Putative Fathers' Rights in Adoption Proceedings

Nanette K. Laughery

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.law.missouri.edu/mlr/vol39/iss4/5
PUTATIVE FATHERS' RIGHTS IN ADOPTION PROCEEDINGS

I. STANLEY v. ILLINOIS

Most courts and legislatures have traditionally refused to grant parental rights to the father of an illegitimate child. He has been denied custody of his offspring, his consent has not been required for its adoption, and what rights he may have as the biological father have been terminated in proceedings of which he had no notice.

This approach was challenged in Stanley v. Illinois. In that case, the petitioner, Peter Stanley, lived with Joan Stanley for eighteen years and fathered three children by her which he raised and supported. On Joan's death, the children were made wards of the court pursuant to an Illinois statute which raised an irrebuttable presumption that all unwed fathers were unfit to have custody of their illegitimate children. In comparison, parents of legitimate children and mothers of illegitimate children were denied custody of their children only on a showing of abuse or neglect. Stanley attacked the statutory scheme on the grounds that it denied him equal protection under the law.

The United States Supreme Court struck down the statute. The Court recognized that Stanley had a "cognizable and substantial" interest in retaining custody of his children. The court also acknowledged that the State had a legitimate interest in legislating to protect "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community," but found that the creation of an irrebuttable presumption against the unwed father was inconsistent with the advancement of that interest. One of the goals of the Illinois statute was to "strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal...." The Illinois presumption, however, might deny custody to a fit unwed parent, contravening the express purpose of the statute. Relying on Bell v. Burson,

1. For a complete breakdown of relevant statutes see brief for respondent at Appendix B, Stanley v. Illinois, 405 U.S. 645 (1972).
5. 405 U.S. at 652.
6. Id.
7. Id. at 652-58.
the Court found a deprivation of property which, "without reference to the very factor that the state itself deemed fundamental to its statutory scheme,"\textsuperscript{10} violated due process. Procedures more precise than irrebuttable presumptions were available to determine the parental fitness of the unwed father. Having found the State's violation of due process, the Court reasoned that since all other biological parents were afforded a hearing, it was a violation of fourteenth amendment equal protection to deny it to Stanley.\textsuperscript{11}

While Stanley and its progeny\textsuperscript{12} have clearly indicated that a father has some constitutionally protected interest in his illegitimate child, the cases have been inconclusive as to the scope of that protection. This uncertainty has complicated the efforts of state legislators to bring their statutes into compliance with the Constitution and cast a shadow over adoption proceedings in which the putative father's consent is not obtained.\textsuperscript{13} The result is a legally uncertain adoption and the possibility that the biological father may step forward to claim the child in the future.\textsuperscript{14}

The purpose of this article is to analyze a putative father's constitutional rights in adoption proceedings and to present some consideration for drafting a statute consistent with these rights and in the best interests of the child.

14. In Missouri, adoption proceedings have been altered in response to Stanley. In the past, case workers ignored the natural father when placing a child in an adoptive home. Now, even if the mother requests that the father not be contacted, caseworkers are required to notify him of the planned adoption and to obtain a release if possible. If he cannot be reached, most juvenile courts require documentation that an effort has been made to locate him. Some welfare agencies have developed a "potentially adoptive" program in response to the problem. Children whose legal status is uncertain are placed with a foster family on the understanding that as soon as the legal problems are resolved, the child will be available to them for permanent placement. These administrative provisions reduce the possible impact of Stanley but do not resolve the problem of determining what rights must be accorded the putative father.

There is a provision in § 453.040, RSMo 1969, that the consent of a parent who has willfully abandoned a child for one year prior to an adoption proceeding, is not needed. However, § 211.021, RSMo 1969, defines parent in the case of the illegitimate child as the mother. Hence the statute would not seem to apply to unwed fathers and his rights could conceivably be raised at a later time. Furthermore, where knowledge of the child has been kept from the father, his failure to meet the child's needs could not be described as willful.
II. Fourteenth Amendment Equal Protection

The Constitution does not require that a state treat all persons alike.\textsuperscript{15} A classification, however, must be sufficiently related to a constitutionally permissible purpose.\textsuperscript{16} The key to analyzing an equal protection problem is to determine which test the court will apply in deciding if the classification is sufficiently related to the purpose of the statute.\textsuperscript{17}

