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EQUAL PROTECTION AND THE PUTATIVE FATHER: AN ANALYSIS OF PARHAM v. HUGHES AND CABAN v. MOHAMMED

by Sharon Nelson Freytag

At common law the father of an illegitimate child had no parental rights[1] according to the doctrine of *nullius filius*, which characterized the illegitimate child as no man's son.[2] Reflecting this historical bias against a putative father,[3] state laws consistently treated him less favorably than other parents with respect to the privileges of parenthood.[4] An Oregon adoption statute typified the traditional attitude toward the father of an illegitimate child by providing: "The consent of the mother of the child is sufficient . . . and for all purposes relating to the adoption of the child, the father of the child shall be disregarded just as if he were dead . . . ."[5] Most states have softened this rigid attitude by allowing putative fathers limited rights with respect to their children.[6] In addition, the United States Supreme Court, by invalidating a state statute discriminating against putative fathers, has recognized a natural father's right to a hearing on his fitness as a parent before being denied custody of his illegitimate children.[7] The decisions of *Parham v. Hughes*[8] and *Caban v. Mohammed*[9] demon-

1. *See* Barron, *Notice to the Unwed Father and Termination of Parental Rights Implementing Stanley v. Illinois*, in FATHERS, HUSBANDS AND LOVERS 95 (S. Katz & M. Inker eds. 1979). *See also* cases collected in Annot., 45 A.L.R.3d 216, 224-25 (1972).

2. 1 W. BLACKSTONE, COMMENTARIES *485. *But see* Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 235 (1971), who concludes that courts have often denied paternal rights in favor of the mother of the child based on a mistaken interpretation of the common law under which the mother was no more a parent than the father because a bastard was the child of no one.

3. Putative father is defined as "[t]he alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979). In this Comment "putative father" also refers to a known father who has acknowledged the paternity of an illegitimate child.

4. For a listing of state statutes that affect the rights of putative fathers, see Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115, 138-47 (1973-1974). *See generally* Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972).

5. OR. REV. STAT. § 109.326 (1969) (current version at OR. REV. STAT. § 109.094 (1977)). An Illinois decision further exemplified the historical attitude toward putative fathers. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964). In that opinion, an Illinois court held that fathering an illegitimate child was a tort committed by the father upon the child.

6. *See, e.g.*, note 26 *infra*. The 1977 version of the quoted Oregon statute suggests an increased sensitivity to the putative father's plight. The statutory scheme now provides that once paternity has been established, the natural father has the same rights as a father who is or was married to the mother of the child. OR. REV. STAT. § 109.094 (1977). These rights include consent to adoption. *Id.* § 109.312.

7. Stanley v. Illinois, 405 U.S. 645 (1972); *see* notes 11-18 *infra* and accompanying text.

8. 441 U.S. 347 (1979).

9. 441 U.S. 380 (1979).

strate, however, the Court's uncertainty in the area of equal protection of the putative father.

This Comment traces Supreme Court decisions involving a putative father's rights,[10] discusses the fluctuating equal protection standard of review applied in sex discrimination cases, and focuses on the standards used and the results achieved in *Parham* and *Caban*, both cases of alleged sex discrimination brought by fathers of illegitimate children. Finally, this Comment analyzes the possible effect of the decisions in *Caban* and *Parham* on the Texas adoption and wrongful death statutes as they apply to the putative father.

I. EARLY DECISIONS AFFECTING THE PUTATIVE FATHER'S RIGHTS

The Supreme Court first confronted the issue of the custody rights of a putative father in 1972 in *Stanley v. Illinois*.[11] For eighteen years, the petitioner had lived intermittently with the mother of his three children, but had never married her. When the mother died, the state of Illinois instituted dependency proceedings as a result of which the children were declared wards of the state according to the provisions of the Illinois statutes.[12] They were then placed in the custody of a married couple appointed as guardians by the court.[13] Stanley contended that he had been deprived of equal protection. He argued that Illinois law required a showing of unfitness before fathers of legitimate children and all mothers, even if unwed, could be denied custody.[14] Yet, the state need only show that a father was not married to the mother before depriving him of his children.[15] The Supreme Court, holding unconstitutional a presumption that fathers of illegitimate children are unsuitable and neglectful parents, de-

10. The Supreme Court has not decided a case treating visitation rights per se of the putative father; therefore, this Comment does not discuss visitation rights in depth, but focuses instead on the putative father's rights regarding custody, adoption, and wrongful death actions. For a discussion of putative fathers' visitation rights, see Tabler, *supra* note 2, at 231-36. *See also* Schwartz, *Rights of a Father with Regard to His Illegitimate Child*, 36 OHIO ST. L.J. 1, 11 (1975).

11. 405 U.S. 645 (1972). Before *Stanley* the courts in three states had granted a putative father's claim, basing their decisions on preserving the family relationship or on furthering the best interest of the child, but not on recognizing the rights of the putative father. *See In re* Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888 (1954); *In re* Mark T., 8 Mich. App. 122, 154 N.W.2d 27 (1967); *In re* Brennan, 270 Minn. 455, 134 N.W.2d 126 (1965). *See also* Commonwealth v. Rozanski, 206 Pa. Super. Ct. 397, 213 A.2d 155 (1965), in which the decision was based on the child's welfare, but a dissenting justice noted:

> The grant of such [visitation] rights emphasizes and advertises to the community in general the illegitimacy of the child to the child's detriment. It can, too, by this sanction of the creation of legal rights in a putative father, encourage the renewal of the meretricious relationship between the parties which cannot possibly contribute to the welfare of the child.

213 A.2d at 159 (Watkins, J., dissenting).

12. ILL. ANN. STAT. ch. 37, §§ 701-14, 702-1, -5 (Smith-Hurd 1972).

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

14. ILL. ANN. STAT. ch. 37, §§ 702-1, -4 (Smith-Hurd 1972).

15. Under the statutory scheme, the state could circumvent neglect proceedings on the theory that unwed fathers were not parents. *Id.* § 701-14 provides that "parents" means the father and mother of a legitimate child or the natural mother of an illegitimate child.

cided that both due process and equal protection required that Stanley be given a hearing to determine his fitness before his children could be removed from his custody.[16] The Court concluded: "Stanley's interest in retaining custody of his children [was] cognizable and substantial,"[17] and this private interest "of a man in the children he has sired and raised, undeniably warrant[ed] deference and, absent a powerful countervailing interest, protection."[18]

The impact of the Court's holding immediately affected state judicial and legislative actions. Following *Stanley*, the Supreme Court vacated and remanded two cases, *Vanderlaan v. Vanderlaan*[19] and *State ex rel. Lewis v. Lutheran Social Services*,[20] for reconsideration in light of that decision. In *Vanderlaan* a putative father had been denied the custody of his illegitimate children, but on remand[21] the Illinois Supreme Court reversed and granted the putative father custody based on the *Stanley* decision. In *Lewis* a putative father challenged the adoption of his children that had been arranged without his consent, but the Wisconsin Supreme Court originally held that only the mother had power to terminate parental rights and to consent to the adoption of a child born out of wedlock.[22] On remand[23] the Wisconsin court reversed its earlier decision and, based on *Stanley*, held that an adoption could not be completed without either the unwed father's consent or the termination of his parental rights.[24] Thus, the court interpreted the decision in *Stanley* as applying to adoptions as well as custody. The *Stanley* holding, however, caused confusion among state adoption authorities over whether both known and unknown putative fathers had to receive notice and the opportunity for a hearing[25] before

16. The Court stated:

> [A]s 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 . . . 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 of the laws guaranteed by the Fourteenth Amendment.

