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# The Unwed Father and the Right to Know of His Child's Existence

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# The Unwed Father and the Right to Know of His Child's Existence

## INTRODUCTION

In recent years, the rights of unwed fathers<sup>1</sup> vis a vis their illegitimate<sup>2</sup> children<sup>3</sup> have received increased attention. Until a few years ago,<sup>4</sup> unwed fathers were ignored by or received virtually no protection from either the United States Constitution<sup>5</sup> or

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<sup>1</sup> This note uses "unwed father" instead of the perhaps more common term "putative father." The latter is a legal term of art and is defined as "[t]he alleged or reputed father of an illegitimate child." BLACK'S LAW DICTIONARY 1113 (5th ed. 1979). The reason "unwed father" is used here is two-fold. First, the generally accepted usage of "putative father" is both overinclusive and underinclusive for purposes of this Note. "Putative father," for example, "may be used to refer both to biological fathers whose identities are known and to those who have acknowledged paternity." Comment, *Delineation of the Boundaries of Putative Fathers' Rights: A Psychological Parenthood Perspective*, 15 SETON HALL L. REV. 290, 290 n.1 (1985) [hereinafter Comment, *Delineation of the Boundaries*]; see Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115, 119 n.26 (1973-74) [hereinafter Comment, *Protecting the Putative Father's Rights*]. In contrast "unwed father," as used here, generally refers to biological fathers who are ignorant of their paternity. The phrase may also refer to biological fathers whose identities are not known with certainty—even by the biological mother. Second, "unwed father," as used here refers to the biological father in fact—regardless of whether he is "alleged or reputed" to be a father.

<sup>2</sup> The use of the adjective "illegitimate" to refer to children born out of wedlock has come under increased attack in recent years. The adjective is said to be disparaging. Moreover, it is unfair in that the person burdened with the adjective played no role in the event that led to his out-of-wedlock status. Instead of being called illegitimate children, or the more offensive "bastards," it has been suggested that the terms "out-of-wedlock children" or "nonmarital children" should be used. See, e.g., Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 53 n.228 (1975). Despite the author's agreement with the objections to the use of the term "illegitimate" in this context, the term will nevertheless be used in this Note to avoid confusion and to remain consistent with the Supreme Court's usage of the term.

<sup>3</sup> See, e.g., *Caban v. Mohammed*, 441 U.S. 380, 385-94 (1979); FATHERS, HUSBANDS AND LOVERS: LEGAL RIGHTS & RESPONSIBILITIES 3-8 (S. Katz & M. Inker eds. 1979) [hereinafter FATHERS, HUSBANDS AND LOVERS]; Duskow, *The Constitution, Notice, and the Sins of the Fathers*, 8 J. JUV. L. 12, 15-31 (1984); Martin, *Legal Rights of the Unwed Father*, 102 MIL. L. REV. 77, 77-82 (1983).

<sup>4</sup> See *infra* notes 10-12 and accompanying text.

<sup>5</sup> See *infra* notes 79-269 and accompanying text.

the statutes of most states.<sup>6</sup> Indeed, courts<sup>7</sup> and legislatures<sup>8</sup> traditionally have been openly hostile to the recognition of parental rights of unwed fathers.<sup>9</sup>

The turning point, to the extent one is identifiable,<sup>10</sup> came on April 3, 1972, when the United States Supreme Court announced its decision in *Stanley v. Illinois*.<sup>11</sup> For the first time, the Court recognized that the unwed father's parental rights are afforded some protection under the Constitution.<sup>12</sup> *Stanley* concerned the termination of an unwed father's custodial rights, leaving unresolved, but forcing attention upon, a host of other questions<sup>13</sup> pertaining to unwed fathers' rights vis a vis their children.<sup>14</sup> These issues included: whether an unwed father may inherit from a deceased child's estate;<sup>15</sup> whether an unwed father may sue for

<sup>6</sup> See *infra* notes 270-304 and accompanying text.

<sup>7</sup> See generally G. DOUTHWAITE, UNMARRIED COUPLES AND THE LAW 111-17 (1979); I. SLOAN, LIVING TOGETHER: UNMARRIEDS AND THE LAW 34-38 (1980); Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 245-50 (1971).

<sup>8</sup> See generally M. BENET, THE POLITICS OF ADOPTION 180 (1976); M. LEAVY, LAW OF ADOPTION 46 (1968).

<sup>9</sup> Various justifications have, over the years, been put forward to explain the hostility shown to the unwed father. Usually they involve allegations that he is "immoral, irresponsible and just plain bad," and/or that he is highly unlikely to be a good—and committed—parent. Littner, *The Natural Parents*, in A STUDY OF ADOPTION PRACTICE 21 (M. Shapiro ed. 1956); see *In re Brennan*, 134 N.W.2d 126, 131 (Minn. 1965); Demblitz, *Lehr Decision Helps Out-of-Wedlock Newborns Find Homes*, 70 A.B.A. J. 126, 127 (Jan. 1984). Recently, the validity of these assumptions has been vigorously challenged as having little basis in fact. See, e.g., L. BURGESS, THE ART OF ADOPTION 31-43 (1981); A. SOROSKY, A. BARAN, & R. PANNOR, THE ADOPTION TRIANGLE 49-54 (1978); see also Doskow, *supra* note 3, at 22 n.71 (noting that such assertions are rarely supported by citation to legal or to sociological authority).

<sup>10</sup> It would perhaps be more appropriate to refer to the *Stanley* decision as the first major victory for unwed fathers, rather than as a "turning point." The protection of unwed fathers' rights still has a long way to go. See *infra* notes 175-200, 276-304 and accompanying text.

<sup>11</sup> 405 U.S. 645 (1972).

<sup>12</sup> *Id.* at 657-59; see *infra* notes 81-106 and accompanying text.

<sup>13</sup> Chief Justice Burger's dissent in *Stanley* warned that the decision "embarks on a novel concept of the natural law for unwed fathers that could well have strange boundaries as yet undiscernible." *Stanley*, 405 U.S. at 668 (Burger, C.J., dissenting).

<sup>14</sup> This, of course, is not meant to imply that all issues concerning unwed fathers' rights are of constitutional dimension. Nor does this Note purport to enumerate all the questions concerning fathers' rights that were left open by *Stanley*.

<sup>15</sup> See N. LAVORI, LIVING TOGETHER, MARRIED OR SINGLE: YOUR LEGAL RIGHTS 52-55 (1976).

the wrongful death of his child;<sup>16</sup> whether and to what extent an unwed father is obligated to support his child;<sup>17</sup> and, whether and to what extent an unwed father has any rights with respect to the custody of his child absent the special circumstances present in *Stanley*.<sup>18</sup>

Perhaps the most important issue left unresolved by *Stanley*<sup>19</sup> was whether and to what extent unwed fathers have any rights with respect to the adoption of their children.<sup>20</sup> Must the unwed father receive notice that the unwed mother has surrendered the child for adoption? Must he be granted an opportunity to be heard at the adoption proceeding? Must his consent be obtained before his child can be adopted? Does the lack of his consent constitute an absolute veto of the proposed adoption? Are his adoption rights superior to those of all other persons, perhaps even those of the unwed mother? Does the age of the child make any difference? Is the father's prior or ongoing relationship with the mother or the child significant? Does it matter whether the mother surrenders the child for adoption by others or instead keeps the child, later marries, and desires to have the child adopted by her new husband? Is it significant that the identity of the father cannot be ascertained with certainty? What if the father's identity is known but he cannot be located?<sup>21</sup>

Since *Stanley* was decided, the Supreme Court has attempted to resolve some of these questions.<sup>22</sup> These decisions have, in turn, received a great deal of attention from commentators,<sup>23</sup> and have

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<sup>16</sup> See *Parham v. Hughes*, 441 U.S. 347, 355-59 (1979).

<sup>17</sup> See *Martin*, *supra* note 3, at 79.

<sup>18</sup> See *Quilloin v. Walcott*, 434 U.S. 246, 248-56 (1978). For a discussion of the facts of *Stanley*, see *infra* notes 81-106 and accompanying text.

<sup>19</sup> This statement should perhaps be qualified. In certain cases, an unwed father's custodial rights may be more critical than his adoption rights. For example, if the mother's new spouse seeks to adopt the child, aside from the legal ramifications, the relationship between the unwed father and the child might otherwise remain unchanged.

<sup>20</sup> Some of these questions were answered in later cases. See, e.g., *Caban*, 441 U.S. at 385-94; *Quilloin*, 434 U.S. at 253-56.

<sup>21</sup> This Note does not purport to exhaust the list of questions pertaining to adoption that implicate unwed fathers' rights.

<sup>22</sup> See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban*, 441 U.S. at 388-94; *Quilloin*, 434 U.S. at 254-56; see also *infra* notes 107-200 and accompanying text.

<sup>23</sup> See, e.g., *Buchanan*, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313 (1984); Note, *Lehr v. Robertson: Unwed*

prompted many states to revise their statutory adoption schemes.<sup>24</sup> Almost without exception, however, courts, commentators, and state legislatures have tended to ignore or to gloss over one narrow, yet fundamental, problem that accompanies increased protection of the unwed father's rights regarding the adoption of his child. This problem is whether the unwed mother who surrenders an infant<sup>25</sup> for adoption can unilaterally circumvent whatever parental rights the unwed father has by failing or by refusing to reveal the existence of the child to the father or the identity of the father to the agency handling the adoption.<sup>26</sup> In other words, does the unwed father have a right to know that he is a father? Should he have such a right?

This Note discusses the unwed father's right to know of his child's existence. Part I elaborates on the nature of the issue.<sup>27</sup> Part II discusses whether this right is protected by the Constitution, under the Court's *Stanley* line of cases.<sup>28</sup> Part III examines whether and to what extent this right is protected under present state statutes.<sup>29</sup> Part IV addresses the more fundamental question of whether recognition and protection of such a right is desirable.<sup>30</sup> Finally, Part V discusses the difficulties involved in protecting this right and the competing interests that must be considered and reconciled.<sup>31</sup>

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*Fathers and Adoption—How Much Process Is Due?*, 7 HARV. WOMEN'S L.J. 265 (1984) [hereinafter Note, *Lehr v. Robertson*]; Note, *Putative Fathers: Unwed, but No Longer Unprotected*, 8 HOFSTRA L. REV. 425 (1979-80) [hereinafter Note, *Putative Fathers*]; Note, *Adoption: The Constitutional Rights of Unwed Fathers*, 40 LA. L. REV. 923 (1979-80) [hereinafter Note, *Adoption*]; Comment, *Caban v. Mohammed: Extending the Rights of Unwed Fathers*, 46 BROOKLYN L. REV. 95 (1979-80) [hereinafter Comment, *Extending the Rights of Unwed Fathers*]; Comment, *Removing the Bar Sinister: Adoption Rights of Putative Fathers*, 15 CUMB. L. REV. 499 (1984-85) [hereinafter Comment, *Removing the Bar Sinister*].

<sup>24</sup> See *infra* notes 270-304 and accompanying text.

<sup>25</sup> The term "infant" is commonly used in the law to refer to anyone under the age of legal majority. See BLACK'S LAW DICTIONARY, *supra* note 1, at 699 (defining "infancy"). As used in this Note, however, the term "infant" refers to newborns.

<sup>26</sup> See *infra* notes 40-78 and accompanying text.

<sup>27</sup> See *infra* notes 32-78 and accompanying text.

<sup>28</sup> See *infra* notes 79-269 and accompanying text.

<sup>29</sup> See *infra* notes 270-304 and accompanying text.

<sup>30</sup> See *infra* notes 305-405 and accompanying text.

<sup>31</sup> See *infra* notes 406-28 and accompanying text.

## I. THE RIGHT TO KNOW: THE NATURE OF THE PROBLEM

After *Stanley*,<sup>32</sup> the Supreme Court held that the Constitution's protection extends to unwed fathers with respect to the adoption of their children.<sup>33</sup> Although the Court later limited the rights of the unwed father in the adoption context,<sup>34</sup> the recognition that the Constitution may be implicated if unwed fathers are denied any role in the adoption of their children prompted many states to revise their adoption statutes to protect more fully the rights of unwed fathers.<sup>35</sup>

Typically,<sup>36</sup> these revised statutory schemes provide some mechanism whereby the unwed father is given notice of the proposed adoption of his child.<sup>37</sup> Notice is often coupled with an opportunity to be heard at the adoption proceeding.<sup>38</sup> Generally, an effort is made to obtain his consent to the adoption.<sup>39</sup>

This Note examines the unwed father's right to be informed of his child's existence.<sup>40</sup> This issue is both broader and narrower than whatever rights an unwed father has or does not have in the adoption context. Full recognition of the right to know is broader than the unwed father's adoption rights in that the right to know would extend to cases in which the unwed mother decides to rear the child herself. The right would vest the moment the child came into existence.<sup>41</sup> Vesting would not be triggered by either the mother's surrender of the child for adoption or the mother's

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<sup>32</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>33</sup> *Caban v. Mohammed*, 441 U.S. 380, 385-94 (1979).

<sup>34</sup> *Lehr v. Robertson*, 463 U.S. 248, 260-69 (1983).

<sup>35</sup> See *infra* notes 270-304 and accompanying text.

<sup>36</sup> An inherent danger exists in describing any statutory theme or trend as typical; state statutes, and the case law interpreting them, are such that probably no two states' laws regarding adoption are identical. The reader is cautioned to keep this in mind when the discussion in this Note makes statutory generalizations. Such generalizations, however, are frequently necessary; a detailed examination is unfortunately beyond the scope of this Note and would, in any event, prove to be only minimally useful. See *infra* notes 270-304 and accompanying text.

<sup>37</sup> See *infra* note 282 and sources cited therein.

<sup>38</sup> See *infra* note 283 and sources cited therein.

<sup>39</sup> See *infra* note 290 and sources cited therein.

<sup>40</sup> This right will hereinafter be referred to as "the right to know."

<sup>41</sup> To avoid any objection that the right to know would in any way interfere with a woman's right to obtain an abortion, this Note assumes that a child "comes into existence" only at birth. See generally *Roe v. Wade*, 410 U.S. 113, 145-67 (1973).

future spouse's attempt to adopt the child.<sup>42</sup> Logically, the right would extend to the father—whether wed or unwed—of a child born out of an adulterous relationship.

The right to know has a somewhat narrower procedural impact on existing statutory adoption requirements.<sup>43</sup> For example, when an unwed father receives actual notice of the forthcoming adoption proceeding,<sup>44</sup> his right to be told is necessarily protected. In addition, when the unwed father has remained in contact with the mother after her pregnancy is diagnosed or is obvious,<sup>45</sup> or after the child is born but before it is surrendered for adoption,<sup>46</sup> the unwed father's right to know is protected to the extent that he is thereby put on notice that he might be the child's father.<sup>47</sup>

The right to know is distinguishable from the unwed father's adoption rights in other respects. Some states "protect" an unwed father's adoption rights by using mechanisms that do not actually inform the father of the adoption of his child.<sup>48</sup> A form of "constructive notice" may be used—usually taking the form of notice by publication.<sup>49</sup> Obviously, any statutory mechanism that

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<sup>42</sup> A mother may choose not to elect to surrender the child until well after the child is born. Similarly, it may be years before a mother's spouse attempts to adopt the child.

<sup>43</sup> For example, an unwed—or wed—father might have known of the child's existence, but might nevertheless argue that there was a violation of his right to notice of an adoption proceeding, his right to be heard at an adoption proceeding, or his right to block the adoption by withholding his consent.

<sup>44</sup> See *infra* note 282 and accompanying text.

<sup>45</sup> For nearly every gestation period, the time will come when it will be difficult, if not impossible, for the woman to hide her pregnancy. An unwed father who knows of the woman's pregnancy should not later be heard to complain that his right to know has not been protected. Knowledge of the pregnancy, in effect, provides him with constructive notice of his potential fatherhood.

<sup>46</sup> The male should be able to count back forty weeks from the birthdate of the child to determine whether he might be the child's father, assuming, of course, that the father has remained in relatively continuous contact with the mother during the term of her pregnancy.

<sup>47</sup> There may, however, be cases in which an unwed father might reasonably believe that the child could not be his. An abnormally long or short gestation period, the male's knowledge that birth control devices had been used, the mother's representation to the male concerning the child's paternity, and numerous other factors may be relevant in determining whether the father reasonably should have been put on notice of his fatherhood.

<sup>48</sup> See *infra* note 287 and sources cited therein.

<sup>49</sup> Even in cases in which the unwed father's identity and location is known, constructive notice may still be the only form of notice that he receives. See *infra* notes 286-89 and accompanying text.

provides for constructive, implied, or imputed notice to or consent by the unwed father, while "protecting"<sup>50</sup> the unwed father's adoption rights, does not protect his right to know if he is unaware of his child's existence.<sup>51</sup>

If a state's statutory scheme does not provide for constructive notice or some other form of implied or imputed notice or consent, the right to know may still go unprotected. This is the case in those states that still do not require notice to or consent by the unwed father—even when his identity and location are known by the mother and revealed to the adoption agency and/or the court.<sup>52</sup> In states that purport to require the unwed father's consent to the adoption of his child,<sup>53</sup> however, the right to know is not protected when his identity or location is truly unknown or unascertainable even to the mother.<sup>54</sup> The right to know is also not protected if the mother refuses to reveal the identity or location of the father, lies to the agency or court about his identity or location, or omits information necessary to the correct identification or location of the father.<sup>55</sup>

Notwithstanding this lack of coextensiveness between the right to know and the unwed father's adoption rights,<sup>56</sup> it is in the adoption context that the right to know assumes its most critical importance. This is particularly true when the child is a newborn

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<sup>50</sup> The use of quotation marks perhaps alerts the reader to the author's personal dissatisfaction with using constructive notice or other similar procedures as a shortcut to effective protection of a right. See Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois*, in *FATHERS, HUSBANDS AND LOVERS supra* note 3, at 531.

<sup>51</sup> If constructive notice is the only means available with which to inform an unwed father of his child's existence, then such devices *could* be designed so as to increase the odds of actually accomplishing its purported end. See *infra* notes 406-28 and accompanying text.

<sup>52</sup> See *infra* note 284 and sources cited therein.

<sup>53</sup> See *infra* note 290 and sources cited therein.

