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Custody Rights Of Unwed Fathers

California Civil Code Sections 220 and 224 give the mother of an illegitimate child total right to custody and control over that child and no right to custody and control to the father of such child. Furthermore, if there is some reason for the mother to relinquish her custody and control of the illegitimate child, the father is still given no preference over third parties as to custody and control. In this comment the author examines the development of the common law behind the California statutes which gave the mother preference as to custody, discusses the policies behind the specific California rules concerning the custody of illegitimate children, suggests that in our modern society the present rules serve no valid policy, compares the rules concerning illegitimate children with those concerning legitimate children and finds no rational reason for difference in policy as to custody between the two types of children, examines the constitutionality of the California rules in light of the due process and equal protection clauses as well as the proposed equal rights amendment, and concludes that a law which gives no right to custody and control of the illegitimate child to the natural father of that child should not survive either policy considerations or constitutional attack.

California custody statutes presently give the mother of illegitimate children the right to full custody and control over the children. Custody statutes for legitimate children, on the other hand, favor parents over nonparents but do not favor one parent over the other. This comment examines the common law parental preference rule and finds a rational basis for extending this rule to include unwed fathers. Also discussed is the recent United States Supreme Court decision of Stanley v. Illinois, which suggests that an unwed father's right to due process and equal protection of the law may be violated when he is denied custody without a hearing as to his parental unfitness. Moreover, if the equal rights amendment recently ratified by the California Legislature becomes law, statutes governing custody of illegitimate children may be invalid as discriminating against male parents.

1. CAL. CIV. CODE §§200, 224.
2. CAL. CIV. CODE §§224, 4600.
Unwed Father’s Custody Rights at Common Law

At early English common law, an illegitimate child was held to be *filius nullius*, the child of nobody, or *filius populi*, the child of the people. Under this doctrine “the custody of such a child was in the hands of the parish.” Custodial rights were considered property rights which had commercial value and were subject to transfer and sale. Presumably, custody rights were not recognized in unmarried parents because no legal relationship existed between such parents and their children.

As equity began to exercise jurisdiction in custody disputes, the doctrine of *filius populi* was modified to recognize a primary right to custody of illegitimate children in the mother. Various reasons have been proposed for considering the unwed mother a more natural guardian than the father. These include: (1) the mother is more easily identified than the father; (2) she is biologically better suited to care for and nurture the child; and (3) the natural bonds of love and affection for the child are stronger in the mother than in any other person. Later the custody rules were further modified to recognize that the right of a competent father to custody of his illegitimate child is superior to the right of anyone other than the mother “and on the death of the mother he *prima facie* becomes entitled as against the world to the care and custody of the child.” The reasoning behind the rule that the mother of illegitimate children is necessarily a better custodian than the father may be invalid, but it underlies both the common law rule and California custody statutes.

Unwed Father’s Custody Rights under California Statutes

A. Mother’s Right to Full Control over Child

California Civil Code Section 200 provides that the mother of an illegitimate unmarried minor is entitled to its custody, services and earnings. If the mother is alive and a fit parent, and the child has not been legitimated, her right to custody is absolute. Moreover, the natural father does not acquire custody rights merely by acknowledging

5. 8 CAL. JUR. 2d Bastards §2 (Rev. 1968).
9. 10 AM. JUR. 2d Bastards §60 (1963).
10. Id. §62.
11. Id. §60; CAL. CIV. CODE §200.
paternity.\textsuperscript{18}

Even when the mother does not desire custody, the father has no
dominant parental right and only the mother's consent is necessary for
adoption of the illegitimate child.\textsuperscript{14} If the unwed mother wishes to
put the child up for adoption, a father who wishes to give the child
his parental care is confronted with the judicial argument that if the
legislature had intended the father's consent to be necessary for adop-
tion, it would have said so in simple language.\textsuperscript{15}

It has also been held that the unwed mother acts for herself and
as the father's agent in all matters affecting the child, and that her
agency is implied in law and extends to renunciation of the father's
parental rights.\textsuperscript{16} While this view seems to recognize by implication
the existence of a parental right of the father, it denies him any oppor-
tunity to exercise it. Thus, in Guardianship of Truschke,\textsuperscript{17} a natural
father who acknowledged paternity of his illegitimate child, spent $310
for a crib and baby clothes, and desired to receive the child into his
home, was denied custody of his child because the mother put it in a
pre-adoptive foster home before the father could legitimate it. The
court of appeal in Truschke said that Civil Code Section 200 implied
the mother's right to full control over the child.\textsuperscript{18} Thus neither the
father's public declaration of his paternity nor his desire to legitimate
his child was sufficient to prevent the mother from allowing the child
to be placed for adoption.

