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FAMILY VALUES AND THE SUPREME COURT

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I. INTRODUCTION

CASES involving unwed fathers asserting paternal rights pose unique problems for the Supreme Court. The unwed father cases[1] often raise sensitive social issues as well as constitutional challenges to various state domestic relations statutes. Unwed fathers, like other unpopular parties, face a greater than average risk of denial of their Fourteenth Amendment rights because of moral opprobrium by the public and, by extension, the courts.[2] This Article examines the questions of whether and to what extent public opinion and morally based judgments influence judicial decisions.[3] The six cases involving constitutional rights of unwed or putative[4] fathers which were heard by the United States Supreme Court between 1972 and 1989 are specifically employed in this examination.

The discussion focuses on the two unwed father cases most illustrative for its purposes, *Parham v. Hughes*[5] and *Caban v. Mohammed*.[6]

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1. *See infra* note 36.
2. *See infra* notes 201-13 and accompanying text.
3. *See infra* notes 173-213 and accompanying text.
4. A putative father is defined as "the alleged or reputed father of a child born out of wedlock." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990). Objections have been raised against the use of the word "putative" to describe nonmarital fathers as it immediately calls into question the fact of fatherhood by those whose rights may depend upon a finding of biological paternity in cases where no real factual dispute of paternity exists. Bridgitte M. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV 10, 53 n.288 (1975).
5. 441 U.S. 347 (1979).
6. 441 U.S. 380 (1979).

Like the others, these cases provided the Court with an opportunity to decide an issue involving illegitimacy and the extent of a state's authority to legislate different treatment of its citizens, on the one hand, and the extent to which distinctions may be justified within the bounds of the Federal Constitution, on the other. Specifically, the Court in both cases looked at the extent to which a state could deny fathers of illegitimate[7] children those rights which were freely granted to unwed mothers and married or divorced parents. Neither case involved the difficult issue of establishing paternity, insofar as each involved fathers who had maintained close, loving relationships with their illegitimate children and who had contributed to their support.[8] Despite their many similarities, the rulings in these two cases are simply inconsistent, a fact which has piqued this writer's "constitutional curiosity."[9]

II. THE FAMILY AND THE LAW

The determination of the legal status of the family unit is within the constitutional authority of each state.[10] State lawmakers have al-

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7. The word "illegitimate" is defined as "that which is contrary to law; term is usually applied to children born out of lawful wedlock." BLACK'S LAW DICTIONARY 747 (6th ed. 1990). There are numerous objections to the use of this word to describe the innocent children born to nonmarital parents. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972), where the Court made the following observation:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust . . . . [L]egal burdens should bear some relationship to individual responsibility or wrongdoing. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth . . . .

406 U.S. at 175-76 (dictum).

8. These facts distinguish *Caban* and *Parham* from two more recent cases which are discussed below: Lehr v. Robertson, 463 U.S. 248 (1983) (upholding a New York statute by ruling that it did not operate to deny a putative father equal protection insofar as he had never established any custodial, personal, or financial relationship with his illegitimate child); and Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that a California statute which created the presumption that a child born to a married woman living with her husband is the child of the marriage, unless the husband was impotent or sterile, did not violate substantive due process rights of putative father). *See infra* notes 63-88 and accompanying text.

9. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968).

10. Trimble v. Gordon, 430 U.S. 762, 771 (1977) (dictum); *see, e.g.*, EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY 27 (1986); Lynda H. Walters & Audrey W. Elam, *The Father and the Law*, 29 AM. BEHAVIORAL SCIENTIST 78, 78 (1985) stating:

> Traditionally families have been regulated not by federal constitutional law but by state laws. One reason for locating the regulation of families in the states may have been the fact that early jurisdiction over families was held by the church. Another important reason is that issues concerning family life and/or personal status have been differentiated from constitutional issues (footnotes omitted).

ways been concerned with the family unit insofar as it is a fundamental social institution.[11] Predictably, laws governing familial relationships have developed in line with the norms governing behavior in society at large.[12] Indeed, there have always been laws which have reinforced certain presumptions regarding the roles and relationships between and among the members of families. At common law, fathers were thought to have a natural right to exclusive custody—read possession—of their children. Mothers, on the other hand, had only the right to receive the love and respect of their children.[13]

American courts did not follow the example of England, and generally refused to acknowledge an absolute right to child custody in the father.[14] American courts did, however, treat mothers and children similarly insofar as both were deemed to need of the protection of the father, who was the legal head of the household and responsible for supporting the family.[15] Nonetheless, judges in United States courts have long been more likely to base their decisions on the facts and circumstances in individual cases,[16] rather than on a presumption that a father's actions in his role as head of the household are legally supportable.[17] For example, on the issue of whether to resolve a child custody

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11. Trimble v. Gordon, 430 U.S. 762, 769 (1977); *see generally* JOSEPH GOLDSTEIN & JAY KATZ, THE FAMILY AND THE LAW (1965); HENRY S. MAINE, ANCIENT LAW (4th ed. 1870); Roger A. Arnold, *Marriage, Divorce, and Property Rights: A Natural Rights Framework, in* THE AMERICAN FAMILY AND THE STATE 195 (Joseph R. Peden & Fred R. Glahe eds., 1986); Lyla H. O'Driscoll, *Toward a New Theory of the Family, in* THE AMERICAN FAMILY AND THE STATE, *supra,* at 81.

12. *See* PETER N. SWISHER ET AL., FAMILY LAW: CASES, MATERIALS AND PROBLEMS 1 (1990). Various commentators have observed that family law theory and doctrine are in a period of transition because of a need to come more in line with the reasonable expectations of a contemporary society. *See, e.g.*, MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); Carl E. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REF. 1039 (1985).

13. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *453 (9th ed. 1978).

14. Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 234 ("An absolute rule of paternal preference does not appear to have been generally applied in nineteenth century America, and in many jurisdictions courts were authorized to award custody to either parent . . . .").

15. Helms v. Franciscus, 36 Md. (2 Bland's Chancery) 519, 535 (1830); Finlay v. Finlay, 148 N.E. 624, 625 (N.Y. 1925); People *ex rel.* Olmstead v. Olmstead, 27 Barb. 9, 13 (N.Y. 1857).

16. State *ex rel.* Paine v. Paine, 23 Tenn. (4 Hum.) 513, 516 (1843); Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns For Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473, 479 (1979).

17. *See generally* State *ex rel.* Paine v. Paine, 23 Tenn. (4 Hum.) 513 (1843); Henry H. Foster & Doris J. Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, 325-26 (1978) (explaining the

matter in favor of either parent, matters including parental fitness and the best interests of the child have long been given serious consideration in United States courts.[18]

By the early twentieth century, in a striking departure from the common law, American judges had established a preference for mothers in child custody matters.[19] This presumption in favor of mothers has been severely criticized, and came under direct attack in the 1970s when several states rewrote their domestic relations laws in order to remove maternal preference bias,[20] and judicial decisions modified the preference in other jurisdictions.[21] This activism stands in contrast to an historical tendency toward protectionism against encroachments upon the autonomy of the family.[22] As a practical matter, this meant that state courts typically avoided creating the appearance of controlling what were deemed to be essentially private family decisions.[23]

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development of the "best interests of the child" standard as a basis for looking at the specific facts of each case).

18. *See* Weitzman & Dixon, *supra* note 16; Stanley v. Illinois, 405 U.S. 645 (1972); *see also* Walters & Elam, *supra* note 10.

19. As Walters and Elam state:

> In many cases, this took the form of fathers being required to prove that the mother was unfit; if she was fit, it was assumed that a child would be better off with the mother. If there was no real difference in the fitness of a father and mother, the maternal preference often served as a tie-breaker. In most cases, unless the mother could be shown to be unfit, she was almost guaranteed custody.

Walters & Elam, *supra* note 10, at 90 (citations omitted); *see also* Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1976-77).

20. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-56 (West 1986) (requiring that courts award custody based on a determination of the best interests of the child without any preference given to either the mother or father of the child); DEL. CODE ANN. tit. 13, § 722(b) (Supp. 1992) (prohibiting the courts from making legal presumptions regarding parental competence based upon the gender of the parent); IND. CODE ANN. § 31-1-11.5-21 (Burns 1987) (prohibiting courts from making legal presumptions in favor of either parent when deciding issues regarding the best interests of the child).

21. *See, e.g.*, King v. Vancil, 341 N.E.2d 65 (Ill. App. 1975); *In re* Marriage of Winter, 223 N.W.2d 165 (Iowa 1974); *In re* Marriage of Blessing, 220 N.W.2d 599 (Iowa 1974); *In re* Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974).

22. Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of* Michael H. v. Gerald D., 65 TUL. L. REV. 585, 616-17 (1991).

23. *See* Hewlett v. George, 68 Miss. 703 (1891) (holding that a mother who wrongfully committed daughter to an insane asylum could not be sued for personal injuries resulting therefrom because parent/child tort immunity was deemed to be in the best interest of peace in families); Finlay v. Finlay, 148 N.E. 624 (N.Y. 1925) (refusing to accept jurisdiction over a case involving an issue regarding child custody as between separated parents where parents were not divorced for the reason that their relationship was of no concern to the court); Roller v. Roller, 37 Wash. 242 (1905) (upholding a state statute which provided that a father could not be sued for damages

The United States Supreme Court has prohibited state legislators from attempting to exercise control over the parent-child relationship, especially with regard to such fundamentally private matters as religion and education.[24] The Supreme Court has, on occasion, upheld state statutes that interfered with the parent-child relationship where the state's objective was found to protect the health or safety of the child.[25] Though entitled to strong protection against encroachments on its autonomy,[26] the "formal family" is not immune from state laws enacted in the public interest.[27] So, "[d]espite its basically profamily position, the U.S. Supreme Court . . . has evolved to a practical position in which the rights of individuals supersede family autonomy [and] the relationship of the state to the individual [takes] precedence over relationships within families."[28]

State laws which interfere with the parent-child relationship are often attacked under the Equal Protection Clause of the Federal Constitution. State laws in general are entitled to a presumption of validity when attacked under the Equal Protection Clause,[29] and the power of lawmakers to control the legal status of the state's citizenry is seldom preempted.[30] Nonetheless, federal case law has evolved which cautions that this presumption is more easily rebuttable in the face of evidence that the state legislation creates class distinctions which are implicitly

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arising from the rape of his daughter and which prohibited intra-family tort litigation as violative of the sanctity of the family unit).

24. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down the Wisconsin compulsory school attendance statute as violative of the Free Exercise Clause of the First Amendment insofar as it interfered with Amish parents' right to direct the upbringing of their children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down an Oregon statute which required children to be educated in state-run primary schools insofar as it interfered with parental choice in the selection of schools that their children could attend); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a Nebraska statute which prohibited the instruction of foreign languages to primary school children to the extent that such instruction interfered with parental duty to educate their children).

25. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding a state statute which prohibited minors from selling magazines in public streets insofar as it represented a legitimate exercise in furtherance of the state's goal of protecting children).

26. *See supra* text accompanying notes 22-23.

27. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 562 (1983) (stating that "[a] number of permitted interests may cause the courts to limit the protection traditionally afforded to the formal family. It is instructive to observe the effects of this phenomenon in situations where a particular legal policy has demanded—and sometimes taken—something from the status of marriage as the price for upholding its own valid interest.").

28. Walters & Elam, *supra* note 10, at 89; *see also* Roe v. Wade, 410 U.S. 113 (1973).

29. Lockport v. Citizens for Community Action, 430 U.S. 259, 272 (1977).

30. *See generally supra* text accompanying note 10.