The traditional and most frequently applied test is the "rational basis test."\textsuperscript{18} Under this test the court initially assumes that the statute is valid, thus placing the burden on the party seeking relief to show that no constitutionally permissible purpose could rationally justify the classification.\textsuperscript{19} If the court finds there is any purpose rationally related to the classification, the statute is upheld regardless of how unlikely it is that such a purpose actually motivated the legislation.\textsuperscript{20} A classification can be upheld under the rational basis standard even though it affects persons in addition to those who are legitimate targets of the classification.\textsuperscript{21}

A classification distinguishing between fathers of illegitimate children and fathers of legitimate children would probably be upheld under the rational basis test. The State has an interest in discouraging promiscuity and in protecting the family unit.\textsuperscript{22} It also has an interest in protecting the child by concealing the illegitimate birth and in encouraging the putative father to legally adopt the child so that he may be held responsible for the child's well-being.\textsuperscript{23} These purposes would justify a state's decision to give parental rights only to the father of a legitimate child. Likewise, there is a basis for treating the putative father differently from the mother of an illegitimate child. Courts have consistently found that the interests of a child are best protected by awarding custody to the mother.\textsuperscript{24} Furthermore, the mother is readily identifiable as one of the parties responsible for the birth; proof of paternity is often difficult if not impossible.\textsuperscript{25}

\textsuperscript{15} Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947); Tigner v. Texas, 310 U.S. 141, 147 (1940).
\textsuperscript{17} Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1077-87 (1969).
\textsuperscript{20} Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). The purpose the Court attributes to a statute often determines whether the statute stands or falls. The Court has used its imagination freely in the past to find a purpose sufficient to sustain a classification. Goesaert v. Cleary, 335 U.S. 464 (1948). But at other times it has closed its eyes to a very probable purpose in order to strike the statute down. Frontiero v. Richardson, 411 U.S. 677 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).
\textsuperscript{24} Hoyt v. Florida, 368 U.S. 57, 63 (1961); M. Mead, Male and Female 197 (Laurel ed. 1968).
\textsuperscript{25} For a discussion on the means and likelihood of establishing paternity see Krause, Scientific Evidence and the Ascertainment of Paternity, 5 Fam. L.Q. 252 (1971).
If, however, the Court found these classifications were suspect or impinged on a fundamental right protected by the Constitution, a more rigorous test would be applied. The Court would not presume the constitutionality of the statute, nor would a mere rational relation between the statute and its purpose be sufficient to sustain the classification. Rather, the burden would be on the state to provide a compelling state interest precisely related to the classification.

It is unlikely that laws distinguishing the putative father from other natural parents would withstand this strict scrutiny. A classification based on state policy against promiscuity, or to protect the integrity of the family unit, would fail for under-inclusiveness. The mother also would have to be denied parental rights to justify a classification on these grounds. Similarly, a classification based on the difficulty of establishing paternity would fail for over-inclusiveness as some putative fathers are readily ascertainable. The same rationale would apply concerning the best interests of the child. Some fathers are better suited to care for their children than are the mothers.

How then could it be argued that a putative father classification is entitled to strict scrutiny? There are two possible approaches.

A. Sex Is a Suspect Category

States have consistently awarded the legal status of parent to mothers of illegitimate children and denied it to fathers of illegitimate children. Is such discrimination based on sex prohibited by the fourteenth amendment? Historically the Supreme Court has used a rational basis test to review sex discrimination. In Reed v. Reed, the Court, purporting to apply this test, struck down an Idaho statute favoring men over women as administrators of estates. The statute provided that between persons otherwise equally qualified to serve as an administrator, there was to be a mandatory preference for the male. The State argued that the classification had a rational basis because it simplified probate court proceedings, avoided intrafamily squabbles, and because men were generally more conversant in business affairs than were women and hence better qualified to serve

34. 404 U.S. 71 (1971). Cf. Goeaert v. Cleary, 335 U.S. 464 (1948), where the Court had found that Michigan could deny all women the right to bear children on the ground that the particular dangers of the calling were inappropriate to the role and abilities of the woman. See also Hoyt v. Florida, 368 U.S. 57, 61-62 (1961).
as an administrator. The Court’s rejection of these contentions arguably represented a hesitant step towards making sex a suspect classification.

In *Stanley v. Illinois*, the Court avoided the issue of whether classifications based upon sex were inherently suspect. Stanley had argued in state court that the Illinois statute’s sex classifications were unjustified absent a compelling state interest. The Supreme Court, however, grounded its decision on the due process clause, ignoring both Stanley’s equal protection argument and the Court’s own rule that it only passes on issues decided by the state court.