405 U.S. at 649.

Justice White's opinion focused primarily on a procedural due process analysis of the statute's denial of a hearing. The due process issue, however, had not been raised in the lower courts and thus posed jurisdictional problems, so the Court "grafted its due process line of reasoning onto the petitioner's equal protection theory." Case Comment, *Constitutional Law—A Dependency Hearing Which Would Deny an Unwed Father Custody of His Child on the Death of Its Mother Without Reference to the Father's Fitness as a Parent is Violative of Due Process and Equal Protection*, 4 LOY. CHI. L.J. 176, 189 (1973); *see* Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 459 (1978), who believes that the Court avoided the equal protection issue that unwed fathers stand equal with all mothers and wed fathers vis-á-vis child custody and took a "smaller step" by basing its decision on due process.

17. 405 U.S. at 652.

18. *Id.* at 651.

19. 126 Ill. App. 2d 410, 262 N.E.2d 717 (1979), *vacated*, 405 U.S. 1051 (1972).

20. 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated sub. nom.* Rothstein v. Lutheran Social Servs., 405 U.S. 1051 (1972).

21. Vanderlaan v. Vanderlaan, 9 Ill. App. 3d 260, 292 N.E.2d 145 (1972).

22. 178 N.W.2d at 63.

23. State *ex rel.* Lewis v. Lutheran Social Servs., 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

24. 207 N.W.2d at 832-33.

25. In *Stanley* the Court commented:

being deprived of their children. Reacting to *Stanley*, many states modified their adoption statutes to give the putative father a limited right in preventing the adoption of his child,[26] and one state interpreted *Stanley* broadly by giving the father absolute equality with the unwed mother regarding the right to veto the adoption of their illegitimate child.[27]

After a period of six years,[28] the Supreme Court explained the breadth of the *Stanley* holding in a unanimous decision in *Quilloin v. Walcott*.[29] In *Quilloin* the natural father of an illegitimate child challenged the constitutionality of a Georgia statute[30] that required only the mother's consent to the adoption of an illegitimate child unless the father had obtained an or-

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> We note in passing that the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness appears to be minimal. If unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings. If they do care, under the scheme here held invalid, Illinois would admittedly at some later time have to afford them a properly focused hearing in a custody or adoption proceeding.

Stanley v. Illinois, 405 U.S. 645, 657 n.9 (1972).

Professor Harry D. Krause concluded that *Stanley* was an "imprecise opinion, giving the father an interest in his illegitimate child's custody and adoption" but "causing difficulty with the adoption process in many states, as many courts and some legislatures . . . interpreted the case to require notice of adoption—even to *unknown* fathers . . . ." Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 7-8 (1974). As one author realized, *Stanley* "inevitably carrie[d] the potential for altering drastically the legal framework of the adoption process." Note, *The "Strange Boundaries" of Stanley: Providing Notice of Adoption to the Unknown Putative Father*, 59 VA. L. REV. 517, 518 (1973).

26. *E.g.*, CAL. CIV. CODE § 224 (West Supp. 1980); DEL. CODE ANN. tit. 13, § 908(2)(a) (Supp. 1978); MINN. STAT. ANN. § 259.24(1)(a) (West Supp. 1980); MONT. CODE ANN. § 40-8-111 (1979); NEB. REV. STAT. § 43-104 (1978); WASH. REV. CODE ANN. § 26.32.030(2) (Supp. 1978); WIS. STAT. ANN. § 48.84 (West 1979). For information on the Texas adoption statutes, see notes 129-36 *infra*.

27. ARIZ. REV. STAT. ANN. § 8-106 (West Supp. 1979-1980) provides: "No adoption shall be granted unless consent to adopt has been obtained and filed with the court from the following: 1. From both natural parents, if living . . . ." The present statute supersedes the original section that provided:

> Consent is not necessary from a father who was not married to the mother of the child both at the time of its conception and at the time of its birth, unless the father under oath has acknowledged parentage in a document filed with the court or with the agency or division at or prior to the time the petition is filed, or unless the parentage of the father has been previously established by judicial proceedings.

Id. § 8-106(A)(1)(d) (West 1974) (amended 1976).

28. During that period, in Fiallo v. Bell, 430 U.S. 787 (1977), the Supreme Court considered the constitutionality of §§ 1101(b)(1)(D) and 1101(b)(2) of the Immigration and Nationality Act of 1952. 8 U.S.C. § 1101 (1970) (amended 1976). The Act provided that a parent or child of a United States citizen could get special preference immigration status without regard to a quota. The definition of "child" included an illegitimate child claiming preference through his mother but did not include an illegitimate child claiming preference through his father. All three appellants in *Fiallo*, one the father of an illegitimate alien child, the other two, illegitimate children of alien fathers, lost their due process and equal protection claims under the fifth amendment. The Court, recognizing that Congress's power to exclude aliens was subject to narrow judicial review, upheld the statute, based on the hypothesis that Congress had created the statutory classification to alleviate paternity proof problems. 430 U.S. at 799.

29. 434 U.S. 246 (1978). For a more detailed discussion of this case, see Note, *Illegitimacy and the Rights of Unwed Fathers in Adoption Proceedings After Quilloin v. Walcott*, 12 J. MAR. L.J. 383 (1979); Note, *The Putative Father's Parental Rights: A Focus on "Family,"* 58 NEB. L. REV. 610 (1979).

30. GA. CODE ANN. § 74-403(3) (1973).

der of legitimation[31] that gave him authority to veto the adoption. In contrast, the general statutory scheme[32] required the consent of both parents of a legitimate child. The putative father petitioned the court, opposing the adoption of his eleven-year-old son by the boy's stepfather and seeking an order of legitimation and visitation rights. After a hearing to determine the father's interest in his son, the trial court ruled that the father should be denied the request for legitimation and visitation rights and that the adoption should be granted.[33] The Georgia Supreme Court affirmed.[34] Appealing to the United States Supreme Court, the father argued that he had been denied due process because he had not been declared unfit as required by *Stanley* and that he had been denied equal protection because the statute discriminated against a putative father by refusing him the same power to veto an adoption that it provided to a married or divorced father.[35] The Supreme Court rejected both arguments,[36] noting that the "best interests of the child" demanded that the child remain with the family unit that had been provided him by his mother and his stepfather for seven years.[37] The petitioner had shown only sporadic interest in his child[38] and had never sought custody. The Court distinguished the petitioner's situation from that of a married or divorced father, emphasizing

31. An order of legitimation is a court order granted pursuant to a statutory provision providing for the legitimation of an illegitimate child. BLACK'S LAW DICTIONARY 811 (5th ed. 1979).

32. GA. CODE ANN. § 74-403(1) (1973).

33. 434 U.S. at 250. The trial court found that, although the child had never been abandoned or deprived, the natural father had provided support on an irregular basis. In addition, the child expressed a desire to be adopted by his mother's husband who was found to be a fit and proper person to adopt the child. The trial court therefore concluded that the proposed adoption was in the best interests of the child. *Id.* at 251. "Best interests of the child" is one of the most important factors in determining the question of child custody. It is, however, a broad, indefinite term. To determine what is in the "child's best interest" a court may consider the moral fitness of the parties, the home environment, the child's emotional ties to the parties, the parties' emotional ties to the child, the age, sex, or health of the child, the desirability of continuing an existing third-party relationship, and the preference of the child. *See* Turner v. Pannick, 540 P.2d 1051, 1054 (Alaska 1975). Some writers have criticized the consideration of parental rights in determining a child's best interests, suggesting instead that the total emphasis be the consideration of the child's situation and developmental needs. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 106 (1973).