<sup>54</sup> Although the focus of this Note is on cases in which the unwed mother does in fact know the natural father's identity, it is not the case that the mother's ignorance in fact of his identity effectively precludes any protection of the right to know. See *infra* notes 407-28 and accompanying text.

<sup>55</sup> Cases in which the unwed mother is uncooperative might present the greatest obstacle to effective protection of the right to know. Any effort to protect the right must address the problems inherent in such cases. See *infra* note 407.

<sup>56</sup> See *supra* notes 40-55 and accompanying text.



and the infant is to be adopted by strangers.<sup>57</sup> Under the statutes of most states, any prior legal relationship between the natural parents and their child terminates upon the adoption of that child by a third party.<sup>58</sup> After such an adoption, an unwed father generally cannot obtain visitation privileges,<sup>59</sup> and he has no say in any matter pertaining to the care, the rearing, or the life of the child, including the child's education, religious upbringing, or medical treatment.<sup>60</sup>

In addition, in most states the adoption is statutorily irreversible except in limited circumstances.<sup>61</sup> Even in the absence of such a statute, it is highly unlikely that a court would invalidate a completed adoption because reversal would be contrary to the best interests of the child.<sup>62</sup> Furthermore, most states provide that adoption records, including the child's original birth certificate, are to be sealed once the adoption proceeding ends.<sup>63</sup> Many statutes impose criminal penalties on anyone responsible for the unauthorized disclosure of information contained in these records.<sup>64</sup>

The impact of these and similar statutes upon the right to know are enormous. Once the child is adopted, the uninformed father has, in effect, forever lost any opportunity he might otherwise have had to know his child.<sup>65</sup> If he learns of the child's

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<sup>57</sup> In this Note, the term "stranger" with respect to an adoption refers to someone who seeks to be an adoptive parent who is not a natural parent, a spouse of a natural parent, or a friend or relative of a natural parent.

<sup>58</sup> See *infra* notes 270-304 and accompanying text.

<sup>59</sup> See *Jouett v. Rhorer*, 339 S.W.2d 865 (Ky. 1960); *Spencer v. Franks*, 195 A. 306 (Md. 1937); *In re Gustafson's Adoption*, 183 P.2d 787 (Wash. 1947); cf. *Weinschel v. Strople*, 466 A.2d 1301 (Md. Ct. Spec. App. 1983) (no statutory or common law right to visitation privileges following adoption, but parties can enter into an agreement regarding such privileges). But see *In re Estate of Zook*, 399 P.2d 53 (Cal. 1965); *In re Abraham L.*, 385 N.Y.S.2d 103 (N.Y. App. Div. 1976); *In re Adoption of N.*, 355 N.Y.S.2d 956 (Surr. Ct. 1974).

<sup>60</sup> Adoption is defined as the "legal process pursuant to state statute in which a child's legal rights and duties toward his natural parents are terminated and similar rights and duties toward his adoptive parents are substituted." BLACK'S LAW DICTIONARY, *supra* note 1, at 45.

<sup>61</sup> See *infra* note 296 and sources cited therein.

<sup>62</sup> See *infra* notes 297-99 and accompanying text.

<sup>63</sup> See *infra* note 300 and source cited therein.

<sup>64</sup> See *infra* note 301 and source cited therein.

<sup>65</sup> Even if the child is not surrendered for adoption by the unwed mother, there is no guarantee that an unwed father will be able to develop a meaningful relationship with his child. See *Lehr*, 463 U.S. at 269-72 (White, J., dissenting).

existence after the adoption, he is left knowing that there is a child somewhere that he has fathered but perhaps will never see.<sup>66</sup> The potentially traumatic impact upon the father of such knowledge is self-evident.<sup>67</sup>

There is perhaps even more potential for psychological trauma to the unwed father in cases in which, subsequent to the adoption of an infant surrendered by a woman with whom the father had had sexual relations during the relevant time period,<sup>68</sup> the father learns of the child's existence, but is unable to verify through the mother whether the child was in fact his.<sup>69</sup> Because of the confidentiality of adoption records, the father is left in the position that he might never be able to ascertain whether a child that he has fathered exists. This uncertainty will remain with him and perhaps haunt him for the remainder of his life.<sup>70</sup>

Because of the critical importance of the right to know in the adoption context,<sup>71</sup> this Note's discussion of the right to know will focus on that area. Much of the discussion of the right to know in this Note is relevant to the non-adoption context, and is, therefore, equally applicable to cases in which a child has not

<sup>66</sup> As noted, the unwed father will generally not have access to the adoption records and thus cannot discover the child's location. See *supra* notes 63-64 and accompanying text.

<sup>67</sup> See A. SOROSKY, A. BARAN, & R. PANNOR, *supra* note 9, at 47-72 (1978). An excerpt from a statement by an unwed father quoted in this source is illustrative: "I heard, after it was too late, that it was a boy, and I will always wonder if there is a kid out there who is mine, who looks like me, and who thinks he has a louse for a father. It hurts more than I can express." *Id.* at 68.

<sup>68</sup> The "relevant time period" is somewhere between 7 to 10 months before the child's birth.

<sup>69</sup> An unwed mother might refuse to provide verification for any one or more of several reasons: she might make a unilateral determination that it is in the best interests of the child for the unwed father not to be told of his paternity; she might wish to "punish" the unwed father by leaving him in doubt; or, she might be uncertain of the child's paternity.

<sup>70</sup> Uncertainty can result in devastating psychological consequences. The discovery that one may be a father serves as a traumatic event sufficient to induce "a heightened state of emotionality that can loosely be called fear." M. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* 53 (1975). The inability to either confirm or to dispel the possibility through any act or omission on the victim's part can result in a depressive state heralding the beginnings of some form of emotional disturbance. See *id.* at 53-54. The resulting feelings of hopelessness can serve as a harbinger of several forms of mental disorders. See *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 533 (3d ed. 1987).

<sup>71</sup> See *supra* notes 57-69 and accompanying text.

been surrendered for adoption. The types of cases that are the primary focus of this Note, however, are those in which: an unwed mother knows the identity and location of the father;<sup>72</sup> the mother surrenders the child for adoption by a stranger;<sup>73</sup> the father has no way<sup>74</sup> of learning of the child's existence or upcoming adoption;<sup>75</sup> the father would receive notice of the adoption if his identity and/or location were known to the court or to the adoption agency;<sup>76</sup> and the mother does not provide the court or agency with the identity and/or location of the father, whether this failure on her part be due to her absolute refusal to reveal the information, her professed ignorance as to the information, or her deceiving or misleading the court or agency as to this information.<sup>77</sup> In these cases the right to know is of the utmost importance.<sup>78</sup>

## II. THE UNWED FATHER AND THE CONSTITUTION

### A. *The Cases*

The Supreme Court has decided only a handful of cases concerning the rights of unwed fathers.<sup>79</sup> The right to know has

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<sup>72</sup> Cases in which an unwed father's identity or location are in fact unknown are more troublesome and perhaps involve somewhat different considerations. See *infra* notes 372-93 and 401-21 and accompanying text.

<sup>73</sup> Cases in which the mother does not surrender the child for adoption arguably involve additional considerations that are beyond the scope of this Note. The same may be true in cases in which a child is not adopted by a stranger, but rather by a stepparent. See, e.g., *Adoption of Rebecca B.*, 137 Cal. Rptr. 100 (Cal. App. 3d 1977). See generally Comment, *A Survey of State Law Authorizing Stepparent Adoption Without the Noncustodial Parent's Consent*, 15 AKRON L. REV. 567, 567-71 (1982).

<sup>74</sup> The type of notice referred to in this Note is formal notice—from a court or agency—rather than “secondhand notice,” such as gossip or rumor.

<sup>75</sup> The discussion in this Note is not directed toward cases in which the unwed father has, by virtue of his contact with the unwed mother during the final stages of pregnancy, thereby been provided with “constructive notice” of his potential fatherhood. See *supra* notes 45-47 and accompanying text.

<sup>76</sup> Not all states have such progressive statutory schemes and practices. See *infra* notes 276-95 and accompanying text.

<sup>77</sup> In other words, this Note discusses whether and to what extent the right to know is and should be protected when the unwed mother desires that the right not be protected.

<sup>78</sup> See *supra* notes 57-67 and accompanying text.

<sup>79</sup> See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Parham v. Hughes*, 441 U.S. 347 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

not been in issue in any of them. The cases, however, do provide guidance on whether and to what extent the right to know is presently protected by the Constitution.<sup>80</sup>

The Court first held that the Constitution extended protection to unwed fathers in *Stanley v. Illinois*.<sup>81</sup> Peter and Joan Stanley lived together in a nonmarital relationship for eighteen years.<sup>82</sup> The relationship produced three children.<sup>83</sup> Joan subsequently died, and "Peter Stanley lost not only her but also his children."<sup>84</sup> The state instituted a dependency proceeding, and Stanley's children were removed from his custody and placed with court-appointed guardians.<sup>85</sup>

Under Illinois law, illegitimate children automatically become wards of the state upon the death of their mother.<sup>86</sup> The state attempted to justify its actions on the grounds that "unwed fathers are presumed unfit to raise their children and that it is unnecessary to hold individualized hearings to determine whether particular fathers are in fact unfit parents before they are separated from their children."<sup>87</sup> Stanley maintained that depriving him of his children without a showing of parental unfitness violated the equal protection clause<sup>88</sup> of the fourteenth amendment.<sup>89</sup>

The Court held that Stanley's constitutional rights had been violated.<sup>90</sup> The Court, however, did not rest its decision solely on the equal protection clause:<sup>91</sup>

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<sup>80</sup> See *infra* notes 201-69 and accompanying text.

<sup>81</sup> 405 U.S. 645 (1972).

<sup>82</sup> *Id.* at 646.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 647.

<sup>88</sup> *Id.*

<sup>89</sup> The fourteenth amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

<sup>90</sup> *Stanley*, 405 U.S. at 645. Justice White wrote the majority opinion for the Court, joined by Justices Brennan, Stewart, Marshall, and for most of the opinion by Justice Douglas. Chief Justice Burger wrote a dissenting opinion, in which Justice Blackmun joined. Justices Powell and Rehnquist did not participate in the consideration or the decision of the case. *Id.*

<sup>91</sup> The Court's reasoning has been criticized. First, the opinion was somewhat vague as to whether Stanley's protection came from the equal protection clause, the due process clause, or both. "While the language and reasoning . . . was indicative of a due process

We conclude that, as a matter of due process of law,<sup>92</sup> Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged,<sup>93</sup> the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>94</sup>

Under its procedural due process analysis,<sup>95</sup> the Court first identified the private interest involved as "that of a man in the children he has sired and raised,"<sup>96</sup> and concluded that "absent a powerful countervailing [state] interest,"<sup>97</sup> Stanley's interest warranted protection.<sup>98</sup> The Court took careful note of the constitutional protection that had been accorded the family relationship<sup>99</sup> and pointed out that such protection was not limited to family relationships legitimized by marriage.<sup>100</sup>

The Court acknowledged that Illinois' interests<sup>101</sup> were

approach . . . the precise holding was phrased solely in equal protection terms." Comment, *Extending the Rights of Unwed Fathers*, *supra* note 23, at 101-02 n.43. The dissent also chastised the majority for the due process aspects of its analysis since Stanley had relied only on the equal protection clause in his challenge. See *Stanley*, 405 U.S. at 661 (Burger, C.J., dissenting). Second, it was unclear whether the due process rights implicated in Stanley, if any, were procedural or substantive. See Comment, *Extending the Rights of Unwed Fathers*, *supra* note 23, at 100.

<sup>92</sup> The fourteenth amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

<sup>93</sup> Under Illinois law at that time, the type of hearing that Stanley was denied was granted to both mothers and fathers of legitimate children and to mothers of illegitimate children. *Stanley*, 405 U.S. at 650.

<sup>94</sup> *Id.* at 649.

<sup>95</sup> Because the opinion tended to focus on the type of hearing to which Stanley was entitled—one determining his parental fitness or unfitness—the author believes that the Stanley analysis was primarily grounded in procedural due process. See *id.* at 657-59.

<sup>96</sup> *Id.* at 651.

<sup>97</sup> *Id.*

<sup>98</sup> "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 momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Id.* (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

<sup>99</sup> *Id.* at 651-52.

<sup>100</sup> *Id.*

<sup>101</sup> The state's interests asserted were "to protect 'the moral, emotional, mental, and physical welfare of the minor and the best interests of the community' and to 'strengthen the minor's family ties whenever possible, removing him from the custody of his parents

legitimate<sup>102</sup> but observed that "the State registers no gain towards its declared goals when it separates children from the custody of fit parents."<sup>103</sup> The Court rejected the state's contention that all unwed fathers were unfit parents.<sup>104</sup> The Court further refused to accept the assertion that unwed fathers so seldom make fit parents that the state's interest in administrative convenience justified its failure to inquire into an unwed father's fitness as a parent.<sup>105</sup> Thus, Stanley was entitled, under the due process and equal protection clauses, to a hearing on his fitness as a parent before his children could be removed from his custody.<sup>106</sup>

The next case dealing with the rights of unwed fathers to reach the Court was *Quilloin v. Walcott*.<sup>107</sup> While Stanley was concerned with the rights of unwed fathers in dependency proceedings,<sup>108</sup> *Quilloin* dealt with the constitutionality of an adoption statute.<sup>109</sup> In *Quilloin*, the unwed father attempted to block the adoption of his child by the mother's husband.<sup>110</sup>

The facts of the case revealed that Quilloin had a far less substantial relationship with his child than had Stanley.<sup>111</sup> Quilloin and the unwed mother, Walcott, "never married each other or established a home together."<sup>112</sup> Walcott married a third party less than three years after the child was born. Quilloin provided

only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal.' " *Id.* at 652 (quoting ILL. REV. STAT., c. 37, § 701-02).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> "We are not aware of any sociological data justifying 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. . . ." *Id.* at 654 n.7.

<sup>105</sup> In response to this argument, the Court noted that "the Constitution recognizes higher values than speed and efficiency." *Id.* at 657 (footnote omitted). The Court went on to state that "[p]rocedure by presumption is always cheaper and easier than individualized determination." *Id.* at 656-57.

<sup>106</sup> *Id.* at 658.

<sup>107</sup> 434 U.S. 246 (1978).

<sup>108</sup> *Stanley*, 405 U.S. at 647-48.

<sup>109</sup> The statute challenged in *Quilloin* operated as an exception to the general rule that the consent of both parents was required before an adoption could proceed. The statute, GA. CODE ANN. § 74-403(3) (1975), provided that "if the child be illegitimate, the consent of the mother alone shall suffice." *Quilloin*, 434 U.S. at 249 n.3.

<sup>110</sup> *Id.* at 247.

<sup>111</sup> Compare *id.* at 249-52 with *Stanley*, 405 U.S. at 646-56.

<sup>112</sup> *Quilloin*, 434 U.S. at 247.

support for the child “only on an irregular basis.”<sup>113</sup> Walcott had concluded that Quilloin’s visits with the child were “having a disruptive effect on the child.”<sup>114</sup> The child wanted to be adopted by Walcott’s husband. Over a period of eleven years, Quilloin had not attempted to legitimize the child.<sup>115</sup> When he tried to block the adoption, Quilloin “did not seek custody or object to the child’s continuing to live with [Walcott and her husband].”<sup>116</sup>

Under Georgia law,<sup>117</sup> “only the consent of the mother is required for the adoption of an illegitimate child.”<sup>118</sup> The Georgia trial court found that the child’s adoption by Walcott’s husband was in the “best interests of [the] child”<sup>119</sup> and that, because Quilloin had not legitimized the child, he could not object to the adoption.<sup>120</sup> There was no finding that Quilloin was an unfit parent.<sup>121</sup> When his appeal reached the Supreme Court, he argued, relying on *Stanley*,<sup>122</sup> “that he was entitled as a matter of due process and equal protection to an absolute veto over adoption of his child, absent a finding of his unfitness as a parent.”<sup>123</sup>

The Court rejected Quilloin’s claim.<sup>124</sup> Writing for a unanimous Court, Justice Marshall noted first that there was no claim that Quilloin had not received notice or an opportunity to be heard prior to the adoption decree.<sup>125</sup> Justice Marshall framed the issue as being “whether, in the circumstances of this case and in light of the authority granted by Georgia law to married fathers, [Quilloin’s] interests were adequately protected by a ‘best interest of the child’ standard.”<sup>126</sup> The Court then proceeded to examine both the due process and the equal protection claims.<sup>127</sup>

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<sup>113</sup> *Id.* at 251.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 249.

<sup>116</sup> *Id.* at 247.

<sup>117</sup> See GA. CODE ANN. § 74-403(3) (1975).

<sup>118</sup> *Quilloin*, 434 U.S. at 248.

<sup>119</sup> *Id.* at 251.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 247.

<sup>122</sup> *Id.* at 252-54.

<sup>123</sup> *Id.* at 253. Quilloin “focused his equal protection claim solely on the disparate treatment of his case and that of a married father.” *Id.*

<sup>124</sup> *Id.* at 256.

<sup>125</sup> *Id.* at 253.

<sup>126</sup> *Id.* at 254.

<sup>127</sup> *Id.*

The Court first found that there was no due process violation<sup>128</sup> but declined to rest the decision on Quilloin's failure to legitimize the child.<sup>129</sup> Instead, the Court seemed to rest its decision on Quilloin's irresponsibility and minimal involvement in the child's life and the fact that the adoption would not break up an existing family unit.<sup>130</sup>

Quilloin's equal protection challenge was based on the fact that Georgia law permitted a separated or a divorced father to veto the adoption of his children.<sup>131</sup> The Court held that there was no equal protection violation, because Quilloin's interests were distinguishable from those of separated or divorced fathers.<sup>132</sup> Unlike a formerly married father, Quilloin "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."<sup>133</sup> Consequently, Quilloin's constitutional rights were not violated by his having been denied the absolute veto authority over the adoption of his child.<sup>134</sup>

The Court next addressed the rights of unwed fathers in the adoption context in *Caban v. Mohammed*.<sup>135</sup> Abdiel Caban and Maria Mohammed lived in a nonmarital relationship for slightly more than five years.<sup>136</sup> The relationship produced two children.

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<sup>128</sup> *Id.* at 255.

<sup>129</sup> *Id.* at 254.