In *Frontiero v. Richardson*, it became clear that the Court was split on whether sex classifications were inherently suspect. A married female Air Force officer challenged the constitutionality of statutes which automatically granted the wives of male members of the armed forces dependency status for the purposes of housing and medical benefits, but denied such status to the spouses of female members unless they were in fact dependent for over one-half of their support. Justices Brennan, Douglas, White and Marshall argued for strict scrutiny of the statutes on the basis that sex, like race, is an immutable characteristic determined solely by chance, that there has been a long history of sex discrimination, and that congressional action indicated the classification was inherently invidious. Justices Blackmun, Powell and Burger contended the standard of review used in *Reed v. Reed* was sufficient to strike down the challenged statutes, and, since the Equal Rights Amendment was before the people, it would be disrespectful to the legislative process to apply a different standard of review at that time. Justice Stewart contended only that *Reed v. Reed* should set the precedent for the case. Justice Rehnquist dissented on the basis that there was a rational basis for the statute.

In *Kahn v. Shevin*, a widower contended that a Florida statute which allowed widows a $500 annual property tax exemption but provided

---

41. Id. at 684-86.
42. Id. at 687.
44. 411 U.S. at 691.
45. Id.

In *Cleveland Bd. of Ed. v. LaFleur*, U.S. 94 S. Ct. 791 (1974), the Court held unconstitutional as violative of due process mandatory
no analogous benefits for widowers violated fourteenth amendment equal protection. Justice Douglas for the majority upheld the statute because the discrimination was founded on a reasonable distinction not in conflict with the Federal Constitution, namely that the financial difficulties of the lone woman exceeded those of a man. Justice Douglas, who had based his decision in *Frontiero* on a strict scrutiny analysis, now argues that that case was decided because administrative convenience alone is not a sufficient rationale to sustain a discriminatory classification. *Kahn* indicates that the Court will not afford sex classifications strict scrutiny.

**B. A Putative Father Has a Fundamental Interest in His Child**

It has been suggested that where a statutory classification impinges on a fundamental personal interest, a stricter standard of review is applied than under the rational basis test. Can the relationship between a parent and his illegitimate child be characterized as so fundamental that the Court will afford it this special protection?

In *Levy v. Louisiana* five illegitimate children brought an action for the wrongful death of their mother. A Louisiana statute allowed a surviving child to bring such an action, but the Louisiana Supreme Court interpreted "child" to mean legitimate child and accordingly denied recovery to the five illegitimate children. The Supreme Court struck down this interpretation as a violation of fourteenth amendment equal protection. The Court stated: "In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. . . . However, . . . we have been extremely sensitive when it comes to basic civil rights. . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side." The Court, however, also found that the purpose of the statute was not rationally related to the classification. As a consequence, the decision was unclear as to the standard of review applied.

In *Labine v. Vincent*, an illegitimate child sought to be declared the sole heir of her father. Even though the father had publicly acknowledged her as his daughter prior to his intestate death, she was barred by a school board rules requiring pregnant school teachers to take maternity leave five months prior to birth. Justice Powell in a concurring opinion contended that the case should have been decided in an equal protection framework, but did not reach the issue of whether mandatory pregnancy leave was a classification based upon sex or physical disability.

That issue was decided in *Geduldig v. Aiello*, U.S. 94 S.Ct. 2485 (1974). The Court held that it was not a denial of equal protection for California to exclude disabilities attributable to a normal pregnancy from its state disability insurance program. "Not every legislative classification concerning pregnancy is sex based . . . . Normal pregnancy is an objectively identifiable physical condition . . . ." 94 S.Ct. at 2492 n.20.

---

49. Id. at 71.
50. Id. at 72.
51. 401 U.S. 532 (1971).
PUTATIVE FATHERS' RIGHTS

Louisiana statute which allowed illegitimate children to inherit through intestacy only where there was no eligible heir other than the State. In upholding this statute, Justice Black stated that a state's traditional right to control the passage of property on death should be free from federal interference except where a specific constitutional guarantee is violated. Because the illegitimate child could have taken under a will or through intestacy had she been legitimized, the Louisiana statute did not create an insurmountable barrier to her ability to inherit, and therefore, no constitutional guarantee was violated. Justice Black also stated that "[e]ven if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis..." which indicates that he reached his decision without resort to any of the traditional equal protection tests. Since the Labine decision was not clearly grounded on equal protection, it is not helpful in determining the degree of scrutiny to be applied to illegitimacy classifications.

