involved a custody dispute between divorced parents over two children born following the divorce decree. *Vanderlaan* indicates that *Stanley* applies not only to custody disputes between the state and the putative father, but also to custody disputes between an unmarried mother and a putative father.

Further, the *Stanley* Court was unclear as to whether the rights of putative fathers who do not have actual custody of their children at the commencement of the proceedings would be protected. Initially, the Court noted that the cost of providing *unwed fathers* with an opportunity for individualized fitness hearings would probably be minimal.[34] At a later point, however, the Court employed more specific language and stated that all Illinois parents were entitled to a fitness hearing before their children could be *removed from their custody*.[35] In both *Rothstein* and *Vanderlaan*, however, the putative father did not have actual custody of his children at the commencement of the proceedings which indicates that actual custody is not a prerequisite for *Stanley* to apply.

B. *Limiting* Stanley: Quilloin

The issue of putative fathers' rights came before the Supreme Court a second time in *Quilloin v. Walcott*.[36] Quilloin sought to block the adoption of his illegitimate child by the child's step-father. Quilloin never had and did not seek actual or legal custody of his child. Under Georgia law,[37] only the consent of the unmarried mother was required before adoption of an illegitimate child, whereas the consent of both parents was required before adoption of a legitimate child. Since Quilloin had not legitimated his child either by marrying the mother[38] or by a court proceeding,[39] his consent was not required.

In a unanimous opinion, the Supreme Court held that Quilloin's substantive rights under the due process clause were not violated by applying the best interests of the child standard in determining whether to terminate his parental rights.[40] Thus, Quilloin's rights could be terminated even

31. State *ex rel.* Lewis v. Lutheran Social Servs., 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated sub nom.* Rothstein v. Lutheran Social Servs., 405 U.S. 1051 (1972); Vanderlaan v. Vanderlaan, 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970) *vacated* 405 U.S. 1051 (1972).

32. State *ex rel.* Lewis v. Lutheran Social Servs., 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated sub nom.* Rothstein v. Lutheran Social Servs., 405 U.S. 1051.

33. 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970), *vacated*, 405 U.S. 1051.

34. 405 U.S. at 657 n.9 (1972).

35. *Id.* at 658.

36. 434 U.S. 246.

37. GA. CODE § 74-403(1)-(3) (1975).

38. GA. CODE § 74-101 (1975).

39. GA. CODE § 74-103 (1975).

40. 434 U.S. at 254.

though he was not found unfit. The Court also held that the statute did not violate equal protection because a state can constitutionally distinguish between a married father (even if later separated or divorced) and a putative father.[41] The basis for this distinction was that Quilloin had never shouldered any significant responsibility for his child, whereas a married father does shoulder significant responsibility for his child.[42]

Quilloin's importance in determining the limited nature of constitutional protection extended to putative fathers lies in three areas. The first lesson to be learned from *Quilloin* is that while the Court is willing to grant substantive rights to a putative father, it is not willing to give the putative father the same substantive rights accorded to all other parents. The *Quilloin* Court recognized that a putative father has a constitutionally protected liberty interest in his child, and, therefore, is entitled to some degree of protection,[43] but the Court was unwilling to raise this interest to the status of a fundamental right.

This proposition is evidenced by the Court's action in allowing Quilloin's parental rights to be terminated without giving him a fitness hearing[44] and also in permitting his child to be adopted without his consent. The Court stated that whatever substantive rights Quilloin might have, they were amply protected by a hearing solely on the child's best interests.[45] Thus, *Quilloin* illustrates how the Court is limiting *Stanley* to procedural due process. If the Court were reading *Stanley* as a substantive due process case, then Quilloin's parental rights could not have been terminated as he did not consent to the adoption and was not given a fitness hearing and found unfit.

The second significant aspect of *Quilloin* is the Court's discussion of the factors relating to the putative father's relationship with his child that are determinative of the type of hearing that a putative father will receive. The four factors that the Court considered important are whether the putative father ever had actual custody of the child, whether the putative father participated in the upbringing of the child, whether the putative father supported the child regularly, and whether the adoption would be by a family with whom the child was already living.[46]

Because Quilloin never had actual custody of his child, did not participate in the child's upbringing, only provided irregular support, and the child was to be adopted into a family with whom the child had been living,[47] the

41. *Id.* at 256.