"suspect" under the Federal Constitution or that it burdens a personal fundamental right, such as a parent's right to raise his child.[31]

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31. Parham v. Hughes, 441 U.S. 347, 351 (1979). Constitutional guarantees of equal protection are generally understood to check legislative classifications with an eye toward ensuring standardized treatment for all individuals who are similarly situated. Richard Fielding, Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 809 (1973). The Supreme Court has fashioned a two-tiered analysis of cases which challenge state laws purporting to serve a legitimate governmental purpose. *Id.* These standards were first described in United States v. Carolene Prods. Co., 304 U.S. 144, 152-54 (1938) (dictum) as a part of an approach which was fashioned in an effort to reduce the "endless tinkering with legislative judgments." Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (characterizing pre-1937 Supreme Court decisions involving substantive due process).

The *reasonable relationship test* has been applied in most cases when the issue is whether the state legislation has a rational basis in its purported objectives. This standard triggers minimal judicial scrutiny. On the other hand, actionable claims which allege that a state law has had an adverse effect on either a suspect class or on fundamental personal rights have been subject to strict scrutiny by the Court. Here the state's burden is to defend the legislation by showing that it is essential to serve a *compelling state interest.*

This two-tiered approach is fairly straightforward, easy to apply, and therefore, commendable. Unfortunately, the Court's application of this test can result in rigid, automatic determinations without affording individual relief. Rational basis standards, suspect classifications and fundamental rights notwithstanding, the Supreme Court has shown little inclination to invalidate contested state laws where the state has invoked its authority to protect its own interests as asserted. *See* Morey v. Doud, 354 U.S. 457 (1957), *overruled by* New Orleans v. Dukes, 427 U.S. 297, 306 (1976); Korematsu v. United States, 323 U.S. 214 (1944); Susan E. Wills, Comment, *Paternity Statutes: Thwarting Equal Protection for Illegitimates*, 32 U. MIAMI L. REV. 339, 344 (1977).

Reed v. Reed, 404 U.S. 71 (1971) was a landmark in the development of the expansion of equal protection and significantly eased some of the tensions of the two-tiered approach. Presented with a sex-based classification which gave a mandatory preference to male candidates when qualifying estate administrators, the Court in *Reed* was not prepared to declare sex a suspect category. Nor was it prepared to uphold the overtly discriminatory statutory classification. The Court saw that a new standard was needed and it adopted one from the otherwise infrequently cited opinion of Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), to wit:

> The Equal Protection Clause [of the Fourteenth Amendment] does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Reed, 404 U.S. at 75-76 (citations omitted) [hereinafter the *Reed/Guano* test].

The *Reed/Guano* test can be compared to the traditional two-tiered standard in two important ways. *See* Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 FORDHAM L. REVIEW 605, 614-18 (1973). First, there is an amplification of the requirement that a state's defined classifications should not have the effect of treating individuals differently on the basis of criteria which are wholly unrelated to the objective of the statute, so that the statute is not redeemed simply because it meets the standards of the "rational relationship test." *Royster Guano*, 253 U.S. at 415. This new standard imposes an affirmative duty on the state to defend the statute by demonstrating a concrete connection between the objective of the statute and the classification which purports to effectuate that goal. Wills, *supra*, at 347. Second, the relationship be-

Consequently, the legislation is subject to strict, rather than minimal, judicial scrutiny. The threshold question is whether the statute enforces discriminatory treatment of individuals who are similarly situated.[32] If so, the state must show that the discrimination is necessary to protect a compelling state governmental interest. Otherwise, the statute violates the Equal Protection Clause and is voidable to the extent of the violation.[33] In addition to the strict scrutiny afforded under the Equal Protection Clause, the parent-child relationship has been accorded specific protection under the Due Process Clause of the Fourteenth Amendment.[34]

III. THE UNWED FATHER CASES

A large and increasing number of children are born to adults who choose to become parents though unmarried. Not surprisingly, the consequences of such lifestyle choices have been the subject of litigation and legislation.[35] In particular, the rights of the unwed or putative father have been litigated before the Supreme Court on six occasions, with varying results.[36] In each of the six cases, the Court ostensibly looked at the issue of whether an unwed father is entitled to the same constitutional guarantees of equal protection and due process under state laws as other parents.[37]

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tween the statute and its effect on the individual was required to be fair and substantial, rather than merely rational. This stricter standard clearly opened the way for findings of unconstitutionality in cases where a state statute infringed upon fundamental personal rights, even though the plaintiff may be unable to establish himself as a member of a suspect class. *Id.*

The significance of this rule expanding equal protection is demonstrated by its frequent application by the Supreme Court. During the Court's 1971 Term which followed *Reed*, several equal protection cases were heard in which the Court found violations of the Equal Protection Clause without resort to strict scrutiny as the basis of liability. James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972). *See also* McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954).

32. *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

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

34. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

35. *See* Elizabeth M. McCarron, Comment, *Expansion of Putative Fathers' Rights in Louisiana*, 37 LOY. L. REV. 93 (1991) (discussing the increasing recognition of the rights of biological fathers in Louisiana and in other states).

36. Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Parham v. Hughes, 441 U.S. 347 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

37. *See* U.S. CONST. amend. XIV.

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36. Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Parham v. Hughes, 441 U.S. 347 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

37. *See* U.S. CONST. amend. XIV.

Illinois argued that even if Mr. Stanley had not been given the same treatment as other parents, the distinction did not violate the Fourteenth Amendment because he could seek custody through other means such as adoption or guardianship.[45] Rejecting this argument, the Supreme Court refused to "embrac[e] the general proposition that a wrong may be done if it can be undone,"[46] and decided that the Illinois statute was unconstitutional. The Court reviewed in detail its earlier cases which clearly established that unwed fathers have an interest in their children which is "cognizable and substantial."[47] In a five to two decision,[48] the Court then ruled that Mr. Stanley had been denied equal protection on due process grounds, and remanded the matter to the Illinois Supreme Court.[49]

Stanley entitled unwed fathers, like married fathers and unwed mothers, to a hearing on fitness as a parental right.[50] Nonetheless, because of the conflicting language in its holding, it remains unclear whether the Court in *Stanley* based its decision on the Equal Protection Clause or on the Due Process Clause of the Fourteenth Amendment.[51] Given this ambiguity, states have differed in their interpretation of, and compliance with, the decision.[52]

B. Quilloin v. Walcott

Stanley was the first of the six Supreme Court cases decided between 1972 and 1989 in which the Court decided issues involving unwed fathers and their Fourteenth Amendment rights to equal protec-

45. *Stanley*, 405 U.S. at 647.

46. *Id.*

47. *Id.* at 652.

48. Justice Powell and Justice Rehnquist took no part in considering or deciding *Stanley*.

49. Chief Justice Burger and Justice Blackmun joined in the dissent opposing a majority opinion based upon due process when, in their view, "no due process issue was decided by any state court." *Stanley*, 405 U.S. at 659 (Burger, C.J., dissenting).

50. *Id.* at 658-59.

51. Steven E. Davis, Comment, *Illegitimacy and the Rights of Unwed Fathers in Adoption Proceedings After* Quilloin v. Walcott, 12 J. MARSHALL J. PRAC. 383, 384 (1979). The author observes:

> First, relying on the due process clause, the Court struck down the Illinois law as it related to the parental rights of the unwed, because it conclusively presumed parental unfitness from the fact of illegitimacy. Second, relying on the equal protection clause, the Court held that the unwed father was entitled to the same hearing on the parental fitness question as a legitimate's parents.

Id.

52. *See id.*

tion and due process.[53] The first of these cases to be heard following *Stanley* was *Quilloin v. Walcott*.[54]

In *Quilloin*, the father of an illegitimate child appealed the decision by the Supreme Court of Georgia to grant an adoption petition which had been brought by the child's stepfather. Under the Georgia law, legitimate children could not be adopted without the consent of each living parent unless the parent(s) had voluntarily surrendered rights to the child, or had been judged unfit. Yet under the Georgia statute, the adoption of an illegitimate child required only the consent of the mother.[55] A father could not veto the adoption of an illegitimate child, but acquired this right only if he had legitimated the child.[56]

The petitioner in *Quilloin* argued that he had been subjected to disparate treatment under the statute, as applied in his case, in violation of the Equal Protection Clause of the Fourteenth Amendment, insofar as it denied him the same right to veto the adoption that it provided for married fathers, divorced fathers, and married or unmarried mothers.[57] Quillion also alleged due process violations because the trial court never reached the question of abandonment or unfitness to support its refusal to allow him to veto the adoption.[58]

The U.S. Supreme Court unanimously upheld the statute, agreeing with the Georgia Supreme Court that the different treatment was supportable in view of "the strong state policy of rearing children in a family setting, a policy which . . . might be thwarted if unwed fathers were required to consent to adoptions."[59] In other words, the Court concluded that the state validly could deny the unwed father his parental rights "*in the best interests of the child*,"[60] even though the statute

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53. *See* cases cited *supra* note 36.

54. 434 U.S. 246 (1977).

55. GA. CODE ANN. § 19-8-12 (Harrison 1991).

56. *Id.* § 19-7-22 states:

> A father of a child born out of wedlock may render the same legitimate by petitioning the superior court of the county of his residence . . . . [T]he petition shall set forth the name, age, and sex of the child, the name of the mother, and, if the father desires the name of the child to be changed, the new name. If the mother is alive, she shall have notice of the petition for legitimation. Upon the presentation and filing of the petition, the court may pass an order declaring the child to be legitimate and to be capable of inheriting from the father in the same manner as if born in lawful wedlock and specifying the name by which the child shall be known.

57. *Quilloin*, 434 U.S. at 252.

58. *Id.* at 253-54.

59. *Id.* at 252 (the Court's opinion was unanimous).

60. *Id.* at 254-55 (emphasis added); *see also* Smith v. Organization of Foster Families, 431 U.S. 816 (1977) (establishing the standard of "in the child's best interest" in domestic relations

could not invoke that same child's best interests in order to deny his married father, divorced father, or unwed mother the right to veto his adoption.

C. Lehr v. Robertson

In *Lehr v. Robertson*,[61] an unwed father sought to stay an adoption proceeding which had been instituted by the child's mother and stepfather. When the adoption was subsequently granted, appellant Lehr brought an action to set it aside on the grounds that his Fourteenth Amendment rights to due process and equal protection had been violated. The applicable New York statute, which provided that the biological parents of prospective adoptees were entitled to advance notice of adoption proceedings,[62] did not apply to Lehr because he was an unwed father. Lehr's petition was denied.

The Supreme Court affirmed the New York state court's finding that Lehr had been denied neither due process[63] nor equal protection.[64] In a six to three opinion[65] written by Justice Stevens, the Court concluded that, although Lehr had a protectable family interest, the statute had provided him with adequate protection by affording unwed fathers opportunities to receive notice of pending adoptions pursuant to New York Domestic Relations Law Section 111(a), a "statutory adoption scheme that automatically provide[d] notice to seven categories of putative fathers who [were] likely to have assumed some responsibility for the care of their natural children."[66] Lehr fell within one of the categories: Section 111a(2)(b). Section 111a(2)(b) incorporated by reference New York Social Services Law, Section 372c, establishing a putative father registry wherein appellant could have filed a notice of his intent to claim paternity, which would have then entitled him to notice under Section 111.[67] Because Lehr "had not entered his name in the registry,"[68] the State of New York found that he was estopped from

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matters, in a case which prohibited the break-up of a family unit without either the consent of the parents and their children or a showing of unfitness).