In Weber v. Aetna Casualty & Surety Co., the Court returned to the reasoning of Levy in striking down an illegitimacy classification. The deceased father in this instance had four legitimate and two illegitimate children. He treated them all the same and they all lived together. A Louisiana statute provided that illegitimate children could recover under workmen's compensation for injury to their parent only where there were not enough surviving legitimate children to exhaust the award. As a consequence, the two illegitimate children were not allowed to share in the workmen's compensation award for their father's death. The Supreme Court struck down the statute stating that "[w]hen state statutory classifications approach sensitive and fundamental rights, this Court exercises a stricter scrutiny." Labine was expressly distinguished on the basis that it involved the disposition of property by inheritance, an area traditionally controlled by the State. Justice Powell, writing for the majority, proposed a balancing test to deal with those situations where fundamental personal rights are threatened. "The essential inquiry... is a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"

In San Antonio Independent School District v. Rodriguez, however, Justice Powell made it clear that only those rights implicitly or explicitly protected by the Constitution are fundamental rights entitled to the protection of a higher standard of judicial review than a rational basis test.

52. Id. at 534.
53. Id. at 536 n.6.
55. Id. at 172.
56. Id. at 173.

The court today does not "pick out particular human activities, characterize them as 'fundamental', and give them added protection..." To the contrary, the court simply recognizes, as it must, an established constitutional right, and gives to that right no less than the Constitution itself demands.

Id. at 642.
While Rodriguez involved a finding that education was not a fundamental right, Justice Powell's analysis of Skinner v. Oklahoma may provide a clue whether the court will find that a father has a fundamental right or interest in his illegitimate child.

In Skinner, the strict scrutiny test was applied to a statute requiring forced sterilization of certain habitual offenders. Justice Powell found that "implicit in the court's opinion [in Skinner] is the recognition that the right of procreation is among the rights of personal privacy protected under the Constitution." While there is no explicit language in the Constitution guaranteeing a right to privacy, the Court has recognized that certain personal rights deemed "fundamental" or "implicit in the concept of ordered liberty" were exempt from governmental interference absent a showing of compelling state interest. Within this line of cases are several decisions directly or indirectly protecting the privacy of the family.

In Griswold v. Connecticut, the Court found that a state law that forbade the use of contraceptives violated the ninth amendment. The right to procreate was held to be constitutionally protected even though it was not expressly mentioned in the Constitution. Certain rights are so fundamental that their enumeration was unnecessary; the ninth amendment was expressly included to insure that the enumeration of certain rights could not be interpreted to mean that other rights were denied. The Court refers to marriage as "a right of privacy older than the—Bill of Rights—older than our political parties, older than our school system."

In Eisenstadt v. Baird, where a statute forbidding distribution of contraceptives to unmarried persons was invalidated under the equal protection clause, the court stated:

It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

In Meyer v. Nebraska, the court found that the fourteenth amendment due process clause protected an individual's right "to marry, establish a home and bring up children . . . ." In Pierce v. Society of Sisters, it invalidated a statute restricting a child's right to attend parochial schools

60. 316 U.S. 535 (1942).
63. 381 U.S. 479 (1965).
64. Id. at 486.
66. Id. at 453.
67. 262 U.S. 390 (1923).
68. Id. at 399.
69. 268 U.S. 510 (1925).
stating "the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent." \(^7\) In Prince v. Massachusetts,\(^7\) the court said "[i]t is cardinal with us that the custody, care and nurture of the child reside first with the parents. . . ." \(^7\)

Based on these cases, it can reasonably be argued that the unwed father, like the unwed mother, has a constitutional right to privacy in his relationship with his "family." Classifications which impinge on this right will be suspect and subject to strict scrutiny. Hence, the father of the illegitimate child should be treated similarly to the mother of the illegitimate child and the father of the legitimate child. This might mean that on proof of paternity, the putative father would have a claim to custody of the child; that such custody could not be denied absent a showing that the mother was the more qualified or that the father was unfit to be a parent; and, that regardless of the outcome of the custody issue, the child could not be adopted without the father's consent absent evidence of abandonment.