34. Quilloin v. Walcott, 238 Ga. 230, 232 S.E.2d 246, 248-49 (1977) (footnote omitted):

> The natural father contends that the Georgia statutes take away his parental rights without due process of law. He relies on *Stanley v. Illinois* . . . . In *Stanley*, the Supreme Court held an Illinois statutory scheme unconstitutional which required a hearing and proof of unfitness before the state could assume custody of a child of married or divorced parents or unmarried mothers, yet required no such showing before separating a child from an unwed father. In *Stanley*, the father was a de facto member of the family unit, and the mother had died. Either of these factual differences would be sufficient to distinguish *Stanley* from the case before us. We find that *Stanley* is not controlling and that Ga. Code Ann. §§ 74-203 and 74-403(3) violate neither equal protection nor due process.

35. 434 U.S. at 253.

36. *Id.* at 254-56.

37. *Id.* at 255.

38. The putative father had consented to the recording of his name on the birth certificate and had made irregular support payments and infrequent visits. *Id.* at 249 n.6, 251.

that the petitioner had never shouldered a "significant responsibility with respect to the daily supervision, education, protection, or care of the child."[39] With this language, the Court in *Quilloin* clarified *Stanley* by stressing the necessity of a substantial relationship between a putative father and his illegitimate child before the Court would grant a father constitutional protection of his parental rights.

The petitioner's brief raised the additional equal protection claim that the relevant Georgia statute[40] discriminated on the basis of sex by requiring only the consent of the unwed mother for an adoption.[41] The Supreme Court rejected this claim on the ground that it had not been presented in the petitioner's jurisdictional statement.[42] When the Court decided *Stanley*, it also had refused to confront the issue of sex discrimination against the putative father.[43] In the recent cases of *Parham v. Hughes*[44] and *Caban v. Mohammed*,[45] however, the Court analyzed the father's sex discrimination claim. To provide background for the equal protection analysis in these two cases, this Comment discusses first the standards of review the Supreme Court has applied to classifications based on gender.

II. EQUAL PROTECTION: A STANDARD OF REVIEW FOR GENDER-BASED CLASSIFICATIONS

The fourteenth amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[46] To determine whether a state law violated this clause, the United States Supreme Court previously employed a two-tiered model for equal protection review.[47] The first tier involved minimal scrutiny of the challenged legislation to determine whether a rational relationship between the statute and a legitimate state interest existed.[48] When the statutory classification

39. *Id.* at 256.
40. GA. CODE ANN. § 74-403(3) (1973).
41. 434 U.S. at 253 n.13.
42. *Id.*
43. *See* Ginsburg, *supra* note 16.
44. 441 U.S. 347 (1979).
45. 441 U.S. 380 (1979).
46. U.S. CONST. amend. XIV, § 1.
47. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).
48. In McGowan v. Maryland, 366 U.S. 420, 425-26 (1961), the Court, holding constitutional a statute providing for Sunday closing laws, stated:

> [The equal protection clause] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

For a recent decision based on the rational basis test, see City of New Orleans v. Dukes, 427 U.S. 297 (1976). This test results in considerable deference to state legislatures and has traditionally been used in the sphere of economic regulation. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 996 (1978).

concerned a fundamental right[49] or a suspect class,[50] however, the Court, using a second standard of review, applied strict scrutiny to the classification to determine whether it was warranted or justified by a compelling state interest.[51] The Court's choice of which standard to apply usually determined the outcome of the challenge; most classifications withstand minimal scrutiny, but most fail under strict scrutiny.[52]

The Supreme Court traditionally gave only minimal scrutiny to classifications based on gender and, therefore, always upheld them as reasonable,[53] based upon presumptions about the appropriate roles of men and women in society. In 1971, however, the Court in *Reed v. Reed*[54] significantly changed its previous position by invalidating a statute that discriminated against women on the basis of sex.[55] Writing for a unanimous Court, Chief Justice Burger suggested a heightened scrutiny of the statute, noting that a classification must have "a fair and substantial relation to the object of the legislation."[56] Certain commentators[57] viewed the Court's action in *Reed* as a break from the two-tiered analysis previously employed and a move toward an intermediate level of scrutiny. The Court's language, however, did not provide a clear standard to be used for gender discrimination.[58]

49. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

50. *See* Loving v. Virginia, 388 U.S. 1 (1962) (race). In Graham v. Richardson, 403 U.S. 365 (1971), the Court treated alienage as a suspect classification. *But see* Foley v. Connelie, 435 U.S. 291 (1978) (rationality standard applied to uphold statute requiring all police officers to be United States citizens; such standard appropriate only when state limits the right to govern to its citizens). In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the Court suggested that wealth might constitute a suspect condition. *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (although not specifically rejecting wealth as a suspect classification, Court upheld school financing scheme based on local property tax).

51. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

52. Professor Gunther characterizes minimal scrutiny as virtual judicial abdication and strict scrutiny as "strict" in theory and "fatal" in fact. Gunther, *supra* note 47, at 8.

53. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (statute exempting all women from jury service declared constitutional); Goesaert v. Cleary, 335 U.S. 464 (1948) (statute permitting no female bartenders other than a wife or daughter of male owner of liquor establishment considered constitutional); Muller v. Oregon, 208 U.S. 412 (1908) (statute limiting women to 10-hour work day in laundry had a rational basis).

54. 404 U.S. 71 (1971).

55. The challenged statute gave preference to men over women otherwise equally entitled to appointment as administrators of a decedent's estate.

56. 404 U.S. at 76 (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). The Chief Justice also echoed the language of the rational basis test: "The question presented by this case . . . is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced . . . ." *Id.* The Court concluded that, although the state's objective in administrative efficiency might be a legitimate one, it did not meet the demands of the equal protection clause. *Id.*

57. *See, e.g.*, Gunther, *supra* note 47, at 33-34; Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 953 (1975).

58. The ambiguity that existed in the Court's equal protection approach to gender-based classifications prompted many commentators to analyze the Court's emerging inter-

The next sex discrimination case to reach the Supreme Court, *Frontiero v. Richardson*,[59] further exemplified the Court's search for a proper standard of scrutiny in gender-based classifications. In a plurality opinion,[60] Justice Brennan declared sex to be a suspect class by stating that "[c]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[61] Even though only three Justices agreed with Justice Brennan that sex should be subject to strict scrutiny, eight agreed that the challenged statute, even under the *Reed* intermediate standard requiring a "fair and substantial relation" to the object of the legislation, violated the equal protection clause.

Reed and *Frontiero* suggested that a heightened standard of review would be applied to statutes discriminating against women on the basis of sex, but the Court's opinion in both cases demonstrated the unsettled and uncertain nature of its equal protection analysis in this area. The Court's

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mediate level of analysis and to make various recommendations for a model to be used by the Court. Professor Gunther, for example, described the Court's new analysis as intensified "means scrutiny" and suggested that this level of scrutiny would close the wide gap between strict scrutiny and minimal scrutiny not by abandoning the strict, but by raising the level of the minimal from virtual abdication to genuine judicial inquiry. Gunther, *supra* note 47, at 24; *see* Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N.C.L. REV. 1, 53-54 (1978), who proposed a one-tiered approach involving a three-pronged inquiry:

> (1) Is the group discriminated against sufficiently analogous politically to a racial minority to distrust a legislative or administrative decision discriminating against it? (2) If so, is there objective evidence of a legitimate non-discriminatory purpose? (3) If so, is that evidence sufficient to render it probable that the discriminatory effect was merely an incidental adjunct to the legitimate, nondiscriminatory purpose?