42. *Id.*

43. The Court stated that "we have recognized on numerous occasions that the relationship between parent and child is constitutionally protected [under the due process clause of the fourteenth amendment]" (citing Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923)). The Court also stated that "it is now firmly established that 'freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment' " (citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)). 434 U.S. at 255.

44. The Court noted that Quilloin had not been found unfit. *Id.* at 247.

45. *Id.* at 254.

46. *Id.* at 255-56.

47. The trial court found that during the eleven years of the child's life, before the adoption proceedings, Quilloin did not petition to legitimate the child nor did he support the child

Court was unwilling to extend the same protection to Quilloin that all other parents receive, *i.e.*, a fitness hearing and consent to adoption. For a putative father like Quilloin, a hearing on the child's best interests was sufficient, and his consent for adoption was not required.

The Court is implicitly stating that if a putative father does not accept the same responsibility for his child presumably accepted by all other parents, then he has no right to expect the same degree of constitutional protection. *Stanley* could be distinguished because Stanley had accepted full responsibility for his children. Therefore, he was entitled to a fitness hearing. Quilloin, on the other hand, had not. Therefore, he was entitled solely to a best interests hearing.

The third facet of *Quilloin* that merits attention is the Court's holding that a state can constitutionally distinguish between married and putative fathers.[48] This holding adds still another limitation to the rights of putative fathers. It also further supports the proposition that the interest of a putative father in his child is not fundamental. If it were, the Court would have applied strict scrutiny to the classification.[49] Instead, the Court did not explicitly state which standard of review it applied to the classification, but merely indicated that under any standard of review, the classification would be constitutional.[50]

The import of this holding is that a state may constitutionally provide lesser standards for terminating a putative father's rights than for terminating a married father's rights, such as not requiring his consent or not finding him unfit before his child can be adopted. The appropriate standard of review would be either the traditional rational relation test[51] or an intermediate standard of scrutiny[52] since neither a fundamental right nor a suspect class is involved.[53] Under either of these tests, the classification would be upheld unless the putative father could prove that he shouldered significant responsibility as defined by the factors set forth in *Quilloin* for the child similar to that of a married father. Since this is a heavy burden of proof, most

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regularly. Also, the child had been living with the mother and stepfather when they filed a petition to adopt the child. *Id.* at 247, 249, 251.

48. *Id.* at 256.

49. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

50. 434 U.S. at 256.

51. Under the rational relation test, the statutory classification must bear some rational relationship to a legitimate state purpose. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

52. The intermediate standard of scrutiny requires that the classification serve important governmental objectives and that it is also substantially related to the achievement of those objectives. Craig v. Boren, 429 U.S. 190 (1976).

53. The Court would probably apply the traditional rational relation test since the only classifications that have thus far received an intermediate level of scrutiny are gender, Frontiero v. Richardson, 411 U.S. 677 (1973), and illegitimacy, Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). Classifications which the Court has found suspect include race, Loving v. Virginia, 388 U.S. 1 (1967), national origin, Oyama v. California, 332 U.S. 633 (1948), and alienage, Nyquist v. Mauclet, 432 U.S. 1 (1977). The rights held to be fundamental by the Court are the right to have a family, Moore v. City of East Cleveland, 431 U.S. 494 (1977), the right of privacy in marriage and family matters, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965), the right to vote, Kramer v. Union Free School Dist., 395 U.S. 621 (1969), the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), the right of access to courts, NAACP v. Button, 371 U.S. 415 (1963), the right of association, NAACP v. Alabama, 357 U.S. 449 (1958), and the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942).

adoption statutes which distinguish between married and putative fathers will pass constitutional muster.

Quilloin narrowed considerably the boundaries of *Stanley* in extending constitutional protection to putative fathers. *Caban* added further refinements to this newly emerging right.

III. ADDITIONAL LIMITATIONS ON *STANLEY: CABAN*

A. *The Court's Analysis of* Caban

The Court decided *Caban* solely on equal protection grounds[54] even though Caban raised a substantive due process claim.[55] Because the classification involved gender, the Court properly applied an intermediate standard of scrutiny rather than the traditional rational relation test.[56] Strict scrutiny was not warranted as the classification did not involve a suspect class[57] or a fundamental right.[58]

Under the intermediate standard of scrutiny, the classification must serve important governmental objectives and must be substantially related to the achievement of those objectives.[59] The statute in question fulfilled the first part of the test as the Court recognized that the state interest in promoting the welfare of illegitimate children through adoption is an important governmental objective.[60] But the statute failed the second part of the test because the Court found that the gender classification was not substantially related to the articulated state interest.