<sup>130</sup> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interests." But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned except [Quilloin].

*Id.* at 255 (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in the judgment)).

<sup>131</sup> *Id.* at 255-56.

<sup>132</sup> *Id.* at 256.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> 441 U.S. 380 (1979).

<sup>136</sup> *Id.* at 382.



Caban contributed to the support of the children, was listed as the father on their birth certificates, and lived with them as their father until Mohammed left Caban—taking the children with her—to enter into a relationship with a third party, whom she married approximately one month later. For the next nine months Caban saw the children once a week when they visited Mohammed's mother.<sup>137</sup>

Mohammed's mother took the children to Puerto Rico.<sup>138</sup> Fourteen months later Caban went to Puerto Rico himself to visit the children.<sup>139</sup> The grandmother "willingly surrendered the children to Caban with the understanding that they would be returned after a few days."<sup>140</sup> Instead of returning the children, however, Caban returned to New York with them. On learning of this, Mohammed instituted proceedings to regain custody of the children, and the New York Family Court granted her temporary custody and gave Caban and his new wife visitation rights.<sup>141</sup>

Two months later, Mohammed and her new husband petitioned for adoption of the children.<sup>142</sup> The Cabans cross-petitioned for adoption. A hearing was held, and the Mohammed's petition was granted. Under New York law, only the mother's consent was required for the adoption of an illegitimate child.<sup>143</sup> Thus, under the applicable statute,<sup>144</sup> Mohammed was able to block Caban's petition for adoption by withholding her consent, but

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 383.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* The adoption petition was jointly filed by Mohammed and her new husband.

*Id.*

<sup>143</sup> The statute in question, N.Y. DOM. REL. LAW § 111 (McKinney 1975), provided, in pertinent part: "Subject to the limitations hereinafter set forth consent to adoption shall be required as follows: . . . 3. Of the mother, whether adult or infant, of a child born out of wedlock. . . ." *Caban*, 441 U.S. at 385-86 n.4.

<sup>144</sup> Absent one of these circumstances [where the statute makes parental consent unnecessary], an unwed mother has the authority under New York law to block the adoption of her child simply by withholding consent. The unwed father has no similar control over the fate of his child, even when his parental relationship is substantial—as in this case. He may prevent the termination of his parental rights only by showing that the best interests of the child would not permit the child's adoption by the petitioning couple.

*Id.* at 385-87.

Caban could not similarly block her petition.<sup>145</sup> Caban could block Mohammed's petition only by showing that the best interests of the children would not be served by allowing adoption by the Mohammeds.<sup>146</sup>

On appeal to the Supreme Court,<sup>147</sup> Caban argued that the New York statute was violative of both the due process and the equal protection clauses.<sup>148</sup> The Court declined to reach the due process claim<sup>149</sup> and rested its decision on the equal protection clause.<sup>150</sup> After subjecting the statutes to "intermediate scrutiny,"<sup>151</sup> the Court invalidated the statute as it applied to Caban. The Court rejected the contention "that the broad, gender-based distinction [in the New York statute] is required by any universal difference between maternal and paternal relations, at every phase of a child's development."<sup>152</sup> Furthermore, the Court rejected the statutory distinction between unwed mothers and unwed fathers because the statute did "not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children."<sup>153</sup>

Important to the Court's decision were the facts that the children were older,<sup>154</sup> that no difficulty in locating or identifying

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<sup>145</sup> *Id.* at 388.

<sup>146</sup> *Id.*

<sup>147</sup> Justice Powell's opinion for the Court was joined by Justices Brennan, White, Marshall, and Blackmun. Two dissenting opinions were submitted: one by Justice Stewart, the other by Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist.

<sup>148</sup> [A]ppellant presses two claims. First, he argues that the distinction drawn under New York law between the adoption rights of an unwed father and those of other parents violates the Equal Protection Clause of the Fourteenth Amendment. Second, appellant contends that this Court's decision in *Quilloin* . . . recognized the due process right of natural fathers to maintain a parental relationship with their children absent a finding that they are unfit as parents.  
*Id.* at 385.

<sup>149</sup> *Id.* at 394 n.16.

<sup>150</sup> *Id.* at 388-94.

<sup>151</sup> The Court considered the relevant statutory classification to create an "undifferentiated distinction" between unwed mothers and unwed fathers. *Id.* at 394. Gender-based classifications are subjected to intermediate scrutiny when challenged under the equal protection clause; such classifications must serve an important "governmental objective" and be "substantially related" to the achievement of that objective. *See generally* Craig v. Boren, 429 U.S. 190, 197 (1976).

<sup>152</sup> *Caban*, 441 U.S. at 389.

<sup>153</sup> *Id.* at 391.

<sup>154</sup> *Id.* at 392.

the father existed,<sup>155</sup> and that Caban had “established a substantial relationship”<sup>156</sup> with his children and had “admitted his paternity.”<sup>157</sup> Thus, the New York statute denying unwed fathers the right to block the adoption of their children by withholding consent, while granting such a right to unwed mothers, violated the equal protection clause.<sup>158</sup>

On the same day the Court handed down its ruling in *Caban*, it also announced its decision in *Parham v. Hughes*.<sup>159</sup> In *Parham*,<sup>160</sup> an unwed father challenged the constitutionality of a Georgia statute that allowed unwed mothers to sue for the wrongful death of their children but did not grant unwed fathers the same right.<sup>161</sup> An unwed father who had legitimized his child could bring such an action if there were no mother, but one who had not legitimized his child was precluded from bringing an action.<sup>162</sup> *Parham* had not legitimized his child and challenged the statute under the due process and the equal protection clauses.<sup>163</sup>

Writing for a plurality of the Court,<sup>164</sup> Justice Stewart rejected *Parham*'s challenge,<sup>165</sup> concluding that the statutes did not “in-

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 393.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 393-94.

<sup>159</sup> 441 U.S. 347 (1979).

<sup>160</sup> *Id.*

<sup>161</sup> The statute at issue, GA. CODE ANN. §§ 105-1307 (1978) provided:

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

*Parham*, 441 U.S. at 348 n.1 (emphasis added by the Court).

<sup>162</sup> *Id.* at 349.

<sup>163</sup> *Id.*

<sup>164</sup> Justice Stewart's opinion was joined by Chief Justice Burger and Justices Rehnquist and Stevens, all of whom, it should be noted, dissented in *Caban*, which was handed down the same day. The swing vote, not surprisingly, came from Justice Powell, who wrote an opinion concurring in the judgment. Justice Powell wrote the majority opinion in *Caban*. Justice White submitted a dissenting opinion, in which Justices Brennan, Marshall, and Blackmun joined.

<sup>165</sup> *Parham*, 441 U.S. at 359. It is also noteworthy that the *Parham* plurality concluded that cases examining the validity of illegitimacy-based classification were not applicable because the challenged “statute [did] not impose differing burdens or award differing benefits to legitimate and illegitimate children.” *Id.* at 354. Decisions striking down

vidiously discriminate against the appellant simply because he is of the male sex."<sup>166</sup> The rationale for this conclusion was that "mother[s] and father[s] of illegitimate children are not similarly situated"<sup>167</sup> because "[u]nlike the mother of an illegitimate child whose identity will rarely be in doubt, the identity of the father will frequently be unknown."<sup>168</sup> The plurality applied the deferential "rational-basis test"<sup>169</sup> and concluded that the statutory distinction between unwed fathers who had legitimized their children and those who had not bore a rational relationship to the permissible state objective of avoiding fraudulent claims of paternity in an effort to prevent spurious claims against the intestate estate of illegitimate children.<sup>170</sup>

The plurality quickly disposed of the due process challenge, finding that the appellant's reliance on *Stanley* was misplaced because

The interests which the Court found controlling in *Stanley* were the integrity of the family against state interference and the freedom of a father to raise his own children. The present case is quite a different one, involving as it does only an asserted right to sue for money damages.<sup>171</sup>

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classifications based on illegitimacy usually reason that such statutes tend to place a burden upon the illegitimate person by virtue of his status as such and that this is unjust because an illegitimate person is not responsible for that status. *See, e.g.*, *Trimble v. Gordon*, 430 U.S. 762, 769-72 (1977); *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972). *But see, e.g.*, *Lalli v. Lalli*, 439 U.S. 259, 274-76 (1978); *Mathews v. Lucas*, 427 U.S. 495, 504-08 (1976). *See generally* Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967). For a helpful examination of the status that illegitimate persons enjoy under the law, see H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 1-105 (1971).

<sup>166</sup> *Parham*, 441 U.S. at 355.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> The rational basis test, traditionally applied to determine the validity of economic legislative classifications, requires a statute to serve a "permissible" state objective and be "rationally related" to the achievement of that objective. *See generally* *McDonald v. Board of Election*, 394 U.S. 802, 809 (1969); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Railway Express Agency v. New York*, 336 U.S. 106 (1949). The rational basis test has been criticized as being little more than a rubber stamp validating legislative enactments. *See* Gunther, *Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). Justice Marshall has opined that the entire three-tier approach to equal protection analysis should be abandoned. *See* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 70-133 (1973) (Marshall, J., dissenting).

<sup>170</sup> *Parham*, 441 U.S. at 356-57.

<sup>171</sup> *Id.* at 358-59.

Justice Powell concurred in the judgment<sup>172</sup> and supplied the fifth vote to uphold the Georgia statute. He felt that the statute did discriminate on the basis of gender, but nonetheless found that the classification passed muster under the intermediate scrutiny standard.<sup>173</sup> In Justice Powell's view, the statute's distinctions between unwed mothers and unwed fathers bore a substantial relationship to the important state interest of "avoiding difficult problems in proving paternity after the death of an illegitimate child."<sup>174</sup>

The most recent case in which the Court has addressed unwed fathers' rights is *Lehr v. Robertson*.<sup>175</sup> According to the majority's statement of the facts,<sup>176</sup> Mr. Lehr lived with Ms. Robertson in a nonmarital relationship.<sup>177</sup> Robertson became pregnant, and Lehr visited her in the hospital when the child was born.<sup>178</sup> Lehr did not live with Robertson after the child's birth. He never provided financial support to either Robertson or the child, and he never offered to marry Robertson.<sup>179</sup> Lehr's name did not appear on the child's birth certificate, and he never entered his name in the state's "putative father registry."<sup>180</sup>

Eight months after the child's birth, Robertson married another man.<sup>181</sup> Approximately one and one-half years later, Robertson's new spouse sought to adopt the child by filing an adoption petition in the Family Court of Ulster County, New York.<sup>182</sup> One

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<sup>172</sup> *Id.* at 359 (Powell, J., concurring in the judgment).

<sup>173</sup> *Id.* at 359-60.

<sup>174</sup> *Id.*

<sup>175</sup> 463 U.S. 248 (1982). *Lehr* is perhaps the most interesting and disturbing of the *Stanley* line of cases, because, as one commentator has put it, "[r]eading the dissent is like reading a different case." Doskow, *supra* note 3, at 24.

<sup>176</sup> *But compare Lehr*, 463 U.S. at 249-53 (facts as stated by the majority) *with id.* at 268-71 (White, J., dissenting) (facts as stated by the dissent).

<sup>177</sup> *Id.* at 253. The parties cohabitated for approximately two years prior to the child's birth. *See id.* at 268-69 (White, J., dissenting).

<sup>178</sup> *Id.* at 252.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 251. The registry was provided for under N.Y. SOC. SERV. LAW § 372-c (McKinney Supp. 1983). It was used to record the names and the addresses of persons who intended to claim paternity of an illegitimate child. Persons who had signed the registry were one of seven classes of putative fathers who were entitled to notice of adoption proceedings regarding their children. *See* N.Y. DOM. REL. LAW § 111-1(2)(c) (McKinney 1977 & Supp. 1982-83), set forth at *infra* note 289.

<sup>181</sup> *Lehr*, 463 U.S. at 251.

<sup>182</sup> *Id.*

month after the adoption proceeding was commenced, Lehr filed a petition in the Westchester County Family Court, asking for a determination of paternity, an order of support, and visitation privileges.<sup>183</sup> The Ulster County judge, though fully aware of the proceeding commenced by Lehr, granted the Robertsons' petition for adoption,<sup>184</sup> without giving Lehr notice of, or an opportunity to be heard in, the adoption proceeding.<sup>185</sup> Under New York law, Lehr was not entitled to notice or to an opportunity to be heard unless he had signed the putative father registry.<sup>186</sup>

Lehr argued that the New York statutory scheme violated the Constitution in two respects:

First, he contend[ed] that a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law; he argu[ed] therefore that he had a constitutional right to prior notice and an opportunity to be heard before he was deprived of that interest. Second, he contend[ed] that the gender-based classification in the statute, which both denied him the right to consent to [his child's] adoption and accorded him fewer procedural rights than [the child's] mother, violated the Equal Protection Clause.<sup>187</sup>

The Court rejected both of Lehr's claims.<sup>188</sup> The Court<sup>189</sup> held that "the mere existence of a biological link"<sup>190</sup> between an unwed father and his child does not merit constitutional due process protection until and unless the unwed father "demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'"<sup>191</sup> If an unwed father takes such action, "his interest in personal contact with his

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<sup>183</sup> *Id.* at 252.

<sup>184</sup> *Id.* at 252-53.

<sup>185</sup> *Id.*

<sup>186</sup> See *supra* note 180.

<sup>187</sup> *Id.* at 255 (footnote omitted).

<sup>188</sup> *Id.* at 263-65, 268-69.

<sup>189</sup> Joining Justice Steven's opinion were Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Curiously, Justice Brennan also joined the majority opinion. Justice White authored a dissenting opinion, in which Justices Marshall and Blackmun joined.

<sup>190</sup> *Id.* at 261.

<sup>191</sup> *Id.* (quoting *Caban*, 441 U.S. at 392).

child acquires substantial protection under the Due Process Clause."<sup>192</sup> The majority believed that Lehr's failure to sign the putative father registry was a sufficient reason for the state to deny Lehr notice of and opportunity to be heard at the adoption proceeding.<sup>193</sup> In effect, Lehr's failure to sign the registry meant that he had not "earned" his right to receive notice.<sup>194</sup> The New York statute, therefore, did not violate the due process clause.<sup>195</sup>

The Court also rejected Lehr's equal protection claim, holding that Lehr and Robertson were not similarly situated in their respective relationships with their child.<sup>196</sup> In contrast to Robertson, Lehr had never "come forward to participate in the rearing of his child"<sup>197</sup> and had "never established any custodial, personal, or financial relationship with [his child]."<sup>198</sup> The Court explicitly stated that "[i]f one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights."<sup>199</sup> The New York statute therefore did not violate Lehr's rights under the equal protection clause.<sup>200</sup>

### B. *The Right to Know in the Context of Stanley and Its Progeny*

None of the *Stanley* line of cases necessarily decided the question of whether the Constitution protects the unwed father's right to know. In each case, the unwed father knew of his child's existence.<sup>201</sup> In addition, the children involved were not infants.<sup>202</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 264.

<sup>194</sup> See Doskow, *supra* note 3, at 23.

<sup>195</sup> *Lehr*, 463 U.S. at 256-65.

<sup>196</sup> *Id.* at 267-68.

<sup>197</sup> *Id.* at 267 (quoting *Caban*, 441 U.S. at 392).

<sup>198</sup> *Id.* at 267.

<sup>199</sup> *Id.* at 267-68 (footnotes omitted).

<sup>200</sup> *Id.*

<sup>201</sup> In *Stanley*, the unwed father had been living with the children until the time when they were removed from his custody. See *Stanley*, 405 U.S. at 647. In *Quilloin*, the very fact that Leon Quilloin attempted to block his child's adoption evidences his knowledge of the child's existence. See *Quilloin*, 434 U.S. at 247. In *Parham*, the unwed father's knowledge of the child is shown by his signing the child's birth certificate. See *Parham*, 441 U.S. at 349. In *Caban*, the unwed father's contact and relationship with his children were substantial. See *Caban*, 441 U.S. at 382-84. Finally, in *Lehr*, the father's knowledge

The right to know was, in each case, well past the temporal point when its protection is most critical.<sup>203</sup> Indeed, in each case, the unwed father in question knew of his paternity when the child was born.<sup>204</sup>

Furthermore, the cases cannot be easily analogized to a case in which the right to know is in dispute. The question of whether the right to know is constitutionally protected is essentially a question of whether some form of "notice" of paternity is required by the Constitution.<sup>205</sup> Only *Lehr* presented the question of whether the unwed father was entitled to some form of notice.<sup>206</sup> The notice question in *Lehr*, however, concerned whether the unwed father was constitutionally entitled, in all cases, to notice that his child was the subject of adoption proceedings.<sup>207</sup> The private and the state interests pertinent to an unwed father's right to notice of his child's adoption<sup>208</sup> are not coextensive with

of his child's existence is seen from *Lehr*'s visits to the child, his efforts to seek a declaration of paternity, and his attempt to block the child's adoption. See *Lehr*, 463 U.S. at 250-53.

<sup>202</sup> See *supra* note 25 for an explanation of this Note's use of the term "infant." The facts in *Stanley* do not indicate the ages of Peter Stanley's children; however, the Court's description of his interest as being "that of a man in the children he has sired and raised," *Stanley*, 405 U.S. at 651 (emphasis added), implies that the children were at least beyond the age of newborns. In *Quilloin*, the child was approximately 12 years old when Randall Walcott first sought adoption of the child. *Quilloin*, 434 U.S. at 247. The child in *Parham* was dead, and, therefore, was not "involved" in the case; his or her age at death is somewhat irrelevant to the present discussion. *Parham*, 441 U.S. at 349. Caban's children were ages 6 and 4 respectively when the Mohammeds filed their adoption petition. *Caban* 441 U.S. at 382-83. *Lehr*'s child was more than 2 years of age when the Robertsons sought to adopt her. *Lehr*, 463 U.S. at 250, 252.

<sup>203</sup> See *supra* notes 56-71 and accompanying text.

<sup>204</sup> In *Stanley*, *Caban*, and *Lehr*, the respective unwed fathers were living with the respective unwed mothers at the time (or shortly before) the births of the children in question. See *Lehr*, 463 U.S. at 252; *Caban*, 441 U.S. at 382; *Stanley*, 405 U.S. at 646. In *Quilloin* and *Parham*, the unwed fathers consented to the entry of their names on their children's birth certificates. See *Quilloin*, 434 U.S. at 249 n.6; *Parham*, 441 U.S. at 349.