See also Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 678-79 (1977), who favored a four-level model of constitutional analysis:

> (1) Courts should decide whether the interest affected by the classification before them is fundamental, significant or insignificant; (2) Courts should determine whether the disadvantage to the affected interest is total, significant or insignificant; (3) Courts should ascertain whether the interest in forming the classification is compelling, significant, insignificant, or unlawful; (4) Courts should determine the necessary, significant, insignificant, or nonexistent character of the relationship between means and end.

Professor Wilkinson suggested that the Court abandon the strict scrutiny of the suspect class and consider three elements when making a constitutional inquiry: "(1) the importance of the opportunity being unequally burdened or denied; (2) the strength of the state interest served in denying it; and (3) the character of the groups whose opportunities are denied." Wilkinson, *supra* note 57, at 991.

59. 411 U.S. 677 (1973).

60. Justice Brennan was joined by Justices Douglas, White, and Marshall. Justice Stewart concurred in the judgment, citing *Reed*. The Chief Justice, joined by Justices Blackmun and Powell, concurred in the judgment, but refused to characterize sex as a suspect classification, deferring to state legislatures that would have the opportunity to consider the proposed Equal Rights Amendment.

61. 411 U.S. at 688. The Court considered a federal statute providing that husbands of women in the uniformed services were not dependents eligible for medical benefits and increased housing allowances unless they were in fact dependent on their wives for more than one-half of their support. The statutory scheme, on the other hand, allowed male members of the services to claim their wives as dependents without proof of actual dependency. *Id.* at 678. The Court concluded that the government's interest in administrative efficiency failed to justify the discrimination against servicewomen caused by the classification. *Id.* at 689.

consideration of sex discrimination in four subsequent cases exemplified the Court's further dilemma when confronting sex discrimination against men. In *Kahn v. Shevin*[62] the Court reviewed the constitutionality of a statute that granted an annual property tax exemption to widows but not to widowers. A majority of the Court, using the *Reed* "fair and substantial relation" test, upheld the statutory distinction based upon its ameliorative purpose[63] in compensating women for past discrimination.[64] Faced with a case of "reverse" sex discrimination,[65] the *Frontiero* plurality split. Justice Douglas refused to consider sex a suspect class when a male was the victim.[66] Significantly, although Justices Brennan and Marshall still labeled gender-based classifications "suspect," they considered the statute invalid, not because it discriminated against men, but because it was so broadly drafted that it included women who did not need its benefits.[67] Only Justice White concluded that the statute unconstitutionally discriminated against men.[68] Despite the majority's attempt to distinguish *Frontiero* in *Kahn*,[69] the only clear distinction was the sex of the challenger.

Continuing this passive posture in examining statutes discriminating against men, the Court in *Schlesinger v. Ballard*[70] upheld the promotion system of the United States Navy that mandated discharge of male lieutenants who had twice failed to be selected for promotion.[71] In contrast, the statutory scheme required discharge of a female officer only if she was not on a promotion list after thirteen years of active service.[72] In response to

62. 416 U.S. 351 (1974).

63. *But see* Erickson, *Kahn, Ballard, and Wiesenfeld: A New Equal Protection Test in "Reverse" Sex Discrimination Cases?*, 42 BROOKLYN L. REV. 1, 11 (1975), who believes that the statute was not ameliorative at all but a stereotyped codification of attitudes toward women and men. *See also* Ginsburg, *supra* note 16, at 466, in which the author concluded that the *Kahn* decision evidenced a paternalistic attitude toward women.

64. 416 U.S. at 353-55. The majority also emphasized that the challenged statute involved taxation, an area in which state legislatures traditionally possess great freedom. *Id.* at 355. Justice Douglas used the language of rationality in speaking of the deference generally accorded tax statutes. *Id.*; *see, e.g.*, Madden v. Kentucky, 309 U.S. 83, 88 (1940) (upholding state taxing power).

65. This term applies to discrimination against men. For a discussion of reverse sex discrimination, see Erickson, *supra* note 63, at 11.

66. Given the three criteria for suspectness that the plurality had enunciated in *Frontiero*, Justice Douglas's opinion is understandable. These three criteria characterize a suspect class: (1) the class suffers from an immutable characteristic determined solely by accident of birth and bearing no relation to the ability to contribute in society, (2) the class suffers historic vilification, and (3) the class lacks effective political power and redress. Frontiero v. Richardson, 411 U.S. 677, 685-86 n.17 (1973). Although Justice Douglas did not explicitly analyze widowers in terms of these three criteria, he did describe the American culture as "male-dominated," thus implying that, although maleness is an immutable characteristic, widowers as a class have suffered no historic discrimination or political powerlessness. 416 U.S. at 353-56.

67. 416 U.S. at 360.

68. *Id.* at 361.

69. The Court stressed that the sole justification for the statutory discrimination in *Frontiero* was administrative efficiency, while the challenged legislation in *Kahn* did not discriminate against anyone, but provided a remedial benefit to women who had suffered previous economic discrimination. *Id.* at 355.

70. 419 U.S. 498 (1975).

71. 10 U.S.C. § 6380(a) (1970) (amended 1976).

72. *Id.* § 6401(a).

the male petitioner's contention that he had been discriminated against on the basis of sex, Justice Stewart, writing for the majority, determined that male and female officers were not similarly situated with regard to career advancement opportunities, and thus he apparently applied only the rational basis test in upholding the statute.[73] Moreover, the majority reinforced *Kahn* by stressing that the challenged statutes compensated women for other restrictions imposed upon them by reason of their sex and thus met the "fair and substantial relation" test of *Reed*.

The Court rejected such a compensation theory in *Weinberger v. Wiesenfeld*[74] and invalidated a provision of the Social Security Act[75] that denied benefits to a widower while granting benefits to a widow based on the earnings of her deceased husband. The Court, however, avoided confronting the reverse discrimination issue by viewing the statutory scheme as a discrimination against wage-earning women, who paid the same social security taxes as men, rather than against the surviving widower. With no mention of *Reed*'s equal protection standard, the Court used the language of the rational basis test and declared the gender-based classification "entirely irrational."[76]

Kahn, *Ballard*, and *Wiesenfeld* demonstrated the Court's unwillingness to find the respective statutes unconstitutional based on discrimination against men. In *Craig v. Boren*,[77] however, the Court not only took an

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73. The Court emphasized:

> [T]he different treatment of men and women naval officers under [the statutory scheme] reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service. . . . Specifically, "women may not be assigned to duty in aircraft that are engaged in combat missions nor may they be assigned to duty on vessels of the Navy other than hospital ships and transports." 10 U.S.C. § 6015. Thus, in competing for promotion, female lieutenants will not generally have compiled records of seagoing service comparable to those of male lieutenants. In enacting and retaining § 6401, Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs."

419 U.S. at 508 (quoting H.R. REP. No. 216, 90th Cong., 1st Sess. 5 (1967)). Significantly, the dissimilar situations of the men and women were imposed by the statutory scheme. *See* note 102 *infra* for a comment on the same statutory imposition of dissimilar treatment in *Parham*.

