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NOTES

WHITHER THE LIMITED-PURPOSE PUBLIC FIGURE?

The Supreme Court has long grappled with the problem of balancing the first amendment¹ values of free press and free speech against the states' legitimate interest in protecting their citizens' reputations. In *New York Times Co. v. Sullivan*,² decided in 1964, the Court provided the press with a qualified constitutional privilege against defamation suits by public officials. This constitutional privilege, which required a plaintiff to prove that the defendant entertained actual malice when the defamatory statements were made, reached a high watermark in 1971: In *Rosenbloom v. Metromedia, Inc.*,³ the Supreme Court held that the *New York Times* privilege applied whenever the statement concerned a public issue, even if the plaintiff was a private individual.

In 1974 the Supreme Court reversed this trend toward expansive press protection and began to give more deference to the states' interest in redressing harms to their citizens' reputations. In *Gertz v. Robert Welch, Inc.*,⁴ the Court focused on the character of the plaintiff, not the nature of the issue, and barred the press from availing itself of the *New York Times* privilege in defamation suits brought by private individuals. After *Gertz*, courts began to distinguish between private individuals, who need not overcome the *New York Times* privilege to prevail, and public officials and public figures, who must still prove actual malice.

1. The first amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press" U.S. CONST. amend. I.

2. 376 U.S. 254 (1964). In *New York Times* the Supreme Court fashioned a "qualified privilege" for the press in defamation suits brought by public officials. *Id.* at 282-83. When a public official brings suit for defamatory remarks about his or her official conduct, he or she must prove "actual malice" by defendant to recover damages. Failure to do so bars recovery by plaintiff. If actual malice is proved, then the qualified privilege is not an obstacle, and plaintiff can recover. For a discussion of the actual-malice standard, see Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 HOFSTRA L. REV. 655 (1979).

3. 403 U.S. 29 (1971).

4. 418 U.S. 323 (1974).

The Supreme Court decisions subsequent to *Gertz* have narrowed the applicability of the public-figure category.⁵ In attempting to balance these competing concerns, the Court has distinguished between individuals who have achieved such widespread notoriety that they must satisfy the actual-malice standard irrespective of the subject matter of the defamatory remark and those individuals who have become public figures only within the limited scope of a particular controversy. Beyond the particular controversy in which they are involved, limited-purpose public figures remain private individuals and need not show actual malice to recover for defamatory remarks. The two latest Supreme Court defamation decisions, *Hutchinson v. Proxmire*⁶ and *Wolston v. Reader's Digest Association, Inc.*⁷ represent the most extensive narrowing of the limited-purpose public-figure category since *Gertz*.

This Note assesses the effects of the *Hutchinson* and *Wolston* decisions on the limited-purpose public figure. It discusses the first amendment values the Supreme Court sought to ensure in *New York Times Co. v. Sullivan* and the refinement of the *New York Times* standard in subsequent cases. Finally it assesses the deleterious effect *Hutchinson* and *Wolston* will have upon the press' ability to report newsworthy events.

CONSTITUTIONALIZING THE LAW OF DEFAMATION

New York Times Co. v. Sullivan: *First Amendment Press Protection in Defamation Suits*

New York Times Co. v. Sullivan marks the initial Supreme Court extension of first amendment protections to defendants in defamation cases. Sullivan, an elected official in Montgomery, Alabama,⁸ sued the New York Times Company and various signatories of an advertisement that allegedly contained defamatory statements about his official conduct.⁹ The advertisement sought support for

5. See *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

6. 443 U.S. 111 (1979).

7. 443 U.S. 157 (1979).

8. Sullivan testified that he was "'Commissioner of Public Affairs and [that his duties included] supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales.'" 376 U.S. at 256.

9. *Id.* Although the advertisement did not mention him by name, Sullivan asserted that since he was the commissioner who supervised the police department, any alleged police misconduct would be imputed to him. *Id.* at 258. The alleged defamatory statements in the advertisement read as follows:

the civil rights movement in the South. A jury in Montgomery returned a verdict for Sullivan and awarded him \$500,000 for the injury to his reputation.¹⁰ This verdict was later affirmed by the Alabama Supreme Court.¹¹ The United States Supreme Court unanimously reversed,¹² holding that Alabama law failed to protect adequately the freedoms embodied in the first amendment.¹³ In assessing the extent of an individual's right to recover damages for defamatory remarks, the Court established standards that both safeguard first amendment values and recognize an individual's right to have his or her reputation protected. The Court noted that earlier decisions afforded first amendment protection to freedom of expression on public issues.¹⁴ In deciding the scope of protection to afford defamatory remarks, the Court examined the values that the first amendment seeks to protect.

The first amendment was adopted to secure those rights deemed fundamental to the maintenance of a democracy. In the *Federalist Papers*, James Madison defined the government established by the Constitution as one that "derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited pe-

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

....

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*.

N.Y. Times, Mar. 29, 1960, at 25, col. 1 (emphasis in original), *reprinted in* 376 U.S. at 257-58.

10. 376 U.S. at 256.

11. New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd*, 376 U.S. 254 (1964).

12. 376 U.S. 254 (1964).

13. *Id.* at 264.

14. *Id.* at 269-73 (citing NAACP v. Button, 371 U.S. 415 (1963) (state decree regulating legal profession's right to solicit clients declared unconstitutional interference with freedom of association); Bridges v. California, 314 U.S. 252 (1941) (convictions of newspaper publisher and editor for contempt, based on publication of editorials commenting upon cases pending in state court, were violative of constitutional rights of freedom of speech and of press); Stromberg v. California, 283 U.S. 359 (1931) (state statute prohibiting display of red flag declared unconstitutional)).

riod, or during good behavior.”¹⁵ A well-informed general populace is a necessary precondition to the maintenance of this republican government. To secure this form of government, it is necessary to protect the free flow of information that facilitates the public’s ability to make intelligent decisions about public affairs and candidates for public office. The Bill of Rights institutionalized freedom of speech and of the press to ensure that access to information would not be impeded by governmental interference.¹⁶ As Alexander Meiklejohn observed, “Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”¹⁷

Defamation laws impose a cost on free speech that in certain circumstances may prove inconsistent with first amendment values. Given the integral part played by public officials in shaping and resolving public issues, allowing these officials to bring defamation actions places a particularly onerous burden on first amendment values. One of these costs is the potentially deleterious effect on the “citizen-critic.”¹⁸ Implicit in the Constitution’s establishment of a republican form of government is the citizen’s duty to criticize. This duty is as fundamental as the public official’s duty to administer.¹⁹ The Court recognized that libel suits by government officials threatened to chill the speech of these citizen-critics.²⁰

At issue in *New York Times* was a defamatory remark against a

15. THE FEDERALIST No. 39, at 280-81 (J. Madison) (Harvard Univ. Press ed. 1966).

16. “[T]he people need free speech” because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others. And, in order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities require, the judgment-making of the people must be self-educated in the ways of freedom. That is, I think, the positive purpose to which the negative words of the First Amendment gave a constitutional expression.

Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263 (quoting Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 16).

17. *Id.* at 255.

18. 376 U.S. at 282.

19. *Id.* In this regard the Court analogized to its earlier decision in *Barr v. Mateo*, 360 U.S. 564 (1959), which extended an absolute privilege to public officials for defamatory statements made in his or her official capacity. 376 U.S. at 282-83.

20. 376 U.S. at 282.

public official about his violent anti-civil-rights activities. The Court was thus squarely faced with balancing the first amendment value of vigorous debate on public issues against the state's right to protect an individual's reputation. In examining these two conflicting interests the Supreme Court scrutinized Alabama's standard for proving defamation to ascertain whether it adequately protected both interests. The Court concluded that Alabama afforded too much protection to the individual's reputation because it assumed malice²¹ and allowed the defendant to rebut his presumption only by showing the truth of the statement. The difficulty of establishing an amorphous truth,²² together with the low level of proof required of plaintiffs, would produce a substantial number of defamation awards. The threat of these awards would lead to self-censorship by the media and other citizen-critics unable or unwilling to bear the cost. This would reduce the vigor of debate on public issues. The Court devised an "actual malice" standard for suits brought by public officials to recover for defamatory falsehoods relating to their official conduct. This standard forces public officials to demonstrate with "convincing clarity"²³ that the statement made by a defendant was knowingly false or in reckless disregard of the truth.²⁴ This qualified privilege shields the press from liability for honest misstatements of fact.²⁵

21. *Id.* at 283-84.

22. *Id.* at 279. The Court asserted, "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship.'" *Id.* If truth is the sole defense available to a defendant, the Court found that

would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone."

Id. (quoting *Speiser v. Randall*, 357 U.S. 513, 526, (1958)).

23. *Id.* at 285-86.

24. *Id.* at 280. The Court believed that the malice standard would allow for a proper balance between first amendment values of free expression and an individual's right to protection of his or her reputation. For a detailed discussion of actual malice, see *Oakes*, *supra* note 2.

25. The Court allowed such protection because an "erroneous statement is inevitable in free debate, and [the ability to make those statements] must be protected if the freedoms of expression are to have 'breathing space' that they 'need . . . to survive.'" 376 U.S. at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

*Expanding Press Protection:
From Butts and Walker to Rosenbloom*

The cases following *New York Times* continued to recognize the importance of protecting first amendment values in defamation suits. In the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,²⁶ a plurality of the Supreme Court extended the *New York Times* privilege to defamation suits brought by public figures—those who command substantial public interest at the time of publication—against the press.²⁷ The concurring opinion of Chief Justice Warren, which subsequently became the controlling rule,²⁸ emphasized that there is no rational distinction between public officials and public figures:

[T]he distinctions between governmental and private sectors are blurred. . . . This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.²⁹

The Court concluded that the public has a substantial interest in the conduct of public figures, and accordingly the press has the same right to report on public figures as it has to report on public officials.³⁰ Therefore, the debate on public figures involved in a public issue should be afforded similar protection.³¹

In characterizing the individual plaintiffs in *Butts* and *Walker* as public figures, the Court relied on the individuals' abilities to rebut any untrue statements:

Butts may have attained [the status of public figure] by position alone and *Walker* by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both commanded sufficient continuing

26. 388 U.S. 130 (1967). *Butts* and *Walker* were decided in one opinion.

27. There were four separate opinions: Justice Harlan wrote for the plurality, *id.* at 133; Chief Justice Warren concurred in the result in both cases, *id.* at 162; Justice Black concurred in the result in *Associated Press* and dissented in *Butts*, *id.* at 170; Justice Brennan concurred in the result in *Associated Press*, joined parts I and II of the Chief Justice's opinion, and dissented in *Butts*, *id.* at 172.

28. See *Gertz v. Robert Welch, Inc.*, 418 U.S. at 345 (citing 388 U.S. at 164 (Warren, C.J., concurring in result)); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 41-42 (citing 388 U.S. at 163-64 (Warren, C.J., concurring in result)).

29. 388 U.S. at 163-64 (Warren, C.J., concurring in result).

30. *Id.* at 155.

31. See *id.*; *Gertz v. Robert Welch, Inc.* 418 U.S. at 351.

public interest and had sufficient access to the means of counter-argument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements.³²

Following the lead of *New York Times*, the various opinions in *Butts* and *Walker* concurred in the belief that a negligence standard was inadequate to protect the press; therefore a stricter standard was applicable for suits brought by public figures against the press.³³

In *St. Amant v. Thompson*³⁴ the Supreme Court clarified the actual-malice standard. The Court held that the recklessness requirement is not satisfied by a showing of mere negligence or gross negligence: The requirement is only met if the plaintiff can prove that the defendant entertained actual doubt as to the accuracy of a published statement.³⁵ By strengthening this requirement, the Court reinforced the actual-malice standard as a vehicle for protecting the values of the first amendment.³⁶

While *New York Times* and *Butts* and *Walker* involved public officials and public figures, the emphasis in both opinions was on the public nature of the issues involved. The logical conclusion of the Court's reasoning was that ultimately the public issue, and not the status of the plaintiff, would trigger the actual-malice standard.

In *Rosenbloom v. Metromedia, Inc.*,³⁷ a plurality of the Supreme Court³⁸ extended the *New York Times* privilege to any defa-

32. 388 U.S. at 155 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

33. Justice Harlan's plurality opinion and Chief Justice Warren's concurrence set forth two different standards: Justice Harlan's standard of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," *id.* at 155, was not utilized by later Supreme Court decisions; instead, it was Chief Justice Warren's opinion, which utilized the actual-malice standard, that became controlling. *See, e.g.*, *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

34. 390 U.S. 727 (1968).