<sup>205</sup> In the right to know's purest form, the duty to give notice arises at the birth of the child. See *supra* notes 40-47 and accompanying text. For a representative sample of cases discussing whether and to what extent the Constitution requires notice in other contexts, see *Greene v. Lindsey*, 456 U.S. 444 (1981) (pendency of action); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949) (in rem proceeding); *Wuchter v. Pizzutti*, 276 U.S. 13 (1928) (action against non-residents); *McDonald v. Mabee*, 243 U.S. 90 (1917) (lack of service of process).

<sup>206</sup> 463 U.S. 248, 255; see *supra* notes 175-200 and accompanying text.

<sup>207</sup> *Id.* at 255.

<sup>208</sup> See *id.* at 256-68.



the interests implicated when the issue concerns an unwed father's right to notice of his child's existence.<sup>209</sup>

The cases, at least until *Lehr*,<sup>210</sup> while not necessitating the conclusion that the right to know is constitutionally protected,<sup>211</sup> add support to—or at least are not inconsistent with—such a contention. In *Stanley*, the Court noted that “offering unwed fathers an opportunity for individualized hearings on fitness” would impose only minimal cost on the state.<sup>212</sup> Further, the Court stated, “[i]f unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings.”<sup>213</sup>

The *Stanley* Court seemed to indicate that affording every unwed father whose parental rights were about to be terminated an opportunity to be heard would impose such a minimal burden on the state that a state's failure to provide the opportunity was constitutionally impermissible.<sup>214</sup> In contrast, protecting the right to know, involving as it does only the right to receive notice of one's child's existence—and not a corresponding right to be heard,<sup>215</sup> would seem to impose even less administrative burden

<sup>209</sup> See *supra* notes 41-47 and accompanying text; *infra* notes 310-426 and accompanying text.

<sup>210</sup> But see *infra* notes 254-60 and accompanying text.

<sup>211</sup> See *supra* notes 201-09 and accompanying text.

<sup>212</sup> *Stanley*, 405 U.S. at 657 n.9.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 657-58.

<sup>215</sup> Some might object that the right to know—even if protected—is of little practical value if an accompanying right to be heard on at least some matter does not exist. Perhaps this is true; perhaps not. Certainly in cases in which the principal concern is with informing the unwed father of the child's existence prior to the child's adoption—the scenario which is the reference point of this Note—the right to know probably would carry with it a right to be heard on matters pertaining to the adoption. See *supra* notes 57-67 and accompanying text. On the other hand, however, the right to know, in its purest form, would extend to cases in which the mother keeps the child and in which there is no stepparent seeking to adopt the child. See *supra* notes 40-42 and accompanying text. The question of whether and to what extent the right to know should be protected and the question of whether and to what extent unwed fathers should be provided with an opportunity to be heard are not necessarily bound together inextricably. Different considerations may be involved in each, and an examination of whether and to what extent an opportunity to be heard should accompany protection of the right to know is beyond the scope of this Note. For cases discussing whether and to what extent the Constitution requires that an opportunity to be heard be provided in other contexts, see *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (wage garnishment proceeding); *Mitchell v. W.T. Grant Co.*,

on the state,<sup>216</sup> at least if the father's identity and location are known or are readily ascertainable.<sup>217</sup> Thus, if an unwed father has any constitutionally protected parental interest—solely by virtue of the biological relationship—the Constitution should require that his right to know also be protected. The primary question, not addressed in *Stanley*, is whether such an interest exists.<sup>218</sup>

*Quilloin*, in contrast, provides little guidance on whether the right to know is constitutionally protected. The most that can be said of *Quilloin* is that its rationale and its holding are not inconsistent with the contention that the right to know is protected by the Constitution.<sup>219</sup> *Quilloin*'s challenge of the Georgia law<sup>220</sup> failed because he had failed to take advantage of the opportunity to develop a substantial relationship with his child.<sup>221</sup> He would never even have had such an opportunity, of course, had he not known of his child's existence.<sup>222</sup>

Similarly, *Parham* offers little help in determining whether or not the Constitution protects the right to know.<sup>223</sup> As in

416 U.S. 600 (1974) (sequestration hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (hearing on prejudgment writ of replevin); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (prejudgment hearing on garnishment of wages).

<sup>216</sup> Requiring a state to provide notice but not to provide a hearing is less burdensome than requiring the state to provide both.

<sup>217</sup> Somewhat different considerations seem to be involved if the unwed father's identity or location cannot readily be determined, with a positive correlation between the degree of difficulty in making such a determination and the burden that the state must bear. Cf. *Caban*, 441 U.S. at 392 n.11 (leaving open the question of whether a state might be able to impose more stringent standards concerning the acknowledgment of paternity in cases in which the identity of the father is more difficult to ascertain, such as when the child is an infant).

<sup>218</sup> *Stanley*'s interest appears to have risen to the level of being constitutionally protected by virtue of his fatherhood and his substantial relationship with the children. See *Lehr*, 463 U.S. at 261-62 (distinguishing *Stanley*).

<sup>219</sup> The Court did not need to address the issue of whether the biological relationship in and of itself could suffice to give an unwed father a constitutionally protected interest in a relationship with his child, for even if such an interest exists, *Quilloin*'s failure to develop such a relationship operated as a waiver of whatever rights he might otherwise have had. See *Quilloin*, 434 U.S. at 254-56.

<sup>220</sup> See GA. CODE ANN. § 74-403(3) (1975).

<sup>221</sup> See *supra* notes 111-30 and accompanying text.

<sup>222</sup> If *Quilloin* had not known of his child's existence, then his argument would have been that he was deprived of a constitutionally protected opportunity to develop a relationship with his child. This argument is clearly different from the one he advanced; the question of whether it is a *better* one is what this section of the Note is trying to determine.

<sup>223</sup> The issue in *Parham*—whether an unwed father could be deprived of the privilege of suing for the wrongful death of his child when such a privilege is granted to an unwed

*Quillon*,<sup>224</sup> the *Parham* plurality rested its decision, in large part, on the unwed father's failure to take action that would have rendered his relationship to his child legally more substantial.<sup>225</sup> Yet, the unwed father in *Parham* would not have had the opportunity to fail if he had not known of his child's existence. Justice Powell's concurrence, resting as it did on the difficulty of proving the paternity of the father of a deceased child,<sup>226</sup> also is of little use. The right to know, it will be remembered, is discussed here only in the context of cases in which the father's identity is known or is readily ascertainable.

*Caban* is somewhat more helpful to the analysis. It is like the previously discussed cases in that *Caban*'s substantial relationship with his children was a critical factor in the Court's decision.<sup>227</sup> However, he would not have had the opportunity to develop this relationship if he had not known of his children's existence.<sup>228</sup> The Court offered guidance to the analysis late in the opinion when the Court discussed the decision in *In re Malpica-Orsini*.<sup>229</sup>

In *In re Malpica-Orsini*, the New York Court of Appeals held that it was not necessary to obtain an unwed father's consent to the adoption of his child, even though an unwed mother's consent was required.<sup>230</sup> The decision rested, in part, on the court's conclusion that requiring the unwed father's consent would burden the adoption procedure because of the difficulty in locating him when adoption proceedings are brought.<sup>231</sup> The unwed mother, in

mother—is sufficiently different from the issue presented in the other unwed fathers' rights cases that some commentators have not listed *Parham* as being in the *Stanley* line of cases. See, e.g., Comment, *Removing the Bar Sinister*, *supra* note 23, at 506-07; Note, *Putative Fathers*, *supra* note 23, at 429-30; Note, *Adoption*, *supra* note 23, at 926. Such judgments are quite legitimate. *Parham* bears little relevance to most issues concerning unwed fathers' parental rights. *Parham*, however, has been included in this Note's discussion because it provides at least some minimal guidance on how the Supreme Court has viewed claims by unwed fathers.

<sup>224</sup> Cf. *supra* note 222.

<sup>225</sup> In particular, Curtis Parham failed to take action to legitimize the child. See *Parham*, 441 U.S. at 353-56.

<sup>226</sup> See *supra* note 174 and accompanying text.

<sup>227</sup> See *supra* notes 154-56 and accompanying text.

<sup>228</sup> Cf. *supra* note 222.

<sup>229</sup> 331 N.E.2d 486 (N.Y. 1975), *appeal dismissed sub nom.* Orsini v. Blasi, 423 U.S. 1042 (1976).

<sup>230</sup> See *id.* at 513.

<sup>231</sup> See *Caban*, 441 U.S. at 392 (discussing the reasoning in *Malpica-Orsini*).

contrast, is less difficult to locate because she is more likely to remain with the child.<sup>232</sup>

The Supreme Court rejected the New York court's rationale in *In re Malpica-Orsini* when it struck down the New York statutory scheme in *Caban*.<sup>233</sup> The Court stated that such difficulties were not present in *Caban's* case.<sup>234</sup> If the Court had left it at that, the contention that the right to know is constitutionally protected would have been buttressed<sup>235</sup>—when the unwed father is not difficult to locate prior to the adoption,<sup>236</sup> a state, under the Court's reasoning, appears to be constitutionally compelled to protect the right to know<sup>237</sup> by informing the father of the child's existence.<sup>238</sup>

However, the difficulties mentioned in *In re Malpica-Orsini* were not present in *Caban's* case because *Caban's* children were no longer infants.<sup>239</sup> The Court stated: “[e]ven if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns, these difficulties need not persist past

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<sup>232</sup> *Id.*

<sup>233</sup> *Caban*, 441 U.S. at 395. *Caban* operated to overrule the New York Court of Appeal's decision in *In re Malpica-Orsini*, which involved the same statute that was struck down in *Caban*.

<sup>234</sup> *Id.* at 393.

<sup>235</sup> *But see infra* notes 239-41 and accompanying text.

<sup>236</sup> The focus of the discussion in this Note is on cases in which the unwed fathers' identity is at least known to the unwed mother. *See supra* notes 72-78 and accompanying text.

<sup>237</sup> The contrary argument is that the problem in *Caban* was that unwed mothers had been *statutorily* granted the right to block the adoption of their children, while such a right was denied to unwed fathers. *See id.* at 392-94. In right to know cases, in contrast, the protection of the unwed *mothers'* “right to know” comes not from statute, but rather from nature; therefore, no statutory classification is responsible for the alleged inequality. This, in effect, is a variation of the “not similarly situated in fact” rationale, adopted by many courts that have refused to find classifications based on pregnancy to be impermissible gender discrimination under Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2002e (1964). *See Geduldig v. Aiello*, 417 U.S. 484 (1974). *See generally* *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *General Elec. v. Gilbert*, 429 U.S. 125 (1976). Title VII was amended by the Pregnancy Discrimination Act of 1978 so as to include employers' classification on the basis of pregnancy within the proscriptions of Title VII, thus overturning *Gilbert* and *Satty*. 42 U.S.C. § 2000e (1978).

<sup>238</sup> Such a requirement would presumably arise from the equal protection clause—the basis upon which *Caban* rested its decision. *See supra* note 89 for the text of the equal protection clause.

<sup>239</sup> *See Caban*, 441 U.S. at 392.

infancy.”<sup>240</sup> Further, the Court stated that “[b]ecause the question is not before us, we express no view whether such difficulties would justify a statute addressed particularly to newborn adoptions. . . .”<sup>241</sup>

Thus, on the one hand, the Court’s reasoning lends support to the proposition that the right to know might be constitutionally protected in cases in which there is no special difficulty in locating the unwed father of an infant.<sup>242</sup> If an unwed father has any constitutional interest in an infant of whom the father is unaware,<sup>243</sup> the state would suffer no greater burden in informing him of the child’s adoption if the father’s identity is known than it would in informing the unwed father of a non-infant of the child’s adoption, if his identity is known,<sup>244</sup> an obligation mandated by *Caban*.<sup>245</sup> Therefore, if the unwed father’s identity is known or is readily ascertainable, the Constitution might protect the right to know to the extent that the state must inform the father of the adoption of his infant child, of whom the father has no knowledge.<sup>246</sup>

The Court’s caveat,<sup>247</sup> however, precludes one from making this assertion with confidence. In very clear terms, the Court left open the possibility that a state may constitutionally elect not to inform an unwed father of his newborn child’s adoption—even if there is no question as to the father’s identity or location.<sup>248</sup> As in *Stanley*,<sup>249</sup> a critical question with regard to the right to know is left open.

*Lehr*<sup>250</sup> is arguably the most useful case in ascertaining whether the Constitution protects the right to know. It could easily be read to have answered the question left open in *Stanley*.<sup>251</sup> The

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<sup>240</sup> *Id.* (footnotes omitted).

<sup>241</sup> *Id.* at 392 n.11.

<sup>242</sup> See *supra* notes 233-38 and accompanying text.

<sup>243</sup> This was the question identified as having been left open in *Stanley*. See *supra* notes 214-18 and accompanying text.

<sup>244</sup> See *supra* notes 233-38 and accompanying text.

<sup>245</sup> See *Caban*, 441 U.S. at 392-94.

<sup>246</sup> But see *supra* note 238.

<sup>247</sup> See *supra* notes 240-41 and accompanying text.

<sup>248</sup> See *supra* text accompanying note 241.

<sup>249</sup> See *supra* notes 218-19 and accompanying text.

<sup>250</sup> *Lehr*, 463 U.S. at 248.

<sup>251</sup> But see *infra* notes 254-60 and accompanying text.

Court, in ruling against *Lehr*, held that because *Lehr* had not taken advantage of the opportunity to develop a substantial relationship with his child, he had no constitutionally protected interest in that relationship.<sup>252</sup> Similarly, if an unwed father's right to know has not been protected, by definition, he has not developed a substantial relationship with his child. *Lehr* could be read to say that an unwed father has no constitutionally protected interest in the child, which would foreclose the assertion that the right to know is protected by the Constitution.<sup>253</sup>

*Lehr*, however, might not preclude such a contention. The critical difference between the facts in *Lehr* and in cases in which the right to know has not been protected is that in the latter, the unwed father is not only foreclosed from objecting to his child's adoption, but he is also precluded from learning of his child's existence. In other words, while *Lehr* may have decided that an unwed father's failure to take advantage of an opportunity to develop a relationship with his child removed him from the Constitution's protection with respect to that relationship,<sup>254</sup> *Lehr* did not necessarily decide whether an unwed father could be deprived of that opportunity in the first place.<sup>255</sup> It is not inconsistent with *Lehr*, therefore, to maintain that the Constitution requires that the right to know be protected when the child is surrendered for adoption<sup>256</sup> and the father's identity and location are known or readily ascertainable.<sup>257</sup>

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<sup>252</sup> *Lehr*, 463 U.S. at 261-65.

<sup>253</sup> It would be more correct—considering the holdings in *Stanley* and *Caban*—to say that *Lehr* could be read as saying that an unwed father, by virtue of his status as such, without more, does not have a constitutionally protected liberty interest in the opportunity to develop a relationship with his child. Even if this is true, however, this does not negate the possibility that an unwed father might have further constitutional rights with respect to his relationship with his child than those that have thus far been identified, and that some of these rights might not have a “right to know” component to them. Adoption rights provide the best example of such rights.

<sup>254</sup> See *supra* notes 251-53 and accompanying text.

<sup>255</sup> *Lehr*, 463 U.S. at 261-63.

<sup>256</sup> Although under this view, it would not be inconsistent with *Lehr* to contend that an unwed father has a right to know of his child's existence even if the child has not been surrendered for adoption, it would read far too much into *Lehr*, and the previous cases, to suggest that they support such an assertion.

<sup>257</sup> This qualification is advisable because of the question left open in *Caban*. See *supra* notes 239-49 and accompanying text.

This conclusion gathers further support from the Court's statement that

[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.<sup>258</sup>

It is curious that this statement discusses the "significance of the biological connection,"<sup>259</sup> when earlier in the opinion the Court stated "the mere existence of a biological link does not merit *equivalent* constitutional protection."<sup>260</sup> On the basis of the earlier statement, *Lehr* has been read by some to hold that the mere biological connection between an unwed father and his child is not constitutionally protected *at all*.<sup>261</sup> Such an interpretation seems to be a flat misreading of *Lehr*, because it ignores the crucial word "equivalent" in the Court's statement.

What the Court actually said was that the Constitution extends greater protection to unwed fathers who have the "biological link" *and* have developed substantial relationships with their children than to unwed fathers who have *only* the "biological link."<sup>262</sup> The Court did *not* say that unwed fathers of the latter type have *no* constitutionally protected interest in the relationship with their children.<sup>263</sup> Moreover, if the statement in question was interpreted to mean that such a biological link is accorded no protection under the Constitution, this would be inconsistent with the statements discussing "the *significance* of the biological connection."<sup>264</sup>

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<sup>258</sup> *Lehr*, 463 U.S. at 262 (footnotes omitted).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 261 (emphasis added).

<sup>261</sup> See, e.g., Raab, *Lehr v. Robertson: Unwed Fathers and Adoption—How Much Process Is Due?*, 7 HARV. WOMEN L.J. 265, 268 (1984) ("Justice Stevens' analysis was shaped by the explicit presumption that the biological tie between the unwed father and his child does not in itself create a constitutionally protected interest." (footnote omitted)).

<sup>262</sup> See *Lehr*, 463 U.S. at 262 n.18.

<sup>263</sup> *Id.* at 262.

<sup>264</sup> *Id.* (emphasis added).

When one considers that the two statements are on the same page of the opinion, the better view is that *Lehr* implies that the existence of a biological connection *does* give rise to a constitutionally protected interest, albeit less substantial than it would be if there were also a developed relationship between the unwed father and the child.<sup>265</sup> The pertinent question remaining after *Lehr*, therefore, concerns the *extent* to which the Constitution provides protection to "a mere biological link."