74. 420 U.S. 636 (1975). The Court declared: "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Id.* at 648.

75. 42 U.S.C. § 402(g) (1976).

76. 420 U.S. at 651. The Court invalidated the discrimination against working women by apparently using only the minimal scrutiny of the rational basis test; yet in *Kahn* and *Ballard* the Court had upheld statutes discriminating against men while using the more rigorous scrutiny of the *Reed* test.

77. 429 U.S. 190 (1976). For reviews of this decision, see Comment, *Gender-Based Discrimination and a Developing Standard of Equal Protection Analysis*, 46 U. CIN. L. REV. 572 (1977); Note, *The Search for a Standard of Review in Sex Discrimination Questions*, 14 HOUS. L. REV. 721 (1977); Note, *Gender-Based Discrimination and Equal Protection: The Emerging Intermediate Standard*, 29 U. FLA. L. REV. 582 (1977).

activist position by invalidating a statute that discriminated against males,[78] but also enunciated an intermediate standard for equal protection review in gender discrimination cases.[79] The Court stated: "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[80] After *Craig*, a majority of the Court remained consistent and applied the substantial relationship standard to gender-based statutes.[81] In *Orr v. Orr*,[82] a recent case involving sex discrimination against a male petitioner, the Court applied that standard to invalidate an Alabama statute requiring husbands but not wives to pay alimony.[83] *Orr* suggested that the Court would approach discrimination against men with increased sensitivity, but *Parham v. Hughes*[84] and *Caban v. Mohammed*,[85] when considered to-

78. 429 U.S. at 191-92. The challenged Oklahoma statute prohibited the sale of 3.2% beer to males under 21 and females under 18.

79. The Court has recently applied this standard to classifications based on illegitimacy. Lalli v. Lalli, 439 U.S. 234 (1978). For an analysis of the balancing process involved in a "substantial relationship" standard, see Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 182-88 (1977). *See generally* Comment, *Equal Protection and the "Middle Tier": The Impact on Women and Illegitimates*, 54 NOTRE DAME LAW. 303 (1978). *See also* Bice, *Standards of Judicial Review Under the Equal Protection and Due Process Clauses*, 50 S. CAL. L. REV. 689 (1977).

80. 429 U.S. at 197. Justice Stevens concurred in the judgment but strongly disagreed as to the standard used. He stressed:

> There is only one Equal Protection Clause . . . . It does not direct courts to apply one standard of review in some cases and a different standard in other cases . . . I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply to a single standard in a reasonably consistent fashion.

Id. at 211-12 (Stevens, J., concurring).

Justices Blackmun and Rehnquist dissented on the basis of the standard used by the plurality. Both favored the continued application of the rational basis test to gender classifications. Justice Rehnquist wrote:

> I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of "rational basis," and the "compelling state interest" required when a "suspect classification" is involved—so as to counsel weightily against the insertion of still another "standard" between those two. How is this Court to divine what objectives are important? How is it to determine whether a particular law is "substantially" related to the achievement of such objectives, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at "important" objectives or, whether the relationship to those objectives is "substantial" enough.

Id. at 220-21 (Rehnquist, J., dissenting).

81. *See* Califano v. Webster, 430 U.S. 313 (1977) (upholding a statutory classification giving more favorable benefits to retired female workers than to retired male workers because of its ameliorative purpose); Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidating a statute providing survivor benefits to widows but denying them to widowers unless the deceased wife had provided three quarters of the couple's support).

82. 440 U.S. 268 (1978).

83. ALA. CODE § 30-2-51 (1975).

84. 441 U.S. 347 (1979).

85. 441 U.S. 380 (1979).

gether, show the Court's indecision when the male discriminated against has fathered an illegitimate child.

III. SEX DISCRIMINATION AGAINST PUTATIVE FATHERS

In *Parham* and *Caban* the Court not only reviewed gender-based discrimination against men, but also, for the first time, considered claims of sex discrimination against fathers of illegitimate children.[86] The Georgia statute[87] under review in *Parham* allowed the mother of an illegitimate child to sue for the wrongful death of that child. In contrast, the statutory scheme denied the father a wrongful death action unless he had legitimated the child.[88] The father brought an action seeking to recover for the wrongful death of his illegitimate son who was killed along with his mother in an automobile accident. The child's maternal grandmother, administratrix of the estate, also brought an action to recover for the boy's wrongful death.[89] In response to the father's claim, the appellee moved for a summary judgment, asserting that the putative father did not have standing to sue because he had never legitimated his child pursuant to the statutory requirement.[90] The trial court denied the summary judgment, concluding that the statute violated the due process and equal protection clauses of the fourteenth amendment.[91] The Georgia Supreme Court reversed, finding the statute rationally related to three legitimate state interests: (1) avoiding difficult problems of proving paternity, (2) promoting a legitimate family unit, and (3) setting a standard of morality.[92]

The United States Supreme Court affirmed. Justice Stewart, writing for

86. The Court decided Stanley v. Illinois, 405 U.S. 645 (1972), with a due process rationale. *See* notes 11-18 *supra* and accompanying text. Quilloin v. Walcott, 434 U.S. 246 (1978), raised a twofold equal protection claim, but the Court dismissed the claim of sex discrimination and treated only the claim of discrimination between married or divorced fathers, on the one hand, and unwed fathers, on the other. *See* notes 29-41 *supra* and accompanying text.

87. GA. CODE ANN. § 105-1307 (1968).

88. *Id.* § 74-103 (1973) provides:

> 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.

89. *Id.* § 105-1309 (Supp. 1979) provides:

> In cases where there is no person entitled to sue under the foregoing provisions of this Chapter [the Georgia Wrongful Death Chapter], the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin. In any such case the amount of the recovery shall be the full value of the life of the decedent.

90. Although never formally legitimating the child, the father had signed the birth certificate, contributed to his support, and visited him regularly. 441 U.S. at 349.

91. *Id.* at 350.

92. Hughes v. Parham, 241 Ga. 198, 243 S.E.2d 867, 869-70 (1978).

the plurality,[93] acknowledged that "a State is not free to make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class."[94] A statutory classification containing such an overbroad generalization constitutes an invidious discrimination.[95] According to the plurality opinion, a threshold test must be applied to determine if a gender-based classification results in such invidious discrimination. Only when a challenged statute contains distinctions based exclusively on the biological differences between men and women rather than the differences in their situations[96] will the plurality then apply the *Craig* substantial relationship test.[97] In *Parham*, the plurality discovered a significant difference between men and women in the statutory scheme itself. The opinion stressed that fathers and mothers of illegitimate children were not similarly situated[98] because the Georgia statute allowed a father, but not a mother, to legitimate his child[99] and thus to control the child's status. Therefore, Justice Stewart determined that the statute discriminated, not on the basis of sex, but on the basis of those fathers who legitimated their children and those who did not. Having decided that no invidious sex discrimination existed, the plurality exercised only minimal scrutiny of the statute and found a rational relationship between the legitimation requirement and the state's interest in proving paternity to avoid fraudulent claims. By applying a threshold test to determine if the statute's apparent gender distinction was based on any difference between men and women other than mere sex and then finding the crucial distinction between fathers and mothers in the statutory scheme imposed by the state,[100] the plurality opinion suggests that at least these members of the Court may search for any difference at all to justify characterizing the statute as other

93. Justice Stewart was joined by Chief Justice Burger and Justices Rehnquist and Stevens. Justice Powell concurred in the judgment.