35. *Id.* at 731. The Court stated, "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.*

36. *See generally* notes 14-25 *supra* and accompanying text.

37. 403 U.S. 29 (1971).

38. In *Rosenbloom* there were five separate opinions: Justice Brennan wrote for the plurality, *id.* at 30; Justice Black concurred in the judgment, *id.* at 57; Justice White concurred in the judgment, *id.*; Justice Harlan dissented, *id.* at 62; and Justice Marshall dissented, *id.* at 78. Justice Douglas took no part in the case.

mation suit against media defendants that involved a public issue, regardless of the plaintiff's notoriety or anonymity.³⁹ The plaintiff in *Rosenbloom*, admittedly a private individual, claimed that he was defamed by a broadcast on the defendant's radio station that reported plaintiff's arrest for the sale of obscene material.⁴⁰ The plurality held that since a violation of the obscenity laws was an issue of public interest, plaintiff's status as a private individual should not hinder the media's right to report on the event.⁴¹ Justice Brennan, writing for the plurality, found that

[t]he public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.⁴²

Since the actual-malice standard is difficult to overcome, *Rosenbloom* drastically reduced the possibility of success in defamation suits brought against media defendants. In justifying this extension, the Court expressed concern about the possibility of media self-censorship: If private individuals could recover money damages from the press on a standard of reasonable care, a publisher's fear of miscalculating what constitutes either reasonable care or a public figure could inhibit publication.⁴³ The Court recognized that self-censorship arises not only from fear of large money judgments,⁴⁴ but also from the large litigation costs involved in defending defamation suits.⁴⁵ Therefore, to achieve the free flow of information that the first amendment was designed to

39. *Id.* at 43-44.

40. *Id.* at 33-35.

41. *Id.* at 43-45.

42. *Id.* at 43-44 (footnotes omitted).

43. *Id.* at 50. As one commentator has observed, "The Court plainly perceived the need for 'breathing space' for 'these great freedoms'—speech and press—as much weightier than the reputation interest at stake, and considered and rejected a negligence standard precisely because it failed to provide sufficient latitude for the first amendment." Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 205 (1976) (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971)).

44. 403 U.S. at 52-53.

45. *Id.*

protect and that *New York Times* sought to further, the Court extended the actual-malice standard to the reporting of public issues without regard to the status of the individual involved. The Court hoped that the reduced likelihood of successful suits against the media would reduce the number of actions filed and spare the media the high costs of litigation.

Contracting Press Protection: Gertz and Firestone

In *Gertz v. Robert Welch, Inc.*,⁴⁶ the Supreme Court retreated from its expansive extension of press protections. In previous defamation cases the Court's focus had been on the public issue involved in the defamatory statement and on ensuring press protections and first amendment values. In *Gertz* the Court's focus shifted to protecting the individual's reputation. Elmer Gertz, a prominent Chicago attorney, brought a wrongful death action on behalf of the family of a young man allegedly shot to death by a police officer.⁴⁷ Defendant, Robert Welch, Inc., printed an article in its John Birch Society publication condemning the trial as a Communist plot against the police.⁴⁸ The article labeled Gertz a Leninist," a "Communist-fronter," and a member of various Communist-sympathizer organizations⁴⁹—all false allegations.⁵⁰ Gertz filed suit to recover for the injury to his reputation caused by these defamatory falsehoods.⁵¹ After the trial the district court granted defendant's motion for a judgment notwithstanding the verdict.⁵² Although Gertz was not a public figure, the defamatory article contained sufficient discussion of public issues to warrant protection under the *New York Times* actual-malice standard.⁵³ The Seventh Circuit Court of Appeals affirmed the district court's decision, citing the intervening *Rosenbloom* decision as support.⁵⁴

The Supreme Court reversed.⁵⁵ *Rosenbloom's* public-issue test

46. 418 U.S. 323 (1974).

47. *Nelson v. Nuccio*, 133 Ill. App. 2d 261, 262, 268 N.E.2d 543, 544 (1st Dist. 1971).

48. Stang, *FRAME UP: Richard Nuccio and the War on Police*, AM. OPINION, Apr. 1969, at 1, 1, *quoted in* 418 U.S. at 326-27.

49. *Id.* at 12, 17, *quoted in* 418 U.S. at 326.

50. 418 U.S. at 326.

51. *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

52. *Id.* at 1000.

53. *Id.*

54. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 805 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).

55. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

was rejected, and the Court focused instead on the plaintiff's status. In an effort to protect individuals from defamatory falsehoods, the Court narrowed and redefined the public-figure category:⁵⁶

In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.⁵⁷

The Court held that Gertz was a private individual since he had not thrust himself into the public spotlight to influence the outcome of any public issue.⁵⁸ As a private individual Gertz was entitled to recover for defamatory falsehoods without having to overcome the actual-malice standard of *New York Times*.

In determining that Elmer Gertz was a private individual the Court established a number of bases for distinguishing between private individuals and public figures and officials:

Public officials and public figures usually enjoy significantly greater access to the channels of effective communication than private individuals and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.⁵⁹

The Court also recognized that

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.⁶⁰

56. *Id.* at 348. This state interest in protecting individuals' reputations conflicts with the first amendment value of having "a vigorous and uninhibited press" because any damages recovered from a media defendant may result in future self-censorship. *Id.* at 342. Nevertheless, the Court concluded that a state's interest in providing a remedy for harm to a citizen's reputation is of paramount importance where that citizen is a private individual. *Id.* at 345-46.

57. *Id.* at 351.

58. *Id.* at 352.

59. *Id.* at 344 (footnote omitted).

60. *Id.*

The Court concluded, therefore, that private individuals are more deserving of recovery than public officials and public figures.⁶¹

In *Time, Inc. v. Firestone*⁶² the Supreme Court both reiterated its rejection of the *Rosenbloom* public-issue test and narrowed the *Gertz* public-figure definition. The plaintiff in *Firestone*, a wealthy Florida socialite, brought a libel action against Time, Inc., after it printed a story that falsely stated that one of the grounds for the plaintiff's divorce was adultery.⁶³ Utilizing the *Gertz* public-figure definition,⁶⁴ the Court concluded that the plaintiff was not a public figure because she "did not assume any role of especial prominence in the affairs of society . . . and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."⁶⁵

Various commentators have interpreted the *Firestone* decision as restricting the definition of public figure.⁶⁶ It is clear that Mrs. Firestone satisfied the public-figure definition in *Gertz* and therefore should not have been designated a private individual if that decision governed. As Justice Marshall stated in his dissent:

We must assume that it was by choice that Mrs. Firestone became an active member of the "sporting set"—a social group with "especial prominence in the affairs of society" . . . whose lives receive constant media attention. . . . Having placed herself in a position in which her activities were of interest to a significant segment of the public, Mrs. Firestone chose to initiate a lawsuit for separate maintenance, and most significantly, held several press conferences in the course of that lawsuit. If these actions for some reason fail to establish as a certainty that Mrs. Firestone "voluntarily exposed [herself] to increased risk of injury from defamatory falsehood," surely they are sufficient to entitle the press to act on the assumption that she did. Accordingly, Mrs. Firestone would appear to be a public figure under *Gertz*.⁶⁷

61. *Id.* at 345.

62. 424 U.S. 448 (1976).

63. *TIME*, Dec. 22, 1967, at 77, 77, quoted in 424 U.S. at 452.

64. See text accompanying note 57 *supra*.

65. 424 U.S. at 453.

66. E.g., Anderson, *Libel Law Today*, *TRIAL*, May 1978, at 18; Note, *The Demise of the Public Figure in Defamation Cases and the Ascent of a Responsible Press—Time, Inc. v. Firestone*, 26 DE PAUL L. REV. 863 (1977); Note, *Libel and the First Amendment*, 56 NEB. L. REV. 366 (1977); Comment, *Time, Inc. v. Firestone: Sowing the Seeds of Gertz*, 43 BROOKLYN L. REV. 123 (1976).

67. 424 U.S. at 486-87 (Marshall, J., dissenting) (citation omitted).

Justice Marshall also emphasized that the real focus of *Gertz* is on the individual's actions, and how much public attention has developed or will develop from those actions.⁶⁸ But despite Justice Marshall's forceful argument, a majority of the Court was persuaded otherwise.

The narrowing of the public-figure category, initiated in *Gertz* and furthered in *Firestone*, evidences a changing attitude by the Supreme Court toward first amendment press protection. The two most recent Supreme Court defamation cases further confirm this preference for sacrificing first amendment protections to redress harms caused by defamatory falsehoods.⁶⁹

RECENT CASES AND A NEW PUBLIC-FIGURE CATEGORY

Wolston v. Reader's Digest Association

Ilya Wolston is a naturalized citizen of the United States⁷⁰ and the nephew of convicted Soviet intelligence agents Myra and Jack Soble.⁷¹ As a result of the criminal proceedings brought against his aunt and uncle in January 1957, Wolston was subpoenaed on numerous occasions to appear in New York before a federal grand jury conducting investigations on Soviet espionage activity in the United States.⁷² On one occasion Wolston failed to respond to the subpoena because of ill health, and on July 14, 1958, a federal judge issued an order to show cause why Wolston should not be held in criminal contempt. When Wolston failed to respond to the grand jury subpoena, numerous news stories appeared describing his actions.⁷³ Wolston pleaded guilty to the contempt charge and received a one-year suspended sentence and was placed on probation for three years.⁷⁴ In 1974, Reader's Digest Association published a book entitled *KGB*, which identified Wolston⁷⁵ as a Soviet

68. *Id.* at 489 (Marshall, J., dissenting).

69. See Sugarman, *Who Is a Public Figure in Law of Libel?*, N.Y.L.J., July 12, 1979, at 1, col. 2.

70. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 162 n.4 (1979).

71. *Id.* at 161.

72. *Id.* at 161-62.

73. *E.g.*, N.Y. Times, Aug. 8, 1958, § 1, at 38, col. 1; *id.*, July 29, 1958, § 1, at 9, col. 4; *id.*, July 15, 1958, § 1, at 11, col. 1.

74. *Wolston v. Reader's Digest Ass'n*, 429 F. Supp. 167, 169 (D.D.C. 1977), *aff'd*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979). The sentence had the proviso that Wolston would cooperate with the grand jury in any further investigations of Soviet espionage. 443 U.S. at 163.

75. J. BARRON, *KGB* (1974).

agent operating in the United States.⁷⁶ Wolston claimed that these statements were defamatory and filed suit against Reader's Digest and the author.⁷⁷ The District Court for the District of Columbia agreed that the statements in the book were false,⁷⁸ but held that Wolston's voluntary failure to answer the grand jury subpoena and his subsequent contempt citation made him a public figure for the limited purpose of comment upon the controversy surrounding Soviet espionage in the United States.⁷⁹ Having been so adjudged, Wolston was required to prove that the defendants entertained actual malice when they printed the falsehoods. After reviewing the affidavits and deposition testimony, the district court held that there was no issue as to the presence of actual malice by either Reader's Digest or the author, and summary judgment was granted.⁸⁰

After the District of Columbia Circuit Court of Appeals affirmed the district court's decision,⁸¹ the Supreme Court reversed.⁸² The Court held that Wolston was not a public figure and therefore did not have to satisfy the *New York Times* actual-malice standard to recover.⁸³ In examining the public-figure issue, the Court concluded that Wolston could not be classified as a public

76. *Id.* at 188, 462. The statements that Wolston objected to in the book were: "Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullman, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston*, Alfred and Martha Stern." *Id.* at 188 (emphasis added), *quoted in* 443 U.S. at 159. The index of *KGB* states: "Wolston, Ilya, Soviet agents in U.S." *Id.* at 462, *quoted in* 443 U.S. at 159.

77. *Wolston v. Reader's Digest Ass'n*, 429 F. Supp. 167 (D.D.C. 1977), *aff'd*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979).

78. *Id.* at 180.

79. *Id.* at 176. The district court was persuaded that Wolston relinquished a measure of his anonymity:

In no sense did the Government compel [Wolston] to remain at home on July 1, 1958. He might instead have chosen to comply with the subpoena or . . . to go to court to vindicate whatever right he may have had not to comply with it. When he failed to choose either of these alternatives, he became involved in a controversy of a decidedly public nature in a way that invited attention and comment, and thereby created in the public an interest in knowing about his connection with espionage that outweighed his competing interest in remaining anonymous.

Id. at 177 n.33.

80. *Id.* at 179-81.