B. Legitimation by the Father

The reluctance of California courts to recognize custody rights of
unwed fathers may be explained by the existence of the California le-
gitimation statute, Civil Code Section 230. Under this statute, the fa-
ther of an illegitimate child by publicly acknowledging it as his own,
receiving it into his family, and treating it as a legitimate child "adopts"
and legitimates it.\textsuperscript{19} If the father complies with the requirements of
Section 230, the child's status becomes that of a legitimate child of
both natural parents; thus the mother's rights under Section 200 are

\textsuperscript{13} Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964). For
effect of legitimation of the child by its father, see text accompanying notes 19-20
infra.
\textsuperscript{14} Guardianship of Truschke, 237 Cal. App. 2d 75, 79-80, 46 Cal. Rptr. 601,
604 (1965); \textsc{Cal. Civ. Code} \$224.
\textsuperscript{15} Adoption of Irby, 226 Cal. App. 2d 238, 241, 37 Cal. Rptr. 879, 881-82
\textsuperscript{16} Adoption of Laws, 201 Cal. App. 2d 494, 500, 20 Cal. Rptr. 64, 68 (1962).
\textsuperscript{17} 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965).
\textsuperscript{18} Id. at 79-80, 46 Cal. Rptr. at 604.
\textsuperscript{19} \textsc{Cal. Civ. Code} \$230.
modified and neither parent has a superior right to custody.\textsuperscript{20}

Since the public interest favors the legitimation of children, it is argued that custody rights are justly denied to unwed fathers who fail to confer the status of legitimacy on their children. Yet in many cases, despite the father's public acknowledgment of paternity and desire to legitimate the child, he cannot do so. For example, if the father is married to a woman who is not the child's mother, he must obtain his wife's consent to receive the child into their home; if she refuses consent, he cannot comply with Section 230. Similarly, if the child's natural mother wants custody and refuses to marry or live with the father, he would have no chance to legitimate the child since he would have to take the child away from its mother in order to receive it into his family. Even in a situation in which the mother and father had been living together as a family, if the mother places the child up for adoption immediately after its birth, the father would have no opportunity to receive the child into his home as is required under Section 230.

C. Father's Obligation to Support Child

Regardless of whether or not the father seeks custody of his illegitimate child, he, as well as the mother, is obligated to support and educate the child. The child's mother or guardian may sue to enforce such an obligation\textsuperscript{21} and the father may be criminally liable if he willfully fails to provide his illegitimate child with necessary food, shelter or medical attention. This is true even when the mother is legally entitled to custody and regardless of whether or not such necessities are already being furnished by other persons.\textsuperscript{22} Therefore, it seems clear that the legislature has adopted a policy in which the father's duty to support his illegitimate child is independent of his right (or lack thereof) to custody of the child.

In summary, the California Legislature has chosen a policy toward the father of an illegitimate child which gives him no right to custody of his child. This policy, based in part on a belief that it will encourage the legitimation of illegitimate children, is independent of the father's duty to support his illegitimate child. It has been held, however, that this policy toward the father is applicable only while the mother is alive, and no California statute covers the question of the existence or non-existence of a father's right to custody after the death of the mother.

\textsuperscript{22} Cal. Pen. Code §270.
FATHER'S CUSTODY RIGHTS AFTER MOTHER'S DEATH

In *Guardianship of Smith*, a majority of the California Supreme Court, relying on case law of other jurisdictions, concluded that upon the death of the mother, the natural father is entitled to custody of an illegitimate child if the father is a fit person. In *Smith*, the sister of two minor children petitioned to be appointed their guardian after the mother had died. The natural father filed objections to the sister's appointment and asked that he be appointed the children's guardian. The trial court found that both the sister and the father were fit and proper persons to be given custody, but that it was in the best interests of the children that the sister be appointed guardian. The supreme court reversed for retrial on the issues of fact, stating that while the best interests of an illegitimate child are the important factor, the child's parents have a superior claim to any *third parties* if they are fit and proper. The court cited numerous foreign cases holding that an unwed father is entitled to custody of the child as against all but the mother, that he is considered its “natural” guardian though he is not legally related to it, and that after the mother's death the father has a *prima facie* superior right to custody.

One of the central issues dividing the *Smith* court was the question of whether the father, even after the mother's death, must legitimize the child in order to earn his right to custody. The majority did not make legitimation a prerequisite of obtaining custody but did note that legitimation is more likely to occur if the father is awarded custody, since without the right to custody he would not be likely to receive the children into his home and treat them as legitimate offspring. Justice Traynor, in his concurring opinion, assumed the children would be legitimated if custody were given to the father and that otherwise “they [would] remain to all intents and purposes orphans.” Justice Traynor was also concerned that the children would not receive proper care and support from their father if they remained outside his home and “essentially strangers to him.” Certainly it does not seem likely that the sister, though she might provide adequate support, would go through the necessary procedures to formally adopt the children. It is much easier for the desired legitimate status to be achieved by the father's informal actions of treating the children as his own.

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24. *Id.* at 93, 265 P.2d at 890.
25. *Id.*
26. *Id.*
27. *Id.* at 94, 265 P.2d at 890.
28. *Id.* at 97, 265 P.2d at 892.
29. *Id.*
While the majority in *Smith* was willing to take the chance that the father would legitimate the children if given custody, Justice Traynor insisted that the father should be required to explain why he had not already legitimated the children and to establish on retrial that the children would be legitimated "as a minimum prerequisite to establishing his fitness for appointment as guardian." Seeming to regard parental custody in the unwed father as more of a privilege than a right, Justice Traynor asserted that a father who is able to legitimate his child but fails to do so thereby demonstrates his unfitness as a guardian. Further, "[s]uch a father must not be allowed to bargain with the court by offering to exercise his power to legitimate in exchange for custody." Yet Justice Traynor seemed to be allowing the court to bargain with the father by withholding the right of custody until receiving the father's promise to legitimate. If the father in *Smith* had willfully refused to legitimate his children, probably not even the majority of the court would have been willing to appoint him as guardian; it might have found that such an attitude proved the father an unfit parent, or simply that custody in a person who was willing to inflict illegitimate status permanently on his children would be detrimental to the children's best interests. 