The Court gave three reasons for the statute's failure to meet the second part of the test. First, a state cannot assume in all cases that an unmarried mother has a closer relationship with her child than a putative father, and, therefore, her interest in her child is more important so that only her consent is merited in adoption proceedings.[61] The relationship that Caban had with his children refuted this assumption as the Court recognized that his relationship with the children was "fully comparable" to the mother's relationship with the children.[62]

Second, there is no basis for assuming that putative fathers would consent to adoption any less frequently than unmarried mothers thereby hinder-

54. 99 S. Ct. at 1768-69.

55. The Court avoided the substantive due process issue of whether parental rights could be terminated absent a fitness hearing by claiming that since the statute was struck down on equal protection grounds, it was unnecessary to reach the substantive due process issue. *Id.* at 1769 n.16.

56. Beginning with Reed v. Reed, 404 U.S. 71 (1971), the Court has applied a higher level of scrutiny in gender discrimination cases than the traditional rational relation test although not as high a level of scrutiny as strict scrutiny demands. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). *See generally* Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

57. Loving v. Virginia, 388 U.S. 1.

58. Kramer v. Union Free School Dist., 395 U.S. 621. For the classifications that the Court has found suspect and the rights that the Court has held to be fundamental, *see* note 53 *supra*.

59. Craig v. Boren, 429 U.S. 190.

60. 99 S. Ct. at 1767.

61. *Id.* at 1766-67.

62. *Id.* at 1766.

ing the important state interest of promoting adoption of illegitimate children.[63]

Third, even if it might be difficult to locate and identify a putative father at birth, possibly justifying a distinction between unmarried mothers and putative fathers, this problem could decrease after infancy.[64] Alleviation of this problem would require a carefully tailored statute which distinguishes between putative fathers like Caban who have manifested an interest in their children and disinterested fathers.[65]

Therefore, the Court concluded that the statute could not stand as it was an "overbroad generalization" which the Court has repeatedly struck down in gender discrimination cases.[66]

Justice Stevens filed a dissenting opinion in which the Chief Justice and Justice Rehnquist joined. Justice Stewart also filed a dissenting opinion stating that his reasons for dissenting were similar to those expressed by Justice Stevens.[67] Both Justices viewed the classification as a permissible gender classification based on the rationale that unmarried mothers and fathers are not similarly situated in the majority of adoption proceedings.[68] Although the majority avoided the substantive due process issue, both Justice Stewart and Justice Stevens addressed this issue indicating that the statute did not violate any constitutionally protected interest that Caban may have had in his children.[69]

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63. *Id.* at 1768.

64. *Id.*

65. The Court stated that the equal protection clause would not be violated if a state did not require the consent of a putative father who had never "come forward to participate in the rearing of his child." *Id.* at 1768. The Court added that for fathers like Caban, who had participated in his children's rearing, "a State should have no difficulty in identifying the father even of children born out of wedlock." *Id.* at 1769. Therefore, a distinction between *Caban*-type fathers and unmarried mothers could not be justified.

66. *Id.* at 1769.

67. *Id.* (Stewart, J., dissenting).

68. The reasons given by Justice Stewart and Justice Stevens to support their contention that unmarried mothers and putative fathers are not similarly situated in the majority of adoption proceedings stemmed from the biological relationship of the mother and child. Both Justices premised their arguments on the fact that the majority of adoptions involve newborns and infants—not older children as in *Caban*. *Id.* at 1771 (Stewart, J., dissenting), 1774 (Stevens, J., dissenting).

Justice Stewart gave the following reasons: the unmarried mother bears the child, can always be identified, and is the custodian of the child (absent state intervention) whereas most putative fathers are unknown, unavailable, or uninterested. *Id.* at 1771-72 (Stewart, J., dissenting). Stewart conceded that Caban was similarly situated to an unmarried mother because he had established a paternal relationship with his children. He agreed with Justice Steven's argument, however, that the statute did not violate equal protection because Caban had failed to bear his burden of proof of showing that the statute's "unjust applications are sufficiently numerous and serious to render it invalid." *Id.* at 1777 (Stevens, J., dissenting). Further, "[t]he mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason for invalidating the entire rule." *Id.* at 1778 (Stevens, J., dissenting) (citing Vance v. Bradley, 440 U.S. 93 (1979); Califano v. Jobst, 434 U.S. 47 (1977); Dandridge v. Williams, 397 U.S. 471 (1970)).