61. 463 U.S. 248 (1982).
62. *Id.* at 248-54.
63. *Id.* at 256-65.
64. *Id.* at 265-68.
65. Justices Marshall, Blackmun, and White dissented.
66. 463 U.S. at 263.
67. *Id.* at 250-52 nn.4-5.
68. *Id.* at 251.

asserting a denial of due process.[69] Moreover, the Court refuted Lehr's claim that he had been "entitled to special notice because the court and the mother knew that he had filed an affiliation proceeding in another court."[70]

On the equal protection claim, the Court acknowledged that states "may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective."[71] Nonetheless, the Court distinguished *Quilloin v. Walcott*[72] on the ground that the unwed father and mother in that case were not similarly situated insofar as the father "ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."[73] Therefore, "the New York statutes at issue in this case did not operate to deny appellant equal protection."[74] Likewise, the Court concluded that Lehr was not similarly situated to the child's mother and therefore could be treated differently. The ultimate result of this convoluted reasoning was that the unwed father was denied a parental right to notice of the impending adoption of his child despite the fact that mothers were treated differently in identical situations.

D. Michael H. v. Gerald D.

The uncontested facts of *Michael H. v. Gerald D.*[75] were that the appellant, Michael H., had an adulterous affair with the appellee's wife, Carole; that Carole and her daughter, Victoria, had at one time lived with Michael H.; that he had provided Victoria with substantial support, had a loving relationship with her and considered her to be his daughter. Additionally, blood test results revealed a 98.07% probability that Michael H. was Victoria's biological father.[76]

At issue was a California statute[77] which created a presumption that a child born to a married woman who lives with her husband is a child of that marital union. Appealing the State's denial of his requests for visitation rights, Michael H. asserted that the statute denied him

69. *Id.* at 256-65.
70. *Id.* at 264-65.
71. *Id.* at 265 (citing Reed v. Reed, 404 U.S. 71, 76 (1971)).
72. 434 U.S. 246 (1977).
73. *Id.* at 256.
74. *Lehr*, 463 U.S. at 267.
75. 491 U.S. 110 (1989).
76. *Id.* at 114.
77. CAL. EVID. CODE ANN. § 621 (West 1989).

due process by depriving him of the opportunity to establish his right to associate with his child.

In a five to four decision written by Justice Scalia, the Supreme Court ruled that the statutory presumption could not rightfully be treated as procedural in nature.[78] Such presumptions, according to the Court, call into question not the adequacy of procedures but the adequacy of substantive law and policy.[79] Finding Michael H.'s procedural due process claim insufficient at law, the Court dismissed the claim and proceeded to address the substantive issues.

The Court considered whether the state's interest was sufficient to cut off the paternal relationship which the appellant had established with his child. Finding that this argument was based on an assumption that Michael H. had a constitutionally protected liberty interest in his relationship with Victoria, the Court ruled that such protection did not apply in this case. Justice Scalia stated that in order for an interest to be protected under the Fourteenth Amendment, it must be one traditionally protected by our society.[80] The Court concluded that Michael H. was not denied a protectable liberty interest because the interest he advanced was not "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[81]

Distinguishing *Michael H.* from *Stanley v. Illinois*,[82] *Quilloin v. Walcott*,[83] *Caban v. Mohammed* (discussed later herein),[84] and *Lehr v. Robinson*,[85] the Court declared that Michael H. had merely misread those cases by claiming that their rulings had established a liberty interest in biological, but unwed, fathers. Revealing a personal belief that the Court could not both recognize unwed fathers' constitutional rights and support American family values, Justice Scalia repudiated this interpretation of the unwed father cases by stating that "our traditions have protected the marital family . . . against the sort of claim [appellant] asserts."[86]

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78. *Michael H.*, 491 U.S. at 119.
79. *Id.* at 120-21.
80. *Id.* at 122.
81. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
82. 405 U.S. 645 (1972). *See supra* note 39 and accompanying text.
83. 434 U.S. 246 (1977). *See supra* note 54 and accompanying text.
84. 441 U.S. 380 (1978). *See infra* note 91 and accompanying text.
85. 463 U.S. 248 (1982). *See supra* note 61 and accompanying text.
86. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989). Justice Scalia asserts that "'[U.S. Supreme Court] decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.'" *Id.* (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

The Court concluded that Michael H.'s interest could not be accorded protection as a fundamental freedom insofar as Michael H. had failed to show that American society "has traditionally accorded [biological fathers] parental rights, or at least has not denied them."[87] The Court also concluded that the state satisfied the rational basis test under equal protection.[88]

E. Caban v. Mohammed *and* Parham v. Hughes

The two most intriguing of the six unwed father cases are *Caban v. Mohammed*[89] and *Parham v. Hughes*.[90] Alhough both cases were decided on the same day in consecutive opinions, the Court, in two five to four decisions, reached conflicting conclusions about the extent of a state's power to deny the parental rights of the natural fathers of illegitimate children.

1. *Caban v. Mohammed*

In *Caban v. Mohammed*,[91] the unwed father, Abdiel Caban, appealed from a ruling by an adoption panel granting the adoption petition filed by the mother of his children and her new husband, while denying his cross petition to adopt. At issue was whether Section 111 of the New York Domestic Relations Law violated Caban's constitutional rights by denying him equal protection under a law which permitted an unwed mother, but not an unwed father, to block the adoption of her children simply by withholding consent.[92] The appellant Caban argued that the statute drew an insupportable distinction between the adoption rights of unwed mothers and those of unwed fathers, thus violating the Equal Protection Clause of the Fourteenth Amendment.

Caban also based his appeal upon an additional argument that the statute violated his right to due process by denying him a fitness hearing in further abrogation of his parental rights.[93] Unlike the mother, Maria Mohammed, Caban was granted neither a fitness hearing nor

87. *Michael H.*, 491 U.S. at 126.
88. *Id.* at 131-32.
89. 441 U.S. 380 (1978).
90. 441 U.S. 347 (1978).
91. 441 U.S. 380 (1978).
92. The provision stated in relevant part: " '[C]onsent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) [o]f the mother, whether adult or infant, of a child born out of wedlock. . . .' " *Id.* at 385 (quoting N.Y. DOM. REL. LAW § 111 (McKinney 1977)).
93. 441 U.S. at 385.

any opportunity to block the adoption, even though his parental relationship with his children was well-established and substantial.[94]

Appellee, the State of New York, argued that the statute was not unconstitutional insofar as it had consistently and primarily looked to the best interests of the child and it could also abrogate the mother's right to consent in order to serve those interests.[95] The Supreme Court rejected this interpretation of New York case law, relying instead on the New York Court of Appeals ruling in *In re Corey L. v. Martin L.*,[96] which held that the question of whether parental consent was indispensable to the adoption process was completely separate from consideration of the child's best interests.[97] The Court found there was no innate difference between the parental roles of Abdiel Caban, as the unwed father, and Maria Mohammed, as the unwed mother, and that any presumption to the contrary under the New York statute was, in fact, insupportable.[98] Finding a gender-based distinction between unmarried mothers and unmarried fathers imbedded in the statute, the Court applied the standard of *Reed v. Reed*:[99] such distinctions must serve important state governmental objectives and they must be substantially related to the achievement of those objectives.[100]

In *Caban*, the State of New York was able to name several important goals. There was no dispute over the State's asserted rights to protect the loving relationship which one parent may have established with his or her child; to promote the adoption of illegitimate children; and to attempt to do all of those things which it may consider to be in the best interests of children.[101] These were certainly worthy and laudable goals. The Supreme Court ruled, however, that New York had failed to show a substantial relationship between the statute's different treatment of unwed fathers and unwed mothers and the State's interest in providing adoptive homes for illegitimate children.[102] There simply was no evidence that an unwed father was more likely than an unwed mother to hinder an adoption.[103] Consequently, the Court held that the

94. *Id.* at 385-87.
95. *Id.* at 387.
96. 380 N.E.2d 266 (N.Y. 1978).
97. 441 U.S. at 387 n.5.
98. *Id.* at 389.
99. 404 U.S. 71 (1971). *See also* Craig v. Boren, 429 U.S. 190 (1976).
100. *Craig*, 429 U.S. at 197.
101. *Caban*, 441 U.S. at 391.
102. *Id.*
103. In *Caban*, the Court noted that any impediment to adoption (which an unwed father may produce) is usually the result of a natural parental interest shared by both genders alike; it is not a

New York statute was unconstitutional and that the unwed father was entitled to parental rights equal to those granted to unwed mothers and to married fathers.

Speaking for the Court, Justice Powell declared that Section 111 was unconstitutional to the extent that it treated unmarried parents differently based solely on their sex. The statute violated the Equal Protection Clause of the Fourteenth Amendment because it excluded fathers from the State's adoption process without showing any substantial relationship between the gender of the parent and the interests which the State of New York said it sought to protect.[104] Relying on the *Reed/Guano* test, the Court said:

> As we repeated in *Reed v. Reed* . . . such a statutory "classification 'must be reasonable, *not arbitrary*, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "[105]

The state has an important interest in providing for the well-being of children, illegitimate and legitimate. The extent of its authority to sponsor enabling legislation to further this interest is limited, however, and cannot justify the gender-based distinctions of Section 111. Rather, the relevant cases analyzing the Equal Protection Clause require a showing that such distinctions are structured reasonably to further stated objectives.[106]

One rationale for denying unwed fathers the same rights afforded other biological parents is that to do so would discourage prospective adoptive parents. Justice Stevens reiterated this argument in his dissent in *Caban*.[107] Responding to a suggestion that the state either require or permit the consent of both parents in connection with adoption proceedings,[108] Justice Stevens voiced strong opposition:

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manifestation of any profound difference between the affection and concern of mother and father for their children. Neither the State nor the appellees have argued that unwed fathers are more likely to object to the adoption of their children than are unwed mothers; nor is there any self-evident reason why as a class they would be. *Id.* at 391-94.

104. *Id.* at 388.

105. *Id.* at 391 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)) (emphasis added) (first citation omitted).

106. *Id.* at 391.

107. *Id.* at 402.

108. *Caban* also suggested that the State law should require mandatory hearings in order to determine whether the consent of both (all) parents is either unnecessary or unobtainable. This rule would be especially important in cases involving the adoption of older children against the

> [S]uch a rule would remove the mother's freedom of choice in her own and the child's behalf without also relieving her of the unshakable responsibility for the care of the child. Furthermore, questions relating to the adequacy of notice to absent fathers could . . . cause the adopting parents to doubt the reliability of the new relationship, and add to the expense and time required to conclude what is now usually a simple and certain process.[109]

Justice Stevens presented no support for his argument that mothers have an inherently unshakable binding relationship to the child.[110] However, even if Justice Stevens' argument were well-founded, it does not obviate the need to acknowledge the constitutional rights of the natural father.

Indeed, insofar as competing claims by fathers impede the smooth operation of a process which has been designed to facilitate the adoption of illegitimate children, such claims demonstrate a strong paternal interest, more than any profound difference in the nature of the affection and concern fathers feel for their children as compared to that of mothers.[111] Neither party in *Caban* alleged that unwed fathers are more likely than unwed mothers to make arbitrary objections during adoption proceedings, nor is there any reason to presume that they would.[112]

Two additional weaknesses plague Justice Stevens' argument. First, if the natural mother of an illegitimate child decides, for whatever reason, to place the child for adoption, then she has expressly exhibited a willingness to relinquish her parental rights and responsibilities. Under such circumstances, a statute which subordinates the rights of the natural father who desires to adopt his children and raise them to those of a mother who is unable or unwilling to do so, is arbitrary[113] and unfair. Second, the state's interest in facilitating the certainty and simplicity of the adoption process cannot be so substantial as to supersede the inherent right of a child's natural parents, fathers included. In

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wishes of the natural father who has established a substantial parental relationship with them.