A different situation would arise if the father, though willing to legitimate, could not do so because of circumstances beyond his control—for example, lack of his present wife's consent. Here the court might have found that the presumption that parental custody serves the children's best interests was overcome by the facts and that it would be detrimental to the children to have their legal guardianship in their father while their physical custody was elsewhere. However, it seems more likely that the *Smith* majority would have appointed the father legal guardian in such a situation in order to encourage the father's parental concern which could only benefit the child.

**Extension of the Rule in Smith**

Can the rule of *Smith*, that the unwed father has a *prima facie* superior right to custody after the mother's death, be extended to situations in which the mother is alive but cannot be granted custody? *Truschke* held that the father had no dominant parental right even when the mother did not want custody; but in that case the mother had already placed the child for adoption, thereby putting the child be-

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30. Id. at 98, 265 P.2d at 893.
31. Id. at 98, 265 P.2d at 892.
32. Id. at 98, 265 P.2d at 892-93.
yond the father's control because of Civil Code Section 224. If the mother simply had not wanted custody and had done nothing to affect the child's legal status, or if the mother was found to be an unfit parent and thus denied custody, would the father then have a dominant right to custody as against a stranger? If the parents of an illegitimate child do indeed have a superior claim to custody as against the world if they are fit and proper, as the Smith majority asserted, then the father, if a fit parent, arguably should be given custody in both of these hypothetical situations.

Though California and other jurisdictions infer that a father's right to custody of an illegitimate child after the mother's death is a natural right, it is universally assumed that the mother has a stronger right than the father. The argument which holds that a father's natural rights lie dormant while the mother is alive and then suddenly spring to life when the mother dies appears more expedient than logical. Furthermore, the reasoning underlying this argument is based on the assumption that the unwed mother is always, or generally, a better custodian of her minor children than is their father. This assumption may be invalid, especially in the light of contrary assumptions made as to legitimate parents.

CUSTODY RIGHTS OF LEGITIMATE PARENTS:
THE PARENTAL PREFERENCE RULE

A. History of the Rule

Prior to enactment of California Civil Code Section 4600 in 1969, there were two important California statutes dealing with custody of legitimate children: Civil Code Section 138 and Code of Civil Procedure Section 1751.

Civil Code Section 138 provided that in divorce and separate maintenance actions the court could “make such order for the custody of such minor children as may seem necessary or proper” and was to be guided “by what appears to be for the best interests of the child.” The section made no mention of parents having preferred status over strangers as custodians, and in fact it read as a strict best interests of the child rule. Under such a rule, a court was free to award custody to a stranger merely upon finding that his care would be better for the child's welfare than would the care of either parent. However, the

34. See text accompanying notes 14-15 supra.
36. Id.; Armstrong v. Price, 292 S.W. 447, 448 (Mo. App. 1927); Ex parte Wallace, 26 N.M. 181, 190 P. 1020, 1022 (1920); Aycock v. Hampton, 84 Miss. 204, 36 So. 245 (1904).
courts interpreted the statute in light of the strong common law doctrine of parental preference.\textsuperscript{38} Under this doctrine, parents are given a dominant right to custody of their children, not only because parents are presumed fit guardians, but because a presumption exists that the best interest of a child is served by having it placed with its fit parent.\textsuperscript{39}

Thus in \textit{In re Campbell}, a guardianship proceeding before the California Supreme Court in 1900, the court observed that “[u]nder the general law, and independently of the provisions of the codes, the father has a natural right to the care and custody of his child.”\textsuperscript{40} At the time of this decision, the court was guided by Code of Civil Procedure Section 1751,\textsuperscript{41} which provided that the father or mother of a minor child was entitled to be appointed guardian if found by the court to be competent to discharge the duties of guardianship. \textit{Campbell} declared that under this provision, \textit{and under the general law}, the parent was assumed to be competent, and thus the court could not appoint another as guardian unless the parents are found incompetent.\textsuperscript{42}

Later cases continued to hold that before a fit parent could be deprived of custody there had to be an affirmative finding that the parent is unfit\textsuperscript{43} even though none of the code sections expressly required such a finding. Though \textit{Campbell} considered parental custody rights to be “at least so far as the services of the child are concerned . . . strictly a property right,”\textsuperscript{44} modern cases emphasize a personal status theory of custody rather than a property theory. That is, “natural parents, because of their relationship to the child, [are] presumed to be the custodians best fitted to serve the child’s needs.”\textsuperscript{45}

\textbf{B. Modern Statutes Governing Legitimate Child Custody}

Modernly, in both guardianship and custody proceedings for legitimate children, California statutes give preference to parents over non-parents, but neither parent is favored over the other.\textsuperscript{46}

Code of Civil Procedure Section 1751 was repealed in 1931 with the enactment of the Probate Code.\textsuperscript{47} Sections 1406 and 1407 of the Probate Code provide that, in appointing a general guardian of a minor, the court is to be guided by the best interests of the child but