94. 441 U.S. at 354.

95. Justice Stewart wrote in his *Caban* dissent:

> Sex-based classifications are in many settings invidious because they relegate a person to the place set aside for the group on the basis of an attribute that the person cannot change . . . . Nonetheless, gender-based classifications are not invariably invalid. When men and women are not in fact similarly situated in the area covered by the legislation in question, the Equal Protection Clause is not violated.

Caban v. Mohammed, 441 U.S. at 398 (1979) (Stewart, J., dissenting) (citations omitted).

96. 441 U.S. at 354.

97. Professor Tribe suggested that invidious discrimination usually requires strict scrutiny. L. TRIBE, *supra* note 48, at 1011; therefore, the use of this term as a threshold determination before the application of intermediate scrutiny confuses the equal protection analysis.

98. Justice Stewart distinguished *Reed* and *Frontiero* because the claimants in those sex discrimination cases were similarly situated to those of the opposite sex who benefitted from the statutory scheme. 441 U.S. at 356-57.

99. The Court noted that the constitutionality of the legitimation provision was not before the Court. *Id.* at 355 n.6.

100. Justice White's dissenting opinion emphasized the circularity of the plurality's argument by stating: "That only fathers *may* resort to the legitimization process cannot dissolve the sex discrimination in *requiring* them to." *Id.* at 361 (White, J., dissenting); *see* note 102 *infra*.

than gender-based. This posture effectively limits the instances in which the *Craig* test will be applied.

Justice Powell concurred in the Court's judgment, but wrote a separate opinion solely because he disagreed with the equal protection test used by the plurality. Recognizing that the statute resulted in sex discrimination against unwed fathers, Justice Powell wrote that gender-based distinctions must "serve important governmental objectives and must be substantially related to achievement of those objectives."[101] Even though Justice Powell would have used heightened scrutiny in examining the statute, he would have found a substantial relationship between the statute's requirements and the state's interest in avoiding difficult problems of proof of paternity.[102]

Neither the plurality opinion nor the concurring opinion squarely addressed the other two asserted state interests of encouraging family units and setting standards of morality. The plurality, instead, emphasized the father's control over both the original act of conception and the later act of legitimation and concluded it was "neither illogical nor unjust . . . to express . . . 'condemnation of irresponsible liaisons beyond the bounds of marriage' by not conferring upon a biological father the statutory right to sue for the wrongful death of his illegitimate child."[103] This censure of the putative father contrasted sharply with the Court's attitude toward the mother of an illegitimate child in *Glona v. American Guarantee & Liability Insurance Co.*[104] In that case the Court invalidated a Louisiana statute that denied the mother a wrongful death action,[105] declaring:

> [W]e see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be far-fetched to assume that women have illegitimate children so that they can be compensated in damages for their death.[106]

The plurality in *Parham* distinguished *Glona* by pointing out that the Louisiana statute denied all unwed women a wrongful death action whereas the Georgia statute in *Parham* denied only those fathers who had not legitimated their children.[107] Yet, the plurality did not mention that the mother in *Glona* could have legitimated her child under the state's statu-

101. 441 U.S. at 359 (Powell, J., concurring) (citing Craig v. Boren, 429 U.S. 190, 197 (1977)).

102. Applying the same substantial relationship test, however, Justice White would have reached the opposite result. In a dissenting opinion, joined by Justices Brennan, Marshall, and Blackmun, Justice White focused on the irrationality of the plurality's conclusion that because the state statute required putative fathers to legitimate their children, these fathers were not similarly situated to mothers who were not required to do so. In other words, the statutory scheme caused the dissimilar treatment, and the plurality resorted to it to prove the father's dissimilar situation.

103. 441 U.S. at 353. Yet, the plurality's opinion suggests that a biological father who obtains a legitimation order is less deserving of condemnation for his "sinful" act.

104. 391 U.S. 73 (1968).

105. LA. CIV. CODE ANN. art. 2315 (West 1952).

106. 391 U.S. at 75.

107. 441 U.S. at 355 n.7.

tory scheme to become eligible to recover,[108] did not do so, and still prevailed. In *Parham* the Court based its decision on the state's interest in proving paternity, but the result suggests that the Court, even though it used the rational basis test in both *Parham* and *Glona*, condoned a statute penalizing fathers of illegitimate children but not one affecting mothers.

The decision in *Caban v. Mohammed*[109] provides an anomalous contrast to the result in *Parham*. The statute under attack in *Caban* required only the consent of the mother for the adoption of her illegitimate child.[110] Accordingly, it operated to prevent adoption by a putative father of his children if the mother withheld consent and to deny the father the same veto unless he could prove that adoption by someone else would not be in the child's best interest. Appellant Caban fathered two illegitimate children[111] during the several years he lived with their mother. The children's birth certificates identified Caban as their father, and he continued to contribute to their support even after the mother left with the children to marry the appellee Mohammed. After the appellant tried to gain custody of the children, the appellees, the mother and her husband, petitioned to adopt them. Caban cross-petitioned for adoption, but the New York Surrogate Court granted the Mohammeds' petition.[112] The New York Supreme Court[113] and the New York Court of Appeals affirmed,[114] based on the state's concern for the best interests of the child for whom adoption provides a legitimate family unit.

Caban appealed to the United States Supreme Court, claiming that the gender-based distinction in the statute violated the equal protection clause and that he had been denied due process because he had not been proved an unfit parent, as required by *Stanley*, before being deprived of his children.[115] Although a similar Georgia statute had been upheld in *Quilloin*,[116] the Court, in a five-to-four decision, invalidated the New York statute. Justice Powell, writing for the majority, joined the four dissenting Justices from *Parham*[117] and applied the intermediate level of equal protection scrutiny[118] to the statute without mentioning the threshold test of *Parham*.[119] The Court stressed that fundamental differences do not exist between mothers and fathers in their relationships with their children;

108. 391 U.S. at 79 n.7.
109. 441 U.S. 380 (1979).
110. N.Y. DOM. REL. LAW § 111 (McKinney 1977).
111. The children were four and six years old at the time of the claim.
112. 441 U.S. at 383-84.
113. *In re* Anonymous, 56 A.D.2d 627, 391 N.Y.S.2d 846 (1977).
114. *In re* Anonymous, 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977).
115. 441 U.S. at 385.
116. *See* notes 29-39 *supra* and accompanying text.
117. Justices Brennan, White, Marshall, and Blackmun joined Justice Powell in the decision of the Court.
118. The Court also repeated the *Reed* test requiring a fair and substantial relation to the objective of the legislation, suggesting that the *Reed* and *Craig* tests are interchangeable. 441 U.S. at 391.
119. Justice Powell, who believed the substantial relationship standard should have been applied in *Parham*, authored the *Caban* decision.

therefore, the statute would apparently fail the threshold test, if it were applied, because no differences other than sex separated the mother of an illegitimate child who could consent to the child's adoption and the father who could not. Because, in some instances, the father-child relationship is fully comparable to the mother-child relationship once the child passes infancy,[120] the Court rejected the appellees' contention that mothers are closer to their children than fathers. The Court distinguished *Quilloin* on the ground that the father in that case had not established a substantial relationship with his children as had Caban.[121] Recognizing the state's legitimate interest in promoting adoptions, the Court nonetheless decided that this interest did not justify the gender-based distinction in the statute. Furthermore, the Court saw no reason to uphold the statute in order to avoid problems in identifying unwed fathers because those fathers who did not participate in rearing their children could constitutionally be denied the privilege of vetoing their adoption,[122] while those fathers like Caban who continued to have a close relationship with their children past infancy could easily be identified.[123]

The four Supreme Court Justices who joined Justice Powell in striking the adoption statute discriminating against fathers of illegitimate children in *Caban* also would have granted the putative father's claim in *Parham*. As a result of Justice Powell's shifting alignment[124] in these two cases, however, the law now requires a putative father's consent to the adoption of his children if he has maintained a close relationship with them, but denies him a recovery in damages for their wrongful death unless he has legitimated them. Justice Powell clarified his contrasting opinions by emphasizing that the statutory scheme in *Parham* gave the father complete control over the disqualifying factor in the statute by permitting a wrongful death action by a father if he had legitimated his children.[125] In *Caban*, on the other hand, the father could not remove himself from the statutory burden—regardless of his proof of paternity.