### III. Fourteenth Amendment Due Process

#### A. Does Due Process Attach?

Although Stanley v. Illinois\(^7\) involved a guardianship proceeding, its holding that a father's tie to his illegitimate child can not be severed without due process of law might be equally applicable to an adoption.\(^7\) Due process may require that the consent of the illegitimate child's father be obtained prior to terminating his parental rights and transferring those rights to the adopting parents.

To be entitled to constitutional procedural safeguards, an interest must be one contemplated by the fourteenth amendment—life, liberty or property.\(^7\) While these terms have received much consideration, they have never been precisely defined.\(^7\) Undoubtedly though, the concept of liberty encompasses more than mere freedom from bodily restraint.\(^7\) Stanley v. Illinois\(^7\) has been cited as an example of the broad application the Court has given to the concept of liberty.\(^7\) There the Court found that a father's interest in his illegitimate child was substantial enough to come within the perimeter of liberty as contemplated by the fourteenth amendment. The Court stated:

> It is plain that the interest of a parent in the companionship, care, custody and management of his or her children "come[s] to this court with a . . . respect [which is] lacking when appeal

---

70. Id. at 518.
72. Id. at 166.
73. 405 U.S. 645 (1972).
74. See, e.g., Rothstein v. Lutheran Social Servs., 405 U.S. 1051 (1972), where the Court vacated a judgment curtailing a putative father's parental rights and remanded the case for further consideration in light of Stanley.
75. Board of Regents v. Roth, 404 U.S. 564, 571 (1972).
78. 405 U.S. 645 (1972).
is made to liberties which derive merely from shifting economic arrangements.80

The Stanley decision is based on the proposition that a father's interest in his illegitimate child is substantial enough to be protected by the fourteenth amendment.81

Yet unresolved is whether a man must fill the social as well as biological role of father to be entitled to this constitutional protection. Recent Supreme Court decisions concerning the biological family versus the legal family have involved, like Stanley, well-developed parent-child relationships.82 Must the father acknowledge and assume responsibility for his illegitimate child to assure him an interest substantial enough to be within the scope of the fourteenth amendment? Stanley might seem to indicate so: "The interest being protected was that of a man in the children he has sired and raised . . ."83 Some commentators have pointed to this language to support the argument that Stanley should be limited to its facts—that only a father who has actively participated in the care of his children is entitled to due process before his legal relationship to them can be served by the court.84 There are four possible arguments against this proposition.

First, one of the illegitimate children in Weber never knew his father, having been born after his father's death. With regard to this child Justice Powell states:

The affinity and dependency on the father of the posthumously born illegitimate child are, of course, not comparable to those of offspring living at the time of their father's death. This fact, however, does not alter our view of the case.85

Second, a distinction can be made between a tort action and a proceeding to sever parental rights. Wrongful death and workmen's compensation were unknown at common law.86 In creating these actions, legislatures provided for recovery commensurate with the loss incurred. An illegitimate child would not suffer loss upon the death of a father who had not acknowledged the child's existence.87 Therefore, in Levy and Weber it was important to emphasize that the children had been raised by the deceased parent and therefore had suffered compensable damages.

Third, it would be a practical impossibility for courts to determine at what point a father had shown sufficient interest in his child to be entitled

---

to due process.\textsuperscript{88} If parental ties are severed at birth or shortly thereafter, a father has no chance to develop a relationship with the child. Without notice he may not even be aware of the birth before his rights are terminated.\textsuperscript{89}

Lastly, the Court in Stanley seems to contemplate that due process must be afforded a father regardless of the amount of interest he had shown in his child. In arguing that the states would not be substantially burdened by the extension of fitness hearings to unwed fathers, the Court reasoned that unwed fathers with no concern for the disposition of their children would simply fail to appear after being notified of the dependency hearings.\textsuperscript{90}

The biological relationship between father and child would in itself appear to deserve due process protection in any proceeding which threatens it.

\textbf{B. Notice}

The court in \textit{Mullane v. Central Hanover Bank \& Trust Co.}\textsuperscript{91} held that, at a minimum, the due process clause requires reasonable notice and an opportunity for a hearing appropriate to the nature of the case before an individual could be deprived of life, liberty, or property.\textsuperscript{92} In situations where the affected individual is identified and his address is available, nothing short of personal service or service by mail will suffice.\textsuperscript{93} In \textit{Armstrong v. Manzo},\textsuperscript{94} failure to give the father of a legitimate child notice of an adoption proceeding was held to violate due process.\textsuperscript{95} Due process notice requirements may also be required in the adoption proceedings of illegitimate children.