\textsuperscript{39} \textit{Id.} at 422, 66 Cal. Rptr. at 427.
\textsuperscript{40} \textit{In re Campbell}, 130 Cal. 380, 382, 62 P. 613, 614 (1900).
\textsuperscript{41} \textit{Repealed}, CAL. STATS. 1931, c. 281, §1700, at 687.
\textsuperscript{42} \textit{In re Campbell}, 130 Cal. 380, 383, 62 P. 613, 614 (1900).
\textsuperscript{44} \textit{In re Campbell}, 130 Cal. 380, 382, 62 P. 613, 614 (1900).
\textsuperscript{45} Katz, supra note 7, at 151.
\textsuperscript{46} CAL. CIV. CODE §4600; CAL. PROB. CODE §§1407, 1408.
\textsuperscript{47} CAL. STATS. 1931, c. 281, §§1406, 1700, at 670, 687.
that preference is to be given to a parent among persons equally entitled in other respects to the guardianship.

California Civil Code Section 4600 (which replaced Section 138 in 1969) requires the award of custody of a minor child to a parent unless the court finds that custody in either parent would be detrimental to the child, and that the award to a nonparent is required to serve the child's best interests. Section 4600 at one time gave preference to the mother if the child was of tender years, but this provision was deleted by the legislature in 1972, apparently recognizing that each family situation should be examined independently of any assumptions about which parent is generally considered more suited to caring for very young children.

Compared to former statutes as interpreted, the language of Civil Code Section 4600 could be construed as a weakening of the parental preference rule. The section does not require a finding of parental unfitness before custody can be awarded to a nonparent, but only that parental custody would be detrimental to the child and that award to a nonparent would be required to serve the child's best interests. Yet the wording of the statute may simply be the result of legislative reluctance to impose the stigma of unfitness on a parent. Also, the criteria for establishing unfitness and those for establishing detriment to the child would seem to be substantially the same.

Thus it appears that the California custody statutes for legitimate children codify the parental preference rule, although this is unclear from a literal reading of the statutes.

Two recent cases, In re Marriage of Russo and Bookstein v. Bookstein, suggest that as between married parents the courts will continue to apply the best interests of the child standard under Civil Code Section 4600 in determining which parent should have custody. Since these cases did not involve custody disputes between parents and nonparents, they do not indicate whether or not the parental preference rule will be applied when courts interpret Section 4600 in such disputes. Even if they are not bound to do so by the statute's language, it seems likely that the courts will read a strong parental preference rule into Section 4600 just as they did in interpreting former Section 138.

50. See text accompanying notes 41-43 supra.
C. Should Parental Rights be Subordinated to Best Interests of the Child?

Some courts dislike the parental preference rule because it seems to place parental rights above the welfare of children. In *Roche v. Roche*53 a divorce court awarded joint control of a child to both parents but gave physical care and control to the paternal grandparents. Though the child had been living with her grandparents for several years, the California Supreme Court reversed the order and gave custody to the mother because she had not been proven unfit.54 Justice Schauer objected in his dissent, "Surely the child must be regarded as having some rights," and then asserted that "those rights should be weighed and balanced as against or in favor of those who are asserting their own rights to its custody."55

Correctly stated, however, the parental preference rule is not that parents' claims are superior to the rights and welfare of children, but only that the law presumes parental custody will serve the child's best interests.56

D. Dangers of a Strict Best Interests Rule

In the well publicized decision of *Painter v. Bannister*,57 a father, after his wife's death, had given temporary custody of his son to the maternal grandparents. A year and a half later the father remarried and sought to regain custody of his son. There was no showing that the father was unfit, though the court found that he had unconventional religious beliefs and generally led a Bohemian type of life. Conversely, the grandparents were conventional, stable, middle-class folk. The Iowa court reversed an order awarding custody to the father because the court believed it would not be in the boy's best interest to remove him from the stable atmosphere of the grandparents' home. Thus the court seemed to use the best interests rule to apply its own values and prejudices to deny custody to a parent who was not found to be unfit.58 Had the parental preference rule been applied, the father probably would have been awarded custody.

In a California case, *O'Brien v. O'Brien*,59 a father appealed an order awarding custody of his minor child to her maternal grandpar-

53. 25 Cal. 2d 141, 152 P.2d 999 (1944).
54. Id. at 143-44, 152 P.2d at 1000.
55. Id. at 145, 152 P.2d at 1001.
58. 258 Iowa at 1393, 140 N.W.2d at 154.
ents after the parents' divorce. The trial court had found that neither parent was a fit and proper person to have custody. The evidence showed that the father was reserved with limited ability to show affection and that because of his long working hours he was not able to spend a great deal of time with his daughter. But the appellate court observed that "[a]lthough fitness is a factual question, the burden on the one claiming parental unfitness is a heavy one." Finding that the evidence did not prove the father to be an unsuitable or incompetent parent, the court reversed the order and awarded custody to the father. Under application of a strict best interests test, the lower court's order in O'Brien probably could not have been disturbed on appeal.