The reasons advanced by Justice Stevens were substantially the same as those given by Justice Stewart. Justice Stevens summarized his reasons by concluding that "it is virtually inevitable that from conception through infancy the mother will constantly be faced with decisions about how best to care for the child, whereas it is much less certain that the father will be confronted with comparable problems." *Id.* at 1775 (Stevens, J., dissenting).

69. *Id.* at 1770-71 (Stewart, J., dissenting), 1779-80 (Stevens, J., dissenting).

B. *Limited Rights for the Putative Father*

Two facets of *Caban* are of particular importance in understanding the limited protection afforded to putative fathers. First, *Caban* illustrates that *Stanley* did not declare the interest of a putative father in his child to be a fundamental right; therefore, *Stanley* is not a substantive due process case. Second, *Caban* extends the rights of putative fathers to include equal protection under the laws with unmarried mothers, but not without limitations.

Caban confirms that *Stanley* is limited to procedural due process. If the Court had wanted to declare that the putative father's interest in his child was fundamental, *Caban* provided an ideal opportunity to do so. The Court's reluctance to address the substantive due process issue of whether a putative father's parental rights could be terminated without showing him to be unfit or without his consent, strongly implies that the Court is not going to elevate a putative father's interest in his child to the status of a fundamental right.[70]

In *Quilloin* the putative father's relationship with his child did not merit declaring that the putative father had substantive rights equal to all other parents. Caban, in contrast, had assumed all the fatherly duties that a married father is expected to assume. He had shouldered the significant responsibility for his children which the *Quilloin* Court found to be so important. He regularly supported his children; he had actual custody of them both by himself and with their mother; and he participated in their upbringing as part of a *de facto* family.[71] He also acknowledged his paternity and wanted to assume full parental obligations by adopting his children.[72] He was found to be a fit parent. The only characteristic distinguishing Caban from married fathers was that he had never married the children's mother.

In spite of all these factors, the Court refused to address the substantive due process issue, dismissing it in a footnote as unnecessary to reach because the statute in question was struck down on equal protection grounds.[73] If the Court had addressed this issue and granted Caban the same substantive rights that all other parents have under New York law,[74] this would have created a fundamental right in putative fathers to their children. Since the Court did not do so, it implicitly stated that the rights of putative fathers are not entitled to the same degree of constitutional protection as the rights of all other parents. This proposition is founded on the same considerations that led to limiting *Stanley* to procedural rights and limiting a putative father, such as Quilloin, to a hearing on the child's best interests.

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70. For a similar view even before *Quilloin* and *Caban* were decided, see Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1592-97 (1972).

71. 99 S. Ct. at 1763.

72. *Id.* at 1763-64.

73. *Id.* at 1769. *But see* the dissenting opinions of Justice Stewart and Justice Stevens. Both Justices thought it was necessary to address the substantive due process issue. *Id.* at 1770-71 (Stewart, J., dissenting), 1779-80 (Stevens, J., dissenting).

74. Under New York law, the consent of married parents and unmarried mothers is required unless unfit. N.Y. DOM. REL. LAW § 111(1)(b)-(c), (2)(a)-(e) (McKinney 1977). This statute implicitly recognizes that a parent has a fundamental right to his or her child since parental rights can only be terminated with consent or by a finding of unfitness.

Moreover, in an adoption proceeding there are competing interests at stake which must be balanced—those of the child and those of his parents.[75] By granting putative fathers the same rights as all other parents, but with no guarantee that they would assume the responsibilities that other parents assume, the Court would be giving the putative father an unqualified right to block an adoption, absent unfitness, even though the adoption might be in the child's best interest. The Court was unwilling to allow a putative father to have the rights of parenthood without also assuming the responsibilities of parenthood. This reasoning represents a careful balancing of the competing interests at stake.