The question whether the Constitution accords some protection to the right to know thus remains open. Using the Court's prior decisions as guidelines, two arguments support such an assertion. The first is that failure to protect the right to know is violative of the equal protection clause.<sup>266</sup> Absent such protection, an impermissible gender-based classification exists that provides the unwed mother with an opportunity to develop a meaningful relationship with the child, while the father is denied the opportunity. However, *Lehr* shows that the Court may be hesitant to find an equal protection violation when the pertinent classification distinguishes between unwed mothers and unwed fathers.<sup>267</sup>

The better argument that supports the recognition of a constitutionally protected right to know is based on the due process clause. The opportunity to develop a relationship with one's child, even if one is an unmarried male, might well be a liberty interest of which one cannot be deprived without due process of law.<sup>268</sup> Resolution of precisely what process is due would depend on the facts of each particular case, but a state could not fail to inform an unwed father of his child's existence in the absence of unusual circumstances.<sup>269</sup>

### III. THE UNWED FATHER AND STATE LAW

#### A. *Historical Treatment of Unwed Fathers*

The previous section examined whether and to what extent unwed fathers are protected by the Constitution. This section

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<sup>265</sup> *Id.*

<sup>266</sup> See *Caban*, 441 U.S. 388-94; *Stanley*, 405 U.S. at 658-59.

<sup>267</sup> See *supra* notes 196-200 and accompanying text.

<sup>268</sup> See *supra* notes 251-65 and accompanying text.

<sup>269</sup> See *supra* notes 214-18, 220-22, 225, 242-60 and accompanying text.



briefly examines the protection accorded to unwed fathers under state statutes.<sup>270</sup> A detailed examination of the intricacies of the statutory schemes of each individual state would prove to be cumbersome, cumulative, and of little use, because no state has enacted legislation aimed specifically at protecting the right to know.<sup>271</sup> Therefore, only general statutory themes relevant to the right to know are discussed.

Historically, states did not acknowledge the existence of parental rights of unwed fathers.<sup>272</sup> Statutory definitions of "parent," while including both the mother and the father of legitimate children, included only mothers as the parents of illegitimate children.<sup>273</sup> Notwithstanding the fact that such statutes were constitutionally defective,<sup>274</sup> their ramifications on the right to know are obvious: an unwed father would have no right to know of his child's existence if the law did not even acknowledge his paternity.<sup>275</sup>

### B. *Modern Treatment of Unwed Fathers*

In modern times, some states, while statutorily recognizing unwed fathers as "parents," nevertheless extend few, if any,

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<sup>270</sup> Rather than citing to the statutory language, most of which is multi-sectional, lengthy, and somewhat complex, most references in this section are to state cases which have construed their respective state statutes.

<sup>271</sup> Some statutes, such as those providing that an unwed father's consent must be obtained before the adoption of his child may proceed, inadvertently protect the right to know.

<sup>272</sup> This lack of recognition probably derived from two traditional—and usually unquestioned—assumptions: (1) that an unwed mother had a prima facie right to the custody of her child; and (2) that the majority of unwed fathers had no interest in recognizing, supporting, legitimizing, or rearing their children. See Comment, *Removing the Bar Sinister*, *supra* note 23, at 502; see also *In re Brennan*, 134 N.W.2d 126, 129-31 (Minn. 1965); Note, *Unwed Fathers and the Adoption Process*, 22 WM. & MARY L. REV. 85, 89 (1980); Comment, *Protecting the Putative Father's Rights*, *supra* note 1, at 115. See generally Tabler, *supra* note 7, at 245-50.

<sup>273</sup> An illustrative example is ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd 1972), which defines "parent" as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parents." (emphasis added).

<sup>274</sup> Such statutes are invalidated by the decision in *Stanley v. Illinois*, 405 U.S. 645 (1972). See Note, *Putative Fathers*, *supra* note 23, at 427 n.14.

<sup>275</sup> After research into the statutes of the several states, the author has not found any state that continues to entirely exclude unwed fathers from their statutory definition of "parent."

substantive parental rights to them.<sup>276</sup> In the adoption context, for example, if an unwed father happens to learn that his child has been surrendered for adoption,<sup>277</sup> he may appear at the proceeding to provide testimony concerning the best interests of the child.<sup>278</sup> His testimony is given no greater weight than any other "stranger"<sup>279</sup> to the proceeding,<sup>280</sup> and is often given less weight than testimony by strangers.<sup>281</sup>

Still other states provide for notice to an unwed father of the impending adoption of his child.<sup>282</sup> Sometimes the father is granted an opportunity to be heard at the adoption proceeding.<sup>283</sup> Varying degrees of weight are given to the father's testimony.<sup>284</sup> Some of the states that purport to protect the unwed father by requiring that notice of his child's adoption be given to him, however, exempt certain cases from this requirement, such as when the

<sup>276</sup> See *infra* note 278 and sources cited therein.

<sup>277</sup> This discovery might come about by judicial notice, by the mother's statements, or by inadvertence. See *infra* notes 282-87 and accompanying text for a discussion of judicial notice.

<sup>278</sup> See, e.g., *In re* Application of Byron N. Ashmore, 293 S.E.2d 457, 459 (Ga. App. 1982) (construing GA. CODE ANN. § 74-406(c) (1977) to give an unwed father the right to file objections to a proposed adoption provided he takes certain steps toward legitimizing child); *Adoption of B. v. E.B.*, 378 A.2d 90, 93 (N.J. 1977) (construing N.J.S.A. 9:3-17 to give an unwed father the right to object to the proposed adoption of his child and to present testimony regarding the child's best interests); *In re* Benjamin, 403 N.Y.S.2d 877, 879-80 (1978) (construing N.Y. Dom. Rel. Law § 111-a to allow unwed father to present evidence regarding best interests of proposed adoptee).

<sup>279</sup> See *supra* note 57.

<sup>280</sup> Often, the report of the adoption agency as to the best interests of the child is given more weight than the testimony of the unwed father.

<sup>281</sup> See, e.g., *In re* Baby Girl Eason, 358 S.E.2d 459, 459-60 (Ga. 1987); *Adoption of G.*, 529 A.2d 809, 810-11 (Me. 1987); *In Re* Adoption of R.G.C., 742 P.2d 471, 472 (Mont. 1987).

<sup>282</sup> See, e.g., *Durr v. Blue*, 454 So. 2d 315, 317 (La. App. 1984), *cert. denied*, 461 So. 2d 304 (1984); *Sadden v. Brennan*, 134 N.W.2d 126, 132 (Minn. 1965).

<sup>283</sup> See sources cited at *supra* note 281. *But see In re* Adoption of R.H.A., 702 P.2d 1259, 1264 (Wyo. 1985).

<sup>284</sup> See, e.g., *W.E.J. v. Superior Court*, 160 Cal. Rptr. 862, 864-68 (Cal. App. 1979) (father's testimony relevant but not to be given dispositive weight); *In re* Adoption of Bradley Joel Mullenix, 359 So. 2d 65, 68-69 (Fla. Dist. Ct. App. 1978) (testimony of father as to child's best interests considered, but not followed); *In re* Adoption of Emily Ann, 522 N.Y.S.2d 786, 787 (N.Y. Fam. Ct. 1987) (father's testimony called "incredible"); *In re* Margaret Rose Schwartz, 1985 WL 7416 (Ohio App. 1985) (unpublished opinion) (father's testimony given decisive weight); *In re* Adoption of GSD, 716 P.2d 984, 989-90 (Wyo. 1986) (father's testimony given little weight).

child is an infant.<sup>285</sup> Often, no effort is made to provide notice of the adoption to the unwed father, when the father's name does not appear on the birth certificate.<sup>286</sup> Sometimes the notice to the unwed father is merely constructive—usually by publication—even in cases in which his identity and location are known or are readily ascertainable.<sup>287</sup> A few statutory schemes, like the one upheld in *Lehr*,<sup>288</sup> specify certain classes of fathers who are entitled to receive notice.<sup>289</sup>

Some states purport to require an unwed father's consent before the adoption of his child will be allowed to proceed.<sup>290</sup>

<sup>285</sup> See, e.g., *In re Laws' Adoption*, 20 Cal. Rptr. 64, 68 (Cal. App. 1962) (when child is an illegitimate infant, mother can act as father's agent in matters relating to adoption).

<sup>286</sup> See, e.g., *In re Adoption of Carmen Lydia S.*, 435 N.Y.S.2d 645, 646-47 (N.Y. Sur. Ct. 1981); *In re Adoption of Mindy Lynn Strauser*, 1987 WL 14237 (Ohio App. 1987) (unpublished opinion); *In re Adoption of Kristina Marie King*, 1985 WL 7902 (Ohio App. 1985) (unpublished opinion).

<sup>287</sup> See, e.g., *In re Steve B.D. and Linda Sue D.*, 730 P.2d 942, 944 (Idaho 1986); *In re Adoption of Jessica XX*, 446 N.Y.S.2d 20 (N.Y. 1981), *aff'd sub nom. Lehr v. Robertson*, 463 U.S. 248 (1983).

<sup>288</sup> *Lehr v. Robertson*, 463 U.S. 248, 266 (1983); see *supra* notes 175-200 and accompanying text.

<sup>289</sup> The statute at issue in *Lehr*, N.Y. DOM. REL. LAW § 111-a(2) (McKinney 1977 & Supp. 1982-83), specified seven classes of fathers that were entitled to notice. The statute provided, in pertinent part, as follows:

2. Persons entitled to notice . . . shall include:

- (a) any person adjudicated by a court in this state to be the father of the child;
- (b) any person adjudicated by a court of another state . . . to be the father of the child . . . ;
- (c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child . . . ;
- (d) any person who is recorded on the child's birth certificate as the child's father;
- (e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;
- (f) any person who has been identified as the child's father by the mother in written, sworn statement; and
- (g) any person who was married to the child's mother within six months subsequent to the birth of the child. . . .

<sup>290</sup> See, e.g., *In re Jones*, 340 N.E.2d 269 (Ill. 1975); *Unwed Mother v. Unwed Father*, 379 N.E.2d 467, 468 (Ind. Ct. App. 1978); *In re Adoption of U.*, 435 N.Y.S.2d 659, 661-62 (Family Court 1981); *In re Mitchell*, 421 N.Y.S.2d 443 (4th Dept. 1979), *rev'd*, 451 N.Y.S.2d 41 (1982). *But see, e.g., In re Dept. of Social Serv.*, 461 N.E.2d 186, 188-89 (Mass. 1984).

Once again, certain cases—such as when the child is an infant<sup>291</sup> or when the father's name is not on the birth certificate<sup>292</sup>—are excluded from this requirement. The concept of waiver, or “constructive consent,” is often utilized when the father's actual consent appears unlikely to be forthcoming.<sup>293</sup> Moreover, an unwed father's right to block an adoption by withholding his consent is seldom, if ever, absolute.<sup>294</sup> It is quite possible, even common, for the adoption to proceed in the absence of the father's consent.<sup>295</sup>

Other statutes are relevant to the right to know. Most, if not all, states provide that an adoption becomes irrevocable after a certain length of time.<sup>296</sup> Even in those states that provide for a relatively longer period of time during which the adoption order can be rescinded,<sup>297</sup> it is usually only the natural mother who has

<sup>291</sup> See, e.g., *In re Ice*, 342 N.E.2d 460 (Ill. App. 1976); *In re Adoption of Doe*, 555 P.2d 906, 907-08 (N.M. App. 1976), *cert. denied*, 558 P.2d 614, and *cert. denied*, 558 P.2d 619 (N.M. 1976); *In re “R” Children*, 418 N.Y.S.2d 741, 743 (Family Court 1979); *In re Orzo*, 374 N.Y.S.2d 554, 555-56 (N.Y. Fam. Ct. 1975); see *In re Adoption of A.*, 226 A.2d 823, 824 (Del. 1967).

<sup>292</sup> See, e.g., *Hoskins v. Nichols*, 386 So. 2d 1169 (Ala. Civ. App. 1980); *In re Martin*, 357 So. 2d 893 (La. Ct. App.), *cert. denied*, 359 So. 2d 1301 (La. 1978); *In re S.*, 435 N.Y.S.2d 645 (Surr. Ct. 1981); see *Wells v. Children's Aid Soc.*, 681 P.2d 199 (Utah 1984).

<sup>293</sup> See, e.g., *Hoskins*, 386 So. 2d at 1171; *In re Adoption of A.*, 226 A.2d at 825; *In re S.*, 435 N.Y.S.2d at 648.

<sup>294</sup> This is also true in the case of unwed mothers. A parent, whether married or unmarried, can have his or her parental rights terminated with respect to his or her child, whether legitimate or illegitimate. See, e.g., Miss. CODE ANN. § 93-15-109 (1973 & Supp. 1986). If this occurs, a child's adoption cannot be blocked by the parent's withholding his or her consent. See, e.g., *id.* at § 93-17-7.

<sup>295</sup> See, e.g., *In re P.G. & L.G.*, 452 A.2d 1183, 1183-84 (D.C. App. 1982); *Adoption of Mullenix*, 359 So. 2d at 66-67; *Steve B.D. & Linda Sue D.*, 730 P.2d at 944; MR v. Meltzer, 487 N.E.2d 836, 839 (Ind. App. 1986); *Adoption of R.G.C.*, 742 P.2d at 472-73; *Adoption of Emily Ann*, 522 N.Y.S.2d at 787; *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1061-62 (Okla. 1985), *cert. denied sub nom.*, *Harjo v. Duello*, 108 S. Ct. 1042 (1988); *Adoption of R.H.A.*, 702 P.2d at 1261-63 (Wyo. 1985). *But see In re Application of S.R.S. & M.B.S. v. M.C.C.*, 408 N.W.2d 272, 278-79 (Neb. 1987).

<sup>296</sup> See, e.g., *In re Pillsbury*, 166 P. 11, 12 (Cal. 1917); *In re Brock*, 25 So. 2d 659, 660-61 (Fla. 1946); *Wailes v. Curators of Central College*, 254 S.W.2d 645, 647-50 (Mo. 1953); *Betz v. Horr*, 11 N.E.2d 548, 550 (N.Y. 1937); *Byrd v. Byrd*, 69 N.E.2d 75, 77 (Ohio Ct. App. 1945); *Ex parte Moulin*, 217 P.2d 1029, 1030-31 (Okla. 1950).

<sup>297</sup> The states vary widely in their treatment of an attempt by a natural parent to withdraw her consent to an adoption. See, e.g., DEL. CODE ANN. tit. 13, § 909 (1981 & Supp. 1986) (60 days to withdraw consent); ILL. REV. STAT. ch. 40, para. 1513 (1980 & Supp. 1987) (1 year to revoke consent if it was obtained by fraud or duress); MD. FAM.

any chance of obtaining a successful revocation of the adoption decree.<sup>298</sup> Once an adoption order has been handed down, an unwed father stands little chance of successfully challenging it.<sup>299</sup>

Furthermore, most, if not all, states provide that records concerning an adoption become sealed after the adoption order has been entered.<sup>300</sup> Some states even impose criminal penalties on anyone who releases information contained in these records without a court order authorizing such release.<sup>301</sup> In effect, these

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LAW CODE ANN. § 5-311(c) (1984 & Supp. 1987) (90 days to revoke consent); N.C. GEN. STAT. § 48-11 (1984) (18-month limit for revoking consent if no adoption proceeding instituted in that time); OHIO REV. CODE ANN. § 3107.09(B) (Anderson 1980) (consent revocable prior to entry of interlocutory order or final decree if in best interests of child); OKLA. STAT. ANN. tit. 10, § 60.10 (West 1987) (30 days to revoke consent if in best interests of child); TENN. CODE ANN. § 36-1-117(b) (1984 & Supp. 1987) (15 days to withdraw consent); TEX. FAM. CODE ANN. § 16.06 (Vernon 1986) (consent may be withdrawn at any time before order granting adoption is entered).

<sup>298</sup> Even if this were not provided by statute, the unwed father would be unlikely to have much chance at success because the records of the adoption would be inaccessible to him. *See infra* notes 300-02 and accompanying text.

<sup>299</sup> There is, of course, no guarantee of success for even an unwed mother's attempt to invalidate the adoption decree. The standard is usually what would be in the best interest of the child. *See, e.g.*, *Graves v. Graves*, 288 So. 2d 142, 144 (Ala. App. 1973); *In re Adoption of Holman*, 295 P.2d 372, 376 (Ariz. 1956); *Lee v. Thomas*, 181 S.W.2d 457, 460-61 (Ky. 1944); *In re Adoption of Child*, 277 A.2d 566, 569-70 (N.J. Super. 1971); *Webb v. Wiley*, 600 P.2d 317, 319-20 (Okla. 1979). Other factors, such as the situation of the proposed adoptive parents, are also taken into consideration. *See generally* *Barwin v. Reidy*, 307 P.2d 175, 184-86 (N.M. 1957).

<sup>300</sup> The Kentucky statute is illustrative. It provides, in pertinent part, as follows:

(1) The files and records of the court during adoption proceedings shall not be open to inspection by persons other than parties to such proceedings, their attorneys, and representatives of the cabinet except under order of the court expressly permitting inspection. Upon the entry of the final order in the case, the clerk shall place all papers and records in the case in a suitable envelope which shall not be open for inspection by any person except on written order of the court. No person having charge of any adoption records shall disclose the names of any parties appearing in such records or furnish any copy of any such records, except under order of the court which entered the judgment of adoption. The clerk of the circuit court shall set up a separate docket and order book for adoption cases and these files and records shall be kept locked.

KY. REV. STAT. ANN. § 199.570(1) (Michie-Bobbs Merrill 1984 & Supp. 1986).

<sup>301</sup> Once again, a Kentucky statute is illustrative, providing, in pertinent part, as follows:

(2) Any person who violates any of the provisions of [the statute cited in *supra* note 300], or any rule or regulation under such section the violation of which is made unlawful shall be fined not less than five hundred dollars

confidentiality statutes, together with the irrevocability statutes, require that an unwed father's right to know must be protected prior to his child's adoption or that right will be forever lost.<sup>302</sup>

Even this cursory examination of state statutory schemes shows clearly that state protection of unwed fathers' rights is, on the whole, dismal.<sup>303</sup> The right to know, in particular, is provided little or no protection. When some protection is provided, numerous methods of circumventing the protection exist. Consequently, one is thus faced with the question of whether the right to know should be protected. The following section addresses that question.<sup>304</sup>

#### IV. THE RIGHT TO KNOW: SHOULD IT BE PROTECTED?

Thus far, this Note principally has been concerned with whether and to what extent the right to know is presently protected under both the Constitution<sup>305</sup> and the state statutes.<sup>306</sup> The focus has been on the existence of the right to know and its scope under the law as it presently stands; little attention has been given to the question of whether and to what extent the right to know

(\$500) nor more than two thousand dollars (\$2000) or imprisoned for not more than six (6) months, or both. Each day such violation continues shall constitute a separate offense.