The vague best interests of the child standard probably does less to protect the child's true interests than the parental preference rule, which protects not only parents' rights but the parent-child relationship from interference by the state or other third parties. Who can understand the child's true best interests better than his fit parent? "There should be a narrower means of protecting children from harm than a law which authorizes the dissolution of the parent-child relationship even when the parent is not harming the child."

**SHOULD PARENTAL PREFERENCE BE APPLIED TO UNWED FATHERS?**

If, under application of a strict best interests of the child rule, a fit parent of a legitimate child may be denied custody because of the court's general disapproval of the parent, then it would seem that the dangers of such a rule would be even greater if it were applied in proceedings involving custody of illegitimate children. However, even a strict best interests of the child rule would at least not burden unwed fathers with the presumption that mothers of illegitimate children are necessarily better parents than are fathers. Such a presumption does seem to underlie Civil Code Section 200.

Evidence suggests that this presumption may not be valid and may not serve the best interests of illegitimate children. According to recent studies, the unwed father "is not so disinterested, uncaring, and detached from the situation he has helped to create as is popularly supposed." The popular belief that his relationship with the mother

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60. Id. at 422, 66 Cal. Rptr. at 427.
61. Id. at 422-23, 66 Cal. Rptr. at 427-28.
63. Id. at 59.
64. Perkins and Grayson, The Juvenile Unwed Father, in NATIONAL COUNCIL ON ILLEGETIMACY, EFFECTIVE SERVICES FOR UNMARRIED PARENTS AND THEIR CHILDREN 59 (1968).
is usually "fleeting and casual" is apparently false. One experienced social worker has stated that, "[i]n the contrary, for the great majority, the children born out of wedlock represent involvements ranging from months to years in duration, and from affection to love . . . ."

Although an unwed father may deny paternity or seek to avoid the burden of supporting his illegitimate child, his attitude may be caused by his lack of opportunity to visit with the child and develop paternal affection. A father's lack of contact with his child does not always signify unconcern—often the mother is unwilling to continue her involvement with the father, and some social agencies follow a policy of keeping the father from seeing the child or communicating with the mother. When an agency actively encourages unwed fathers to become involved with their children, the fathers tend to show parental concern for the welfare of the children.

Since the parental preference rule is modernly based not on the legal relationship but on the natural relationship between parent and child, should not unwed fathers be included in the class of persons known as "parents" and thus be presumed fit custodians of their children? If it is true that "every child has a right to know something about its natural parents," then perhaps every father has a right to take part in vital decisions about his child—for example, the decision of whether the child is going to live with its natural parent or be adopted by strangers.

**ARE CALIFORNIA CUSTODY STATUTES SUBJECT TO CONSTITUTIONAL ATTACK?**

**A. Stanley v. Illinois**

Because of a recent United States Supreme Court decision involving an unwed father's parental rights, the question arises whether the custody rights of unwed fathers are so fundamental as to be constitutionally protected.

The petitioner in *Stanley v. Illinois* was an unwed father whose children, upon their mother's death, were automatically declared state...
wards and placed with court-appointed guardians. Under Illinois statutes, the State assumed custody of the children of married parents, divorced parents, and unmarried mothers only after a hearing and proof of neglect.\textsuperscript{72} The children of unmarried fathers, however, were declared dependent children without a hearing on the father's fitness and without proof of neglect.\textsuperscript{73} Stanley claimed that the Illinois statutes deprived him of the equal protection of the laws guaranteed by the fourteenth amendment.\textsuperscript{74} The Illinois Supreme Court rejected Stanley's equal protection claim, holding that the State could constitutionally omit unwed fathers from its statutory definition of parents and thus deprive him of a hearing. In reversing the Illinois court decision, the Supreme Court held that both the due process and the equal protection rights of Stanley had been violated.\textsuperscript{75}

1. Due Process

To determine whether statutes which grant exclusive custody rights to unwed mothers are "arbitrary" in their discrimination against a class of parents who have not been proven unfit and whether such statutes are reasonably related to a legitimate state purpose—protection of the illegitimate child's best interests—due process of law must be examined.

Due process has been described by the Supreme Court as those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ."\textsuperscript{76} Substantive due process requires that legislation depriving a person of life, liberty or property must be reasonably related to a proper legislative purpose and must not be "arbitrary or capricious."\textsuperscript{77} Procedural due process requires notice and an opportunity for a hearing by a fair and impartial tribunal before a state may deprive a person of a significant right.\textsuperscript{78}

In its recent abortion law decisions,\textsuperscript{79} the Supreme Court examined criminal abortion statutes in the light of modern medical data indicating that abortion in early pregnancy is now actually safer than normal

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\textsuperscript{72} Id. at 658.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 646.
\textsuperscript{75} Id. at 658.
\textsuperscript{76} Hebert v. Louisiana, 272 U.S. 312, 316 (1926).
\textsuperscript{78} Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246 (1944); Powell v. Alabama, 287 U.S. 45, 68 (1932).
\textsuperscript{79} Roe v. Wade, 93 S. Ct. 705 (1973); Doe v. Bolton, 93 S. Ct. 739 (1973). For a detailed analysis of the effect of these abortion cases on California law, see Comment, The Landmark Abortion Decisions: Justifiable Termination or Miscarriage of Justice?—Proposals for Legislative Response, this volume at 821.
The Court found in *Roe v. Wade* that the Texas criminal abortion statute, which permitted abortion only to save the mother's life, invaded petitioner's constitutionally protected zone of privacy and violated due process. The opinion emphasized that only personal rights that are "fundamental" or "implicit in the concept of ordered liberty" are within this right of privacy.