Such requirements in most adoption proceedings could be met with only slight increments in cost and labor. If a man has been adjudged the father of a child, is named by the mother, lived with the mother at the time of conception, or has assumed the social responsibilities of a father, notice may be served under existing state statutes.\textsuperscript{96} If more than one man could be the father, then all should be served with the burden of proving paternity on the men claiming it. Problems of service on a man married to another woman are appropriately handled at the administrative level.\textsuperscript{97}

The real problem, however, is giving notice to a father who is un-
known either because the mother is unaware of his identity or refuses to divulge it. First, while the court has neither the obligation nor right to threaten or intimidate the woman\textsuperscript{98} nor exhaust all possibilities of identification,\textsuperscript{99} it must exercise due diligence.\textsuperscript{100} If it can be shown on review that the court accepted the mother's refusal to identify the father without any independent investigation, it may well be that the father's interest in the child was never extinguished on the theory that state action rather than private interference was responsible for the failure of the father to be notified.\textsuperscript{101}

Notification must be handled so that procedural delays are avoided. Speed is of the essence in the adoption process.\textsuperscript{102} The sooner the child is placed in a permanent environment, the less likely he will suffer emotional trauma.\textsuperscript{103} and the more likely the adoptive parents will quickly adjust to their new role.\textsuperscript{104} Further, the natural mother will have the peace of mind of knowing the child is not in an institutional setting.\textsuperscript{105} Lastly, the older a child becomes the less likely he will be adopted at all.\textsuperscript{106} This means the child will be deprived of a home of his own and financial burden added to the state.

If after diligent search the agency cannot identify the father or notify him by personal or mailed service, one possible method of speedy notification is service by publication. Service by publication, however, may not be appropriate to an adoption proceeding. Although the court in \textit{Stanley} seemed to indicate that notice to an unknown father in the style of "to whom it may concern" would fulfill the requirements of due process,\textsuperscript{107} such a statutory scheme fails to take into account the rights of the mother and the best interests of the child. Service by publication would be meaningless to the putative father unless it contained the name of the mother or child. While such publication could not be characterized as a violation of the mother or child's right to privacy, (since the same information is on the birth certificate),\textsuperscript{108} it would be contrary to the basic aims of the adoption process.

Confidentiality has been a cornerstone of the adoption process.\textsuperscript{109} Shielding the child and particularly the mother from disgrace is of prime

\textsuperscript{101} Memorandum from the Attorney General of Vermont to the Vermont State Welfare Department (Oct. 1972).
\textsuperscript{103} J. Bowley, \textit{Child Care and the Growth of Love} (2d ed. 1965).
\textsuperscript{105} Id. at 15.
\textsuperscript{106} Id. at 15.
\textsuperscript{107} Note, note 88 supra.
\textsuperscript{109} A. Miller, \textit{The Assault on Privacy} 180 (1971).
\textsuperscript{110} Child Welfare League of America, Inc., supra note 104 at 10.
concern. Publication of their situation would have an adverse effect on the sensibilities of the parties involved.\footnote{110} If a woman knew a publication requirement existed, she might resort to placing the child through a private physician or on the black market where her privacy would be respected.\footnote{111} In such cases no accredited welfare agency screens the adoptive home. Also, such adoptions are generally not legally secure. Furthermore, the more exposure the adoption process receives, the more likely the natural parents or adoptive parents will learn of the other's identity. Later disruption of the placement is then more likely.\footnote{112} These factors would also discourage other adoptive couples as well.\footnote{113}

While it is difficult to predict the future decisions of the Supreme Court, it is unlikely that the Court would require notification of the unknown father if it injures the mother or child. The Court could reconcile such a decision with our traditional understanding of due process by several different approaches.