The second area of *Caban's* importance in determining the boundaries of a putative father's rights rests in the equal protection holding of the case. The majority decided the case solely on equal protection grounds holding that a state cannot constitutionally require the consent of an unmarried mother, but not the consent of a putative father, in an adoption proceeding.[76]

Thus, *Caban* extended the limited nature of a putative father's rights in adoption proceedings to include the same rights given to an unmarried mother.[77] The *Caban* Court did not declare the putative father's interest in his children to be a fundamental right because strict scrutiny was not applied to the gender classification.[78] The functional effect, however, of the Court's holding is to give a putative father, who has assumed parental obligations and responsibilities, a fundamental right in his children since the adoption statute recognizes this right in the unmarried mother.[79] A father like Caban cannot have his parental rights terminated without his consent, absent unfitness.

The Court failed to specifically define what factors were essential in the putative father and child relationship before the putative father would be entitled to equal protection. The Court indicated that the putative father was not entitled to equal protection if he had not participated in the child's rearing.[80] Justice Stevens, in his dissenting opinion, viewed the majority holding as quite narrow, limited to those adoption proceedings involving an older child where the putative father has participated in the rearing of the child and has admitted his paternity.[81]

Until the Court gives more explicit guidelines, courts will be struggling to apply *Caban* to their adoption statutes which may result in confusion and

75. *See generally* Disanto & Podolski, *supra* note 30, at 212-19.

76. 99 S. Ct. at 1768-69.

77. The extension, however, is not an unqualified extension to all putative fathers. *See* text accompanying note 80 *infra*. Therefore, it may properly be viewed as a limited extension of the rights of putative fathers as developed in *Stanley* and *Quilloin*.

78. In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices (Brennan, Douglas, Marshall, and White) found sex to be a suspect class, but this position has never been adopted by the Court as a majority.

79. *See* note 74 *supra*.

80. 99 S. Ct. at 1768.

81. *Id.* at 1777 (Stevens, J., dissenting).

misapplication.[82] For example, how should a court handle the case of a putative father and a newborn infant?[83] The putative father has not yet had time to participate in the rearing of the child, but does this mean that he is not entitled to the same rights as an unmarried mother? What if he had assumed all of the parental duties that a father of a newborn infant normally assumes?[84]

As a consequence of the Court's equal protection holding, adoption statutes will have to be more carefully tailored to meet the intermediate standard of scrutiny to which they will be subjected. They must provide a mechanism which distinguishes between those putative fathers who have "manifested a significant paternal interest"[85] in their children and those putative fathers who have not. Otherwise, such statutes will be unconstitutional under *Caban*.

CONCLUSION

The last seven years have witnessed the emergence of a new constitutionally protected interest—that of the putative father in custody and adoption proceedings. *Stanley* left open broad parameters for the development of this right. The Court narrowed these limits considerably in *Quilloin* and *Caban* resulting in a narrow reading of *Stanley* as a procedural due process case requiring notice and a hearing before termination of parental rights.

Quilloin teaches that the content of the hearing will depend on the nature of the relationship between the putative father and his child. *Quilloin* also illustrates that a state may constitutionally distinguish between married and putative fathers.

Caban illustrates that the Court is willing to extend the same rights to putative fathers in adoption proceedings as are accorded to unmarried mothers, but the limits of this extension are uncertain. *Caban* also strongly suggests that the Court is not willing to equate the rights of a putative father with those of all other parents by giving the putative father a fundamental right in his children.

These cases leave many issues open which the courts will be attempting to resolve. For example, what constitutes significant paternal interest? When has a putative father shouldered significant responsibility comparable to that of a married father? Are the same standards applied to infants as to older children? If not, what are the standards for infants?

One conclusion is certain. More litigation can be expected in this area that will serve to further delineate the boundaries of a putative father's rights. The outer boundaries of this right have been fairly well drawn by

82. Confusion reminiscent of *Stanley* seems inevitable. *See generally* Freeman, *Remodeling Adoption Statutes After* Stanley v. Illinois, 15 J. FAM. L. 385 (1977).

83. The position of the four dissenting Justices is clear. *Caban* would not apply to newborn infants. *See* text accompanying note 81 *supra*.

84. If a putative father acknowledged his paternity at birth, paid for all expenses related to the infant, and wanted to adopt the child or have custody of the child, the majority in *Caban* would probably extend equal protection to this father because he had assumed significant responsibility for the child.

85. 99 S. Ct. at 1769.

Stanley, Quilloin, and *Caban*. What remains is a drawing of lines within these boundaries to more narrowly define the constitutionally protected rights of putative fathers.

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