Certainly an unwed father's custody rights are personal, not merely economic; arguably, his rights are as deserving of judicial protection as those of any other parent. Perhaps the relationship between a father and his illegitimate child should be considered fundamental, creating a *zone of privacy* which the state cannot enter without a compelling interest.

In *Stanley* the Supreme Court found that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." The right to raise one's children had been deemed an essential, basic civil right, the Court noted, and due process protection of the family unit had been extended to illegitimate relationships. Thus Stanley's parental rights were not to be ignored because he failed to marry the mother of his children. He had a right to be treated as a parent, not as a stranger, and could not be presumed unfit while legitimate parents were presumed fit.

The fact that Stanley had lived intermittently for eighteen years with Joan Stanley and their children may have been significant in the Court's willingness to protect the parent-child relationship in this case. If parental rights are based on the notion that there is a "private realm of family life which the state cannot enter," would Stanley's right have been protected if he had lived apart from his family during those eighteen years and not as part of the family unit? Could the relationship between father and child then have been considered "cognizable and substantial"?

The Court apparently believed that the rights of all biological parents are so strong that a state cannot assume unfitness without a hearing. The Court admitted, "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents . . . . But

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81. *Id.* at 727.
82. *Id.* at 732.
83. *Id.* at 726.
85. *Id.*
86. *Id.* at 658.
all unmarried fathers are not in this category; some are wholly suited to have custody of their children.”

On the other hand, it might be argued that Stanley, if construed narrowly, requires a hearing only when the state is affirmatively acting to remove a child that is already in the custody of its parent. The procedural due process grounds of Stanley were quite limited: the state cannot presume that unmarried fathers are unsuitable and neglectful parents when all other parents are presumed fit, but must grant a hearing on the father’s fitness before his children can be taken from him. It is not at all clear that due process requires a hearing on the fitness of a father who is challenging the automatic granting of custody to the mother under a statute such as California Civil Code Section 200 because there it does not appear that the state must engage in affirmative action in order to deprive the father of custody of his children.

2. Equal Protection

Under the equal protection clause of the fourteenth amendment, state legislation may not arbitrarily and discriminatorily classify citizens. However, “[t]he Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.” A legislative distinction must have “some relevance to the purpose for which the classification is made.” Whoever challenges the classification “must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.”

When legislation involves mere social or economic regulation or a personal interest which is less than fundamental, the equal protection test applied by the Supreme Court is whether the challenged statute bears a rational relationship to a legitimate state purpose or whether the classification is wholly arbitrary. However, when legislation affects a “fundamental interest,” such as voting, or is based upon a “suspect classification,” such as race, the classification will be upheld only if it is justified by a compelling state interest and is necessary to accomplishment of a permissible state policy.

In striking down the Illinois statute in Stanley, the Supreme Court appeared to rely primarily on procedural due process rather than

89. Id. at 654.
90. Id. at 658.
94. Id.
equal protection grounds. Thus the Court did not say that unwed fathers must in all cases be given equal custody rights with unwed mothers—but merely that such fathers could not arbitrarily be denied a hearing on their parental fitness before the state removed children from their custody. The Court did not say that Stanley had a *fundamental* interest in retaining custody of his children; nor did it seem to apply the strict "compelling state interest" test to strike down the state statute.

Illinois argued in *Stanley* that the illegitimate child normally knows only one parent, the mother, and that the father is usually not present in the home on a day-to-day basis.\(^9\) Physiological studies show that men are not naturally inclined to childrearing, said the State, and so the statute fulfilled a legitimate governmental purpose of protecting children.\(^10\) Since unwed fathers were generally not interested in their illegitimate children and in most instances were strangers to them,\(^11\) the State argued that it need not undergo the inconvenience of inquiring into each case.

But the Court refused to allow Illinois to presume Stanley's unfitness merely because it was more convenient to presume than to prove. Administrative convenience was not a sufficient basis to justify refusing a hearing on the substantial issue at stake.\(^12\) Furthermore, the Court did not find justified the assumption "that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother."\(^13\) While the Court agreed that protecting children is a legitimate state goal, the goal is not furthered by separation of children from their fit parents—in fact the goal is obstructed.\(^14\) Thus the Court seemed to apply the less stringent "rational relation" test in invalidating the Illinois statute.

**B. Can California Custody Statutes Withstand the "Rational Relation" or the "Compelling State Interest" Test?**

*Stanley* does not directly answer the question of whether statutes such as California Civil Code Sections 200 and 224 which automatically grant custody and full control of illegitimate children to the mother deny equal protection to the father. Nor is it clear which test the Supreme Court would apply if these statutes were challenged on equal

\(^10\) Id.
\(^11\) Id. at 654 n.6.
\(^12\) Id. at 658.
\(^13\) Id. at 654 n.7.
\(^14\) Id. at 652-53.
protection grounds—the "rational relation" or the "compelling state interest" test. The Court has not as yet found sex to be a "suspect classification."\(^{105}\) Discrimination between the sexes with respect to matters in which sex is a material factor may be made without violating equal protection, if the classification is a natural and reasonable one.\(^{106}\) Furthermore, the Court has not declared that unwed fathers have a fundamental interest in custody of their children. Though Stanley was found to have a substantial interest in retaining custody of the children he had sired and raised, the Court might not have found such an interest in a father who was seeking to obtain custody of children with whom he had not had a continuing, personal relationship. Even if all unwed fathers were found to have such a substantial interest, the Court would apply only the rational relation test to statutes which denied a less than fundamental interest.