109. *Id.* at 408-409.

110. This line of reasoning should have led Justice Stevens to conclude that a natural father has an inherently closer relationship to the child which is *second only to that of the natural mother.*

111. *Caban*, 441 U.S. at 391-92.

112. *Id.* at 392.

113. *See supra* note 107 and accompanying text.

fact, as noted in Justice Powell's opinion in *Caban*, the New York statute[114] unreasonably discriminated against unwed fathers without regard to the question of whether they had manifested a significant paternal interest in the child.[115]

Thus, the full effect of Justice Stevens' dissent becomes apparent. He not only advocated subordination of the rights of unmarried fathers to those of unmarried mothers (when both parents are similarly situated), but to those of prospective adoptive mothers and fathers as well.

In most cases, the underlying concern of the state is to provide for the best interests[116] of the illegitimate child. Perhaps the natural mother must be accorded the first opportunity to provide for those interests. It defies logic, however, to deny the natural father of the child at least the second opportunity to provide for those interests. Common sense dictates that the interests of prospective adoptive parents, though important, should be considered only after full consideration of the interests of both of the child's natural parents. Any concern about the efficiency of adoption proceedings is merely incidental. There can be no constitutional justification for laws which deny the rights of the child's natural father for the sake of administrative convenience.[117]

2. *Parham v. Hughes*

In *Parham v. Hughes*,[118] an unwed father appealed the ruling of the Georgia Supreme Court upholding the constitutionality of a provision of the Georgia State Code which precluded him from suing for the wrongful death of his son because he had not legitimated the child during the child's life, but which did not bar the same action when brought by an unwed mother.[119] Petitioner argued that the Georgia statute violated the Equal Protection Clause of the Fourteenth Amendment by denying the father, but not the mother, of an illegitimate child the right to sue for the child's wrongful death.[120] The basis of the claim

114. *See supra* note 92 and accompanying text.
115. *Caban*, 441 U.S. at 394.
116. *See supra* notes 17-19, and accompanying text.
117. Stanley v. Illinios, 405 U.S. 645, 658 (1972).
118. 441 U.S. 347 (1979).
119. The statute provided:

> "A mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, unless said child shall leave a wife, husband, or child. The mother or father shall be entitled to recover the full value of the life of such child. *In suits by the mother*, the illegitimacy of the child shall be no bar to recovery."

Id. at 348 n.1 (quoting GA. CODE ANN. § 105-1307 (1978)).
120. *Parham*, 441 U.S. at 349.

was that this statutory distinction was not substantially related to the achievement of any important governmental objective and, therefore, violated the Equal Protection Clause.[121]

The case was complicated by the fact that the Court based its opinion on a clearly overbroad application of another section of the Georgia Code. Section 74-103 of the Georgia Code provided in part that "a father of an illegitimate child *may* render the same legitimate by petitioning the . . . Court . . . and praying the legitimation of such child . . . ." In a startling show of antipathy, the Supreme Court interpreted Section 74-103 in the narrowest possible way by employing the following reasoning: (1) Georgia provides statutory relief for the father of an illegitimate child by providing a way to legitimate the child outside of a marriage; and (2) the appellant did not legitimate the child before the child's death; therefore (3) *only the father of a legitimate child* has the right to sue for Section 105-1307 recovery for wrongful death of his child; and (4) the appellant cannot sue for Section 105-1307 recovery for the wrongful death of his illegitimate child. This acknowledgement of the child's illegitimacy should have been only the beginning of the Court's analysis. Unfortunately, the Court ended its analysis there, never considering the merits of the case or the ramifications of this overly-narrow conclusion and syllogistic reasoning. For example, the majority never attempted to reconcile the fact that only fathers and not mothers of illegitimate children are required to clear the extra hurdle of the legitimation statute.

The Supreme Court in *Parham* merely concluded that the statute's gender-based distinction did not result in invidious discrimination against the petitioner despite his status as a member of a particular class.[122] Failing to acknowledge that this gender-based distinction warranted heightened scrutiny, the Court upheld the Georgia law after simply reviewing "whether the statutory classification [was] rationally related to a permissible state objective."[123] The Court held that the statute was constitutional in view of the State's legitimate interest in preventing fraudulent claims of paternity in order to maintain an accurate and efficient system of decedents' property disposition[124] "in the

121. *Id.* at 357.

122. *See id.* at 353-57.

123. *Id.* at 357.

124. *Id.* (citing with approval Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); and Labine v. Vincent, 401 U.S. 532 (1971)).

context of actions for wrongful death."[125]

On the other hand, Justice Powell, writing a separate concurring opinion, invoked the level of review advocated by the petitioner, noting that "[t]o withstand judicial scrutiny under the Equal Protection Clause, gender-based distinctions must 'serve important governmental objectives and must be substantially related to the achievement of those objectives.' "[126] The higher level of review notwithstanding, Justice Powell concurred with the majority because the statute was substantially related to "the important state objective of avoiding difficult problems in proving paternity after the death of an illegitimate child,"[127] despite the admittedly "marginally greater burden placed upon fathers."[128]

Curiously, the *Reed/Guano* test, which had been so recently applied by the Court in *Caban*,[129] was not applied in *Parham*. The distinction, embodied in Section 105-1307 of the Georgia Code, between the rights of a mother to sue for the wrongful death of her illegitimate child, and the rights of a father to do so, were never proven to be *substantially* related to any important state interest.[130] Consequently, the statute should not have been upheld. The Court in *Parham*, however, ruled that the statutory classification was, in fact, rationally related to three state interests:[131] (i) avoiding difficult problems of proving paternity in wrongful death actions; (ii) promoting the legitimate family unit; and (iii) setting a standard of morality. Presumably, all of these interests could be promoted simply by denying the father of an illegitimate child the statutory right to sue for his child's wrongful death.

Ironically, these state interests were not relevant to the *Parham* facts. First, there were no difficult problems of proving paternity in

125. *Parham*, 441 U.S. at 357 ("If paternity has not been established before the commencement of a wrongful-death action, a defendant may be faced with the possibility of multiple lawsuits by individuals all claiming to be the father of the deceased child. Such uncertainty would make it difficult if not impossible for a defendant to settle a wrongful death action in many cases, since there would always exist the risk of a subsequent suit by another person claiming to be the father.").

126. *Id.* at 359 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)); *see also* Orr v. Orr, 440 U.S. 268, 279 (1979); Stranton v. Stranton, 421 U.S. 7, 14 (1975); Reed v. Reed, 404 U.S. 71 (1971).

127. *Parham*, 441 U.S. at 359-60.

128. *Id.* at 360 (noting that a "marked difference between proving paternity and proving maternity" has been recognized repeatedly by the Court. *See, e.g., Lalli*, 439 U.S. at 268-69).

129. Caban v. Mohammed, 441 U.S. 380, 391-92 (1978).

130. *Id.* at 391.

131. *Parham*, 441 U.S. at 350.

Parham. The fact that the appellant was the child's natural father was not in dispute. The appellant had signed the child's birth certificate and had contributed to his support. The child took appellant's name and had been visited by the appellant on a regular basis.[132] Second, the child's mother was killed in the same collision in which the child had died, rendering irrelevant the State's claim that it had an interest in promoting the particular family unit.[133] And third, the State's interest in safeguarding morality was not served by refusing to allow the petitioner the statutory right to sue for his child's wrongful death. Moreover, it is highly unlikely that anyone would claim to be the father or mother of a child in order to gain a right to sue for that child's wrongful death.[134]

The Equal Protection Clause limits the extent of the state's authority to make distinctions as it chooses.[135] If the Court had applied the *Reed/Guano* test in *Parham*, and had closely examined the asserted state interests, as it had earlier on the same day in *Caban*, it would have been compelled to reach a different conclusion; namely, that the disputed portion of Section 105-1307 gratuitously discriminated against unwed fathers, and was unconstitutional on its face.[136]

Justice White seemed appalled when, in his dissent, he criticized the "startling circularity in [the majority's] argument,"[137] writing:

> The issue before the Court is whether Georgia may require unmarried fathers, but not unmarried mothers, to have pursued the statutory legitimization procedure in order to bring suit for the wrongful death of their children. Seemingly, it is irrelevant that as a matter of state law mothers may not legitimate their children,[138] for they are not required to do so in order to maintain a wrongful death action. That only fathers *may* resort to the legitimization process cannot dissolve the sex discrimination in *requiring* them to. Under the plurality's bootstrap rationale, a state could require that women, but not men, pass a course in order to receive a taxi license, simply by

132. *Id.* at 349.
133. *Id.*
134. *Cf.* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75 (1968).
135. *Id.* at 76.
136. *Parham*, 441 U.S. at 353-54.
137. *Id.* at 361.
138. *Id.* at 361 n.1 (citing LA. CIV. CODE ANN. art. 203 (West 1976)) ("At least one state provides that either parent, or both, may legitimate a child.").

limiting admission to the course to women.[139]

Citing *Caban*,[140] Justice White also argued that in order to withstand scrutiny under the Equal Protection Clause, gender-based discrimination must serve important governmental objectives and must be substantially related to the achievement of those objectives.[141] The dissenting Justices reasoned that the discrimination was not substantially related to the achievement of any of the governmental objectives which had been invoked by the State of Georgia.[142] In response to the deference paid by the majority to the Georgia statute, the dissent also noted that:

> [I]t is clear that the discrimination at issue in this case [did] not proceed from merely a considered legislative determination, however unjustified, that parents such as appellant do not suffer loss when their children die. Rather, the particular discrimination in this case [was] but part of the pervasive sex discrimination in the statute conferring the right to sue for the wrongful death of a child.[143]

The incredible presumption that only mothers of illegitimate children suffer an injury upon the loss of their children is an extreme version of the underlying and equally untenable presumption that fathers are less deserving of recovery than are mothers. In *Parham*, the State of Georgia was simply allowed to eliminate categorically, on the basis of sex, any recovery by those parents it deemed uninjured or undeserving.[144]

IV. A CRITIQUE OF THE UNWED FATHER CASES

A review of the decisions in the unwed fathers cases reveals that despite its many opportunities to establish solid legal principles which could be used to settle foreseeable legal issues in disputes involving

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139. *Id.* at 361-62.

140. 441 U.S. 380 (1979).

141. *Parham*, 441 U.S. at 362 (White, J., dissenting).

142. *Id.* (observing that the stated governmental objectives of promoting a legitimate family unit and setting a standard of morality were not substantially related to the legislation at issue).

143. *Id.* at 368.

144. *Id.* (citing NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEW, 27 VITAL STATISTICS REPORT 19 (1979) which reported that, in 1977, 15.5% of all children and 51.7% of the black children born in the United States had unmarried parents, and quoting from the opinion of the Georgia Supreme Court that "[t]he suggestion that anything approaching a majority of the fathers of these children would 'suffe[r] no real loss from the child's wrongful death' is incredible." 441 U.S. at 367 n.14).

children who have been born outside of marriage, the Supreme Court has failed to do so. Inexplicably, no well-settled legal doctrine has emerged that finally answers the questions: What, if any, constitutionally protected interest in his children does the biological father of a child have? If there is an interest, what countervailing interest must a state have to justify disparate treatment of unwed fathers?