81. *Wolston v. Reader's Digest Ass'n*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979).

82. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979).

83. *Id.* at 165-69.

figure for all purposes.⁸⁴ Further, the Court disagreed with the determination that Wolston qualified as a limited-purpose public figure.⁸⁵ The Court held that Wolston did not "voluntarily thrust" or "inject" himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States.⁸⁶ Instead, the Court found that Wolston "was dragged unwillingly into the controversy"⁸⁷ and that his failure to appear before the grand jury did not suffice to make him a public figure.⁸⁸

Hutchinson v. Proxmire

Ronald Hutchinson, a research behavioral scientist, conducted a federally funded research project to find an objective measure of aggression.⁸⁹ The study attempted to determine why certain animals clench their jaws when exposed to different types of stressful stimuli.⁹⁰ For his efforts, Hutchinson earned Wisconsin Senator Proxmire's famous and facetious "Golden Fleece of the Month Award."⁹¹ Proxmire publicized the award by inserting it into the *Congressional Record*⁹² and by referring to it in a newsletter to his constituents in Wisconsin.⁹³

Hutchinson brought a defamation suit against Proxmire.⁹⁴ Proxmire moved for summary judgment on the ground that

84. *Id.* at 165.

85. *Id.* at 166.

86. *Id.* (quoting *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

87. *Id.*

88. *Id.* at 167-68. The Court did agree that Wolston's failure to appear before the grand jury may have been "newsworthy." However, the Court concluded that "mere newsworthiness" did not require a plaintiff to meet the actual malice standard. *Id.* (citing *Time, Inc. v. Firestone*, 424 U.S. 448 (1976)).

89. *Hutchinson v. Proxmire*, 443 U.S. 111, 115 (1979).

90. *Id.* The National Aeronautics and Space Agency (NASA) and the Navy funded the research because of its potential importance in resolving problems associated with humans who are confined in small quarters for long periods of time. *Id.*

91. *Id.* at 114. Each month Proxmire announces the recipient of the Golden Fleece Award. *E.g.*, 125 CONG. REC. S17,350 (daily ed. Nov. 28, 1979) (remarks of Sen. Proxmire) (United States Air Force won for last minute spending spree in Philippines to use up all available funds); 125 CONG. REC. S13,531 (daily ed. Sept. 27, 1979) (remarks of Sen. Proxmire) (National Science Foundation won for spending \$39,600 to study mountaineering, social change, and evolution of Buddhist religion among Sherpas of Nepal). The purpose of the award is to publicize examples of wasteful governmental spending. *Id.*

92. 121 CONG. REC. 10803 (1975) (remarks of Sen. Proxmire).

93. 443 U.S. at 117.

94. *Hutchinson v. Proxmire*, 431 F. Supp. 1311 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979).

Hutchinson was a public figure and would therefore have to prove that Proxmire entertained actual malice when he made the statement.⁹⁵ The district court granted Proxmire's motion for summary judgment, concluding that upon all of the depositions, pleadings, and affidavits there was no issue as to whether Proxmire made the statement with actual malice.⁹⁶ On appeal, the Seventh Circuit affirmed the district court's decision that Hutchinson was a public figure.⁹⁷ The Supreme Court reversed,⁹⁸ refusing to accept Proxmire's arguments.⁹⁹

The district court had found that Hutchinson was a limited-purpose public figure¹⁰⁰ for the purposes of comment on his receipt of federal funds for research projects.¹⁰¹ The district court determined that Hutchinson's achievements in science, his voluntary participation in activities that were publicly funded, and the local press coverage that his research project generated all combined to make the plaintiff a limited-purpose public figure.¹⁰² Various lower court defamation decisions were relied upon in making this determination, particularly *Adey v. United Action for Animals*.¹⁰³ Like *Hutchinson*, *Adey* involved a defamation suit brought by a research scientist employed by NASA. The alleged defamation occurred when a nonprofit organization devoted to the protection of animals issued a newsletter criticizing the plaintiff's use of a monkey in an unsuccessful space flight.¹⁰⁴ The district court there concluded that the plaintiff was a public figure and granted judgment for the de-

95. *Id.* at 1315-16. Proxmire also asserted that, as a Senator, the speech and debate clause of the Constitution, U.S. CONST. art. I, § 6, granted him immunity from prosecution. 431 F. Supp. at 1319-20.

96. 431 F. Supp. at 1328. The court also found that Senator Proxmire was immune from prosecution under the speech and debate clause. *Id.* at 1325.

97. *Hutchinson v. Proxmire*, 579 F.2d 1027, 1034 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979). The court of appeals affirmed the district court's actual malice and immunity determinations. *Id.* at 1033.

98. 443 U.S. 111 (1979).

99. Half of the Supreme Court's decision in *Hutchinson* dealt with the issue of whether the speech and debate clause protected Senator Proxmire's press release. *Id.* at 123-33. The Court concluded that the press release was not immune under the speech and debate clause because "neither the newsletters nor the press release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process." *Id.* at 130 (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)).

100. For a definition of limited-purpose public figure, see text accompanying note 57 *supra*.

101. 431 F. Supp. at 1327.

102. *Id.*

103. 361 F. Supp. 457 (S.D.N.Y. 1973), *aff'd*, 493 F.2d 1397 (2d Cir.), *cert. denied*, 419 U.S. 842 (1974).

104. *Id.* at 458-59.

fendant.¹⁰⁵ Upon reviewing *Adey* and other similar cases¹⁰⁶ the district court in *Hutchinson* designated the plaintiff as a public figure.¹⁰⁷

In affirming the district court's decision, the Seventh Circuit emphasized the *Gertz* considerations present in *Hutchinson*: Plaintiff had thrust himself into a public controversy and in so doing had gained access to the media.¹⁰⁸ The court stated that

[i]n addition to his public status as to his research, it is evident from the record that plaintiff had sufficient access to the media to rebut any defamatory falsehood. Dr. Hutchinson's answering press release was quoted in detail in the same stories which initially reported the Golden Fleece Award. Thus, Dr. Hutchinson had the appropriate status and access to the means of rebuttal to be considered a public figure with regard to the propriety of his research.¹⁰⁹

However, the Supreme Court concluded that Hutchinson's notoriety and his access to the media came about only as a result of Senator Proxmire's allegedly libelous remarks. Allowing Proxmire to defend his libelous remarks by claiming that Hutchinson had media access would condone bootstrapping.¹¹⁰ The Court also determined

105. *Id.* at 465-66.

106. See *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. 1976) (individual became limited-purpose public figure because of his voluntary contacts with underworld activities), *aff'd*, 580 F.2d 859 (5th Cir. 1978); *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041 (S.D.N.Y. 1975) (author of best seller became limited-purpose public figure by injecting himself into controversy surrounding later years of late Ernest Hemingway), *rev'd*, 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *Buchanan v. Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975) (accountant hired by finance committee for President Nixon's reelection campaign became limited-purpose public figure in suit against news-distributing service and reporter); *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042 (S.D.N.Y. 1975) (author of book became limited-purpose public figure in suit arising out of review of book), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976); *Meeropol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974) (children of Julius and Ethel Rosenberg became public figures solely because of their parents' activities in action involving alleged defamation by Louis Nizer), *aff'd*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314 (W.D. Pa. 1974) (president of taxicab company became limited-purpose public figure because of his voluntary contacts with press and media).

107. 431 F. Supp. at 1327.

108. 579 F.2d at 1034 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

109. *Id.* at 1035 (citations omitted).

110. 443 U.S. at 135-36. "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Id.* at 135. The Court also remarked that Hutchinson "did not have the regular and continuing access to the media that is one of the accoutrements of having become a public figure." *Id.* at 136.

that Hutchinson's published writings do not qualify him as a public figure because they are only read by a small audience of scientists and not by the general public to whom the allegedly defamatory statement was made.¹¹¹ Finally, it concluded that Hutchinson did not thrust himself into any public controversy and, therefore, could not be classified as a limited-purpose public figure.¹¹²

*Wolston and Hutchinson and the
Limited-Purpose Public Figure*

Wolston and *Hutchinson* will not affect those persons considered to be public figures "for all purposes in all contexts,"¹¹³ but the decisions do reduce the number of individuals who can be designated limited-purpose public figures.¹¹⁴ In *Gertz* the Supreme Court held that to become a limited-purpose public figure an individual must voluntarily inject himself or herself or be drawn into a public controversy.¹¹⁵ The characterization turns on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."¹¹⁶ Although the Court in *Gertz* outlined a specific line of inquiry for determining who is a limited-purpose public figure, the *Firestone* decision narrowed the applicability of these considerations. Since *Firestone* did not establish alternative criteria, however, lower courts were left without guidance to resolve these questions. One judge faced with this dilemma remarked, "Defining public figures is much like trying to nail a jellyfish to the wall."¹¹⁷ Most courts relied, albeit uncomfortably, on the *Gertz* standard as the only available test.¹¹⁸

In *Wolston* and *Hutchinson* the Supreme Court attempted to clarify the confusion that existed after *Firestone* about who should qualify as a limited-purpose public figure in defamation cases. In

111. *Id.* at 135.

112. *Id.*

113. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); see *Wolston*, 443 U.S. at 167; *Hutchinson*, 443 U.S. at 134. For example, Frank Sinatra and Muhammad Ali will always be considered public figures because of their pervasive fame or notoriety.

114. For a definition of limited-purpose public figures, see text accompanying note 57 *supra*. See cases cited note 106 *supra*.

115. 418 U.S. at 351.

116. *Id.* at 352.

117. *Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976), *aff'd*, 580 F.2d 859 (5th Cir. 1978).

118. See, e.g., *Hutchinson v. Proxmire*, 431 F. Supp. 1311 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Ass'n*, 429 F. Supp. 167 (D.D.C. 1977), *aff'd*, 578 F.2d 427 (D.C. Cir. 1978), *rev'd*, 443 U.S. 157 (1979).

Wolston the Court disagreed with the district court's determination that the plaintiff had thrust himself into the public spotlight.¹¹⁹ The plaintiff's failure to respond to the grand jury subpoena was considered too passive.¹²⁰ The Court implied that in the future such passive conduct would not be sufficient to transform a private individual into a limited-purpose public figure.¹²¹ While *Gertz* did not differentiate between various types of activity,¹²² *Wolston* narrows the *Gertz* formula to include only those individuals who actively thrust or inject themselves into a public controversy.¹²³ In modifying the standard, however, the Supreme Court did not enunciate the salient distinctions between active and passive conduct. Left without guidance other than the Court's apparent preference for classifying plaintiffs as private individuals,¹²⁴ lower courts will probably take the safer route: Questionable conduct will be classified as passive, leading to the designation of more persons as private individuals.¹²⁵

In reversing the lower courts' decision in *Hutchinson*, the Supreme Court once again limited the *Gertz* criteria for distinguishing public figures from private individuals by modifying its definition of media access. The Court determined that access to the media is a valid factor in designating an individual as a limited-purpose public figure only when such access is available before the defamation. The *Gertz* Court emphasized that media access provided an individual with a means of rebutting defamatory statements. "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."¹²⁶ If the rationale for access to the media is the opportunity to rebut falsehoods, it does not matter whether the access is predefamation or postdefamation. In *Hutchinson* the Court uses media access solely

119. 443 U.S. at 166.

120. *Id.* at 167-68.

121. *See id.* at 168.

122. 418 U.S. at 351.

123. *See id.*

124. *See Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

125. *See, e.g.*, 443 U.S. at 167-69; 443 U.S. at 133-36. Thus, although lower courts may still not know how to define public figure, the courts will now probably lean toward designating defendants as "private individuals" in close cases, rather than designating them as public figures.

126. 418 U.S. at 344 (footnote omitted).

as an indicia of whether a plaintiff is a public figure.¹²⁷ If a plaintiff has access to the media before the defamation, he or she has achieved sufficient notoriety to be classified as a public figure.¹²⁸

By limiting the public-figure category, the Supreme Court will make trial judges hesitant to find that plaintiffs are public figures since this result will often mandate that defendants' motions for summary judgment be granted.¹²⁹ Thus more people will be designated private individuals,¹³⁰ and media defendants will temper their reporting out of fear of defamation suits.

The difficulty in meeting the high standard of proof required by the actual-malice standard often results in a summary judgment for the defendant.¹³¹ This has helped to avoid any chilling effect on

127. 443 U.S. at 136.