I. Applying the "Rational Relation" Test

It is arguable that laws which distinguish married parents from unmarried parents have a rational relation to the reasonable state purposes of discouraging promiscuity, encouraging legitimation of children, and protecting the welfare of children. Custody rights of parents, the argument might continue, derive from the legal relationship between married parents and their children, and the state is justified in concluding that, on the whole, unmarried persons make poorer parents than married persons. However, Stanley indicates that not all unwed parents may be presumed unfit. Furthermore, examination of the California statutes shows that they do not distinguish between married and unmarried parents as such. Under Civil Code Sections 200 and 224, the unwed mother's custody rights are actually greater than the statutory rights of married parents.\(^{107}\) That is, an unwed mother not only has exclusive custody rights but may even permit her child to be adopted without the father's consent. Therefore, in view of the preferential treatment given to unwed mothers as opposed to either legitimate parents or illegitimate fathers, the statutes cannot rationally be said to discourage promiscuity or to protect children from the status of illegitimacy.

Secondly, custody rights of married parents are not distinguished on

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\(^{105}\) In Goesaert v. Cleary, 335 U.S. 464 (1948), the Court upheld a Michigan statute that prohibited women from tending bar unless they were the wife or daughter of the bar's male owner. In Reed v. Reed, 404 U.S. 71 (1971), the Court struck down an Idaho statute that favored men over women as estate administrators; but the Court did not say in Reed that sex was a suspect classification—rather, it applied the rational relation test.


\(^{107}\) CAL. CIV. CODE §§197, 200, 224, 4600; CAL. PROB. CODE §§1407, 1408.
the basis of sex under California statutes.\textsuperscript{108} The mother is no longer to be preferred as custodian of very young children.\textsuperscript{109} Parents are given preference as against all other parties, and neither parent is to be preferred as against the other.\textsuperscript{110} Therefore, legislative discrimination against unwed fathers would have to be justified on some basis other than the mere fact of their sex. That is, it cannot be argued that unwed fathers have unequal custody rights with unwed mothers because men are inherently less suited to child care, since this attitude is not reflected in the statutes governing custody of legitimate children.

If in fact there is a valid reason to suppose an illegitimate child will not enjoy the same paternal love and affection as a legitimate one, thus justifying the need for statutory protection, is there any reason to assume less paternal than maternal love and affection? In his dissent to Stanley, Chief Justice Burger argued that a state may reasonably conclude “that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male’s often casual encounter.”\textsuperscript{111} Can we assume this biological role always makes the mother the more fit parent, any more than we could assume this role creates stronger bonds in a legitimate child’s mother than exist in its father? At least if an unwed father does have a substantial interest in obtaining custody, equal protection would seem to demand a case-by-case consideration of which parent’s custody would serve the child’s best interests, rather than presuming all mothers to be better parents than are fathers. If a father has no parental concern for his illegitimate child, it seems very unlikely that he would seek custody anyway.

It appears, therefore, that the California statutory preference for mothers of illegitimate children may be an arbitrary legislative choice denying unwed fathers equal protection of the law.

2. Applying the “Compelling State Interest” Test

Although the United States Supreme Court has not found sex to be a “suspect classification,” the California Supreme Court in Sail’er Inn, Inc. v. Kirby concluded that sex, being “a status to which class members are locked into by the accident of birth,”\textsuperscript{112} is properly treated as a suspect classification. Thus California custody statutes that classify on the basis of sex presumably would be examined under the strict “compelling state interest” test as applied by the California court.

\begin{footnotes}
\textsuperscript{108} CAL. CIV. CODE §197.
\textsuperscript{109} CAL. CIV. CODE §4600, \textit{as amended}, CAL. STATS. 1972, c. 1007.
\textsuperscript{110} CAL. CIV. CODE §§197, 4600; CAL. PROB. CODE §§1407, 1408.
\textsuperscript{112} Sail’er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 18, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971).
\end{footnotes}
Regulation of sexual promiscuity or misconduct has been held a compelling state interest.\textsuperscript{113} However, as indicated previously, since the State does not deny parental rights to the \textit{mother} of an illegitimate child, the assertion that the State policy discourages promiscuity is not very convincing.

The State might claim that it can require a father to legitimate his child under Civil Code Section 230 before granting him custody, on the grounds that legitimation of children is a compelling State interest. As Justice Traynor argued in \textit{Guardianship of Smith}, a father who can legitimate his child but chooses not to thereby demonstrates his unfitness as a parent.\textsuperscript{114}

Yet with all classes of parents other than unwed fathers, their fitness as parents is \textit{presumed} under the parental preference rule. Can the illegitimate child's father be uniquely burdened with the presumption of unfitness? We do not require the \textit{mother} of an illegitimate child to legitimate the child, or explain her past failure to marry the father, before granting custody to her.