Presumably, if statutory classifications such as illegitimate children and unwed or putative fathers exist, it is because state lawmakers have determined that there are rational reasons related to important public interests for creating them.[145] State courts have advanced a variety of arguments in support of their refusal to afford unwed fathers "an opportunity to be heard."[146] Which important state interests are being protected?[147] Administrative convenience, efficiency, and the need to provide for the smooth operation of child placement agencies, among others, have all been asserted.[148]

One argument which advances the notion that the parental rights of fathers are limited in order to avoid any impediment to the smooth operation of child placement agencies is that if parental authority is extended to unmarried male parents, along with the power to block adoption proceedings and to compete for custody, then unmarried mothers would be less likely to relinquish custody of their illegitimate offspring to adoption agencies.[149] Potential adoptive parents would be discouraged[150] for fear that the father might attempt to block the adoption decree. This reasoning is objectionable and insufficient in view of the extent to which it violates common notions of simple justice for the natural fathers of illegitimate children.[151] Even though the prevention of improper interferences in the adoption process is a reasonable goal, certainly the father's natural parental right to withhold his consent could be limited in a more logical manner. It is no more reasonable to deny a father the right to withhold consent in those situations where he seeks custody of the child, is fit, and is able and willing to provide a suitable home, than it would be to deny a mother an opportunity to be

145. *See* Riga, *supra* note 44, at 27-28.

146. *See id.* at 28.

147. Most of these cases involved adoption proceedings and the right of the unwed father to be involved prior to the adoption of his illegitimate child.

148. *See In re* Adoption of Irby, 37 Cal. Rptr. 879, 882 (1964), *overruled by In re* Richard, 122 Cal. Rptr. 531 (1975).

149. *Irby*, 37 Cal. Rptr. at 882.

150. *See In re* Adoption of Laws, 20 Cal. Rptr. 64, 66 (1962).

151. *See* Riga, *supra* note 44.

heard under the same circumstances.[152]

It has also been argued that if certain powers were extended to the unwed father the potential for fraud, coercion, and grave abuses would be too great.[153] This is also a poor argument as it conclusively assumes parental unfitness or fraudulent character from the fact of illegitimacy.[154] The frequency with which it has been successfully advanced is illustrative of the extent to which this institutionalized prejudice has been tolerated.

Still other arguments which have been advanced in support of statutory classifications which discriminate against unwed fathers include the following: 1) the state's interest in promoting the traditional family unit[155] and 2) the state's commitment to discourage immorality.[156] The alleged deterrent effect of such inequitable state laws is merely speculative, however.[157] These laws also disavow an unquestionable reality in modern society, namely that many contemporary families have chosen alternative lifestyles[158] to which labels such as "immoral" no longer appropriately apply. Characterization of commonplace lifestyle choices as immoral is of questionable validity in a pluralistic society. Moreover, none of these state interests seem sufficiently important to outweigh the substantial invasion of the unwed father's personal rights rendered by state supported discrimination.[159]

It has been twenty years since the *Stanley* Court first rejected most of these arguments on the ground that they were clearly insufficient to support a state statute denying all unwed fathers an opportunity to establish that they are competent and able to care for their own

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152. *See* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

153. *See* Caban v. Mohammed, 441 U.S. 380, 390-91 (1979).

154. *See* Davis, *supra* note 51.

155. *See generally* Michael H. v. Gerald D., 491 U.S. 110 (1989) wherein Justice Scalia's decision is unapologetically emotional as he states the following:

> [T]o *provide* protection to an adulterous natural father is to *deny* protection to a marital father and vice versa. If Michael has a "freedom not to conform" (whatever that means), Gerald must equivalently have a "freedom to conform." One of them will pay a price for asserting that "freedom"—Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit he and Victoria have established. Our disposition does not choose between these two "freedoms," but leaves that to the people of California.

Id. at 130.

156. *See generally* New Jersey Welfare Rights Org. v. Cahill, 349 F. Supp. 491 (D.N.J. 1972).

157. Riga, *supra* note 44, at 31.

158. *In re* Adoption of Irby, 37 Cal. Rptr. 879, 882 (1964).

159. Riga, *supra* note 44, at 30-31.

children. In clear language, the Court elaborated:

> The establishment of prompt, efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes *higher* values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
>
> Procedure by presumption is always cheaper and easier than individualized determination. *But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.*[160]

The only clear statement that has emerged from the Court in connection with the decisions in the six unwed father cases is that unwed fathers *may* have legitimate rights if, and only if, they prove that they have a "psychological" relationship with their children.[161] In search of proof, the Court has looked at evidence that the father had maintained a substantial relationship with the child,[162] or that the father had given the child his surname[163] and/or financial support.[164] In at least two important cases,[165] however, the Court denied the non-marital fathers all parental rights despite the fact that they had established such a relationship with their children under all of these standard criteria.[166]

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160. Stanley v. Illinois, 405 U.S. 645, 656-57 (1972) (emphasis added).

161. *See* Lehr v. Robertson, 463 U.S. 248 (1983); Marianne DeMarco, *Delineation of the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290, 321 (1985) (finding that a psychological relationship between an illegitimate child and a putative father may serve as a safeguard for the putative father's paternity rights).

162. *Lehr*, 463 U.S. at 267.

163. Parham v. Hughes, 441 U.S. 347, 349 (1979).

164. *Lehr*, 463 U.S. at 262.

165. Michael H. v. Gerald D., 491 U.S. 110 (1989); *Parham*, 441 U.S. at 347.

166. In *Parham*, the Court decided that the father was not entitled to protection of his paternal rights—even though he had maintained a close personal relationship with his son—because he had not complied with a Georgia state legitimation statute for the purpose of establishing a *legally* binding relationship with the child. *Parham*, 441 U.S. at 347.

Moreover, the psychological relationship test is impractical and arbitrary as applied, insofar as it is entirely fact-based and requires extensive evidence gathering which unnecessarily wastes judicial resources. The test is also impractical and arbitrary in principle, because the subjectivity of the various criteria invites different judges to reach different conclusions in situations which are substantially similar.

It is clearly arguable that state statutes which protect the interests of unwed and divorced mothers and married or divorced fathers, to the exclusion of unwed fathers, are facially discriminatory on the bases of gender and marital status. Despite claims to the contrary, this disparate treatment is not necessary to guarantee that the child's best interests are served.[167] It is far from clear that a legal system which fosters and protects parental relationships across the board, despite the prospect of occasional (and foreseeable) complications, would not better serve the child's best interests.[168] Certainly, the problems faced by a state which is asked to grant the unwed father the same equal protection[169] and due process rights guaranteed to other parents are significant. They are not, however, insoluble.

The facts and issues presented by the unwed fathers cases have more similarities than dissimilarities and they have attracted a great deal of attention by virtue of their inconsistent outcomes.[170] The Supreme Court's lack of success in crafting a cogent legal doctrine after deciding so many unwed fathers cases suggests that there is something extraordinary about these cases which prevents it from doing so.

The facts of all six of the unwed fathers cases were quite similar, as were the issues, involving as they did unwed fathers complaining that state statutes denied them their constitutional rights to equal protection and/or due process. And one would expect the applicable prin-

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167. Robert S. Rausch, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 106 (1980).

168. *Cf. Caban*, where the Court ruled that where an unwed father had in fact acted as a parent toward his children, he could not be excluded on the basis of his sex from the right to full participation in the adoption decision. Caban v. Mohammed, 441 U.S. 380, 394 (1979). *See* Lisa Weinhaus, *Rights of Unwed Fathers*, 19 J. FAM. LAW 445, 455 (1981).

169. *Parham*, 441 U.S. at 351.

170. *See, e.g.*, Kisthardt, *supra* note 22; John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); William Weston, *Putative Fathers' Rights to Custody—A Rocky Road at Best*, 10 WHITTIER L. REV. 683 (1989); Gail Secor, Comment, Michael H. v. Gerald D.: *Due Process And Equal Protection Rights Of Unwed Fathers*, 17 HASTINGS CONST. L.Q. 759 (1990); Joan C. Sylvain, Note, Michael H. v. Gerald D.: *The Presumption of Paternity*, 39 CATH. U. L. REV. 831 (1990).

ciples of constitutional law to be consistent. Nevertheless, the Court has applied differing standards of review from one case to the next.[171] The determinations upon which the unwed father cases have been routinely decided are clearly subjective, only rarely employing the established legal standards for such constitutional questions.[172] Is it possible that the otherwise inexplicable disarray of the Supreme Court's approach to the issues presented by the unwed fathers cases may be due, in part, to the fact that some of its members felt antipathy toward unwed fathers in general or individual unwed fathers in particular cases?

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171. Regarding the due process issue in Stanley v. Illinois, 405 U.S. 645 (1972), the Court apparently applied an intermediate scrutiny test. In the opinion, Justice White stated, "[t]he private interest here, that of a man in the children he sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley*, 405 U.S. at 651. The burden placed on the State by the Court was greater than the mere rational basis test of minimal scrutiny. However, it was also less demanding than the heightened scrutiny standard which required a showing of necessity.

On the due process issue in Quilloin v. Walcott, 434 U.S. 246 (1977), the Court applied intermediate scrutiny noting that the State needed only to show that its actions were in the child's best interest. This required more than the minimal scrutiny standard of showing a rational basis for the state action, but also lacked the strict scrutiny requirement of showing necessity.

On the equal protection issue in Parham v. Hughes, 441 U.S. 347 (1979) the Court applied its minimal scrutiny test, stating that "[t]he State of Georgia has chosen to deal with this problem by allowing only fathers who have established their paternity by legitimating their children to sue for wrongful death, and we cannot say that this solution is an *irrational one*." *Parham*, 441 U.S. at 357-58 (emphasis added). The language of the opinion suggests that only the rational basis test was applied.

In Caban v. Mohammed, 441 U.S. 381 (1979), the Court again applied intermediate scrutiny to the constitutional equal protection issues before it.

In deciding the due process issue in Lehr v. Robertson, 463 U.S. 248 (1982), the Court applied only minimal scrutiny after it decided that the facts failed to show that the unwed father had rights which were significant enough to require the application of a higher level of scrutiny. The Court dismissed the equal protection claim in *Lehr* ostensibly by determining that he was not similarly situated to the mother of the child. The Court noted that "[i]f one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights." *Lehr*, 463 U.S. at 267-68. Therefore the Court applied no level of constitutional scrutiny to Mr. Lehr's equal protection claims.

In Michael H. v. Gerald D., 491 U.S. 110 (1989), on the substantive due process issue, the Court simply found that the unwed father had no protectable fundamental interest which would support his constitutional claim. Embellishing elaborately upon the importance of protecting the traditional presumptions of paternity, the Court applied none of the various levels of constitutional scrutiny in its assessment of Michael H.'s claims.

172. *See supra* notes 28-34 and accompanying text.

V. EMPIRICAL EVIDENCE OF THE INFLUENCE OF MORALLY-BASED JUDGMENTS IN THE SUPREME COURT DECISIONMAKING PROCESS

Among the rulings in the unwed fathers cases there were notable inconsistencies despite the fact that they each involved virtually identical questions of law. Why would the Court fail to reach similar conclusions in similar cases involving similar issues? While the unwed father cases are inconsistent when assessed solely on the basis of their determination of the issue of whether the Fourteenth Amendment guarantees an unwed father his parental rights, they are more alike when assessed according to other factors. Specifically, the work of several researchers who looked at the impact of public opinion and judicial preference on judicial decision-making can be used to illuminate heretofore unexplored similarities and consistencies in this body of law.