128. *Id.*

129. The summary judgment procedure has special importance in defamation cases because of the important first amendment values that are involved. *Treutler v. Meredith Corp.*, 455 F.2d 255, 257 n.1 (8th Cir. 1972); *Mashburn v. Collin*, 355 So. 2d 879, 890-91 (La. 1977). The court in *Mashburn* stated:

In cases affecting the exercise of First Amendment liberties, proper summary procedure is essential. . . . Summary adjudication may be thought of as a useful procedural tool and an effective screening device for avoiding the unnecessary harassment of defendants by unmeritorious actions which threaten the free exercise of rights of speech and press.

355 So. 2d at 890-91 (footnotes omitted), *quoted with approval in* *Kidder v. Anderson*, 354 So. 2d 1306, 1310 (La.), *cert. denied*, 439 U.S. 829 (1978). Another court noted:

In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle . . . is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as the fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes.

Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

130. One court recently commented on the Supreme Court's trend away from extensive press protection to protection of the individual's reputation:

Proxmire and *Wolston* are important as exemplifying the recent trends of courts, including the United States Supreme Court, in modifying the rigid rules as to what constitutes a "public official" or "public figure" in defamation suits against the news media and in sanctioning a less stringent standard than the *New York Times* standard in suits against publishers of defamatory statements relating to matters of public and general concern.

Poe v. San Antonio Express-News Corp., No. 16150, slip op. at 6 n.3 (Tex. 4th Civ. App. Sept. 19, 1979).

131. *See, e.g., Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638 (4th Cir. 1976); *Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971); *Buchanan v. Associated Press*, 398 F. Supp. 1196 (D.D.C. 1975). Summary judgments have been granted with

first amendment freedoms.¹³² Once a plaintiff is designated a private individual, a lesser standard of proof is required to establish liability.¹³³ Thus, the likelihood of a trial on the merits or settlement is increased. Extending litigation beyond the pretrial stage necessarily increases the costs for media defendants and, therefore, intensifies the chilling effect on the debate over public issues.¹³⁴

Ten years ago the Supreme Court in *Rosenbloom* extended the protections of *New York Times* to spare the media the litigation costs of defending defamation suits. The Court feared that burdensome costs would produce the self-censorship that the actual-malice standard was designed to prevent. After *Wolston* and *Hutchinson* the increased likelihood of surviving a motion for summary judgment will undoubtedly increase the number of suits filed, increase the costs of litigating these suits, and increase the settlements plaintiffs will be able to secure.¹³⁵ Rather than defending lengthy and costly defamation suits and paying large settlements, a publisher will be more selective in what he or she prints. Yet preventing self-censorship was the rationale for the original extension of protection to the press in *New York Times*. If *Wolston*

such frequency in defamation cases, especially those involving public officials and public figures, that one court has stated that the granting of "summary judgment is the 'rule,' and not the exception." *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975) (emphasis in original) (footnote omitted), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976), *quoted in* *Oliver v. Village Voice, Inc.*, 417 F. Supp. 235, 237 (S.D.N.Y. 1976). The viability of this "rule" is questionable after *Hutchinson*. See 443 U.S. at 120 n.9.

132. As one court observed:

The best procedural protection for freedom of speech, which the *New York Times Co. v. Sullivan* . . . standard is designed to protect, is found in the remedy of summary judgment which the courts have utilized freely in such cases. The chilling effect of litigation and the associated expense and inconvenience frequently have led courts to conclude that summary judgment is the most appropriate remedy in an instance such as this in order to minimize that chilling effect as much as possible.

Adams v. Frontier Broadcasting Co., 555 P.2d 556, 566 (Wyo. 1976) (citations omitted) (footnote omitted).

133. For an example of how two states devised different bases of liability after *Gertz*, see *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450 (Colo.) (actual-malice standard applies in suit by private individual involved in issue of public concern), *cert. denied*, 423 U.S. 1025 (1975); *Gobin v. Globe Publishing Co.*, 216 Kan. 233, 531 P.2d 76 (1975) (negligence standard applies in suit by private individual involved in judicial proceeding).

134. "Libel suits are proliferating. In the past it was difficult for public figures to sue newspapers successfully, but recent court decisions have narrowed the definition of who is a public figure. The result has been a dramatic increase in libel suits." *N.Y. Times*, Apr. 7, 1980, at D10, col. 4.

135. See Tybor, *The Libel War Escalates*, *Nat'l L.J.*, Apr. 21, 1980, at 1, col. 1.

and *Hutchinson* have the ultimate effect of curtailing the first amendment values promoted by a free and vigorous press, the law of defamation will have been set back two decades.

CONCLUSION

Wolston and *Hutchinson* confirm the Supreme Court trend favoring an individual's right to protect his or her reputation over the press' right to report newsworthy events. Since *Gertz* the Supreme Court has enhanced the protection of individual reputations by continually refining the public-figure category; the result has been less protection for the press.

While *Wolston* and *Hutchinson* may not be the last word on the issue of public figures, they may be the last straw. The public-figure category has been whittled down to a breaking point. Lower courts are likely to interpret the Supreme Court's actions as a sign of judicial intolerance toward the use of the public-figure designation. Hesistance by lower courts in designating individuals as public figures will lead to self-censorship—a result previously repudiated in *New York Times*.¹³⁶ The Supreme Court did not explicitly seek to undermine or repudiate the first amendment values that provided the impetus to *New York Times Co. v. Sullivan*. Yet *Wolston* and *Hutchinson* will likely have that effect.

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136. 376 U.S. at 279; see *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 50.

PUTATIVE FATHERS: UNWED, BUT NO LONGER UNPROTECTED

In a series of decisions dating back to 1923, the United States Supreme Court has firmly established the right to bear and raise children.¹ Although until 1972 this right was reserved exclusively for married parents,² the Court has since begun to ensure that similar protections are afforded to parents of illegitimate children.³ In delineating the rights of unwed parents, however, the Court has permitted sex-based distinctions to forestall the equal treatment of unwed mothers and fathers.⁴

This Note discusses the Supreme Court decision in *Caban v.*

1. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942) (procreation is a "basic" right); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (right to conceive and raise children found to be "essential").

2. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923). But see *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (law now recognizes "those family relationships unlegitimized by a marriage ceremony").

3. See *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).

4. Compare *Parham v. Hughes*, 441 U.S. 347, 360-61 (1979) (unwed father denied right to sue for wrongful death of his illegitimate child) with *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75 (1968) (unwed mother permitted to sue for wrongful death of her illegitimate child).

Difficulty in proving paternity in cases involving illegitimate children is one traditional explanation offered to justify differential treatment of unwed mothers and fathers. See, e.g., *Parham v. Hughes*, 441 U.S. at 360-61; *Lalli v. Lalli*, 439 U.S. 259, 271-72 (1978); *Trimble v. Gordon*, 430 U.S. 762, 770-71 (1977). Presumptions against the fitness of unwed fathers have served as a basis for denial of rights of custody, visitation, and consent to adoption. In *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972), the Supreme Court held that such presumptions are inconsistent with the due process clause. But see *In re Malpica-Orsini*, 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975), appeal dismissed sub nom. *Orsini v. Blasi*, 423 U.S. 1042 (1976). For discussion of the disparity in treatment between unwed mothers and unwed fathers, see Tabler, *Paternal Rights of the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231 (1971); Comment, *The Emerging Constitutional Protection of the Putative Father's Paternal Rights*, 70 MICH. L. REV. 1581 (1972).

Mohammed,⁵ which extends the right of consent to putative fathers⁶ in the adoption process. Some authorities have interpreted *Caban* as extending the right of consent only to fathers of older children,⁷ but others maintain that the decision requires the state to secure the putative father's consent irrespective of the child's age.⁸ This Note demonstrates that due process and equal protection considerations support an expansive interpretation of *Caban* that applies equally to all putative fathers. Proposals for reforming existing statutes to conform to this constitutional mandate are then examined.

RECOGNITION OF PUTATIVE FATHERS' RIGHTS

Stanley v. Illinois: A Beginning

Beginning in 1968, the Supreme Court sought to clarify the relative rights of illegitimate children,⁹ their mothers,¹⁰ and their

5. 441 U.S. 380 (1979).

6. A putative father is "the alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1402 (4th ed. 1968).

7. Justice Stevens' dissenting opinion in *Caban*, in which Chief Justice Burger and Justice Rehnquist joined, concludes that the Court "confines its holding to cases such as the one at hand involving the adoption of an *older* child against the wishes of a natural father who previously has participated in the rearing of the child and who admits paternity." 441 U.S. at 409 (Stevens, J., dissenting) (emphasis in original); *accord, id.* at 398-99 (Stewart, J., dissenting). A recent California Court of Appeals decision found *Caban* to be even more limited than was found by Justices Stevens or Stewart. *See* W.E.J. v. Superior Court, 100 Cal. App. 3d 303, 160 Cal. Rptr. 862 (2d Dist. 1979). The California court found *Caban* to be consistent with the limitation of the right of consent to "presumed fathers." A presumed father of an illegitimate child, according to the California statute, is an unwed father who has attempted to marry the unwed mother or has had custody of his illegitimate child. CAL. CIV. CODE § 7004 (West Supp. 1980). According to the California court, where there is no attempt to marry on the part of the unwed parents, only a putative father who has had custody would be given the right of consent. *See* 100 Cal. App. 3d at 311, 160 Cal. Rptr. at 867 (construing CAL. CIV. CODE § 7017(d) (West Supp. 1980)).

8. *See In re "R" Children*, N.Y.L.J., Aug. 3, 1979, at 7, col. 2 (New York, N.Y., Fam. Ct. 1979). "A careful reading of the *Caban* decision leads clearly to the conclusion that the U.S. Supreme Court has categorically destroyed the sex-oriented base for consent of unwed mothers in adoption proceedings . . ." *Id.* at col. 3.

9. *See* *Lalli v. Lalli*, 439 U.S. 259, 273-74 (1978) (illegitimate child may not take by intestacy from natural father absent judicial acknowledgment of paternity while father was living); *Trimble v. Gordon*, 430 U.S. 762, 764 (1977) (if marriage to natural mother is only means to legitimate child born out of wedlock, child cannot be foreclosed from sharing in intestate distribution of natural father); *Labine v. Vincent*, 401 U.S. 532, 537 (1971) (if several ways for natural father to legitimate his child, prohibitions from sharing in putative father's intestate distribution when child

fathers.¹¹ The first decision to focus on the rights of putative fathers was *Stanley v. Illinois*,¹² decided in 1972. The Court held that a putative father's illegitimate children cannot be removed from his custody without a prior finding that he is an unfit parent.

In *Stanley* the putative father had lived intermittently with his illegitimate children and their mother for eighteen years.¹³ When the mother died the children were taken from Stanley's custody to become wards of the state without any determination that he was an unfit parent.¹⁴ The state asserted that since "most unmarried fathers are unsuitable and neglectful parents" a neglect hearing was unnecessary.¹⁵ In dismissing this argument, the Court held that because Stanley had "sired and raised" his children he had a cognizable liberty interest in retaining their custody.¹⁶ Although the state has a legitimate interest in safeguarding the welfare of children by removing them from the custody of neglectful parents, this interest is not furthered by removing children from the custody of fit parents.¹⁷ Since nothing in the record indicated that Stanley was un-

not legitimated upheld); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968) (illegitimate child may maintain action for wrongful death of mother).

10. See *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968) (unwed mother permitted to sue for wrongful death of her illegitimate child).

11. See *Parham v. Hughes*, 441 U.S. 347 (1979) (unwed father denied right to sue for wrongful death of his illegitimate child); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (absent significant relationship with his illegitimate child, unwed father entitled to be heard only on child's "best interests" prior to adoption); *Stanley v. Illinois*, 405 U.S. 645 (1972) (illegitimate children may not be taken from father's custody and made wards of state without a prior finding of unfitness).

12. 405 U.S. 645 (1972).

13. *Id.* at 646.

14. *Id.* The Illinois statute provides that children become wards of the state when they have no surviving parent or guardian. ILL. ANN. STAT. ch. 37, § 702-5 (Smith-Hurd 1972). "Parent" was defined as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent." *Id.* § 701-14 (emphasis added) (declared unconstitutional in *Stanley*) (current version at ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd Supp. 1979)).

15. 405 U.S. at 654 (citing Brief for Respondent at 8, 31). In contrast to the treatment of Stanley, before custody of children of married parents, divorced parents, or unwed mothers could be terminated, a judicial determination of unfitness or neglect was required. ILL. ANN. STAT. ch. 37, §§ 702-1, 702-4 (Smith-Hurd 1972).