Further, the State cannot rationally argue that legitimation of the child is the State's overriding concern in custody disputes involving illegitimate children. Surely the child's best interests are most important. If legitimation were all-important, then theoretically the State could remove all illegitimate children from the custody of their mothers or fathers and place them in institutions until the children could be formally adopted by strangers and thus acquire legitimate status.

The United States Supreme Court has indicated that laws which discriminate against illegitimate children may violate the equal protection clause where the right asserted by such children has no relation to the wrong committed by their parents. In \textit{Levy v. Louisiana}\textsuperscript{115} the Court invalidated a statute which denied illegitimate children the right to recover damages for the wrongful death of their mother. The illegitimate children were just as dependent on their mother as are legitimate children,\textsuperscript{116} the Court said and concluded that it was invidious discrimination to prevent their claim of damages for her loss.\textsuperscript{117}

Similarly, in \textit{Weber v. Aetna Casualty & Surety Co.}\textsuperscript{118} the Court

\textsuperscript{114} Guardianship of Smith, 42 Cal. 2d 91, 98, 265 P.2d 888, 892-93 (1954).
\textsuperscript{115} 391 U.S. 68 (1968).
\textsuperscript{116} \textit{Id.} at 72.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} 406 U.S. 164 (1972). Distinguish Labine v. Vincent, 401 U.S. 532 (1971), wherein the Court upheld a statute that barred illegitimate children from sharing equally with legitimates in the estate of their father who had died intestate. The Court argued that if the father had intended to leave property to his illegitimate daughter he could easily have executed a will naming her as a beneficiary. 401 U.S. at 539.
struck down a statute which prohibited dependent, unacknowledged illegitimate children from recovering under state workmen's compensation laws for their father's death on an equal basis with the father's dependent legitimate children. Society may condemn illegitimate relationships, said the Court, "[b]ut visiting this condemnation on the head of an infant is illogical and unjust."¹¹⁹

Perhaps custody statutes which deny parental status to unwed fathers are just as discriminatory against illegitimate children as they are against the fathers. If a natural father is not allowed to show that he is a more suitable guardian for his child than is the mother (or an institution or a stranger, when the mother has died, is unfit, or puts the child up for adoption), then the child loses his right to the care and companionship of a natural and arguably fit parent. It would seem more protective of the child's best interests to presume, as we do with legitimate children, that his needs are best served by custody in a natural parent—of either sex—who wishes to care for the child.

C. Equal Rights Amendment

An equal rights amendment was passed by Congress¹²⁰ during the 1971-72 session and was ratified by the California Legislature¹²¹ in November 1972. If the amendment is ratified by the required three-fourths of the states, the Constitution will provide: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."¹²²

What effect would the amendment have on custody laws favoring mothers over fathers? The amendment was apparently intended to grant complete equality between the sexes. A House supporter of the amendment stated that it would eliminate any legal presumption favoring the granting of custody to the mother.¹²³ A Senate report stated as the basic principle of the amendment that sex should not be a factor in determining the legal rights of men or of women.¹²⁴ However, the amendment would not prohibit classifications based on characteristics that are unique to one sex.

Since the qualifications of a fit parent are not unique to either sex, laws denying unwed fathers equal custody rights with unwed mothers

would probably be unconstitutional under the amendment. Just as women could not be presumed unsuitable for the draft, unmarried parents could not be presumed unfit merely because they were men.

CONCLUSION

Unwed fathers are presently recognized as having natural rights to custody of their children only upon the mother's death. On the other hand, both parents of legitimate children have preferred status as custodians as against third parties, and neither parent is preferred against the other. While the best interests of the child are the important factor, custody in married parents—and in an unmarried mother—is presumed to serve those interests; yet custody in unmarried fathers is presumed not to serve those interests.

It appears evident that the parental preference rule is more desirable than a strict best interest rule which is too vague a standard to be applied equitably—parental preference protects not just parents' rights but the parent-child relationship from state interference.

By analogy to the equal protection argument in Stanley, unwed fathers should not be presumed unfit when all other classes of parents, including unwed mothers, are presumed fit. A father should have the chance to prove he is the more suitable parent to have custody. Though an unwed father may be difficult to locate, inconvenience in locating and identifying him should not be sufficient grounds to presume him unfit. If he does not respond to reasonable notice, statutes may be applied to compel his forfeiture of custody rights. If he abandons his child or willfully fails to maintain it, he likewise forfeits custody rights.

Stanley indicates that at the very least an unwed father has a substantial interest in retaining custody of his illegitimate children. Since no convincing evidence exists that unwed mothers are always better parents than unwed fathers, no individual unwed father should be denied the opportunity to prove himself a fit parent.

Statutes giving unwed mothers the right to exclusive custody and control of their children should, in the writer's opinion, be repealed since they appear to be constitutionally invalid. The rule of California Civil Code Section 4600, under which custody is awarded to a parent unless such award would be detrimental to the child, should be applied to all natural parents, married or unmarried. Contrary to the present policy of merely burdening the unwed father with the obligation to support his child, a policy of equal custody rights might actually encourage his parental responsibility.

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