Despite the fact that the judiciary is supposed to permit others to answer "political questions,"[173] there has long been at least anecdotal evidence that judges are influenced in part by popular opinion as well as their own idiosyncratic sense of morality.[174] This was thought to be particularly true in matters which arouse the moral indignation of certain segments of the general public.[175] Dissatisfied with simple anecdo-

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173. *See* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 102 (1988) (interpreting cases such as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) to demonstrate the Court's abstention from political questions, noting that " 'questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court' " (quoting *Marbury*, 5 U.S. (1 Cranch) at 170)); *cf.* Richard A. Posner, *The Decline Of Law As An Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

174. *See generally* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). Justice Cardozo analyzes the methods which judges employ to make decisions. He prefaces his examination by noting that because judges themselves find it difficult to describe the decision-making process when asked, they invariably "tak[e] refuge in the excuse that the language of craftsmen is unintelligible to those untutored in the craft. Such an excuse may cover with a semblance of respectability an otherwise ignominious retreat. It will hardly serve to still the pricks of curiosity and conscience." *Id.* at 9. Justice Cardozo approaches his analysis of judge-made law by distinguishing between judicial application of precedent, and "[t]he problem [which] remains [of] fix[ing] the bounds and the tendencies of development and growth [of the law], [the need] to set the directive force in motion along the right path . . . ." *Id.* at 30. He identifies several sets of "principles of selection [which, in his opinion, inevitably] guide [a judge's] choice of paths," two of which—"the method of sociology" and the "method of tradition"—refer to the influence of "the *mores* of the day" and of "the customs of the community," respectively. *Id.* at 31. *See also* JEROME R. CORSI, JUDICIAL POLITICS: AN INTRODUCTION 334 (1984) (concluding that judges often decide cases for what are essentially political reasons).

175. *See, e.g.*, Myron H. Bright, *Do Philosophy and Oral Argument Influence Decisions?*, A.B.A. J., Mar. 1991, at 68 [hereinafter Bright Study]; Cecilie Gaziano, *Relationship Between Public Opinion and Supreme Court Decisions: Was Mr. Dooley Right?*, 5 COMM. RES. 131 (1978) [hereinafter Gaziano Study]; Thomas R. Marshall, *Public Opinion, Representation, and the Modern Supreme Court*, 16 AM. POL. Q. 296 (1988) [hereinafter Marshall Study].

tal proof, legal scholars along with social and political scientists have conducted studies in order to uncover hard evidence of an interplay between morally based judgments, public opinion and Supreme Court decisions.[176]

A. *The Bright Study*

One of these studies[177] was conducted by a sitting judge for the United States Court of Appeals for the Eighth Circuit whose research focused on whether oral arguments and a judge's moral philosophy influenced decisionmaking.[178] The participants in the study were fourteen United States circuit court of appeals judges, eight state supreme court justices, two state appellate court justices, two law professors, and nineteen appellate lawyers.

The study employed an actual case, *Walker v. Schaeffer*.[179] The facts of the case were relatively simple. Two black youths went to a local McDonald's after leaving a football game. The black youths were accosted by a group of white youths who banged on their car and verbalized racial epithets. The defendants, local police officers, witnessed one of the black youths pushing through the crowd in an attempt to get to his car. One of the officers told him to move out of the area. After the youth hesitated, the officer arrested him for disorderly conduct. Upon being told by the officer that if he got out of the car he would also be arrested, the second black youth drove away, but turned around in order to meet his friend at the police station. After swerving to allegedly avoid a collision with the crowd of white youths standing in the street, the second black youth was arrested for reckless driving.

The plaintiffs brought an action under 42 U.S.C. § 1983 against the police officers for unlawful arrest and imprisonment. The police officers defended by filing a motion for summary judgment based on their

176. *See, e.g.*, Lawrence Baum, *Measuring Policy Change in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 815 (1988); Bright Study, *supra* note 175; Hazel Erskine, *The Polls: Freedom of Speech*, 34 PUB. OPINION Q. 483 (1970) [hereinafter Erskine Compilation]; Gaziano Study, *supra* note 175; Marshall Study, *supra* note 175; Jeffrey A. Segal, *Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981*, 78 AM. POL. SCI. REV. 891 (1984); Walters & Elam, *supra* note 10.

177. *See* Bright Study, *supra* note 175 (analyzing judicial philosophy and its affect on judicial decisionmaking). Judge Bright conducted his study during a workshop which was sponsored by the American Bar Association's Appellate Judges Conference and the National Institute in April of 1990.

178. *See* Bright Study, *supra* note 175.

179. 854 F.2d 138 (6th Cir. 1988).

qualified immunity.[180] The trial court denied the motion and the police officers appealed. The issue on appeal was whether the district court had correctly denied the motion for summary judgment based upon a finding that there remained genuine issues of material fact on the question of qualified immunity.

The participants in the Bright study knew the disposition at the trial level. They were all familiar with the issue and the briefs were model briefs which had been prepared by the American Bar Association. Moreover, all of the participants were given three days to familiarize themselves with the doctrine of qualified immunity.

Judge Bright selected this case for his study because the facts were relatively simple, and the case did not require any exception to or extension of prevailing law. Nevertheless, Judge Bright stipulated that the issue required the participants to reconcile competing jurisprudential values, such as excessive judicial scrutiny of police officers by the courts and the rights of citizens to be free from unreasonable police behavior.

Next he administered three questions. First, each participant was asked whether or not he would vote for reversal or affirmance of the motion for summary judgment. Second, each participant was asked whether or not his opinion had been swayed by the oral arguments. Third, each participant was asked to specify which of nine Supreme Court justices he most closely identified with philosophically.[181] Responses were then grouped by category: Chief Justice Warren (along with Justices Brennan and Marshall); Chief Justice Burger (along with Justices Blackmun, White, and Stevens); or Chief Justice Rehnquist (along with Justices Scalia, O'Connor, and Kennedy).

Among other findings, Judge Bright concluded that most of the would-be Warren Court justices indicated that they would affirm the district court, while most of the would-be Rehnquist Court justices would reverse. The would-be Burger Court justices also indicated that

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180. The doctrine of qualified immunity is based on the theory that police officers will not be immune from suit "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [an arrest should be made]; but if [on the other hand] officers of reasonable competence could disagree on this issue, immunity should be recognized." Malley v. Briggs, 475 U.S. 335, 341 (1986).

181. The nine justices were: Chief Justice Rehnquist, Justices Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia and Kennedy. Judge Bright divided the responses to his survey into groups according to which of the more recent Chief Justices of the Supreme Court the participant felt "most closely in tune with" after specifically rejecting standard labels of "liberal," "moderate," and "conservative." *See* Bright Study, *supra* note 175, at 71.

they would affirm by a 64% majority. Overall, Judge Bright noted a surprising divergence of opinions among the participants applying the defense of qualified immunity to the same facts. He attributed this divergence to two variables: *judicial philosophy* and *oral arguments*.

Judge Bright was primarily interested in exploring the question of whether judicial philosophy and personal viewpoint play important roles in cases which require only a review of the factual record. Consequently, the Bright study considered the difference in the way that morally-based judgments influence cases which "requir[e] straight-forward review of the factual record and [the] application of those facts to settled legal principles" and, alternatively, their influence on cases which "involv[e] [novel] interpretation of the law."[182] This distinction was designed to help eliminate the possibility that the results of the survey might be tainted by answers from participants who may have inadvertently responded to the questions as if they were inquiring into the role of personal judicial philosophy in cases involving novel interpretations of law.[183]

Insofar as the Supreme Court has not followed *Stanley's* articulation of the legal principles which are applicable in the unwed fathers cases, each of the unwed fathers cases has in turn been treated as an appeal raising novel questions of law which are also clearly controversial. The unwed father cases as a group, then, involving as they do unpopular parties as well as issues which easily arouse a sense of outrage and indignation, are easily classified according to whether and to what extent they follow the personal philosophy and morally-based judgments of the Court.

Judge Bright reported four of his primary observations in the form of practice tips for appellate attorneys. First, practitioners should choose sympathetic judges.[184] Second, the appellate attorney should develop an awareness of judicial philosophy. Knowledge of the philosophy of a particular judge allows the litigating attorney to tailor his argument in a way that may advance his cause. Third, oral argument plays an important role since it gives judges insight into a case that they cannot obtain from the briefs alone. Fourth, no appeal is hopeless in a

182. *See* Bright Study, *supra* note 175, at 69.

183. Bright Study, *supra* note 175, at 70. Prior to this study, Judge Bright had already concluded that most lawyers believe the outcome of an appeal raising a novel or controversial question of law often turns on the personal and moral philosophy of the judge or judges deciding the case.

184. Judge Bright acknowledged that this is not always practicable.

close, fact-oriented case. Judges of every stripe are susceptible to logical, reasonable persuasion which often consists of little more than appeals to their sense of morality and personal values.

Two other scholars, Cecilie Gaziano[185] and Thomas Marshall,[186] have each gathered a large body of polling data which show a significant relationship between public opinion and Supreme Court decisions. A brief description of their methods and findings follows.

B. *The Gaziano Study*

The Gaziano study compared extensive public opinion polling data[187] on the subject of free speech for political extremists to Supreme Court decisions affecting the expansion of the First Amendment constitutional guarantee of freedom of speech.[188] The issues of whether and the extent to which deviant political groups are entitled to First

185. Gaziano Study, *supra* note 175.

186. Marshall Study, *supra* note 175.

187. Gaziano's study relied heavily upon the Erskine Compilation, *supra* note 176, which collated the results of surveys conducted by eight public opinion polling organizations on the subject of the rights of communists, criticism of governments, and war dissent. This data was gathered during a 34-year period (1937-1970). The Erskine Compilation results were as follows:

> [1] The maximum percentage of those polled who believed in freedom of speech with some non-specific limitations remained relatively stable at 68% before 1950 and 70% between 1950 and 1960, but this level of support declined to 61% after 1960.
>
> [2] General support for freedom of speech for extremists declined in every decade after 1938. The support for unlimited rights to free speech for extremists dropped from a maximum of 49% before 1950 to 29% between 1950 and 1960. Support for this group fell even further after 1960 to a low of 21%.

Erskine Compilation, *supra* note 176, at 484.

188. Gaziano limited her review of the 73 Supreme Court cases involving freedom of speech to those rendered between 1937 to 1970. This was the same period for which the Erskine Compilation surveys were applied. In order to assess whether or not public opinion and Court decisions varied together, Gaziano divided the decisions into six groups according to time periods. Period one was 1937-1949, during which the Court rendered seven decisions on matters involving free speech, all of which favored expansion of the First Amendment. Period two was 1950-1954, during which the Court began to take a much more limited view of free speech, supporting communists' rights to free speech in only 21% of the decisions rendered. This period was the most restrictive ever for the rights of association for communists. Period three was 1955-1957, when the Court broadened the range of application of the First Amendment in the 11 cases decided. Period four was 1958-1961, when only one-half of the 22 cases decided supported First Amendment rights. A "conspiracy" theory emerged during this period which suggested that a number of special interests groups had accomplished through Congress what the Court could not have done alone. Period five was 1962-1966, which produced another shift in the direction of the Court, as demonstrated by its eight decisions, all of which supported expansion of First Amendment rights. At issue, generally, was free speech for war protesters. Finally, period six was 1967-1970, when of 13 decisions, only two came down to restrict First Amendment rights. Gaziano, *supra* note 175, at 140-42.