16. 405 U.S. at 651-52. The Court recognized that a parent's liberty interest in the "companionship, care, custody, and management of his or her children" "warrants deference . . . absent a powerful countervailing interest." *Id.* at 651.

17. The Court noted "that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family." *Id.* at 652-53.

fit, the termination of his custodial ties could not be seen as furthering the state's interest. Therefore, removing the children from their father's custody without a prior hearing on his fitness violated Stanley's due process rights.¹⁸ The Court concluded

that, as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.¹⁹

Chief Justice Burger described this unprecedented recognition of putative fathers' rights as "embark[ing] on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernable."²⁰ Although *Stanley* did not address the extent of putative fathers' rights in adoption cases, it is within the context of adoption cases that the Supreme Court has applied the *Stanley* holding.²¹

In re Malpica-Orsini: A Step Backward?

In the 1977 decision, *In re Malpica-Orsini*,²² the New York Court of Appeals upheld the constitutionality of New York Domes-

18. *Id.* at 649. The Court held that the advantage to the state of the expeditious procedure gained by presuming unfitness "is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.* at 658.

19. *Id.* at 649.

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

21. See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978). Several states interpreted *Stanley* as extending protections to putative fathers in the adoption context as well as in custodial proceedings. These states amended their statutes to extend the right of consent to putative fathers in adoption proceedings. See, e.g., ARIZ. REV. STAT. ANN. § 8-106 (West 1974) (current version at ARIZ. REV. STAT. ANN. § 8-106 (West Supp. 1979-1980)); CAL. CIV. CODE § 224 (West 1954) (current version at CAL. CIV. CODE § 224 (West Supp. 1980)); MINN. STAT. ANN. § 259.24(1)(a) (West 1971) (current version at MINN. STAT. ANN. § 259.24(1)(a) (West Supp. 1980)). In addition, the Supreme Court vacated and remanded an adoption case to be considered in the light of their decision in *Stanley*. *Rothstein v. Lutheran Social Servs.*, 405 U.S. 1051 (1972). On remand in *Rothstein* the Wisconsin Supreme Court held that a putative father's rights could not be terminated without a fitness hearing. *State ex rel. Lewis v. Lutheran Social Servs.*, 59 Wis. 2d 1, 8-10, 207 N.W.2d 826, 830-31 (1973). The adoption order was ultimately affirmed when the putative father was found unfit. This was the same procedure Wisconsin provided for other parents. See *State ex rel. Lewis v. Lutheran Social Servs.*, 68 Wis. 2d 36, 41, 227 N.W.2d 643, 646-47 (1975). It should be noted that the child placed for adoption was a newborn. For further discussion of this and related issues, see Note, *The Putative Father's Paternal Rights: A Focus on "Family,"* 59 NEB. L. REV. 610, 612 (1979).

22. 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975), *appeal dismissed sub nom.* *Orsini v. Blasi*, 423 U.S. 1042 (1976).

tic Relations Law (DRL) section 111.²³ This statute requires the consent of both parents prior to the adoption of a child born in wedlock. For a child born out of wedlock, however, only the mother's consent is necessary.²⁴ The Supreme Court ultimately dismissed the case for want of a substantial federal question.²⁵

Heather, the illegitimate child whose adoption was at issue, lived with both of her natural parents for approximately two years. After this period the parents separated, and the child lived with her mother. Orsini admitted paternity in a family court proceeding, and an order was entered directing him to pay monthly support for his child. In turn he was granted visitation rights. Several months later Heather's mother married, and her new husband subsequently filed a petition for the child's adoption. The adoption was permitted over Orsini's objections.²⁶ Under New York law, adoption terminated Orsini's parental rights and obligations.²⁷

The Court of Appeals noted that the *Stanley* requisites of a hearing were satisfied since the natural father had been given an

23. N.Y. DOM. REL. LAW § 111 (McKinney 1977), which provides in part:

1. Subject to the limitation hereinafter set forth consent to adoption shall be required as follows:

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

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

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

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

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of . . . the social services law; or

(c) for whose child a guardian has been appointed under the provisions of . . . the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental illness or mental retardation, . . . is presently and for the foreseeable future unable to provide proper care for the child. . . .

24. *Id.* § 111(1)(b)-(c).

25. *Orsini v. Blasi*, 423 U.S. 1042 (1976). The effect of the dismissal was to uphold the New York Court of Appeals view. *See Caban v. Mohammed*, 441 U.S. 380, 390 n.9 (1979).

26. 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.

27. *See* N.Y. DOM. REL. LAW § 117 (McKinney 1977).

opportunity to voice his objection to the adoption.²⁸ However, the only issue addressed at the hearing concerned the child's "best interests."²⁹ Although Orsini had acknowledged his paternity and lived with and supported his daughter, his attempt to block the adoption was unsuccessful. His ties to his child were permanently terminated without his consent or any finding that he was an unfit parent.³⁰

The Supreme Court's dismissal of *Malpica* is surprising after *Stanley*. Although the putative father in *Malpica* sired and helped raise his child, all of his parental ties were severed without affording him the same protections enjoyed by married fathers in the same situation. The Supreme Court's dismissal suggested that a putative father who had raised his child had only a right to a hearing on the child's best interests before his ties could be permanently terminated, in apparent contradiction to the *Stanley* holding.

Quilloin v. Walcott: *In the Middle of the Muddle*

The Supreme Court's 1978 ruling in *Quilloin v. Walcott*³¹ again failed to provide a definitive determination of the rights of putative fathers in the adoption of illegitimate children. In upholding a Georgia adoption statute³² that was virtually identical to the New York statute³³ at issue in *Malpica*, the Court focused on the putative father's relationship with his illegitimate child.

Leon Quilloin and Ardell Williams Walcott were the natural parents of a son born out of wedlock in 1964. The child lived with his mother for his entire life. In 1967 the mother married Randall Walcott, and in 1976 she consented to Walcott's adoption of her

28. 36 N.Y.2d at 577, 331 N.E.2d at 492, 370 N.Y.S.2d at 520. The court found that "[d]ue process was not lacking here. Although this was an adoption proceeding, appellant Orsini, having been given notice by court direction, the right to object and a full hearing with representation by an attorney, was not deprived of due process." *Id.*

29. *Id.* at 577-78, 331 N.E.2d at 492-93, 370 N.Y.S.2d at 520-21. This concern with the child's "best interests" coupled with presumptions of unfitness for unwed fathers has been the basis for denying unwed fathers the rights enjoyed by unwed mothers. *Id.* at 578-79, 331 N.E.2d at 493-94, 370 N.Y.S.2d at 521-22 (Jones, J., dissenting); see *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

30. 36 N.Y.2d at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513. An order terminating custodial rights is not necessarily permanent and does not preclude visitation rights. See *Tabler*, *supra* note 4, at 231-36.

31. 434 U.S. 246 (1978).

32. GA. CODE ANN. §§ 74-203, 74-403(3) (1964 & Supp. 1979).

33. N.Y. DOM. REL. LAW § 111 (McKinney 1977). For a partial text of this provision, see note 23 *supra*.

child. The adoption was granted over Quilloin's objection.³⁴ Quilloin, like Orsini, was given notice and an opportunity to object on the basis of the child's "best interests."³⁵

Quilloin attacked the Georgia court decision³⁶ on due process and equal protection grounds.³⁷ He urged that he was entitled to the same rights as married, separated, or divorced fathers. Thus, absent proof of his unfitness, the adoption of his child should not have been permitted.³⁸ Although the Court recognized that the parent-child relationship is constitutionally protected, it found that the nature of Quilloin's relationship with his child did not require more than an inquiry into the child's best interests before approving the adoption.³⁹ Unlike the putative father in *Stanley*, Quilloin had merely "sired" his child, leaving the task of raising the child to the natural mother and her husband.⁴⁰ The Court also rejected Quilloin's equal protection argument, finding Quilloin's position distinguishable from married, separated, or divorced fathers:

Although appellant was subject, for the years prior to these proceedings, to essentially the same child-support obligation as a married father would have had, . . . he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. . . . [H]e does not even now seek custody of his child.⁴¹

Taken alone, *Stanley* and *Quilloin* indicate that a putative father who has a sufficient relationship with his child has a liberty interest that due process protects by requiring a separate inquiry into parental "fitness" before the state can terminate parental rights. If only a tenuous relationship between a putative father and his child exists, inquiry focused solely on the child's best interests

34. 434 U.S. at 247.

35. *Id.* at 253.

36. 238 Ga. 230, 232 S.E.2d 246 (1977), *aff'd*, 434 U.S. 246 (1978).

37. Brief for Appellant at 5, 6, *Quilloin v. Walcott*, 434 U.S. 246 (1978). *See* 434 U.S. at 253.

38. Brief for Appellant, *supra* note 37, at 13.

39. 434 U.S. at 255. The Court found that "[w]hatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption . . . [was] in the 'best interests of the child.'" *Id.* *See* Comment, *Illegitimacy and the Rights of Unwed Fathers in Adoption Proceedings After Quilloin v. Walcott*, 12 J. MAR. J. PRAC. & PROC. 383, 385 (1979); Note, *supra* note 21, at 615.

40. *See* 434 U.S. at 248, 252-53.

41. *Id.* at 256.

is sufficient due process protection. Thus, *Stanley* and *Quilloin* suggest that if a putative father has established a sufficient relationship with his child, he should be given the same rights as married parents in similar circumstances.⁴² But the Supreme Court's dismissal of *Malpica* clouds this otherwise comprehensible explanation.

The Supreme Court's latest decision in *Caban v. Mohammed*⁴³ resolves many of these inconsistencies. Notably, *Caban* explicitly overrules *Malpica*.⁴⁴ Although *Caban* does resolve many uncertainties, the extent of the rights of some putative fathers in the adoption process remains an open issue.

CABAN V. MOHAMMED:

CONTINUING THE RECOGNITION, BUT HOW FAR?

Abdiel Caban and Maria Mohammed lived together out of wedlock for several years. During that time they had two children, David, born in 1969, and Denise, born in 1971. Abdiel Caban was identified as the father on each child's birth certificate, and he lived with and supported the children until 1973. At that time, Maria left with the children and took up residence with Kazim Mohammed, whom she married in 1974. Caban also married, but continually visited and kept in touch with the children.⁴⁵

In 1976 the Mohammeds filed a petition under New York DRL section 110⁴⁶ to adopt the children, and the Cabans filed a cross-petition for adoption.⁴⁷ Although both sets of petitioners could provide an adequate home, the court approved the Mohammeds' petition because DRL section 111⁴⁸ required only the natural mother's consent to adoption.⁴⁹ Caban's rights with respect to the adoption were limited. He was entitled to be heard in opposition to the adoption on the question of whether the Mohammeds were suitable parents.⁵⁰ As in *Malpica*, the New York Court of Ap-

42. See *Quilloin v. Walcott*, 434 U.S. at 252-53; *Stanley v. Illinois*, 405 U.S. at 657 & n.9.

43. 441 U.S. 380 (1979).

44. *Id.* at 390 n.9.

45. *Id.* at 382-83.

46. N.Y. DOM. REL. LAW § 110 (McKinney 1977), which provides in part that "[a]n adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse."

47. 441 U.S. at 383.

48. N.Y. DOM. REL. LAW § 111 (McKinney 1977). For a partial text of this provision, see note 23 *supra*.

49. 441 U.S. at 384.

50. *Id.*

peals upheld the adoption procedure.⁵¹ The Supreme Court, however, struck down this application of DRL section 111.⁵²

Finding the Proper Interpretation

There is no doubt that after *Caban* putative fathers of older children must be afforded the same right to consent to adoptions enjoyed by other classes of parents.⁵³ Because the Court did not address whether this right should be extended to putative fathers of "less than older children," the ramifications of the *Caban* holding are unclear. Two distinct views of *Caban* have evolved:⁵⁴ (1) The expansive interpretation, which overlooks the unique factual posture of *Caban* and extends the right of consent to all putative fathers; and (2) the narrow interpretation, which views *Caban* as extending the right of consent only to putative fathers of older children. There is support for both of these positions.⁵⁵

A recent decision in New York Family Court espoused the expansive view when it found that "[a] careful reading of the *Caban* decision leads clearly to the conclusion that the U.S. Supreme Court has categorically destroyed the sex-oriented base for consent of unwed mothers in adoption proceedings."⁵⁶ The court emphasized:

This suspect classification does not emanate from the facts of *Caban* and the limited class of affected fathers, but from [DRL section 111] which encompasses in its sweep both the limited class of fathers with substantial relationships with their out-of-wedlock children and those with little or no contact.⁵⁷

Several other New York courts have likewise found *Caban* to have broad impact.⁵⁸ Regardless of the age of the child placed for adop-

51. *In re David A.C.*, 43 N.Y.2d 707, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977) (mem.), *rev'd sub. nom.* *Caban v. Mohammed*, 441 U.S. 380 (1979).