*Id.* at § 199.990(2).

<sup>302</sup> See *supra* notes 65-67 and accompanying text.

<sup>303</sup> State protection of unwed fathers' rights is, however, much better than it used to be—even as recently as 1972, when *Stanley v. Illinois*, 405 U.S. 645 (1972), was decided. As one commentator has observed:

Reading *Stanley* is something like being in a time warp. It is a matter of some surprise that as recently as 1972 a state could, without notice or hearing, deprive a natural father of any right whatsoever to notice or hearing in a proceeding to cut off all his rights with respect to minor children.

Doskow, *supra* note 3, at 18. For a discussion of *Stanley*, see *supra* notes 81-106 and accompanying text. The decision in *Lehr v. Robertson*, 463 U.S. 248 (1983), seemed, unfortunately, to signal a "leveling off" of state protection of unwed fathers' rights. *Lehr* is discussed at *supra* notes 175-200 and accompanying text.

<sup>304</sup> The reader might object that this question should have been addressed before discussing the status of the right to know under both the Constitution and state law. The objection is not without merit; however, the author believes that the better approach was to look into where the right to know stands in fact before discussing where the right perhaps *should* stand.

<sup>305</sup> See *supra* notes 79-269 and accompanying text.

<sup>306</sup> See *supra* notes 270-304 and accompanying text.

*should* be protected.<sup>307</sup> This section focuses on that more fundamental question—the answer to which concededly will be more subjective.<sup>308</sup>

A multitude of considerations factor into determining whether and to what extent the right to know should be protected. These considerations are of constitutional,<sup>309</sup> public policy,<sup>310</sup> and practical<sup>311</sup> dimensions, all of which must be weighed and balanced before a principled decision regarding the right to know can be made. The remainder of this section will attempt to: (A) identify the constitutional considerations that are relevant to this decision; (B) identify the public policy considerations that are relevant to this decision; and (C) discuss how much weight should be given to each consideration, and place each consideration on the appropriate side of the scale to see which way it balances out.<sup>312</sup>

#### A. *Constitutional Considerations*<sup>313</sup>

Several constitutional principles appear relevant. One such principle arises from the fourteenth amendment's guarantee of

<sup>307</sup> See *supra* note 304.

<sup>308</sup> The personal inclinations of the author favor some form of protection of the right to know. Nonetheless, the author has attempted in this section to remain as objective as possible. Occasionally, the consequence is probably a bit of overcompensation; in certain cases more deference is given to considerations weighing against protection of the right to know than is probably warranted, and close questions have been generally resolved in favor of the argument against protection.

<sup>309</sup> See *infra* notes 313-57 and accompanying text.

<sup>310</sup> See *infra* notes 358-88 and accompanying text.

<sup>311</sup> The practicalities involved in protecting the right to know are discussed in Part V of this Note.

<sup>312</sup> See *infra* notes 389-405 and accompanying text.

<sup>313</sup> The term "constitutional consideration," as used in this section, does not mean that the constitutional provisions discussed mandate protection or nonprotection of the right to know. The status of the right to know under the Constitution has already been discussed. See *supra* notes 201-79 and accompanying text. Instead, "constitutional consideration" refers to those policies which were deemed essential enough by the framers and jurists so as to warrant their furtherance in the Constitution. In a sense, therefore, they are merely "public policy" considerations and are in this section, see *infra* notes 270-304 and accompanying text, only in that they have been elevated, by virtue of their embodiment in the Constitution, to a somewhat higher status than the latter considerations. Moreover, it might be argued that the most important "public policy" consideration is to remain consistent with the principles, policies, presumptions, and rationales that underlie the mandates of the Constitution. The fact that constitutional considerations are discussed before public policy considerations is not necessarily to imply that the former are more important than the latter.

equal protection of the law.<sup>314</sup> Included within this guarantee is a presumption against the validity of classification based on gender.<sup>315</sup> This consideration clearly seems to assume tremendous importance in determining whether the right to know should be protected. Absent some sort of protection, the unwed mother stands in a somewhat more advantageous position with respect to her child than does the child's father—even if it is only the mere knowledge that the child exists.<sup>316</sup> There is an argument—not without merit—that, because of nature, the unwed mother and the unwed father are not “similarly situated,” and classifications that distinguish them do not technically implicate the equal protection clause.<sup>317</sup> However, the egalitarian principles embodied in the clause suggest that the favored course of action is to afford the same rights and privileges, so far as is practicable, to both males and females—even when they are not, in a literal and constitutional sense “similarly situated.”<sup>318</sup> Therefore, the equal protection clause seems to weigh in favor of providing some sort of protection to the right to know.

The due process clause of the fourteenth amendment<sup>319</sup> also raises relevant considerations. As discussed earlier,<sup>320</sup> the Supreme Court has held that a parent's interest in the care, custody, and

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<sup>314</sup> See *supra* note 89 for the text of the equal protection clause.

<sup>315</sup> See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 722-25 (1982); *Craig v. Boren*, 429 U.S. 190, 194-95 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 682-84 (1973) (plurality opinion); *Reed v. Reed*, 404 U.S. 71, 75-78 (1971).

<sup>316</sup> Some might object that in the case of infant adoption, the mother is not “better off” than a father who is ignorant of his paternity. The mother will forever have to live with the knowledge that there is somewhere a child that she bore, while the father is “spared” the trauma if he never learns of the child's existence. Such an “argument” merits little comment, for it is based on at least two faulty premises. First, the citizens of this country have demonstrated their rejection of “ignorance is bliss” paternalism as an acceptable course of action. Evidence of this fact includes, but is certainly not limited to: the recent public outcry about the Iran-Contra scandal, public reaction to Watergate, covert activities conducted by the Central Intelligence Agency, electronic eavesdropping, mass censorship, closed criminal trials, and—lest we forget—the ratification of the first amendment's protection of freedom of speech and of the press. Second, failure to tell an unwed father about his infant child's adoption deprives him of much more than the mere knowledge of the child's existence. See *supra* notes 57-67 and accompanying text.

<sup>317</sup> See *Michael M. v. Superior Court*, 450 U.S. 464, 470-75 (1981); *Geduldig v. Aiello*, 417 U.S. 484, 490-93 (1974); see also *Rostker v. Goldberg*, 453 U.S. 57, 60-72 (1981).

<sup>318</sup> See *supra* note 317 and sources cited therein.

<sup>319</sup> See *supra* note 92 for the text of the due process clause.

<sup>320</sup> See *supra* notes 81-269 and accompanying text.



rearing of his or her child ordinarily rises to the level of a liberty interest that is protected by the due process clause.<sup>321</sup> In the context of unwed fathers, the Court's decisions explicitly state that unwed fathers also have a liberty interest in their children, provided the requisite relationship between the father and the child exists.<sup>322</sup> The opportunity to develop this liberty interest is obviously cut off if the father is not informed of his child's existence. By definition, the right to know is a necessary prerequisite to the opportunity to develop a protected relationship between the father and the child. It can safely be assumed<sup>323</sup> that the policies underlying the due process clause tend to favor affording an individual the opportunity to develop a liberty interest over denying such an opportunity to the individual. This points toward the desirability of providing some sort of protection to the right to know.

The constitutional right to privacy<sup>324</sup> also gives rise to pertinent considerations. Two aspects of the right to privacy seem to be particularly relevant. First, the right to privacy clearly affords some constitutional protection to the familial relationship.<sup>325</sup> But which way does this cut? On the one hand, it appears to weigh in favor of affording some sort of protection to the right to know. The analysis here is similar to the above discussion concerning the due process clause.<sup>326</sup> The opportunity for an unwed father to develop a familial relationship with his child—and there-

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<sup>321</sup> See *Levy v. Louisiana*, 391 U.S. 68, 72 (1968); *Glonn v. Americom Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>322</sup> See *Lehr v. Robertson*, 463 U.S. 248, 261-63 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 254-55 (1978); *Stanley v. Georgia*, 405 U.S. 645, 653-58 (1972).

<sup>323</sup> See J. MILL, ON LIBERTY 38-54 (1859).

<sup>324</sup> The constitutional basis on which the right to privacy rests is a matter of some dispute. Its foundation has been attributed to the due process clause, the penumbras of the Bill of Rights, the ninth amendment, or all or any combinations of the above. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1972) (due process clause); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (penumbras of the provisions of the Bill of Rights); *id.* at 487-93 (Goldberg, J., concurring) (ninth amendment). The actual source of the right is not critical to the present discussion. Consequently, no effort is made to identify its exact constitutional foundation.

<sup>325</sup> See *May*, 345 U.S. at 533; *Prince*, 321 U.S. at 166; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Pierce*, 268 U.S. at 534; *Meyer*, 262 U.S. at 399.

<sup>326</sup> See *supra* notes 319-23 and accompanying text.

fore the opportunity to avail himself of whatever constitutional rights might accompany such a relationship—is cut off unless he is informed of his child's existence. On the other hand, the unwed father traditionally has not been thought to be a member of the child's "family."<sup>327</sup> In contrast, both the unwed mother who does not surrender the child for adoption and the adoptive parents of surrendered children, have always been part of the child's "family."<sup>328</sup> Therefore, at first blush, protecting the right to know might initially seem inconsistent with affording constitutional protection to either the unwed mother's, or the adoptive parents' "family." Upon closer scrutiny, however, this proves not to be the case. The right to know, as that term is used in this Note, is a "passive right"<sup>329</sup> in that it encompasses only an unwed father's right to be informed of his child's existence; it does not necessarily encompass an unwed father's right to interject himself into the familial relationship between the child and the unwed mother (if

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<sup>327</sup> See *supra* notes 272-75 and accompanying text.

<sup>328</sup> See *supra* notes 272-75, 300-04 and accompanying text.

<sup>329</sup> The distinction being made will need some elaboration. It is between "active rights" and "passive rights." The former can be affirmatively exercised; they, in effect, act as a license to take certain types of action with impunity. Examples are: the first amendment's protection of free exercise of religion, freedom of speech, freedom of assembly, and right to petition; the second amendment's protection of the right to bear arms, the right to travel, and the right to vote. Passive rights, in contrast, do not confer a privilege of taking action; they instead proscribe the government from taking certain action against, or require that it take certain action for the benefit of, either the citizenry as a whole or as individuals. Examples include: the first amendment's proscription of an establishment of religion; the third amendment's limitation on when soldiers may be quartered in private homes without the owner's consent; the fourth amendment's prohibition of unreasonable searches and seizures; and the eight amendment's ban on cruel and unusual punishment. Some rights, particularly those that are limited to the criminal justice system, have both "active" and "passive" characteristics; generally they are active in that they must be asserted to avoid waiver, yet, once asserted, they assume a passive role. Examples include: the fifth amendment's privilege against self-incrimination; the sixth amendment's right to a speedy trial; and the six and seventh amendments' right to a trial by jury. The active/passive distinction should not be understated as a dichotomy; it is more appropriately viewed as a continuum that is helpful in characterizing the nature of a particular right. In the context of the present discussion, the right to know is "passive" in that its protection imposes an obligation upon the government to inform an unwed father of his child's existence; it is not "active" essentially because one could not "exercise" it. By way of contrast, an unwed father's right to be heard at the proceeding relating to the adoption of his child is "active"; its protection requires an affirmative act on his part. Even consent rights to adoption are "active" in that an unwed father can block the adoption of his child by withholding his consent.

the mother does not surrender the child for adoption)<sup>330</sup> or the relationship between the child and the third-party adoptive parents (if the child is surrendered for adoption). The right to know is therefore not a "right to interfere." Consequently, protecting the right to know would not intrude into the constitutionally protected family decisions made by either the unwed mother or the adoptive parents.<sup>331</sup> The familial right to privacy, therefore, tends to weigh somewhat in favor of providing protection of the right to know.

Second, under present constitutional doctrine, the right to privacy provides some constitutional protection to family planning decisions.<sup>332</sup> Most notably, a woman has the right to terminate a pregnancy through an abortion, without regard to the preference of her male partner in the conception process.<sup>333</sup> Although the right to an abortion is not absolute,<sup>334</sup> it clearly seems to weigh against providing protection to the right to know.

There are, however, strong arguments to the contrary. The right to know entails only the right to be informed of the child's existence, not the right to be informed of the potential mother's pregnancy. It vests only upon the birth of the child.<sup>335</sup> By that point, of course, the mother's termination rights no longer exist: the right to terminate a pregnancy does not carry with it the right to terminate a child's existence after birth. Because the right to terminate a pregnancy and the right to know do not overlap at any point in time, the existence and the protection of one could reasonably be said to be irrelevant to the existence and the protection of the other. Furthermore, even if the right to know did extend to a right to be informed of a pregnancy, the right to

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<sup>330</sup> Although full protection of the right to know would require notice of the child's existence even when the child is not surrendered for adoption, the focus of this discussion is on the right to know in cases in which the child is surrendered. See *supra* notes 40-81 and accompanying text.

<sup>331</sup> See *supra* note 325 and sources cited therein.

<sup>332</sup> See *Colautti v. Franklin*, 439 U.S. 379, 382 (1979); *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-86 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52, 60-61 (1976); *Roe*, 410 U.S. at 152-55; *Eisenstadt v. Baird*, 405 U.S. 438, 442-43 (1972); *Griswold*, 381 U.S. at 483-85.

<sup>333</sup> This is at least true through the first twelve weeks of her pregnancy. See *Planned Parenthood*, 428 U.S. at 67-72.

<sup>334</sup> See *Roe*, 410 U.S. at 153-57.

<sup>335</sup> See *supra* notes 41-42 and accompanying text.

know, as noted earlier,<sup>336</sup> is merely passive—and would not include a right to interfere in the woman's decision to terminate the pregnancy. Protection of one, therefore, is not inconsistent with protection of the other.

The question is close, but for purposes of discussion it will be assumed that the right to privacy's protection of a woman's right to an abortion points away from affording protection to the right to know. Because the question is so close, however, the weight of this consideration on the analytical scales is somewhat reduced.<sup>337</sup>

Other constitutional considerations should perhaps be noted. To the extent their relevance is more questionable than the constitutional considerations already discussed,<sup>338</sup> they are correspondingly given less weight on the analytical scales.<sup>339</sup>

The eighth amendment<sup>340</sup> provides protection against cruel and unusual punishment.<sup>341</sup> This prohibition includes punishing someone for his or her "status."<sup>342</sup> Historically, one of the primary justifications for not affording any rights to unwed fathers was to "punish" them for their irresponsibility.<sup>343</sup> To the extent that this is punishment premised solely on one's "status" as an unwed father, the eighth amendment seems to point toward providing some protection to the right to know.<sup>344</sup>

The ninth amendment<sup>345</sup> might also figure into the analysis. The ninth amendment reflects a policy of affording protection to

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<sup>336</sup> See *supra* notes 329-31 and accompanying text.

<sup>337</sup> But see *infra* notes 389-405 and accompanying text.

<sup>338</sup> See *supra* notes 313-31 and accompanying text.

<sup>339</sup> But see *infra* notes 389-405 and accompanying text.

<sup>340</sup> The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

<sup>341</sup> See *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Furman v. Georgia*, 408 U.S. 238, 358 (1972) (Marshall, J., concurring); *Weems v. United States*, 217 U.S. 349, 368 (1910).

<sup>342</sup> See *Robinson v. California*, 370 U.S. 660 (1962).

<sup>343</sup> See *supra* notes 7-10 and accompanying text.

<sup>344</sup> As for the argument that compelling an unwed mother to disclose the identity and location of the unwed father would be a punishment on the basis of her status, see *infra* note 421.

<sup>345</sup> The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

rights not enumerated in the Constitution.<sup>346</sup> To the extent that the right to know is an unenumerated right, the ninth amendment arguably places some weight, however miniscule,<sup>347</sup> on the side of protecting the right to know.

### B. Public Policy Considerations

Several public policy considerations are relevant to determining whether and to what extent the right to know should be protected. Public policy considerations that overlap or are coextensive with constitutional considerations, such as the interest in the family unit, have already been discussed.<sup>348</sup> The concern here is with public policy considerations that do not necessarily implicate interests that are protected or promoted by the Constitution.

Numerous public policy considerations arise from a state's compelling interest in promoting the best interests of children.<sup>349</sup> Of particular relevance to determining whether to provide protection to the right to know are the state's interests in: (1) encouraging an unwed mother to surrender her child for adoption when it would be in the child's best interest;<sup>350</sup> (2) encouraging the unwed mother to retain custody of the child when it would be in the child's best interest;<sup>351</sup> (3) placing the child with the person or persons best suited to promote the child's best interest;<sup>352</sup> (4)

<sup>346</sup> See *Griswold*, 381 U.S. at 487-93 (Goldberg, J., concurring); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 34-40 (1980); R. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 34-35 (1955); Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309, 320 (1936); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y. UNIV. L. REV. 787, 805-06 (1962); Comment, *Sodomy Statutes, the Ninth Amendment, and the Aftermath of Bowers v. Hardwick*, 76 KY. L.J. 301, 305-10 (1987-88).

<sup>347</sup> But see *infra* notes 389-405 and accompanying text.

<sup>348</sup> See *supra* notes 319-31 and accompanying text.

<sup>349</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-106 (Supp. 1980-81); D.C. CODE ANN. § 16-304 (1973); MD. ANN. CODE art. 16, § 74 (1981); MASS. GEN. LAWS ANN. ch. 210, § 3 (West Supp. 1981); VA. CODE ANN. § 63.1-225 (1980); see Comment, *Delineation of the Boundaries*, *supra* note 1, at 292-321.

<sup>350</sup> See L. BURGESS, *supra* note 9, at 21-27; Hoggett, *Adoption Law: An Overview*, in *ADOPTION: ESSAYS IN SOCIAL POLICY, LAW, AND SOCIOLOGY* 135-44 (P. Bean ed. 1984); Littner, *The Natural Parents*, in *A STUDY OF ADOPTION PRACTICE* 30-33 (M. Schapiro ed. 1956).

<sup>351</sup> See M. BENET, *supra* note 8, at 174-80; A. SOROSKY, A. BARAN, & R. PANNOR, *supra* note 9, at 219-25.