Amendment freedom of speech protection have long been a source of legal controversy and the subject of many Supreme Court decisions.[189] Additionally, there were a plethora of public opinion polls taken on these issues. These two facts made the Gaziano study possible.[190]

Through her analysis Gaziano was able to produce data from which she drew three conclusions. First, when fewer than four in ten (40%) persons approved of a broad guarantee of free speech, the Court restricted the First Amendment. Second, when fewer than four in ten (40%) persons supported the First Amendment, the Court's decisions were much more likely to be close ones in either direction, especially when the ruling was adverse to free speech. Third, when a lower level of public support for protecting speech was rising, the Court was more likely to render decisions expanding the First Amendment even though fewer than five in ten persons (50%) supported free speech for political extremists.[191]

Gaziano also demonstrated that 60% of the decisions restricting the range of the First Amendment were rendered at times when public support for extremists' rights to free speech was declining.[192] Indeed, all of the Court's decisions restricting the range of the First Amendment occurred during times of low levels of public support for free speech, generally. Furthermore, all of the rulings upholding an absolutist view of the First Amendment occurred either during periods of relatively high public support for free speech overall or at times of lower, but rising, levels of public support. Gaziano concluded that "decisions of the Supreme Court involving freedom of speech for deviant, political groups are correlated with public opinion on this issue."[193]

C. *The Marshall Study*

Thomas Marshall also investigated the issue of whether public opinion is reflected in Supreme Court decisions. His study reported on 110 instances during a fifty year period, from 1936 to 1986, when a nationwide poll could be matched with a Supreme Court ruling. Marshall approached his task by assigning codes to the 110 decisions, based upon whether they agreed with the majority of persons polled on the particular matter. The Court's rulings were classified as *majoritarian* if

189. *See* Marshall Study, *supra* note 175.
190. *See supra* note 187.
191. Gaziano Study, *supra* note 175, at 145-46.
192. *E.g.*, 1950-1954 and 1958-1961. *Id.* at 143.
193. *Id.* at 147.

they agreed with an available poll item. The Court's rulings were classified as *counter-majoritarian* if they disagreed with an available poll item.[194]

The Marshall study tracked patterns of Court majoritarianism by analyzing decisions, including those involving judicial review of legislation and/or public policy, according to certain variables such as level, context and case type. Level, under Marshall's scheme, referred to whether the law was at the federal or state level. Context referred to whether the law or policy in question was itself consistent with nationwide public opinion. Marshall made several findings. First, the Supreme Court upheld 80% of those federal laws that were in agreement with nationwide public opinion. Second, the Supreme Court upheld 63% of the federal laws that were in disagreement with nationwide public opinion. Third, the Court upheld 47% of the state and local laws that were in agreement with nationwide polls. Fourth, the Court upheld 34% of the state and local laws that were in disagreement with nationwide polls.[195] "Overall, two-thirds . . . of the Supreme Court rulings in federal-level disputes reflected nationwide polls."[196]

The cases were categorized according to case type as follows: (1) fundamental freedoms issues; (2) economic issues; and (3) crisis times.[197] Marshall compared the Court's rulings in each case type to public opinion poll data on similar issues and concluded that the Court read public opinion. First, Court decisions were in agreement with the poll results 66% of the time when fundamental freedoms were at issue and 50% of the time when such freedoms were not at issue. Second, the Court was in agreement with the poll results 69% of the time when it considered cases involving economic issues and 59% of the time when considering noneconomic issues. Finally, the Court rulings agreed with polling data at a rate of 80% during times of crisis and 56% during times when there was no crisis.[198]

194. *See* Marshall Study, *supra* note 175, at 299.

195. *Id.* at 305.

196. *Id.* at 302.

197. *Id.* at 303. Since the 1930s, the Court has usually been counter-majoritarian on noneconomic issues. Accordingly, the Court's rulings in cases involving fundamental freedoms were predicted to be less majoritarian than other rulings. On economic issues (labor, taxation, regulation, and commerce), the Court's rulings were predicted to be more majoritarian than other rulings. The modern Court tends to defer to elected officeholders in economic disputes, and elected officeholders, presumably, make policies consistent with public opinion. During crisis times, when public attention was heavily focused on an issue, the Court was predicted to be more majoritarian with respect to its rulings in cases involving issues which were related to the crisis. *Id.* at 304.

198. *Id.* at 305.

Marshall concluded that the Court tends to defer to federal law and policy and is less likely to defer to state and local law and policy, especially if it is inconsistent with nationwide public opinion. Moreover, the Court is usually clearly majoritarian when deciding matters which arise during times of national crisis. In both federal and state or local level disputes that won full review, the modern Supreme Court is virtually as majoritarian as other American policymakers, reflecting nationwide public opinion 62%[199] of the time and disagreeing with it only 38% of the time. Marshall uncovered no support for the idea that judicial activism is essentially counter-majoritarian.[200]

VI. MORALLY BASED JUDGMENTS AND PUBLIC OPINION IN THE SUPREME COURT DECISION-MAKING PROCESS AS THE KEY TO THE UNWED FATHER CASES

Writing for the plurality in *Caban*, Justice Powell spoke in favor of a finding that the New York statute was unconstitutional, noting:

> Despite the plain wording of the statute, appellees argue that unwed fathers are not treated differently . . . from other parents. According to appellees, the consent requirement of § 111 is merely a formal requirement, lacking in substance, as New York courts find consent to be unnecessary whenever the best interests of the child support the adoption . . . .
>
> Appellees' interpretation of § 111 finds no support in New York case law. On the contrary, the New York Court of Appeals has stated unequivocally that the question [of] whether consent is required is entirely separate from that of the best interests of the child. Indeed, the Surrogate's decision in the present case, affirmed by the New York Court of Appeals, was based upon the assumption that there was a distinctive difference between the rights of . . . the unwed father . . . [and] the unwed mother of the children . . . . Accordingly, it is clear that § 111 treats unmarried parents differently according to their sex. . . .
>
> . . . .
>
> . . . Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this *generalization*

199. *Id.* at 310. Marshall cites 68 of 110 examples. Even discounting for the greater number of cases that were heard by the Burger Court, the results differ by only one percent.

200. *Id.* at 311.

> . . . *[is] less acceptable as a basis for legislative distinctions* . . . . There is no reason to believe that the Caban children . . . had a relationship with their mother unrivaled by the affection and concern of their father.[201]

Although many unwed fathers fail to maintain meaningful relationships with their illegitimate offspring, Justice Powell refused to deny the appellant in *Caban* equal protection in the face of evidence that his relationship with his children had been substantial. Rather, in that case Justice Powell recognized the need to address the issue in *Caban* in light of the facts of that particular situation in order to avoid an overbroad application of the state law.

By contrast, in *Parham*[202] Justice Powell swung his vote to the other side of the Court and avoided forming a plurality in favor of the rights of the unwed father as he had in *Caban*.[203] In *Parham*, Justice Powell seemed unwilling to consider the case on its merits and failed to apply the standard invoked in *Stanley v. Illinois*,[204] stating in a concurring opinion that he:

> [found] the present case to be quite different from others in which the Court has found unjustified a State's reliance upon a gender-based classification. In several cases, the Court has confronted a state law under which the burdened individual (whether a child born out of wedlock or the father of such a child) has been powerless to remove himself from the statutory burden—regardless of the proof of paternity.[205]

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201. Caban v. Mohammed, 441 U.S. 380, 387-89 (1979) (emphasis added) (footnotes omitted).

202. Parham v. Hughes, 441 U.S. 347 (1979). Mr. Justice Powell concurred in the judgment in *Parham*, but wrote a separate opinion which he arrived at "by a route somewhat different from that taken by Mr. Justice Stewart." *Id.* at 359.

203. In both *Caban* and *Parham*, the Court was split into two camps. In both cases, Chief Justice Burger and Justices Stewart, Stevens and Rehnquist formed one camp and were consistent in their decisions to refuse to strike down either the New York or Georgia state statutes as unconstitutional because of alleged discrimination against unwed fathers. They were, in both cases, in disagreement with Justices Marshall, White, Blackmun and Brennan—each of whom voted against the validity of the state statutes and would require a remedy for the appellant unwed fathers. To the extent that their rulings and analyses were consistent in both cases, it is possible to feel that we have learned something about these eight Justices related to this issue. Clearly then, the divergence in the outcomes of the two cases was due solely to the different, even contradictory, interpretations made by Justice Powell. Justice Powell's swing vote, the tie-breaker in *Caban* and *Parham*, was dispositive in forging the majority opinion in both cases and exemplifies, in part, the peculiar nature of American jurisprudence.

204. Stanley v. Illinois, 404 U.S. 645, 656-57 (1972).

205. *Parham*, 441 U.S. at 360 (referring to Caban v. Mohammed, 441 U.S. 380 (1979) and

In fact, there was no more of proof of paternity problem in *Parham* than there had been in *Caban*.

Writing for the Court in *Parham*, Justice Stewart criticized the appellant's claim that the Georgia Code sections violated the Equal Protection Clause of the Fourteenth Amendment, saying that the argument revealed a misinterpretation of the basic principles behind the Equal Protection Clause. Previously unsuccessful in his efforts to sway his brethren in *Caban*, in *Parham* Justice Stewart finally prevailed.[206] Finding that it was appropriate for a state statute to legislate disparate treatment of unwed mothers and unwed fathers insofar as it had been "concluded that the classification created by the Georgia statute is a rational means for dealing with the problem of proving paternity, it is constitutionally irrelevant that the appellant may be able to prove paternity in another manner."[207]

The Georgia Code at issue in *Parham* did not make legitimation mandatory, however, and the appellant violated no law by failing to legitimate his son. Moreover, the facts show that the appellant, the child's natural father, had maintained an open and close relationship with the child and that the child had borne his father's name from birth until the child's untimely death.[208]

Parham, like the appellant in *Caban*, should have been allowed to establish that he, no less than the child's mother,[209] had developed close familial ties to his son and was entitled to equal protection as the natural parent of the child, even though the child was illegitimate. Allowing him to do so in this case would have jeopardized none of the important state interests allegedly sought to be protected by the Georgia lawmakers when promulgating the statute in question.[210] Instead of swinging the vote in favor of the rights of the unwed fathers by engaging in the same analysis of this issue as he had in *Caban*, Justice Powell followed as Justice Stewart led the Court with emotion and unyielding fervor against the appellant in *Parham*.

A possible explanation for this refusal to apply the same principles

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

206. Mr. Justice Stewart made this same argument in *Caban*, writing a separate dissent. *Caban*, 441 U.S. at 398 (Stewart, J., dissenting).

207. *Parham*, 441 U.S. at 358.

208. *See id.* at 349.

209. According to the facts in *Parham*, the mother and the child were killed in the same collision, thereby obviating the need to protect any conflicting interest which she may have otherwise had. *Id.*

210. *See supra* note 131 and accompanying text.

to resolve the issues in *Parham* in the same manner as was done in *Caban* is that Justice Powell was troubled by the facts in *Parham*. It is likely that the Court was significantly influenced by the emotional and unfortunate circumstances which had given rise to the initial cause of action.[211] It may have appeared to the Court that Parham had stepped forward to assert his paternal rights only upon learning of his child's death.

Because of Justice Powell's swing vote, the appellant in *Parham* was precluded from suing for the wrongful death of his child. Perhaps unable to control his personal feelings of antipathy, Justice Powell upheld the statutory denial of Mr. Parham's standing to sue for the death of his child. This adverse decision negated any possibility that the unwed father could recover any monetary award as a remedy. The desire to avoid such an undesirable outcome appeared to influence the Court's deliberation on the constitutional issue regarding the operation of the state statute.