52. 441 U.S. at 394.

53. This was conceded by Justice Stevens' dissent in *Caban*. See *id.* at 409 (Stevens, J., dissenting); note 7 *supra*.

54. See Carrieri, *New Issues Raised in Aftermath of "Caban,"* N.Y.L.J., Aug. 2, 1979, at 1, col. 1.

55. Compare note 7 *supra* with note 8 *supra* and note 58 *infra*.

56. *In re "R" Children*, N.Y.L.J., Aug. 3, 1979, at 7, col. 2 (New York, N.Y., Fam. Ct. 1979).

57. *Id.* (discussing, *inter alia*, *Caban v. Mohammed*, 441 U.S. 380 (1979)).

58. E.g., *In re Anthony John P.*, N.Y.L.J., Nov. 16, 1979, at 12, col. 5 (Bronx, N.Y., Sur. Ct. Nov. 7, 1979) (absent proof of abandonment, putative father's consent necessary for adoption); *In re "Female" E.D.*, No. 473, slip op. at 2 (Nassau, N.Y., Sur. Ct. Aug. 27, 1979) (hearing granted on issues of paternity and abandonment to determine if alleged father's consent required).

tion, *Caban*'s requirements are precluded only upon a finding of traditional statutory disqualifications, such as abandonment or neglect.⁵⁹ Support for the expansive position is found in the dispositive paragraph of *Caban*:

In sum, we believe that § 111 is another example of "overbroad generalizations" in gender-based classifications. . . . [T]his undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.⁶⁰

In contrast, *Caban* has been narrowly construed to extend the right of consent only to putative fathers of older children. Support for this restrictive view is found in Justice Stevens' dissent in *Caban*, where he characterized the majority holding as limited "to cases such as the one at hand involving the adoption of an *older* child against the wishes of the natural father who previously had participated in the rearing of the child and who admits paternity."⁶¹ Several portions of the majority opinion can be interpreted as supporting Justice Stevens' contention. The Court seems to limit its holding when it states that "[b]ecause the question is not before us, we express no view whether such difficulties [*i.e.*, locating putative fathers] would justify a statute addressed particularly to newborn adoptions."⁶² The decisive paragraph is fraught with reminders of the injustice wrought by applying DRL section 111 to putative fathers who have a substantial relationship with their children:

The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child. The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to

59. See, e.g., *In re Elizabeth V.C.*, No. (case sealed), slip op. at 2 (Bronx, N.Y., Sur. Ct. July 3, 1979) (abandonment constitutes waiver of consent right); *In re Richard B.*, No. (case sealed), slip op. at 2 (Bronx, N.Y., Sur. Ct. July 3, 1979) (abandonment constitutes waiver of consent right); *In re "Male,"* No. 232 M 1978, slip op. at 1 (Suffolk, N.Y., Sur. Ct. June 27, 1979) (intent to forego all parental obligations and rights constitutes waiver of consent right).

60. 441 U.S. at 394. See text accompanying notes 77-79 *infra*.

61. 441 U.S. at 409 (Stevens, J., dissenting) (emphasis in original). See S. 5845, N.Y.S. 1979-1980 Sess. (proposal to amend N.Y. DOM. REL. LAW § 111 (McKinney 1977)). This bill would limit the right of consent to unwed fathers who had either been adjudicated to be fathers or who were recorded as the father on the child's birth certificate.

62. 441 U.S. at 392 n.11.

exercise a concerned judgment as to the fate of their children. Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers.⁶³

The Court's logic applies equally to all classes of putative fathers. Although the decision pointed to special problems in proving paternity and in applying existing statutory abandonment provisions to putative fathers of newborns,⁶⁴ this does not justify restricting *Caban*. Careful examination of due process considerations, the Court's equal protection analysis, and Justice Powell's majority opinion reveals that even if these problems do exist, the Court's rationale extends the right of consent to *all* putative fathers, regardless of the age of their children.

Due Process Considerations

Caban attacked the New York Court of Appeals decision, claiming that section 111 violated his due process rights and denied him equal protection of the law.⁶⁵ Although the Court expressed "no view" on possible due process violations because they found the statute unconstitutional under the equal protection clause,⁶⁶ due process considerations appear to have been an integral part of the decision.

Caban, like *Stanley* and *Quilloin*, focused on the relationship between the putative father and his illegitimate children.⁶⁷ The decision noted that in rejecting the putative father's claims in *Quilloin*, the Court "emphasized the importance of [Quilloin's] failure to act as a father toward his children."⁶⁸ Quilloin's liberty interest in his child was thus insufficient to require more than a hearing concerning his child's best interests.⁶⁹ In contrast the Court noted that *Caban* had a substantial relationship with his children, demonstrating "that an unwed father may have a relationship with his children fully comparable to that of the mother."⁷⁰ The preser-

63. *Id.* at 394.

64. *Id.* at 392 n.11.

65. See Brief for Appellant at 25, 33, *Caban v. Mohammed*, 441 U.S. 380 (1979).

66. 441 U.S. at 394 n.16.

67. *Id.* at 389 n.7, 391-93.

68. *Id.* at 389 n.7 (citing *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978)).

69. 434 U.S. at 255.

70. 441 U.S. at 389. The Court noted that "[c]ontrary to . . . the apparent presumption underlying § 111, maternal and paternal roles are not invariably different in importance." *Id.*

vation of such a relationship was a sufficient liberty interest in *Stanley* to require a separate inquiry into a putative father's fitness before even custodial ties could be involuntarily terminated.⁷¹ *Caban*, like *Stanley*, rejects the validity of presumptions that paternal roles are always of secondary importance and not as worthy of protection as maternal roles.⁷²

Although the *Caban* decision noted that as a class, unwed fathers of newborns are not as close to their children as unwed mothers,⁷³ this generalization ignores nontraditional life styles. Cohabitation without the benefit of a marriage ceremony is no longer a rare situation. Couples often continue their unmarried status when they decide to have children. Were the right of consent not extended to a putative father in this situation, the unwed mother could relinquish not only her own right to their child, but the father's right as well. This could occur even if the putative father was loving and supportive of the unwed mother during the term of her pregnancy, and even if he would not only be willing to assume the role of a devoted father, but was anxious to do so. Irrespective of whether this situation is the exception or the rule, all unwed fathers cannot be presumed to have an inferior interest in their newborn children. Such presumptions, the result of stereotyping unwed fathers as uniformly unfit, were found to be unconstitutional violations of due process by *Stanley*.⁷⁴ By foreclosing individual inquiry into the paternal fitness of all unwed fathers, those with little interest as well as those with a deep interest in their newborn children are denied the right to participate in the child's upbringing. A blanket denial of any inquiry into fitness before termination of paternal ties of putative fathers of newborns is a deprivation of due process guaranteed by the Constitution.

Equal Protection Analysis

Caban found the application of DRL section 111 to be an unconstitutional violation of the equal protection clause of the fourteenth amendment.⁷⁵ It is well established that the equal protection clause allows a state to treat classes of people differently if there is sufficient justification to support the distinction.⁷⁶ It is

71. 405 U.S. at 651-53. See notes 12-21 *supra* and accompanying text.

72. 441 U.S. at 389.

73. *Id.*

74. 405 U.S. at 651-58.

75. U.S. CONST. amend XIV, which provides in part that no state may "deny to any person within its jurisdiction the equal protection of the laws."

76. See, e.g., *Parham v. Hughes*, 441 U.S. 347 (1979); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Goesaert v. Cleary*, 335 U.S. 464 (1948).

equally clear that states do not have "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."⁷⁷ A middle-ground test has emerged as the applicable standard of review for gender-based classifications.⁷⁸ Thus a sex-based distinction "'must serve important governmental objectives and must be substantially related to achievement of those objectives' to withstand judicial scrutiny."⁷⁹

The Court rejected the notion that unwed mothers are invariably closer to their illegitimate children than unwed fathers, emphasizing the close relationship that both Maria Mohammed and Abdiel Caban had with their illegitimate children. Both had a liberty interest in preserving their ties to their natural children.⁸⁰ Unless it could be demonstrated that the state's sex-based distinction is necessary to further an important governmental objective,⁸¹ the disparate protections afforded to unwed mothers and unwed fathers is a violation of the equal protection clause.⁸²

Although *Caban* found that the legislative history of section 111 was "sparse," it relied on the New York Court of Appeals determination that the state's objective was "the furthering of interests of illegitimate children, for whom adoption is often the best course."⁸³ The Supreme Court found no basis for finding that unwed fathers would be more likely to object to adoptions than unwed mothers. Moreover, the Court noted that when objections

77. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

78. *See, e.g., Craig v. Boren*, 429 U.S. 190, 199-204 (1976); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). *See generally* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

79. *Caban v. Mohammed*, 441 U.S. at 388 (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

80. Although the Court did not couch its decision in due process terms, the ultimate finding was that Abdiel Caban and Maria Mohammed had an equal interest in their illegitimate children. *Id.* at 389.

81. *Id.* at 392. The Court found that "the State's interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction as that made in § 111." *Id.*

82. *See Stanley v. Illinois*, 405 U.S. at 649.

83. 441 U.S. at 390 (citing *In re Malpica-Orsini*, 36 N.Y.2d 568, 572, 331 N.E.2d 486, 489, 370 N.Y.S.2d 511, 516 (1975), *appeal dismissed sub nom. Orsini v. Blasi*, 423 U.S. 1042 (1976)).

The State's interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. Moreover, adoption will remove the stigma under which illegitimate children suffer.

Id. at 391.

to adoptions are raised, it typically is due to the affection and concern the objecting parent has for the illegitimate child.⁸⁴ Where affection and concern are forthcoming, it is not in the child's best interests to sever all parent-child ties by ordering adoption, and the state's interest is not furthered in such a situation.

The Court also stressed the availability of statutory disqualifications, such as abandonment or neglect, as a less restrictive means of furthering the state's interest.⁸⁵ These disqualifications would permit an adoption to be ordered over the objections of any parent who had not shown any care for the child.⁸⁶ Ordering an adoption over parental objections promotes the state's interest in this situation. Therefore DRL section 111's distinction between the rights of unwed fathers and unwed mothers was found to be unreasonable and arbitrary and thus not substantially related to the promotion of beneficial adoptions.⁸⁷

The *Caban* majority was unwilling to delineate the scope of its holding and expressed no opinion whether the state's objectives would be furthered by denying the right to consent to putative fathers of newborns.⁸⁸ However, fathers of newborns, regardless of their marital status, have a liberty interest in their children that the state may not disregard. Therefore the state may not ignore an unwed father's rights by making an "inflexible gender-based distinction."⁸⁹ Any provision that allows the consent right to be waived must recognize both parents' rights to participate in the upbringing of their child absent a disqualifying circumstance.

The Court recognized the "special difficulties attendant upon locating and identifying unwed fathers at birth."⁹⁰ Seemingly, however, the Court did not intend to allow such difficulties to justify withholding the right of consent from putative fathers of newborns. While these difficulties may slow down the adoption timetable in some cases, the Court noted in *Stanley* that although "[t]he establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest . . . the Constitution recog-

84. *Id.* at 391-92.

85. *Id.* at 392.

86. *See, e.g.*, GA. CODE ANN. § 74-403 (Supp. 1979); ILL. ANN. STAT. ch. 40, § 1510 (Smith-Hurd 1977); KAN. STAT. ANN. § 59-2102 (1976); N.J. STAT. ANN. § 9:3-46(a) (West Supp. 1978-1979).

87. 441 U.S. at 391-93.

88. *Id.* at 392 n.11.

89. *Id.* at 392.

90. *Id.*

nizes higher values than speed and efficiency."⁹¹ Due process considerations require that the interests of putative fathers of newborns be protected, and preservation of a constitutional right cannot be sacrificed to increase speed and efficiency in the adoption process.