<sup>352</sup> See *supra* notes 350-51 and sources cited therein.

carrying out the adoption procedure with maximum efficiency and minimum administrative burden;<sup>353</sup> (5) ensuring finality in adoption orders;<sup>354</sup> and (6) providing for stability in the child's life following an adoption.<sup>355</sup> It now remains to ascertain whether these factors weigh in favor of, or against, protecting the right to know.

First, a state has an interest in encouraging an unwed mother to surrender the child for adoption when the surrender would be in the child's best interest.<sup>356</sup> If an unwed mother who otherwise would have placed the child up for adoption elects not to do so solely because such surrender would mean that the unwed father would have to be identified, the policy would be thwarted. This clearly weighs against affording protection to the right to know. On the other hand, full protection of the right to know would not be limited to the adoption context.<sup>357</sup> Consequently, if the father is to be informed of the child's existence regardless of whether the child is surrendered for adoption, the state's interest in encouraging surrender would be irrelevant to the question of whether the right to know should be protected. However, because the discussion focuses on the right to know in the adoption context, it will be assumed that the state's interest under consideration here weighs against such protection.

Second, the state has an interest in encouraging an unwed mother to retain custody of the child when retention would be in the child's best interest.<sup>358</sup> If full protection is afforded to the right to know, of course, the state's interest would seem irrelevant to the question of whether the right to know should be protected.<sup>359</sup> This may not, however, be the case. In such a situation,

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<sup>353</sup> See *Caban v. Mohammed*, 441 U.S. 380, 385-92 (1979); H. KRAUSE, *supra* note 165, at 48-53; Comment, *supra* note 73, at 582-86; Note, *Lehr v. Robertson: Putting the Genie Back in the Bottle*, 15 TOLEDO L. REV. 1501, 1516-18 (1984).

<sup>354</sup> See *Quilloin*, 434 U.S. at 250-51; L. BURGESS, *supra* note 9, at 28-36; Note, *Confirming the Constitutionality of Sealing Adoption Records: ALMA v. Mellon*, 46 BROOKLYN L. REV. 717, 723-24 (1980).

<sup>355</sup> See *Bodenheimer*, *supra* note 2, at 54-59; Note, *Lehr v. Robertson*, *supra* note 23, at 274.

<sup>356</sup> See *supra* note 350 and sources cited therein.

<sup>357</sup> See *supra* notes 40-45 and accompanying text.

<sup>358</sup> See *supra* note 351 and sources cited therein.

<sup>359</sup> Full protection would necessitate that the father be told of the child's existence regardless of whether the child was surrendered for adoption. See *supra* notes 40-42 and accompanying text.

an unwed mother who might otherwise keep the child and not inform the father might, if the unwed father is informed of the child's existence, instead decide that retention of the child presented too much of a possibility of further undesired contact with the father, and thereby elect to surrender the child.<sup>360</sup> Thus, the state's interest in promoting the best interests of the child might not be served by protection of the right to know.

If the right is considered only in the adoption context, however, the analysis is somewhat different. As previously noted,<sup>361</sup> if the father will be informed of the child's existence only if the child is surrendered for adoption, the mother might be more likely to retain custody of the child. Just as this consequence would be detrimental to the state's interest in encouraging surrender of the child when surrender is in the child's best interest, it would nevertheless promote the state's interest in encouraging retention of the child when retention is in the child's best interest.<sup>362</sup> Therefore, because the focus of the discussion is on the right to know in the adoption context,<sup>363</sup> the state's interest under consideration here will be assumed to weigh in favor of affording some protection to the right to know.

Third, if a child is surrendered for adoption, the state has an interest in placing the child with the person or persons best suited to promote the child's best interest.<sup>364</sup> But on which side does this

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<sup>360</sup> If the father decides to attempt to establish a substantial relationship with his child, the likelihood of ongoing contact with the mother—which both the male and the female might otherwise wish to avoid—would be significantly, and perhaps inevitably, increased.

<sup>361</sup> See *supra* notes 356-57 and accompanying text.

<sup>362</sup> Admittedly, it is initially somewhat difficult to conceptualize a scenario in which retention would be in the child's best interest, *and* encouragement, or even coercion, is needed to persuade the mother to keep the child. One would think that in cases in which the retention would be in the child's best interests, the mother would not surrender the child for adoption, regardless of whether the right to know is protected. In such cases, protection of the right to know would, of course, have neither a positive nor a negative impact on the state interest under examination here. Nonetheless, there perhaps are cases in which an unwed mother, for any number of reasons, might adopt a short-term perspective, when a more long-term view would reveal that retention of the child would prove beneficial to the mother and best provide for the child's welfare. In any event, this factor will not prove to be determinative in the present analysis. See *infra* notes 389-405 and accompanying text.

<sup>363</sup> See *supra* notes 57-67 and accompanying text.

<sup>364</sup> See *supra* notes 350-51 and sources cited therein.

interest tip the scale? On the one hand, informing the unwed father of the existence of his child might provide the father with an opportunity to seek to adopt the child himself. If the biological father is the person best suited to provide for the surrendered child's best interest, then protection of the right to know obviously serves this state interest. On the other hand, the presumption that a natural parent will best provide for a child's interest is no longer universally accepted—if it ever was.<sup>365</sup> Indeed, it is not difficult to postulate cases in which it is obvious that a child's best interest would be served by granting custody to third-party adoptive parents over either or both biological parents.<sup>366</sup>

Cases in which the child's best interest clearly would be served by third-party adoptions, however, may also be cases in which the unwed father would not seek to adopt the child.<sup>367</sup> Even if this is not true, the conclusion is unchanged because the right to know is passive,<sup>368</sup> and it does not give an unwed father the right to be "first in line" for his child's adoption. Thus, protection of the right to know would have no adverse impact on the state's interest in placing a child with the person or persons best suited to provide for the child's best interest. Furthermore, if all other factors are equal,<sup>369</sup> the natural parent is probably best equipped to promote the child's best interest.<sup>370</sup> Therefore, the state's interest in placing the child with the person or persons who will serve the child's best interest weighs in favor of affording protection to the right to know.

Fourth, the state has an interest in carrying out the adoption procedure with maximum efficiency and minimum administrative burden.<sup>371</sup> Protection of the right to know would clearly have a

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<sup>365</sup> See, e.g., J. GOLDSTEIN, A. FREUD, & A. SCHMIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 125-37 (1983); Muench & Levy, *Psychological Parentage: A Natural Right*, 13 *FAM. L.Q.* 129, 153 (1979).

<sup>366</sup> See PASCALL, *Adoption: Perspectives in Social Policy*, in *ADOPTION: ESSAYS IN SOCIAL POLICY, LAW, AND SOCIOLOGY* 9-11 (P. Bean ed. 1984).

<sup>367</sup> See B. HIRSCH, *LIVING TOGETHER: A GUIDE TO THE LAW FOR UNMARRIED COUPLES* 28-30 (1976); S. KATZ & M. INKER, *supra* note 3, at 9-10.

<sup>368</sup> See *supra* note 329.

<sup>369</sup> See H. KRAUSE, *supra* note 165, at 18-22; Note, *Ohio's Exception to Consent in Adoption Proceedings: A Need for Legislative Action*, 36 *CASE W. RES. L. REV.* 348, 351 (1985).

<sup>370</sup> But see J. GOLDSTEIN, A. FREUD, & A. SCHMIT, *supra* note 365, at 128-42.

<sup>371</sup> See *supra* note 353 and sources cited therein.



detrimental impact on the state's interest if the unwed father would not otherwise be given notice of the adoption under state law<sup>372</sup> or if ascertaining the identity or location of the father would consume considerable time. However, the discussion here focuses on those cases in which the father would be given notice of the adoption and the identity and location of the father are readily known to the mother.<sup>373</sup> In such cases, protection of the right to know would not adversely impact on the state's interest in efficiency and administration convenience.<sup>374</sup> Nonetheless, it will be assumed that this state interest weighs against protecting the right to know.<sup>375</sup>

Fifth, the state has an interest in ensuring the finality of adoption orders.<sup>376</sup> To some extent, protection of the right to know is irrelevant to this interest. Presumably, the unwed father would receive notice of the child's existence prior to the adoption decree.<sup>377</sup> Yet even if notice is received subsequent to the decree, the father could not detrimentally impact upon the state interest in finality: the right to know, it will be recalled, is merely passive,<sup>378</sup> and its protection gives no right to challenge the finality of an adoption decree.

In fact, the state's interest in finality seems to weigh in favor of protecting the right to know. An unwed father who is informed of his child's existence prior to the adoption is given an opportunity to decide whether he will seek to adopt the child himself. He will therefore be less likely to attempt to challenge the finality of an adoption decree than he would if he actually first learned of the child's existence after the decree has been entered.<sup>379</sup> In

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<sup>372</sup> Such protection would then become the only thing that precluded him from having an opportunity to learn of his child's existence. It would always—or usually—involve more work on the part of the court in which the proceedings are to be held.

<sup>373</sup> See *supra* notes 72-76 and accompanying text.

<sup>374</sup> See *Stanley*, 405 U.S. at 653-55.

<sup>375</sup> *But see supra* note 308.

<sup>376</sup> See *supra* note 354 and sources cited therein.

<sup>377</sup> State statutes regarding the confidentiality of adoption records would seem to preclude protection of the right to know *after* the conclusion of the adoption proceeding. Moreover, the right to know assumes its greatest importance prior to an adoption. See *supra* notes 57-70 and accompanying text.

<sup>378</sup> See *supra* note 335.

<sup>379</sup> The greater reluctance present in the latter situation would stem from the fact that he had an opportunity to obtain a different outcome in the adoption proceeding.

this respect, the state interest in finality of adoption would be better served by affording protection to the right to know.

Sixth, and finally, the state has an interest in ensuring that the child's post-adoption life will be as stable as possible. State statutes providing for the confidentiality of adoption records serve to further this interest.<sup>380</sup> On one level, protection of the right to know would be irrelevant to this state interest: if the unwed father is informed of the child's existence prior to the adoption, the right to know will have been protected, but the father will have no right of access to the adoption records once the decree is entered.<sup>381</sup> The danger that the unwed father will seek access to such confidential information is no greater than the danger that the unwed mother will do so.<sup>382</sup>

If the father is informed of the child's existence after the adoption decree is entered, there is a chance that he will seek access to confidential documents in an attempt to find the child. If he is successful, there is a chance that he will contact the child and possibly disrupt the child's life and hinder the state's interest in ensuring post-adoption stability.<sup>383</sup> This danger is already present with respect to the unwed mother.<sup>384</sup> If the father is informed of the child's existence prior to the adoption, he will be less likely to attempt to disrupt the child's post-adoption life than he would be if he discovered the fact after the adoption. The father will already have had the opportunity to decide whether to seek to adopt the child, and the possibility of future interference in the child's life is thereby reduced—placing the father in somewhat

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<sup>380</sup> See *supra* note 300 and sources cited therein.

<sup>381</sup> See *id.*

<sup>382</sup> Using the quantity of reported cases as a measure, there is no evidence that in those states that do not close the adoption files to an unwed mother there has been a problem with the frequency with which unwed mothers exercise such a privilege. In those states that close the file even to the mother, there is no evidence that unwed fathers seek to obtain access to such a file more often than do unwed mothers. *But see In re Adoption of Martz*, 423 N.Y.S.2d 378, 391 (N.Y. Fam. Ct. 1979), *aff'd sub nom.*, *Lehr v. Robertson*, 463 U.S. 248 (1983) (unwed father denied access to adoption records).

<sup>383</sup> See Comment, *Delineation of the Boundaries*, *supra* note 1, at 291-93.

<sup>384</sup> This is particularly true in states that do not include the unwed mother within the class of persons to whom access to adoption records is denied.

the same position as the unwed mother.<sup>385</sup> Although the question is perhaps close, the state's interest in ensuring stability in an adopted child's life tends to weigh in favor of affording some protection to the right to know.

Beyond the state's interest in promoting the best interests of children, one other public policy consideration is perhaps relevant to the determination of whether the right to know should be protected. A state, although it cannot constitutionally burden the right to obtain an abortion,<sup>386</sup> can nonetheless decide that encouraging abortions is against its public policy.<sup>387</sup> If a state has so decided, then protecting the right to know would arguably undermine the state's interest: women who otherwise would have carried a child to full term might, if they know the father will be informed of the child's existence, instead elect to obtain an abortion. The state's interest in not encouraging abortion, therefore, weighs against affording protection to the right to know.<sup>388</sup>

### C. *Balancing the Considerations*

The following constitutional considerations have been identified as weighing to some degree in favor of protecting the right to know: (1) the equal protection clause's policy against gender discrimination; (2) the due process clause's protection of a parent's liberty interest in his or her child; (3) the constitutional protection derived from the right to privacy in the familial relationship; and, to a lesser degree, (4) the eighth amendment's ban on cruel and unusual punishment; and (5) the ninth amendment's protection of rights not enumerated in the Constitution.<sup>389</sup>

The public policy considerations that tend to weigh in favor of protecting the right to know—at least when the right is afforded protection prior to the child's adoption—have been identified as follows: (1) the state's interest in encouraging unwed

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<sup>385</sup> Each will have had an opportunity to make a decision as to whether third-party adoption was appropriate; each will have to live with and accept the decisions he or she made; and, there is little that either can do even if they change their minds.

<sup>386</sup> See *Planned Parenthood*, 428 U.S. at 71. This is at least true with respect to the first twelve weeks of the pregnancy. See *id.*

<sup>387</sup> See *Maher v. Roe*, 432 U.S. 464, 475-78 (1977).

<sup>388</sup> But see *supra* note 308.

<sup>389</sup> See *supra* notes 314-31, 340-47 and accompanying text.

mothers to retain custody of a child when retention is in the child's best interest; (2) the state's interest in placing a child who has been surrendered for adoption with the person or persons best suited to provide for the child's best interest; (3) the state's interest in ensuring the finality of adoption decrees; and (4) the state's interest in ensuring stability in an adopted child's life.<sup>390</sup>

The constitutional consideration that has been shown to weigh against protecting the right to know is a woman's right, derived from the right to privacy, to obtain an abortion.<sup>391</sup> The public policy considerations that weigh against affording protection to the right to know have been identified as: (1) the state's interest in encouraging surrender of the child for adoption when surrender is in the child's best interest; (2) the state's interest in the efficiency and administrative convenience of adoption proceedings; and (3) the state's interest in not encouraging abortions.<sup>392</sup>

The question remains how heavily these considerations weigh on the analytical scales. The two most obvious approaches would be to give each consideration equal weight or to give the constitutional considerations proportionally more weight than the other considerations identified. If equal weight was given to each consideration, the balance would tip decidedly in favor of the desirability of protecting the right to know.<sup>393</sup> Such an approach, however, appears clearly inappropriate.<sup>394</sup> If, alternatively, the "constitutional considerations," by virtue of their status as such,<sup>395</sup> were to be given proportionately<sup>396</sup> more weight than the "public

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<sup>390</sup> See *supra* notes 358-70, 375-85 and accompanying text.

<sup>391</sup> See *supra* notes 332-37 and accompanying text.

<sup>392</sup> See *supra* notes 356-57, 371-75, 380-88 and accompanying text.

<sup>393</sup> If one unit of weight were to be given to each consideration discussed, the balance would tip, nine to four, in favor of protecting the right to know.

<sup>394</sup> For example, giving the ninth amendment and the equal protection clause the same amount of weight on the analytical scales would be exceedingly hard to justify.

<sup>395</sup> But see *supra* note 313.

<sup>396</sup> The initial difficulty with this approach reveals itself immediately. How much more important than a "mere" public policy consideration is a consideration labeled "constitutional"? The approach would necessitate the use of a formula such as  $a(x) = y$ , where "x" equals a public policy consideration, "y" equals a constitutional consideration, and "a" equals the proportion by which constitutional considerations predominate over public policy considerations. For example,  $2(x) = y$  would mean that each constitutional consideration is given twice as much weight on the analytical scale than each of the public policy considerations. The difficulty is in the premise that "a" would remain constant for each

policy considerations," the balance tips more clearly in favor of affording protection to the right to know.<sup>397</sup> This approach too, might be unacceptable.<sup>398</sup>

Ideally, the best approach would be to assign to each individual consideration its proper weight in relation to the other identified considerations.<sup>399</sup> The obvious practical problem with this approach is its subjectivity: it is entirely too susceptible of ends-oriented reasoning.<sup>400</sup> For this reason, this approach will not be utilized.

Because the two approaches that have already been discussed lead to the conclusion that the right to know should be protected, it may be helpful to determine what would be necessary before the opposite conclusion—that the right to know should not be protected—would be reached. To illustrate: if every factor weighing against the desirability of protecting the right to know were given fifty percent more weight than every factor that weighed in favor of such protection,<sup>401</sup> the scale would still tip in favor of

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constitutional consideration as against each public policy consideration. It would make little sense, for instance, to say that the ninth amendment weighs as heavily against the state interest in encouraging adoptions as does the due process clause.

<sup>397</sup> If, for example, the formula  $2(x)=y$  were used, *see supra* note 396, the consequence would be that each constitutional consideration is given two units of weight, while each public policy consideration is given one unit of weight. The result would then be fourteen to five, in favor of protecting the right to know.

<sup>398</sup> One problem with this approach is discussed *supra* note 396. Another is its subjectivity. *See infra* note 400. Probably the most damaging criticism of the approach, however, is that it is a poor substitute for reasoned analysis.

<sup>399</sup> For example, one might use a 10-point scale, assign to each consideration its value relative to the other relevant considerations, and then place them all on the analytical balance. To illustrate: for each of the following considerations, its respective assigned relative weight is contained in parentheses immediately thereafter: equal protection (8); due process (7); constitutional protection of the family (8); constitutional protection of the right to seek and to obtain an abortion (8); eighth amendment (2); ninth amendment (1); encouraging surrender for adoption (8); encouraging retention (8); seeking the best parents (8); administrative convenience (7); interest in finality (6); interest in stability (6); discouraging abortion (6). When each consideration is then placed on the appropriate side of the analytical balance, the result is that it tips, 54 to 29, in favor of protecting the right to know.