First, the Court could decide that the unknown father's interest in his child does not come within the scope of life, liberty, or property.\footnote{114}

Second, it could consider the adoption of the illegitimate children of an unknown father to be an extraordinary situation that warrants summary adjudication. Such exceptions have been allowed in the past where harm to the public was threatened and the private interest infringed on was deemed to be less important. However, such cases dealt only with property-like interests,\footnote{115} and while the statutes in question provided for action before a hearing, they also provided for a subsequent hearing to insure adequate treatment had been afforded the injured party and to make restitution if necessary.\footnote{116} But bearing in mind that "the very nature of due process negates any concept of inflexible procedures universally applicable to every unimaginable situation,"\footnote{117} the adoption situation might be so unique and the interest of the State so basic that summary adjudication would be allowed. \textit{Mullane} held that "a construction of the due process clause which would place impossible or impractical obstacles in the way [of the State] could not be justified."\footnote{118}

\begin{footnotes}
112. See In re Brennan, 270 Minn. 455, 134 N.W.2d 126 (1965).
113. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972).
115. In North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908), the Court stated: "If a party cannot get his hearing in advance of the seizure and destruction, he has the right to have it afterwards ...." Id. at 316.
\end{footnotes}
Third, while publication has been the usual form of constructive service, the requirements of due process are not technical.\textsuperscript{119} Normally the court suggests a procedure which is an acceptable model, leaving the states free to devise their own so long as they are in compliance with the basic precepts of due process.\textsuperscript{120} Furthermore, the courts have made it clear that due process is an amorphous concept.\textsuperscript{121} Once it has been determined that an interest is protected by the fourteenth amendment, the form the protection may take varies according to the specific factual context.\textsuperscript{122} "the nature of the alleged right involved, the nature of the proceeding and the possible burden on that proceeding. . . ."\textsuperscript{123} Essentially this is a balancing process\textsuperscript{124} where societal interest in summary judgment is weighed against the interest of the parties.\textsuperscript{126} Since the interest of the unknown father is minimal compared to the possible injury to the mother and child, it seems reasonable that the unknown father need be afforded only the most minimal protection to comply with the precepts of due process.

IV. Possible Statutory Solutions

Laws denying a putative father's right to his child were originally formulated to protect him from an embarrassing and financially burdensome relationship,\textsuperscript{128} not to insure the best interests of the child. Any procedure to terminate parental rights should provide safeguards so the father who wishes to provide emotional as well as financial support for his child may do so. The Child Welfare League of America has proposed that two requirements to be met in the adoption process are: (1) that the rights of natural parents be safeguarded; and (2) that no child be unnecessarily deprived of parents or a home of his own.\textsuperscript{127}

Michigan has enacted a statute\textsuperscript{128} which places part of the burden of notification on the father. It states:

Release for purposes of adoption given only by a mother of a child born out of wedlock is sufficient and rights of any putative father shall not be recognized thereafter in any court unless the person claiming to be the father of the child has filed with the probate court prior to the birth of the child a notice of intent to claim paternity. . . .

The statute provides for speedy determination of parental rights immediately after birth without threatening the privacy of mother or child. It also protects a father interested in the welfare of his child from being denied

\textsuperscript{119} Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945).
\textsuperscript{120} McGautha v. California, 402 U.S. 183, 255 (1971).
\textsuperscript{121} Hannah v. Larche, 363 U.S. 420, 442 (1960).
\textsuperscript{123} Hannah v. Larche, 363 U.S. 420, 442 (1960).
\textsuperscript{124} Roth v. Board of Regents, 408 U.S. 564 (1972).
\textsuperscript{126} For a complete discussion of the historical development of the relationship between a father and his illegitimate child see Brief for Center on Social Welfare Policy and Law as Amicus Curiae at 52, Stanley v. Illinois, 405 U.S. 645 (1972).
\textsuperscript{127} Child Welfare League of America, Inc., \textit{supra} note 104 at 60.
notification by a mother who refused to identify him. It would, however, sever the interests of a father not aware of the mother's pregnancy on the rationale that his interests are not worthy of protection.\textsuperscript{129}

It is questionable whether a statute requiring someone to register before he is afforded due process is constitutional. An individual does not need to take any procedural steps to be protected from unwarranted search and seizure or to secure equal protection under the law. Those rights, like due process, are granted by the Constitution and no state legislature has any power to abridge them.\textsuperscript{130} Such a statute might be adequate so far as the unknown father is concerned since the process due him is probably minimal, but as stated in Schroeder v. City of New York,\textsuperscript{131} "The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."\textsuperscript{132} Mullane likely requires that personal notice be given to fathers whose identity and location are known.