The importance of taking the additional time to locate and identify unwed fathers of newborns protects both the constitutional rights of these fathers and the best interests of the adoptive child. Using efficiency as the justification for not seeking to ascertain the natural father, thus preventing him from participating in the adoption proceeding, gives a mandatory preference to unwed mothers and eliminates a hearing on the merits.⁹² The *Caban* opinion emphasized that a case-by-case determination is necessary to decide if adoption is in the child's best interests, and such facts can only be extracted from a full hearing.⁹³ A particular newborn child's welfare cannot be fully explored by arbitrarily dispensing with any input from the natural father. Denying this right to putative fathers of newborns would impede the exploration of the child's best interests and ignore the father's constitutional guarantee to a determination of his fitness as a parent.

In some situations it is desirable to allow an adoption to proceed absent the otherwise necessary consent of the child's parents. *Caban* determined that a waiver of consent only after a finding of neglect or abandonment is a less restrictive means of furthering the state's interest.⁹⁴ However, the putative father of a newborn placed for adoption will have had no opportunity to develop either a substantial relationship with his child or to shirk his responsibilities toward the child.⁹⁵ Thus, a finding of abandonment to justify a waiver of consent presents difficulties when dealing with newborns. Although the *Caban* majority refrained from discussing the feasibility of devising new statutory provisions specifically directed towards newborns,⁹⁶ the Court recognized statutory reform as a possible solution to the "special difficulties" involved with putative fathers of newborns.⁹⁷ The Court specifically mentioned the possi-

91. 405 U.S. at 656.

92. *Id.* at 656-57 & n.9.

93. *See* 441 U.S. at 391-93.

94. *Id.* at 392.

95. *See* 441 U.S. at 405 & n.12 (Stevens, J., dissenting).

96. "Because the question is not before us, we express no view whether such difficulties would justify a statute addressed particularly to newborn adoptions . . ."

Id. at 392 n.11.

97. *See id.* at 392.

bility of a more tailored newborn abandonment statute.⁹⁸ If it had been willing to dispense with the consent requirement altogether for putative fathers of newborns, there would have been no reason to discuss modifying statutory definitions of waiver in the case of newborns. Thus the Court envisioned a statute encompassing unwed fathers of newborns to be applied the way statutory qualifications are applied to other parents—to justify the waiver of otherwise required consent to adoptions.⁹⁹

Justice Powell's Concerns

Justice Powell's majority opinion in *Caban* is best understood in the context of two other opinions handed down within four months of *Caban*. In *Lalli v. Lalli*¹⁰⁰ Justice Powell wrote for the Court, while in *Parham v. Hughes*¹⁰¹ he wrote a separate concurring opinion.¹⁰² Those two opinions clarify his position on putative fathers' rights and thus shed light on the correct interpretation of *Caban*. In *Caban*, *Parham*, and *Lalli* proof of paternity was a precondition to the assertion of any substantive rights.¹⁰³ An analysis of Justice Powell's reasoning demonstrates that the more difficult proof problems inherent in proving paternity of newborns do not justify withholding the right of consent from any class of putative father.

In *Parham*, decided the same day as *Caban*, the Court affirmed the constitutionality of a Georgia statute¹⁰⁴ that permitted an unwed mother but precluded an unwed father from suing for the wrongful death of their child.¹⁰⁵ Justice Powell's affirmance of this gender-based distinction focused primarily on the difficulties in

98. The Court acknowledged the possibility of a newborn statute "setting forth more stringent requirements concerning the acknowledgment of paternity or a stricter definition of abandonment." *Id.* at 392 n.11.

99. See, e.g., N.Y. DOM. REL. LAW § 111 (McKinney 1977). See text accompanying notes 156-160 *infra*.

100. 439 U.S. 259 (1978).

101. 441 U.S. 347 (1979).

102. *Id.* at 359 (Powell, J., concurring).

103. See *Caban v. Mohammed*, 441 U.S. 380 (1979) (veto power over adoptions); *Parham v. Hughes*, 441 U.S. 347 (1979) (right to bring wrongful death suit); *Lalli v. Lalli*, 439 U.S. 259 (1978) (right to share in intestate distribution).

104. GA. CODE ANN. § 105-1307 (1968) (repealed 1979), which 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 a recovery.

105. 441 U.S. at 349.

proving paternity. He characterized Georgia's legislative intent as directed towards "minimizing potential problems in identifying the natural father of an illegitimate child."¹⁰⁶ Justice Powell stressed that difficulties in establishing paternity are compounded when, as in *Parham*, the child is dead.¹⁰⁷ He distinguished this from situations where paternity is asserted by a putative father, and both mother and child are alive and available to offer evidence.¹⁰⁸ Justice Powell cited to his majority opinion in *Lalli* to support this distinction.¹⁰⁹

In *Lalli* the Court affirmed the constitutionality of a New York statute¹¹⁰ that permitted an illegitimate child to be an intestate distributee of his natural father's estate only if a judicial acknowledgment of paternity occurred during the father's lifetime.¹¹¹ Justice Powell did not distinguish problems of proving paternity based on the age of the illegitimate child¹¹² in either *Parham* or *Lalli*. In stead, the key criterion was the availability of mother, father, and child to offer evidence and ensure a reliable finding.¹¹³ Since proof of paternity and not mere speculation is a prerequisite for the assertion of any rights by the putative father, evidence offered solely by a party interested in furthering his own cause would not constitute adequate proof.¹¹⁴

Contrasting Justice Powell's affirmance of the statutory distinctions in *Parham* and *Lalli* and his invalidation of a similar distinction in *Caban* suggests that the determinative factor is the relative difficulties involved in establishing paternity. Considered in this

106. *Id.* at 359 (Powell, J., concurring).

107. *Id.* at 360 (Powell, J., concurring) (citing GA. CODE ANN. § 74-103 (1964)).

108. *Id.* (Powell, J., concurring).

109. *Id.* at 360 (Powell, J., concurring) (citing *Lalli v. Lalli*, 439 U.S. 259, 268-69 (1978)).

110. N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1977).

111. 439 U.S. at 268-69.

112. Comparing the blood type of the putative father with his alleged child is one method used to establish paternity. Beyond such scientific evidence courts hear testimony concerning the father-mother-child relationship that may lead to a finding of paternity. When dealing with newborns, the latter type of evidence is not as readily available. See generally Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 9-14 (1974).

113. See *Parham v. Hughes*, 441 U.S. at 360 (Powell, J., concurring) ("The father is required to declare his intention at a time when both the child and its mother are likely to be available to provide evidence."); *Lalli v. Lalli*, 439 U.S. at 269 ("[P]roof of paternity . . . is difficult when the father is not part of a formal family unit.").

114. See *Parham v. Hughes*, 441 U.S. at 360 (Powell, J., concurring); Tabler, *supra* note 4, at 240-41.

light, even the special difficulties involved in identifying putative fathers of newborns¹¹⁵ should be insufficient to justify disparate treatment of either fathers of older illegitimate children or fathers of newborn illegitimate children. Any putative father who appears at the adoption hearing would have the burden of establishing paternity, without regard to the child's age.¹¹⁶ The putative father who meets his burden and establishes paternity may not be denied substantive rights merely on the basis of his sex. The special difficulties surrounding putative fathers of newborns may increase the father's burden, but should not allow the state to withhold the right of consent.

Therefore, on both due process and equal protection considerations, and upon analysis of Justice Powell's reasoning regarding proof of paternity, the proper interpretation of *Caban* is one that does not distinguish between classes of putative fathers. The state's objective in securing adoptions for those illegitimate children whose interest would be served by adoption is not furthered by withholding the veto power from one class of putative fathers.¹¹⁷

SUGGESTED STATUTORY RESPONSE

Since the Court has declared the gender-based distinction in DRL section 111¹¹⁸ unconstitutional, it is incumbent upon New York and other jurisdictions whose statutes are similarly infirmed¹¹⁹ to bring their laws into compliance with the principles articulated in *Caban*. Furthermore, since notice of a pending adoption is a necessary step before consent rights can be asserted, the disparate notice provisions must be likewise amended.¹²⁰

115. See *Caban v. Mohammed*, 441 U.S. at 392.

116. See *Parham v. Hughes*, 441 U.S. at 360.

117. The *Caban* Court found no evidence that putative fathers would be more likely to block beneficial adoptions than unwed mothers. See 441 U.S. at 391-92. Furthermore, statutory means exist to proceed with adoptions absent the consent of any parent. See, e.g., N.Y. DOM. REL. LAW § 111 (McKinney 1977); note 23 *supra*. The validity of all sex-based distinctions will be brought into question if the Equal Rights Amendment is enacted. See H.R.J. Res. 208, 92d Cong., 1st Sess. (1971). For discussion, see Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 871 (1971); Comment, *Parental Rights: The Putative Father*, 18 WASHBURN L. J. 174 (1978); Comment, *supra* note 4.

118. N.Y. DOM. REL. LAW § 111 (McKinney 1977). For a partial text of this provision, see note 23 *supra*.

119. See, e.g., ALASKA STAT. § 20.10.040 (Supp. 1972); MISS. CODE ANN. § 93-17-5 (1972); WASH. REV. CODE ANN. § 26.32.040 (1961) (repealed 1979).

120. See, e.g., ILL. ANN. STAT. ch. 40, § 1509 (Smith-Hurd 1977); GA. CODE ANN. § 74-406(a)-(b) (Supp. 1977).

Any new statutory plan should implement the state's interest in furthering beneficial adoptions while safeguarding the rights of unwed parents.¹²¹ There are three possible alternatives for curing the gender-based distinction:¹²² (1) Requiring the consent of either unwed parent to secure an adoption; (2) eliminating consent altogether; or (3) requiring consent of both unwed parents. While each alternative would eliminate the gender-based distinction, only the third would protect the interests of the state, the unwed parents, and the adoptive child.

A sex-neutral statute could be drafted that would require only one parent to consent to the adoption of the illegitimate child. This possibility conjures up a rather horrifying scenario, where a putative father could sign away all rights to a child before the unwed mother has even returned from the delivery room. This could occur regardless of the mother's desire for or interest in her child. *Stanley* held that because a putative father has a liberty interest in his illegitimate child, due process requires a hearing on his fitness before even custodial ties can be terminated.¹²³ Thus the unwed father's rights were elevated to a level long since reached by unwed mothers.¹²⁴ Any statute that allows the termination of either paternal or maternal ties without a determination of unfitness would be a flagrant violation of due process.

A statute could be drafted without any consent requirement.¹²⁵ This statute would maximize the opportunity for adoption and thereby increase the legitimation of illegitimate children. The child's "best interests" would be determinative here. This statute would not uniformly serve the best interests of children, however, since permanently severing the ties to a child's natural parents is not necessarily beneficial. Furthermore, such a statute would be

121. See *Caban v. Mohammed*, 441 U.S. at 391-93; *id.* at 400 (Stewart, J., dissenting).

122. Other alternatives are basically variations of these three schemes. For example, the right of consent could be extended to all custodial parents, whether married or not. Under N.Y. DOM. REL. LAW § 111 (McKinney 1977), such provisions exist. See note 23 *supra*. But since the unwed mother is usually the custodial parent, such a scheme would automatically favor unwed mothers, and was rejected in *Caban* for that reason.

123. 405 U.S. at 649-53. See notes 12-21 *supra* and accompanying text.

124. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

125. In *Orr v. Orr*, 440 U.S. 268 (1979), the Supreme Court discussed the possibility of withholding statutory benefits from both sexes as a means of remedying unconstitutional gender-based distinctions. *Id.* at 272.

unable to withstand scrutiny under the due process clause since it disregards the liberty interests of both of the natural parents.¹²⁶

Although giving the right of consent to both unwed parents is not a panacea, it is the most desirable alternative.¹²⁷ While this may delay the final resolution of some adoption proceedings and prevent the beneficial adoption of some children because the requisite consent is withheld,¹²⁸ speed and efficiency cannot justify the denial of constitutional rights.¹²⁹ In addition, while adoption is a desirable route for many illegitimate children, others are likely to benefit more from maintaining ties with their natural parents.¹³⁰ *Caban* noted that withholding the consent to adoption is usually due to a parent's "affection and concern" for his or her child.¹³¹ It is difficult to justify permanently separating any child, legitimate or illegitimate, from someone who cares for and wishes to maintain parental ties with the child.

Assertions that the extension of the right of consent to all putative fathers would severely impede the adoption process are erroneous. It is unlikely that many putative fathers will seek to participate in the adoption proceeding.¹³² Furthermore, a putative father or mother without a deep attachment to his or her child in the case of older children, or one who has not demonstrated substantial early interest in the case of newborns, should not be permitted to veto an adoption.¹³³

126. See *id.* at 272; *Caban v. Mohammed*, 441 U.S. at 387 (citing *In re Corey L. v. Martin L.*, 45 N.Y.2d 383, 391, 380 N.E.2d 266, 270, 408 N.Y.S.2d 439, 442 (1978)).