Justice Powell's opinions in these two cases suggest his application of a sliding equal protection standard for evaluating gender-based statutes affecting putative fathers that depends on whether an economic interest or an interest in preserving a personal relationship between father and child

120. The Court's conclusion about father-child relationships was limited to children past infancy. 441 U.S. at 389.

121. *Id.* at 389 n.7.

122. *Id.* at 392. For a discussion of this conclusion in Quilloin v. Walcott, 434 U.S. 246 (1978), see text accompanying notes 29-39 *supra*.

123. 441 U.S. at 393.

124. Justice Powell concurred with Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens in *Parham*, but joined with Justices Brennan, White, Marshall, and Blackmun to form the majority in *Caban*.

125. Parham v. Hughes, 441 U.S. at 360. Justice White's dissent points out, however, that the Georgia statutory scheme prevents even fathers of legitimate children from bringing a wrongful death action when the mother is alive, so that the entire scheme is based on the presumption that fathers are not injured by the death of their children and not deserving of a recovery for their loss. *Id.* at 368.

is involved.[126] Although Justice Powell purportedly would have applied the same substantial relationship standard in both *Parham* and *Caban*, his argument in *Parham* that the state's interest in proof of paternity justifies the exclusion of a putative father from a wrongful death recovery pales when he considers the state interest in proving paternity insufficient in *Caban* and accepts the identical proof[127] from a putative father who wishes to prevent his child's adoption. Justice Powell himself has acknowledged that "[h]ard questions cannot be avoided by a hypothetical reshuffling of the facts."[128]

IV. EFFECT OF CABAN AND PARHAM ON TEXAS ADOPTION AND WRONGFUL DEATH PROCEDURE

Before being considered a parent under the Texas statutory scheme, a putative father must legitimate his child.[129] Under section 13.21[130] of the Texas Family Code, legitimation of a child by his father first requires the father's execution of a statement of paternity.[131] Subsections 13.21(b)(3) and 13.21(c) also require the consent of the mother, the person with custody, or the court before a father may legitimate his child and thus be considered a parent with the commensurate statutory rights and protec-

126. Parham sought only after-death dollar benefits. Caban, however, had married another woman after he and Marie Mohammed separated and wished to adopt his children and continue a relationship with them; once adoption by the stepfather was approved, however, the New York statutory scheme denied the natural father of an illegitimate child any rights, including visitation. N.Y. DOM. REL. LAW § 117 (McKinney 1977).

127. Both Caban and Parham had signed their children's birth certificates, contributed to their support and maintained regular contact. Parham v. Hughes, 441 U.S. at 349; Caban v. Mohammed, 441 U.S. at 382.

128. Trimble v. Gordon, 430 U.S. 762, 774 (1977).

129. TEX. FAM. CODE ANN. § 11.01(3) (Vernon 1975) provides: " 'Parent' means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated."

130. *Id.* § 13.21 (Vernon Supp. 1980) (footnote omitted) provides:

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the State Department of Public Welfare may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of the court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservator, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

(d) A suit for voluntary legitimation may be joined with a suit for termination under Chapter 15 of this code.

(e) A suit under this section may be instituted at any time.

131. *Id.* § 13.22.

tions afforded to parents.[132] If legitimation is granted by the court, the putative father's consent to the adoption of his child is essential, because section 16.03 provides that "no petition for adoption of a child may be considered unless there has been a decree terminating the parent-child relationship as to each living parent of the child or unless the termination proceeding is joined with the proceeding for adoption."[133]

Neither unwed mothers nor parents of legitimate children have to meet the legitimation and consent requirement of section 13.21 before establishment of their parental rights.[134] Furthermore, to divest parents of legitimate children or mothers of illegitimate children of their parental rights, the state must show them to be unfit according to the standards of section 15.02.[135] By requiring the consent of the mother or the court before a pu-

132. *See* Smith, *Illegitimate Children and Their Fathers: Some Problems with Title 2*, 5 TEX. TECH L. REV. 613, 621 (1974).

133. TEX. FAM. CODE ANN. § 16.03(b) (Vernon Supp. 1980).

134. *Id.* §§ 12.01-.02 (Vernon 1975 & Supp. 1980).

135. *Id.* § 15.02 (Vernon Supp. 1980) provides:

> A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:
>
> (1) the parent has:
>
> (A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or
>
> (B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or
>
> (C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months; or
>
> (D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or
>
> (E) engaged in conduct or knowingly placed the child with persons who engage in conduct which endangers the physical or emotional well-being of the child; or
>
> (F) failed to support the child in accordance with his ability during the period of one year ending within six months of the date of the filing of the petition; or
>
> (G) abandoned the child without indentifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or
>
> (H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or
>
> (I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or
>
> (J) been the major cause of:
>
> (i) the failure of the child to be enrolled in school as required by the Texas Education Code; or
>
> (ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

tative father can legitimate his child and thus become a parent,[136] the Texas statute can operate to deprive the natural father of his child without proof before the court that the father is unfit according to section 15.02. Rather, the court, in its discretion,[137] can determine that the best interests of the child merit a denial of the putative father's claim.[138] According to *Stanley v. Illinois*,[139] a natural father is "entitled to *a hearing on his fitness as a parent* before his children [are] taken from him . . . ."[140] To grant such a hearing to fathers of legitimate children while denying it to fathers of illegitimate children violates the equal protection clause. The provision of section 13.21 requiring a third party's consent before establishment of the putative father's rights while imposing no such condition upon fathers of legitimate children, therefore, could have been considered unconstitutional judged by *Stanley* standards even before the impact of the *Caban* decision.

The Texas Supreme Court, however, in *In re K*[141] upheld the provision of subsection 13.21(c) that allows court discretion to deny a legitimation decree based on the best interests of the child.[142] The court wrote: "*Stanley* does not decree that all unwed fathers have fundamental rights to full parental status or that every statutory discrimination against the unwed father is suspect. The overriding interest of state and courts is the welfare of the affected children."[143] According to the Texas Supreme Court, the putative father constitutionally can be denied a legitimation decree even if he possesses uncontested proof of paternity.

Based on the Supreme Court's *Caban* decision, however, section 13.21 denies the putative father equal protection because he is treated differently

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(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

136. *Id.* § 11.01 (Vernon 1975) provides that a parent is a man whose child is legitimate. By being denied voluntary legitimation under § 13.21, the putative father remains a nonparent. Ironically, an involuntary determination of paternity under § 13.09 creates the parent-child relationship. TEX. FAM. CODE ANN. § 13.09 (Vernon 1975 & Supp. 1980).