The statute is also overbroad. Although it is aimed at the problem of the unknown father, it inevitably restricts fathers who are interested in assuming the responsibilities of parenthood. He and the mother may make arrangements to raise the child together. After the birth, if the mother changes her mind and places the child for adoption, it is too late for him to claim custody; his parental rights will have lapsed. Likewise a father might not register because the mother has actively kept the pregnancy a secret from him. Nonetheless, he might still want to assume his parental role.\textsuperscript{133} The statute might therefore violate equal protection, assuming that a father has a "fundamental interest" in his illegitimate child which would require the State to demonstrate a compelling state interest to sustain the classification.\textsuperscript{134}

The proposed Uniform Parentage Act provides for notice by mail where the father has been identified. Where the father cannot be identified after diligent search, the presiding judge may determine whether publication of notice is likely to locate the father. If it is not likely, notice will not be required.\textsuperscript{135} To allow each judge to decide when notice is necessary, however, will create inconsistencies between counties and the possibility of forum shopping. Furthermore, any publication of notice where the name of the mother or child would be required seems unwarranted and should not be left to the discretion of the trial court.

Another defect in the uniform code is a provision that:

Subject to the disposition of an appeal, upon the expiration of [6 months] after the judgment or order terminating parental rights is issued . . . the judgment cannot be questioned . . . upon any ground, including fraud, misrepresentation, failure to give any re-

\textsuperscript{129} Note, note 88 supra.
\textsuperscript{130} United States v. Raines, 362 U.S. 17 (1960).
\textsuperscript{131} 371 U.S. 208 (1962).
\textsuperscript{132} Id. at 212-13.
\textsuperscript{133} Note, note 88 supra.
\textsuperscript{134} See Pt. II, § B of this comment.
\textsuperscript{135} Proposed Uniform Parentage Act § 24.
required notice or lack of jurisdiction of the parties or of the subject matter.\textsuperscript{136} Such a provision cannot adequately insulate the statute from constitutional attack. A proceeding in violation of an individual's right to due process has no affect on him and a State has no power to make it otherwise.

Illinois has enacted a statute\textsuperscript{137} that provides for notice by mail to any man identified as the father of an illegitimate child. If the recipient of such notice does not file within thirty days a declaration of paternity stating that he is the father and that he intends to assert his legal rights in any proceeding concerning the child or that he wishes to have notice of such proceedings, then his legal rights with respect to the child including the right to notice of any future proceedings for the adoption of the child may be terminated without further notice. This statute seems to be a reasonable resolution of the problems of notifying the identified father. The notice is reasonably calculated to reach the putative father, clearly appraises him of his rights and what he must do to insure their protection, and hence would seem to meet the requirements of \textit{Mullane}.

A possible solution to the problem of notifying the unknown father would be to make the birth certificate of the illegitimate child constructive notice to the world that a hearing to terminate the rights of the natural parent may be pending. The advantages of this are obvious. The integrity of the adoption process will be preserved and its aims fulfilled. The illegitimacy will not be exposed anymore than is already required by law and the father's rights can be terminated anytime after birth when it is in the child's best interest.

While birth certificates will rarely, if ever, come to the attention of a putative father, publication is also unlikely to notify him.\textsuperscript{138} \textit{Mullane} stated that where notice cannot be reasonably expected to reach the interested party, constructive notice is sufficient if "not substantially less likely to bring home notice than another of the feasible and customary substitutes."\textsuperscript{139} Furthermore, a statute making the birth certificate notice to an unknown putative father is a tangible procedure that can be pointed to in arguing that due process has been afforded. Such a procedure would seem commensurate with the minimal interest the unknown father has in his child considering the overriding concern of the state in protecting the child.

\section*{V. Conclusion}

It is, of course, futile to try to predict what rights the Supreme Court will eventually grant putative fathers. But considering the potential damage to the child which could arise out of an invalid adoption process, it would seem appropriate to provide a procedure which, though it may give more rights to a known putative father than constitutionally necessary, would

\begin{footnotesize}
\begin{enumerate}
\item[136] \textit{Id}.
\end{enumerate}
\end{footnotesize}
guarantee an unchallengeable adoption and a stable relationship for children and adoptive parents. Merely granting the putative father notice and a hearing does not mean he will be granted custody of the child. Like any parent he must first show that he is capable of accepting the responsibilities of parenthood. It would be in the best interests of the child to give him opportunity to do so. Where the father is unknown, on the other hand, the best interests of the child dictate that the father be given a minimal amount of notice of the adoption proceedings. In both situations, the best interests of the illegitimate child should be controlling.

NANETTE K. LAUGHERY