127. See 440 U.S. at 272.

128. Even if a putative father withholds his consent to the adoption, a later finding of abandonment or other disqualifying circumstance would then permit the court to order the adoption without the putative father's consent. See *In re Anthony John P.*, N.Y.L.J., Nov. 16, 1979, at 12, col. 5 (Bronx, N.Y., Sur. Ct. Nov. 7, 1979). The court permitted the putative father to veto the adoption, but noted that if the unwed father "wishes to retain his paternal status, [he] must translate his promises of support, paternal interest, and responsibility into a regular pattern of conduct." *Id.*

129. See *Stanley v. Illinois*, 405 U.S. at 656.

130. *Caban* illustrates such a situation. See 441 U.S. at 389.

131. *Id.* at 392.

132. "[T]he vast majority of unwed fathers have been unknown, unavailable, or simply uninterested." *Id.* at 399 (Stewart, J., dissenting) (citations omitted). See *In re Malpica-Orsini*, 36 N.Y.2d 568, 572, 331 N.E.2d 486, 489-90, 370 N.Y.S.2d 511, 516-17 (1975), *appeal dismissed sub nom. Orsini v. Blasi*, 423 U.S. 1042 (1976); Comment, *The Unwed Father's Rights in Adoption Proceedings: A Case Study and Legislative Critique*, 40 ALB. L. REV. 543 (1972). One factor that serves as a deterrent to the sudden appearance and participation of the putative father is the threat that he will then become liable for the support of his child.

133. See *Caban v. Mohammed*, 441 U.S. at 391-93.

The right of both unwed parents to consent to adoptions can be incorporated into a statutory framework in such a way that *Caban* principles are met. But to change the effect of invalidated consent provisions, the statutory provisions dealing with requisite notice must also be reformed.

New Notice Provisions: A Necessary Prerequisite

Stanley held that due process required putative fathers to be notified before any rights to their illegitimate children could be severed.¹³⁴ Ensuring this requisite notice has been stressed in later cases.¹³⁵ In *Stanley* the Court determined that a putative father threatened with having his illegitimate child removed from his custody has a right to an individual hearing to determine if grounds exist to justify such a removal.¹³⁶ However, the precise extent of such notice requirements in the adoption process—who must be notified and the form of notice—is still unclear.¹³⁷

Caban invalidated the gender-based distinction in DRL section 111¹³⁸ on equal protection grounds by requiring the extension of statutory protections to unwed fathers.¹³⁹ Before a putative father can assert his substantive rights, he must receive notice that an adoption is pending. Notice statutes must, therefore, provide for notice to all putative fathers; otherwise a putative father's right to consent will be rendered meaningless. The New York notice provisions that require notification to only seven classes of putative fathers fall short of due process requirements necessitated by the *Caban* ruling.¹⁴⁰

134. 405 U.S. at 645.

135. See *Caban v. Mohammed*, 441 U.S. at 396 (Stewart, J., dissenting); *Quilloin v. Walcott*, 434 U.S. 246, 253 (1978); *In re Malpica-Orsini*, 36 N.Y.2d 568, 577, 331 N.E.2d 486, 492, 370 N.Y.S.2d 511, 520 (1975), *appeal dismissed sub nom. Orsini v. Blasi*, 423 U.S. 1042 (1976).

136. See 405 U.S. at 649-53; notes 12-21 *supra* and accompanying text.

137. See Comment, *supra* note 39, at 388; Comment, *supra* note 132, at 554-55; Comment, *supra* note 4, at 1605, 1607.

138. N.Y. DOM. REL. LAW § 111 (McKinney 1977). For a partial text of this provision, see note 23 *supra*.

139. See 441 U.S. at 394.

140. See N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977 & Supp. 1979-1980), which provides that notice shall be given to

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry . . . ;

It has been suggested that requiring extra steps to be taken to ensure that notice be given to unwed fathers will hinder the adoption process.¹⁴¹ However, if *Caban* is understood as recognizing the right of *all* classes of unwed fathers to participate in any proceedings concerning their illegitimate children, they must receive the requisite notice to secure the finality of the adoption proceeding. Only those notified in connection with the pending petition are bound by the decision of the court.¹⁴² An unwed father who has not been served cannot be bound by the adoption order. To minimize delay and interference with the adoption process proper notice must be given to protect the rights of all fathers, even those who are unknown or unascertained.¹⁴³ Proper notice also protects the adopted child and his or her adoptive parents because a final judgment operates to bar all those properly notified from overturning the adoption order.

When the location of the putative father is known or can be readily ascertained, personal service or service by registered mail

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child . . . ;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

(g) any person who was married to the child's mother within six months subsequent to the birth of the child

But see Stanley v. Illinois, 405 U.S. at 657 n.9 (suggesting all unwed fathers must receive notice of custody or adoption proceeding); Comment, *supra* note 132, at 570.

141. See *Caban v. Mohammed*, 441 U.S. at 401 (Stewart, J., dissenting); *id.* at 407 (Stevens, J., dissenting); *In re Malpica-Orsini*, 36 N.Y.2d 568, 572-73, 331 N.E.2d 486, 489-90, 370 N.Y.S.2d 511, 516-17 (1975), *appeal dismissed sub nom. Orsini v. Blasi*, 423 U.S. 1042 (1976).

142. See *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). For discussion of the voidable status of an adoption order if an unwed father has not been notified of the proceeding, see Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois*, 9 FAM. L. Q. 527, 529 (1975).

143. In *Armstrong v. Manzo*, 380 U.S. 545 (1965), the Supreme Court set aside the adoption of petitioner's child due to a finding that he was not given notice of the adoption petition. The Court there held, "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 550 (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)) (citations omitted).

should be considered reasonable notice.¹⁴⁴ But, if the whereabouts or even the identity of the father is unknown, other measures may be necessary. Notice by publication has been suggested as a solution to the difficulty of serving unwed fathers who are either absent or unknown.¹⁴⁵ While this seems like a logical alternative, publication provides only constructive notice.¹⁴⁶ Constructive notice should safeguard the finality of the adoption order, but it may not afford the putative father actual notice of the adoption proceeding.¹⁴⁷ Publication is also costly and may serve as a source of untold embarrassment to an unwed mother and her child.¹⁴⁸ Balancing the benefit of safeguarding adoption orders with the drawbacks of the potential cost and embarrassment suggests that publication should be used only in limited circumstances—for example, where it appears that the mother is intentionally withholding the identity of the putative father.¹⁴⁹

In New York, DRL section 111-a(4)¹⁵⁰ currently requires that those entitled to notice be served personally at least twenty days

144. See N.Y. DOM. REL. LAW § 111(3), 111-a(4) (McKinney 1977 & Supp. 1979-1980).

145. See ILL. ANN. STAT. ch. 40, § 1509 (Smith-Hurd 1972) (enacted after Stanley); Comment, *supra* note 39, at 401 n.95; Comment, *supra* note 132, at 573. But see N.Y. DOM. REL. LAW § 111-a(4) (McKinney 1977).

146. One court found publication to be a "folly," yet noted that it must be concluded that *Caban v. Mohammed* . . . provides that the status and rights of a non-marital father in an adoption proceeding cannot be different than that of a non-marital mother just because the father is a male and not a female. Since a non-marital mother whose rights have not been previously extinguished or surrendered would have to be served with appropriate process under New York's statutes, even though a petition for adoption alleged she abandoned the child, a non-marital father also must be served with such process. Since here such father is a party whose whereabouts are unknown, the only feasible applicable means of serving this process is by publication

In re Cecile Ann T., N.Y.L.J., Oct. 26, 1979, at 7, cols. 5, 6 (Bronx, N.Y., Sur. Ct. Oct. 17, 1979) (citations omitted).

147. The natural mother may not always know the identity of the putative father. Publication would result in a futile effort to locate a man identifiable only as "John Doe." See *id.*

148. See *Caban v. Mohammed*, 441 U.S. at 408-09 & 408 n.17 (Stevens, J., dissenting). Statutory provisions that allow for notice by publication without naming the mother avoid embarrassment but are relatively ineffective, since an unwed father may not even know he fathered a child. The mother's name would then provide the only link. See Freeman, *Remodeling Adoption Statutes After Stanley v. Illinois*, 15 J. FAM. L. 385, 397 (1976-1977).

149. See Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115, 136 (1973-1974).

150. N.Y. DOM. REL. LAW. § 111-a(4) (McKinney 1977 & Supp. 1979-1980).

prior to the proceeding. If such service cannot be effected, the court in its discretion can authorize service by mail.¹⁵¹ Notice by publication is expressly precluded.¹⁵² Publication, however, may be the only means of providing notice in certain instances. The provision in the Uniform Parentage Act¹⁵³ is illustrative:

If no person has been identified as the natural father or a possible father, the court, on the basis of all information available, shall determine whether publication or public posting of notice of the proceeding is likely to lead to identification and, if so, shall order publication or public posting at times and in places and manner it deems appropriate.¹⁵⁴

Statutory amendments patterned after the Uniform Act would allow for publication when, in the discretion of the court, it would be "reasonably calculated . . . to apprise intended parties of the pendency of the action."¹⁵⁵

Waiver of Consent Provisions

In certain instances beneficial adoptions may be ordered absent consent of either parent.¹⁵⁶ *Caban* makes it clear that if a parent attenuates the ties to his or her illegitimate child, the right to consent to an adoption is lost.¹⁵⁷ Statutory disqualifications of abandonment, neglect, or surrender of the child that operate to foreclose the rights of unwed mothers should be similarly applied to the now-protected class of putative fathers. Thus consent can be dispensed with upon a finding of a disqualifying circumstance. This ensures that where no "meaningful relationship" exists there will be no impediment to adoption.¹⁵⁸

Appropriately drafted abandonment provisions would similarly protect newborn adoptions, although some statutory distinctions such as a more particularized abandonment provision may be warranted.¹⁵⁹ The existing definition of abandonment in New York, for

151. *Id.*

152. *Id.*

153. For discussion of the Act's provisions, see Krause, *supra* note 112.

154. UNIFORM PARENTAGE ACT § 24(f).

155. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (citations omitted). See note 143 *supra*.

156. See, e.g., N.Y. DOM. REL. LAW. § 111(2) (McKinney 1977) (statutory disqualifications rendering consent unnecessary).

157. See 441 U.S. at 392.

158. See Comment, *supra* note 132, at 576. The typical disqualifying circumstance is abandonment. See, e.g., *In re Susan W. v. Talbot G.*, 34 N.Y.2d 76, 312 N.E.2d 171, 356 N.Y.S.2d 34 (1974); *State ex rel. Lewis v. Lutheran Social Servs.*, 68 Wisc. 2d 36, 227 N.W.2d 643 (1975).

159. See *Caban v. Mohammed*, 441 U.S. at 392.

example, refers to a six-month period of time during which a parent evinces "a settled purpose to be rid of all parental obligations and to forego all parental rights."¹⁶⁰ In the context of newborn adoptions the time frame of six months is clearly inappropriate and should be adjusted.

CONCLUSION

As a result of the Supreme Court decision in *Caban v. Mohammed*,¹⁶¹ when the adoption of illegitimate children is sought the rights of putative fathers are now protected to the same extent as the rights of unwed mothers. Contrary to the opinion of Justice Stevens and the *Caban* minority, this protection should extend to all putative fathers, regardless of the age of their children. Unwed fathers, like unwed mothers, have a constitutionally protected liberty interest in their illegitimate children, and the special problems that exist with respect to putative fathers of newborns do not justify the denial of the right to consent to adoptions.

A disqualifying circumstance, such as abandonment, will permit courts to order adoptions without the otherwise required consent of these putative fathers. Special problems involved in proving the paternity of newborns merely increases the burden of proof and does not justify withholding the right to consent.

New York and other jurisdictions whose statutes are similarly flawed must amend their adoption statutes to comply with *Caban*. For consent provisions in adoption statutes to operate effectively, notice provisions must also be changed to reflect consideration of the rights of putative fathers. Finally, new statutory definitions of abandonment must be drafted to give the courts guidelines for dispensing with the consent of unqualified putative fathers of newborns. Statutory reformers must not hesitate to apply the equal protection mandates of *Caban* to all classes of putative fathers: All unwed fathers should be treated equally under the law.

Rona Klein

160. N.Y. DOM. REL. LAW. § 111(2)(a) (McKinney 1977).

161. 441 U.S. 380 (1979).