137. One commentator suggests that "discretion" is often "caprice." Smith, *Title 2: Parent and Child*, 8 TEX. TECH L. REV. 19, 71 (1976).

138. The court can make such a finding based on a general presumption of a father's unfitness rather than a specific finding according to the criteria of § 15.02. *See In re* K, 535 S.W.2d 168, 174-75 (Tex. 1976) (Pope, J., dissenting).

139. 405 U.S. 645 (1972).

140. *Id.* at 649 (emphasis added). The holding in *Stanley* applies to adoption as well as custody proceedings. *See* text accompanying notes 23-25 *supra*.

141. 535 S.W.2d 168 (Tex. 1976). The putative father had not assisted the mother after learning of her pregnancy. Before the child's birth, he was confined to the penitentiary for interstate transportation of a 14-year-old girl and a stolen vehicle. *Id.* at 168-69. After the decision in *In re* K, the Texas Legislature amended § 15.02 to include § 15.02(H), which provides that a father is unfit if he abandons the mother during pregnancy. *See* TEX. FAM. CODE ANN. § 15.02(1)(H) (Vernon Supp. 1980). This provision prevents an irresponsible father from claiming his parental rights without the necessity of the discriminatory provision of *id.* § 13.21(b), which can deny a father with proof of paternity the right to be considered a "parent."

142. 535 S.W.2d at 170.

143. *Id.* at 171.

from the unwed mother. Under the Texas statutory scheme, an unwed mother is a parent because of her biological relationship to her child, whereas the father's undisputed proof of paternity does not qualify him as a parent without the approval of a third party. Thus, the father is effectively denied the opportunity to consent to his child's adoption if the court believes the child's best interests justify denying a legitimation decree and terminating the rights of the putative father. Addressing the issue of the child's best interests, the *Caban* Court wrote:

> We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Moreover, adoption will remove the stigma under which illegitimate children suffer. But the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction of [the New York statute].[144]

Rather, the distinction must bear a substantial relation to the state's interest in providing adoptive homes.[145] The gender-based distinction in the Texas statutory scheme does not bear such a substantial relation because it sets up an arbitrary distinction between an unwed mother, whose rights can be terminated and thus adoption of her child allowed only by showing cause under section 15.02, and an unwed father whose rights can be terminated at the discretion of the mother or the court. The same comment that the United States Supreme Court made about the New York statute in *Caban* applies to the Texas statute: "The effect of [the] classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child."[146]

A Texas putative father also suffers discrimination under the state's wrongful death statute.[147] Although the *Parham* court upheld the statutory distinction that denied the putative father a wrongful death action, the Court emphasized that the natural father could have recovered if he had legitimated the child. Significantly, the Georgia legitimation statute does not require the specific consent of the mother or the court before a legitimation decree can be granted to the father.[148] The relevant Texas statute allows a "parent" of the deceased child to institute a wrongful death action.[149] Because section 13.21 can operate to deny a putative father the

144. Caban v. Mohammed, 441 U.S. 380, 391 (1979). Justice Stewart in his dissent in *Caban* maintained that the Court's decision ignored the rights of the illegitimate child who, being denied adoptive parents, remained illegitimate. *Id.* at 400 (Stewart, J., dissenting).

145. 441 U.S. at 391.

146. *Id.* at 394. Justice Powell commented that Caban was powerless to remove himself from the statutory burden, regardless of proof of paternity, because he could not legitimate his child. The Texas statute provides for legitimation, but disallows absolute, undisputed proof of paternity to establish the rights of a "parent."

147. TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1975).

148. GA. CODE ANN. § 74-103 (1973).

149. TEX. REV. CIV. STAT. ANN. art. 4675 (Vernon 1975) (emphasis added) provides:

> Actions for damage arising from death shall be for the sole and exclusive benefit of and may be brought by the surviving husband, wife, children, and *parents* of the person whose death has been caused or by either of them for the benefit of all. If none of said parties commence such action within three cal-

rights of a parent, even when he is legally identified as the father of the child, he is arguably denied equal protection by the combined operation of the Texas wrongful death statute and section 13.21. In contrast, fathers of legitimate children and unwed mothers are considered parents eligible to bring suit for the death of a child without having to meet the strict legitimation requirements imposed upon putative fathers.

V. CONCLUSION

Although the Supreme Court's decision in *Kahn* reflected an unwillingness to confront squarely a statute's sex discrimination against a male, the *Craig* decision and the recent *Orr* opinion demonstrated the Court's recognition that equal protection means equal treatment of both sexes. The plurality in *Parham*, however, retreated in its equal protection approach to gender discrimination by articulating a threshold test requiring the presence of invidious discrimination before a statute that seems clearly based on gender must meet the substantial relationship test established in *Craig*. Apparently, if the four members of the plurality can discover any constitutionally cognizable difference between men and women upon which a challenged statute is based, they will apply the rational basis test, and the statute will thus be upheld. The only difference between the father and mother in *Parham* resulted from a statutory provision that required putative fathers, but not mothers, to legitimate their children, certainly not a significant inherent distinction between men and women. Because the gender discrimination at issue in *Parham* involved fathers of illegitimate children, the plurality may have enunciated this threshold test to avoid confronting, whenever possible, the complex issues involved in granting equal protection to the putative father. If these Justices continue to apply the threshold test to all statutes as clearly based on gender as that in *Parham*, however, the effect will be, in many instances, an abdication of the heightened scrutiny of the intermediate standard set out in *Craig* as well as further confusion in the somewhat unsettled three-tiered approach to equal protection analysis.

Even if the majority had applied the substantial relationship test in both *Parham* and *Caban*, Justice Powell's opinions in these cases suggest that a putative father's claim for equal protection may be granted if it involves a personal relationship with his child, but denied if it is based on an economic interest arising after the child's death. The substantial relationship standard does provide a less rigid approach than that previously used in the two-tiered model, but it allows significant subjectivity in the analysis as suggested by Justice Powell's inconsistent opinions in *Parham* and *Caban*.

Caban does expand the putative father's rights in the area of adoption

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endar months after the death of the deceased, the executor or administrator of the deceased shall commence and prosecute the action unless requested by all of such parties not to prosecute the same. The amount recovered shall not be liable for the debts of the deceased.

A putative father is a parent only if he has legitimated the child. *See* TEX. FAM. CODE ANN. § 11.01(3) (Vernon 1975).

and will significantly affect state laws such as those in Texas that operate to deny the father a voice in the future of his illegitimate child. The Texas statutory scheme clearly discriminates against unwed fathers on the basis of their sex because an unwed mother becomes a parent as a result of her biological relationship whereas a father may be denied his parenthood even when his paternity is undisputed. Furthermore, an unwed mother's rights regarding her child can only be terminated by specific proof that she is unfit, while a father may lose his child at the discretion of the mother or the court. This distinction based merely on the sex of the parent meets even the threshold requirement set out by Justice Stewart in *Parham*.

Because of the threshold test enunciated in *Parham*, equal protection review of gender-based statutes may be less rigorous in those instances when the four *Parham* Justices initially find no invidious discrimination than it would be if they maintained the *Craig* standard for all gender discrimination. Unless the Court uses the substantial relationship test for all gender discrimination, and unless it sharpens the analytical components of the intermediate standard, the putative father will continue to receive equal protection only on an ad hoc basis.