Justice Stewart openly acknowledged his bias when he concluded that the facts of the *Parham* case were distinguishable from those of similar cases such as *Stanley v. Illinois*[212] solely on the basis of a difference in the remedy sought. The Court, then, did not base its decision on the prevailing law but on the fact that the *Parham* case was "quite a different one, involving as it [did] *only an asserted right to sue for money damages.*"[213]

This portion of the Court's rationale begs the important question of whether it would have reached a different conclusion which was more consistent with existing precedent and rules of law given a different set of facts. As we have seen, this inquiry becomes especially important with regard to the apparent change of heart which led Justice Powell to join the other four Justices who had also voted against the appellant in *Caban*.

VII. CONCLUSION

Historically, the nuclear family unit has, as one of its central functions, provided for the economic, protective, social, and recreational needs of its members.[214] Since ancient times the legal rights of individuals have been derived from powers and privileges conferred in large

211. *See generally* CARDOZO, *supra* note 174 and accompanying text.
212. 405 U.S. 645 (1972).
213. Parham v. Hughes, 441 U.S. 347, 358-59 (1979) (emphasis added).
214. *See* Arnold, *supra* note 11.

part due to one's association with one's family.[215] Even today, individual members of the family unit are often addressed collectively and afforded certain rights and opportunities which they might not otherwise enjoy.[216] Bound together as a group, family members are often better able to bargain with other groups and agencies.[217]

Although there is little empirical evidence available as proof, there are strong indications that the function of the nuclear family unit as the final arbiter in the determination of all social and legal status is changing. Many of these changes have occurred only gradually and without true form or design. The evidence is found primarily by studying modern social conditions and individual accounts.[218]

Questions which arise in connection with inquiries into the constitutional rights of unwed fathers are varied and seldom easy to resolve, involving as they do mostly unpleasant (and, therefore, unwelcome) indications of fundamental changes in American society and alterations in the traditional nuclear family unit.[219] The full realization of the rights of illegitimate children and their parents can occur only through a slow and uncertain process.

While the official role of the Supreme Court is that of an objective reviewer of nonpolitical questions,[220] there is empirical evidence of the

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215. MAINE, *supra* note 11, at 163-65.

216. *See generally* O'Driscoll, *supra* note 11.

217. JOSEPH GOLDSTEIN & JAY KATZ, THE FAMILY AND THE LAW 341 (1965).

218. *See generally* DIANA GITTENS, THE FAMILY IN QUESTION 6-34 (1985) (discussing the erosion of the traditional nuclear family despite legislative attempts to preserve it).

219. Recently, there has been a great deal of publicly expressed concern about the effect of changing—read declining—"family values" in American society. In 1992, this subject appeared repeatedly as a part of political platforms, and 52% of the participants in a recent national poll thought that the federal government should engage in activities which are designed to uphold family values. Robin Toner, *'92 GOP May Find "Family Values" a Tricky Issue*, N.Y. TIMES, Aug. 13, 1992, at A17. When the Vice President of the United States, Dan Quayle, criticized a fictional character from the television program *Murphy Brown* for depicting an unmarried mother who gave birth to a baby, saying that the show set a poor example of family values, only 45% of those participating in another national poll were of the opinion that Quayle's criticism was completely unjustified. *CBS Evening News* (CBS television broadcast, June 2, 1992). In yet another recent national poll, 54% of those asked were of the opinion that a breakdown in family values was responsible for the riots in Los Angeles following the verdict of not guilty in the trial against the L.A. police officers who were charged in the beating of a black man, Rodney King, who had been stopped in connection with a traffic violation. *CNN Headline News* (CNN television broadcast, June 9, 1992).

220. CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 75 (4th ed. 1983). The political question doctrine goes back to the great case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall there expressed the view that the courts will not entertain political questions even though such questions involve actual controversies. The non-justiciability of a political question is founded primarily on the doctrine of separation of powers and the policy of judicial

involvement of another important factor in its decision-making process. Supreme Court Justices "are subject to human limitations,"[221] and though they may protest that they are always "coldly objective and impersonal,"[222] they often decide cases based in part upon a personal code of morality which colors their disposition of an issue or party before them. This is especially true in cases involving novel issues of law[223] which are either controversial or the subject of negative public opinion.[224]

As the Bright study suggested, "It is no secret, for example, that a difficult issue posed to the U.S. Supreme Court often led to remarkably different analyses and outcomes by, say, Chief Justice William Rehnquist and Justice William Brennan."[225] On the contrary, most members of the broad legal community and others interested in the judiciary have long accepted as a matter of fact that different Supreme Court Justices not only hold different philosophical opinions about important social and legal issues, but also that these personal opinions are often reflected in official Court opinions.[226]

The unwed father cases support these conclusions particularly well. First, they represent a manageable universe of cases which can be used to analyze the question of whether, in the real world, there is any demonstrable evidence of a relationship between public opinion and Supreme Court decisions. Second, they represent an emerging body of law without settled legal principles, involving as they do an issue which has arisen only recently as a result of the application of the Fourteenth

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self-restraint. WRIGHT, *supra*, at 75 (footnote omitted).

221. CARDOZO, *supra* note 174, at 168.

222. *Id.*

223. *See* Bright Study, *supra* note 175 and accompanying text; *see also* CARDOZO, *supra* note 174. Justice Cardozo observed that:

> Whether novel situations are to be brought within one class of relations or within the other must be determined, as they arise, by considerations of analogy, of convenience, of fitness, and of justice.
>
> The truth, indeed, is, as I have said, that the distinction between the subjective or individual and the objective or general conscience, in the field where the judge is not limited by established rules, is shadowy and evanescent, and tends to become one of words and little more. . . . The perception of objective right takes the color of the subjective mind. The conclusions of the subjective mind take the color of customary practices and objectified beliefs. There is constant and subtle interaction between what is without and what is within.

CARDOZO, *supra* note 174, at 110-11.

224. *See* Gaziano Study, *supra* note 175.

225. Bright Study, *supra* note 175, at 69.

226. *See generally* Bright Study, *supra* note 175.

Amendment guarantees of equal protection and due process to members of the non-nuclear family.[227] Third, they each involve as a named party someone who is the target of universally negative popular opinion—an unwed father—and about whom widely accepted acrimonious stereotypes persist.[228] Fourth, and perhaps most important, each case was decided between 1972 and 1989, a period during which the Court itself was evolving to a posture more conservative[229] than at any time since before the New Deal.[230]

Despite the many similarities among the facts and issues raised in the six unwed father cases, the Supreme Court has applied different standards in order to reach different outcomes. Making no apologies, the Court is at best unpredictable in its determination of controversial moral issues.[231]

As observers of this process we hold an open invitation to look for evidence which may provide an explanation for the internal inconsistencies within the law, whether statutory or judge-made. That judges sometimes render decisions which reflect their personal values rather than "value-neutral"[232] generalities seems clear.[233] What is equally

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227. *See supra* notes 49-51 and accompanying text.

228. Donald L. Swanson, Note, *The Putative Father's Parental Rights: A Focus on "Family,"* 58 NEB. L. REV. 610 (1979) (analyzing the rights of putative fathers at common law and noting that historically the unwed father has been despised as shiftless, irresponsible and unconcerned).

229. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 641, 651-52 (1990). West notes the changes which have led to a transformation in the Court's posture:

> Over the last few years, a substantial and growing number of Supreme Court Justices, federal judges, and some theorists, including Raoul Berger, Robert Bork, Frank Easterbrook, Michael McConnell, Sandra Day O'Connor, Richard Posner, and Antonin Scalia, have begun to articulate a profoundly conservative interpretation of the constitutional tradition. . . .
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> . . . .
>
> Modern political conservatism is grounded in and united by an aversion to the redistributive normative authority of the political state and a commitment to the preservation, or conservation of existing social, economic, and legal entitlements and structures. . . .

Id. at 651-52.

230. Lochner v. New York, 198 U.S. 45 (1905) epitomized the overtly conservative nature of the court prior to rulings on New Deal legislation. *See* PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF *Lochner v. New York* (1990).

231. *See supra* notes 174, 182-83, and accompanying text.

232. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990).

233. Tribe & Dorf, *supra* note 232, at 1057-59. The authors argue that "a typical judicial opinion distinguishes between *essential* and *non-essential* facts, and that by paying attention to such distinctions, judges trained in the method of the common law can generalize from prior cases without . . . imposing their own values." *Id.* at 1059.

clear, however, is that a litigant's basic rights should not be denied merely because of these influences. Unfortunately, the opportunity to benefit from the type of introspection which may reveal a tendency toward this practice is a luxury which a Supreme Court Justice may seldom enjoy prior to retirement.[234]

In the areas of federalism and states' rights, the Supreme Court has two major responsibilities. First, it orchestrates the distribution of power and interrelationships within an extraordinarily complex governmental structure.[235] Second, the Court is responsible for protecting individuals in their contact with government.[236]

While the Warren Court era brought a marked easing of traditionally difficult, access to the federal courts for litigants seeking the protection of their constitutional rights, the Burger Court retrenched.[237] Is the jury still out on the Rehnquist Court? We can always hope.[238] As long as the Court continues to become ever more socially conservative perhaps we can *only* hope that individual constitutional rights will expand, not contract.

The Supreme Court's rulings in the unwed father cases are inconsistent and generally reflect a subjective assessment of the worthiness of an unpopular party,[239] the unwed father. This is problematic because

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234. On October 18, 1990, during a discussion with a group of law students at New York University School of Law, Lewis F. Powell, Jr., made an incredible admission. Now a private citizen, this former Supreme Court Justice was asked by a student to explain "how he reconciled the 1986 decision in *Bowers v. Hardwick* [478 U.S. 186 (1986)], which limited the right to privacy, with his vote in *Roe v. Wade* [410 U.S. 113 (1973)], which extended a woman's right to privacy to include the decision to have an abortion." In response, Mr. Powell conceded that he provided the "elusive 'swing vote' " that allowed his conservative colleagues to emerge victorious in *Bowers*, but added "*I think I probably made a mistake in that one*"! *Id.* (emphasis added). Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong; Powell on Sodomy*, NAT'L L.J., Nov. 5, 1990, at 3. When asked to elaborate in a subsequent telephone interview, Mr. Justice Powell responded by saying: "I do think it [*Bowers*] was inconsistent in a general way with *Roe* . . . . When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments . . . . My vote was the deciding vote that made the decision 5-4." *Id.*

235. *See* Archibald Cox, *Federation and Individual Rights Under the Burger Court*, 73 NW. U. L. REV. 1 (1978).

236. *Id.*

237. *Id.* at 2.

238. "Hope for what?" you may ask. Well it's always possible that the currently conservative Supreme Court could experience something akin to a rebirth—an awakening with a newfound tendency toward liberality. Stranger things have happened.

239. This Article does not include any assessment of the influence of moral-based judgments and public opinion on the outcome of Supreme Court cases involving other, so-called, unpopular parties such as those cases involving sodomy, obscenity, and homosexuality.

unpopular parties such as unwed fathers are particularly at risk of being denied important basic rights under a judicial system which allows even the occasional manipulation of acceptable objective legal standards in favor of outcomes which reflect the morally-based judgments of the Court.

This Article provides empirical evidence of the influence of morally-based judgments and public opinion upon the decision-making process of the Supreme Court of the United States. Adjudication of cases based on blatantly subjective conclusions regarding the worthiness of individual claimants is inappropriate and erodes the confidence in the federal judiciary which the system of life tenure was designed to produce.[240]

240. *See* William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063 (1990).