<sup>400</sup> The inherent subjective nature of this approach was perhaps best illustrated to the author when he undertook it himself. The results are set forth at *supra* note 399. This is not, of course, to imply that there is necessarily anything questionable about the result the author reached; however, when an analysis leads to the conclusion that one expected to reach, the conclusion should perhaps be viewed with some suspicion.

<sup>401</sup> For example, all the considerations identified as weighing in favor of protecting

affording protection to the right to know.<sup>402</sup> In fact, substantially more weight than fifty percent would have to be given to the factors weighing against the protection of the right to know before equilibrium would be reached.<sup>403</sup>

Given the foregoing analysis, the contention that the right to know should not be afforded some protection probably cannot be sustained on any principled basis.<sup>404</sup> It stretches the imagination, for example, to suggest that a state's interest in administrative convenience and efficiency with respect to adoption proceedings is over fifty percent more important than the equal protection clause's policy against gender discrimination. The law, incidentally, is clearly to the contrary.<sup>405</sup> Suffice to say that anyone wishing to sustain the assertion that the right to know should not be protected carries an extremely heavy burden indeed. The conclusion seems inescapable that the right to know should be protected.

#### V. THE RIGHT TO KNOW: CAN IT BE PROTECTED?

Any attempt to protect the right to know has several hurdles to overcome before it can be said to provide such protection in fact. Numerous difficulties arise and must be dealt with, and several competing interests must be reconciled. Before proposing a statutory means by which the right to know can be afforded

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the right to know are assigned a weight of 5, while each consideration weighing against protecting the right to know is assigned a weight of 7.5.

<sup>402</sup> Using the assigned weights in note 401 *supra*, for example, the result would be that the balance tips, 45 to 30, in favor of protecting the right to know.

<sup>403</sup> For instance, if all of the considerations weighing against protection of the right to know are each assigned over *double* the weight of each consideration weighing in favor of such protection, only then would the analytical scales once again become evenly balanced. To illustrate, if each pro-protection consideration was assigned a weight of 5, and all anti-protection considerations were each assigned a respective weight of 11.25, the scales would then become evenly balanced, with a weight of 45 on each side.

<sup>404</sup> The reader is cautioned to remember that the analytical approach just discussed was, for purposes of this Note, simplified, in that the illustrations of the approach in operation used what might be considered to be averages of the respective values. In the illustration contained at *supra* note 401, for example, the analysis was undertaken as if the considerations weighing in favor of protecting the right to know *averaged* out to a weight of 5, the anti-protection considerations averaging out to a weight of 7.5. Each individual's personal analysis would necessarily have to be considerably more complex. *See, e.g., supra* note 399.

<sup>405</sup> *See, e.g., Reed*, 404 U.S. at 75-77.

protection,<sup>406</sup> it is helpful to identify first the problems one encounters in attempting to provide such protection.

The most obvious requirement that a statute purporting to protect the right to know<sup>407</sup> must meet is that such a statute must

<sup>406</sup> An example of such a statute is set forth *infra* note 407. However, regardless of how one feels, as a personal matter, about whether and to what extent the right to know should be protected, there remains the possibility that it might eventually be held to be of constitutional dimensions. *See supra* notes 201-69 and accompanying text. If this occurs, a state or, conceivably, the federal government, must find a means to protect the right. Accordingly, one should examine a proposed right to know statute from two distinct perspectives: (1) whether, in the absence of constitutional protection for the right to know, the statute is *desirable*; and (2) whether, if the right to know is held to be protected by the Constitution, the statute is *acceptable* as a means of providing such protection. Furthermore, the statute need not be enacted in its entirety to provide protection to the right to know; some protection is better than no protection. The statute set forth *infra* note 407 was drafted, to the extent practicable, to afford maximum protection to the right to know. It was also designed so that its harshness—to the extent it embodies any—can be mitigated by revision without disrupting the statutory scheme. In addition, the proposed statute was designed so that, with slight rewording of its language, entire portions of it could be deleted entirely, while preserving its basic structure.

<sup>407</sup> The following right to know statute will be used as a basis for comparison:  
 § 0000: *Informing Father of Child Born Out-Of-Wedlock of Child's Prospective Adoption*

(A) When an infant child born out-of-wedlock is surrendered by its natural mother for adoption, the court in which the adoption proceeding has been or is to be commenced shall:

- (1) Ascertain the identity of the child's natural father, in the manner and subject to the limitations as set forth in subsection (B);
- (2) Ascertain the present whereabouts of the child's natural father, in the manner and subject to the limitations as set forth in subsection (B); and
- (3) Provide actual notice of the child's prospective adoption to the natural father, in the manner as set forth in subsection (C).

(B) The following shall govern the manner in which the inquiry called for under subsections (A)(1) and (A)(2) shall be made:

- (1) If, after consulting the child's birth certificate, the court, in its discretion, believes that the information contained therein is sufficient to enable the court to provide actual notice of the prospective adoption to the natural father, the court shall cause such notice to be provided to the father, in the manner set forth in subsection (C), and shall not question the natural mother or any other person directly in an effort to ascertain the identity or present whereabouts of the natural father.
- (2) If, after consulting the child's birth certificate, the court believes that the information contained therein is insufficient to enable the court to provide actual notice of the prospective adoption to the natural father, in the manner as set forth in subsection (C), or if, after the court has consulted the child's birth certificate and subsequently attempted to provide actual notice of the prospective adoption to the natural father, in the manner as set forth in subsection (C), it

do what it purports to do: it must provide effective protec-

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appears that the natural father did not in fact receive such notice, the court shall question the natural mother directly, under oath, in an effort to ascertain the identity and present whereabouts of the natural father.

(a) In questioning the natural mother, the court shall:

(i) inquire into any information that is known, or with the exercise of due diligence could reasonably be expected to become known, to the natural mother that would enable the court to determine the identity or present whereabouts of the natural father, provided that the court shall not inquire into any matter beyond that which is reasonably necessary to such a determination;

(ii) inform the natural mother that if she, with an intent to deceive or mislead the court, omits or lies about information that a reasonable person would believe was requested by the court and would prove useful in determining the identity or present whereabouts of the natural father,

(A) she will become subject to imprisonment for a period not to exceed [two years], become criminally liable for a sum not to exceed [five thousand dollars], or both;

(B) other persons who might be able to provide such information may be called before the court and questioned; and

(C) such information as is available to the court may be used to provide constructive notice by publication to the natural father, and that such information may include, but is not limited to, the natural mother's name, her address, and the approximate date on which the child was conceived; and

(iii) inform the natural mother that if the information she supplies to the court provides an insufficient basis for determining the identity or present whereabouts of the natural father, the court may take the action specified in subsections (B)(2)(a)(ii)(B) and (B)(2)(a)(ii)(C).

(b) If, after questioning the natural mother in the manner as set forth in subsection (B)(2)(a), the court is unable to ascertain the identity and present whereabouts of the natural father, and the court believes that such failure is due, in whole or in part, to the natural mother's intentional deception of the court, the court shall report such deception to [the appropriate prosecutorial agency].

(c) If, after questioning the natural mother in the manner as set forth in subsection (B)(2)(a), the court is unable to ascertain the identity and present whereabouts of the natural father, the court in all cases may, and, if such action appears reasonably likely to provide the court with the identity or present whereabouts of the natural father, shall call before it any person or persons who appear reasonably likely to possess relevant information, and question each such person, under oath, as to this information.

(d) If, after questioning the natural mother in the manner as set forth in subsection (b)(2)(a), and taking such further action as provided for in subsection (B)(2)(c), the court is unable to ascertain the identity and present whereabouts of the natural father, the court in all cases may, and, if such actions appear reasonably likely to provide notice of the prospective adoption to the natural father, shall cause notice of the prospective adoption to be placed in any periodical or periodicals that



could reasonably be expected to provide notice of the prospective adoption to the natural father.

(i) Such notice may contain any information that appears reasonably useful in providing the natural father with notice of the prospective adoption, and shall, in all cases, contain the natural mother's name, her address, and the approximate date on which the child was conceived.

(ii) Such notice may be placed in any periodical or periodicals circulated in the jurisdiction

(A) in which the adoption proceeding is pending;

(B) in which the mother's residence at the approximate time the child was conceived is located;

(C) in which a suspected natural father's last known residence is located; and

(D) in which a suspected natural father is currently believed to reside.

(3) If, after questioning the natural mother, in the manner as set forth in subsection (B)(2)(a), and taking such further action as provided for in subsection (B)(2)(a), the court determines that the identity of the natural father is in fact unknown, it shall provide actual notice of the prospective adoption to all persons whom the court determines could potentially be the natural father, in the manner as set forth in subsection (C).

(4) If the present whereabouts of any person whom the court determines to be a potential natural father under subsection (B)(3) are in fact unknown, the court shall provide constructive notice by publication to such a person, in the manner as set forth in subsection (B)(2)(d).

(C) When actual notice is to be provided to a person determined to be a natural father under subsection (B)(1) or (B)(2), or any person determined to be a potential natural father under subsection (B)(3), such notice

(1) Shall be served in either of the following manners:

(a) Sent, via certified mail, to the target, or

(b) Hand-delivered by [the sheriff] in whose jurisdiction the target resides;

(2) Shall contain, but is not limited to containing, the following information:

(a) the name of the natural mother;

(b) the present address of the natural mother;

(c) the approximate date on which the child was conceived;

(d) the date or dates on which any hearings regarding the adoption of the child will or is expected to take place;

(e) the birthdate of the child;

(f) the gender of the child; and

(g) whether the target has been identified on the child's birth certificate as the child's natural father;

(3) May be sent to the target's currently known address, the target's last known address, and the last known address of any person or persons whom the court determines would provide the target with the information contained in such notice, providing that such notice shall be sent only to the target's current address if the court determines that such action is certain to provide the target with actual notice.

It should be noted that the statute is directed toward protecting the right to know in the adoption context, which has formed the basis for this Note's discussion. *See supra* notes 57-78 and accompanying text. The right to know properly so called, however, extends far beyond the adoption area. *See supra* notes 40-55 and accompanying text. The proposed statute is not directed toward protection of the right to know in any of these other areas.

tion.<sup>408</sup> If such a statute is so riddled with exceptions that an unwed father's right to know of his child's existence could be circumvented in the typical case,<sup>409</sup> the effort to protect the right might well be doomed from the outset.<sup>410</sup> Effective protection must be provided for in the statute,<sup>411</sup> especially in those cases in which the right to know assumes its most critical importance.<sup>412</sup>

A statute that otherwise would provide effective protection to the right to know must be enforceable.<sup>413</sup> The enforcement mech-

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<sup>408</sup> The Proposed Statute, *supra* note 407, provides effective protection by requiring—so far as is reasonably possible—actual notice of the child's existence to the father or those persons who may be the child's father prior to the commencement of the adoption proceedings. The effectiveness of the protection offered by the statute is further enhanced by the enforcement mechanism that is provided for. *See infra* notes 413-14 and accompanying text.

It should, however, be noted that while the statute ideally requires that the father be informed of the child's existence prior to the commencement of the adoption proceedings, its plain language forecloses any argument that the commencement of adoption proceedings dispenses with the requirement that the unwed father be informed of the child's existence. The responsibility for informing the father falls to "the court in which the adoption proceeding has been or is to be commenced." Proposed Statute, *supra* note 407, at § 0000(A).

Furthermore, the statute supplies a means by which an unwed father's right to know may be protected when his identity or present whereabouts are unknown to the unwed mother. *See id.* at § 0000(B)(3-4). Certain provisions of the statute would require a judge to take steps beyond that which might be necessary to provide actual notice to the father. In certain questionable cases, therefore, the statute compels the judge to "overact," rather than "underact" in an attempt to provide notice to the father. *See id.* at § 0000(c)(3).

<sup>409</sup> "Typical case" is here referring to the type of case which has been the focus of this Note's discussion. *See supra* notes 71-78 and accompanying text; *infra* note 415.

<sup>410</sup> The fact that a statute will be subject to exceptions does not, without more, necessarily counsel against its enactment. It is difficult to conceive of any law—whether statutory, common, or constitutional—that does not permit exceptions.

<sup>411</sup> Even in other areas of unwed fathers' rights, protection often falls far short of being "effective." *See, e.g., supra* notes 272-304 and accompanying text.

<sup>412</sup> *See supra* notes 57-78 and accompanying text.

<sup>413</sup> The Proposed Statute, *supra* note 407, enforces its protection of the right to know in several respects. Its most obvious enforcement mechanism is the creation of a criminal offense for unwed mothers who fail to comply with its requirements. *See Proposed Statute, supra* note 407, at § 0000(B)(2)(a)(ii-iii). The statute recognizes, of course, that the criminal penalties can vary according to what the legislature deems appropriate. The legislature would also have to specify to what office or offices the court must report an unwed mothers' noncompliance, *see id.* at § 0000(B)(2)(a)(iii), and what official or officials would be responsible for actually delivering notice to the unwed father, *see id.* at § 0000(C)(1)(b).

It is also noteworthy that the statute provides that the appropriate court may, and in some cases, must, take certain action without regard to whether the unwed mother bears any responsibility (other than her inability to say with certainty who the father is or where he can be located) for the court's failure to discover the identity or present whereabouts of the natural father. *See id.* at § 0000(B)(2)(c-d), (B)(3)-(4).

anism is, therefore, the second essential component of any attempt to protect the right to know.<sup>414</sup>

The two necessary requirements of a right to know statute just discussed<sup>415</sup> are self-evident, but what other standards must such a statute<sup>416</sup> meet? The statute must not contravene any provision of the Constitution.<sup>417</sup> The equal protection clause,<sup>418</sup>

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<sup>414</sup> Actually, the distinction between "effectiveness of protection" and "enforcement" should not be overemphasized. While the latter can exist without the former, the converse, it is submitted, is probably not true.

<sup>415</sup> Subsection (C) of the Proposed Statute provides the means of providing notice to the unwed father. This subsection enhances both the statute's effectiveness of protection and its enforcement mechanism. While the subsection is relatively straightforward, one provision perhaps calls for a little elaboration: subsection (C)(3) might have particular application to cases in which the target is relatively young. For example, if he has moved out of his parents' house to attend school, the statute would presumably be met if the notice was provided to his parents.

<sup>416</sup> Although the application of the statute set forth at *supra* note 407 is relatively narrow, the same statute could easily serve as a model for a much broader protection of the right to know. For example, while the statute focuses on the adoption of newborns, its reasoning and application could be extended to older children. Indeed, "infant child," as used in subsection (A) of the statute is left undefined; the legislature could choose to encompass older children within its scope.

In addition, although the statute is limited to cases in which an illegitimate child is surrendered for adoption by the natural mother, it could, with minor revision, be extended to cover cases in which a legitimate child is surrendered for adoption and/or cases in which the child is surrendered for adoption by persons other than the natural mother. Some, but probably not all, portions of the statute's protection of the right to know could even be revised so as to extend to cases in which the child is retained by the mother.

<sup>417</sup> See *Caban v. Mohammed*, 441 U.S. 380, 385-94 (1979); *Stanley v. Illinois*, 405 U.S. 645, 652-55 (1972).

<sup>418</sup> See *supra* note 89 for the text of the equal protection clause. Several cases would seem to indicate that the Proposed Statute, *supra* note 407, would not contravene the equal protection clause. *Lehr v. Robertson*, 463 U.S. 248 (1983), established that burdens placed on only one unwed parent by virtue of the differences in the respective parents' relationships to the child do not violate the equal protection clause. See *supra* notes 196-200 and accompanying text. The Court has clearly stated that a statute can survive scrutiny under the equal protection clause if it is based on the physiological fact that only women can become pregnant. See *Michael M. v. Superior Court*, 450 U.S. 464, 468-72 (1981). Indeed, under present equal protection doctrine, the proposed statute might not even classify on the basis of gender at all: the relevant distinction would instead be between persons who surrender an illegitimate child for adoption and those who do not. Cf. *Geduldig v. Aiello*, 417 U.S. 484, 487-90 (1974) (relevant classification was between pregnant persons and non-pregnant persons, rather than between men and women).

Even if the statute is viewed as a gender-based classification, however, it might well pass the *Craig* test by "substantially advancing" the "important" state interests of maintaining the integrity of the family, protecting the potential relationship between an unwed father and his child, and/or ensuring the finality of adoption decrees.

the due process clause,<sup>419</sup> and the right to privacy<sup>420</sup> might be of particular concern in this connection.<sup>421</sup>

In addition, a number of public policy considerations, discussed in the previous section, were identified as perhaps weighing, to varying degrees, against affording any protection to the right to know.<sup>422</sup> If a right to know statute would detrimentally infringe upon one or more of the identified state interests, the

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<sup>419</sup> See *supra* note 92 for the text of the due process clause. The Proposed Statute, *supra* note 407, would survive scrutiny under the due process clause. In terms of procedural due process, the statute entails no deprivations of property interests. As for liberty interests, an unwed mother would, of course, suffer a deprivation if criminal penalties were imposed on her for her failure to comply with the statute; however, she would be entitled to all the procedures mandated under the due process clause prior to such a deprivation.

In terms of substantive due process, the question is closer, but none of the Court's family planning decisions are on point or compel the conclusion that the statute is constitutionally defective, see sources cited *supra* notes 321, 332; nor does it impair any other fundamental right, see sources cited *supra* note 325; see also *Kusper v. Pontikes*, 414 U.S. 51, 56-61 (1973) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (right to interstate travel); *Douglas v. California*, 372 U.S. 353, 355-58 (1963) (right of access to courts).

<sup>420</sup> See *supra* note 324. The Proposed Statute, *supra* note 407, would not impermissibly infringe upon the right to privacy. Indeed, the statute attempts to strike a balance between providing maximum protection to the right to know and, as much as possible, still respect the privacy interests of the person involved. See Proposed Statute, *supra* note 407, at § 0000(B)(1)-(2)(a)(i), (C)(3).

<sup>421</sup> It is clear that the Proposed Statute would not violate either the self-incrimination clause of the fifth amendment or the eighth amendment. With respect to the former, the Proposed Statute imposes criminal consequences only if there is an affirmative act or omission, in communicative form, on the part of the unwed mother, coupled with an intent to deceive or mislead. True information elicited from the mother, even if compelled, would not incriminate her. The fact that the elicited information might be such that she would have preferred not to disclose it is irrelevant with regard to the self-incrimination clause. See *Hoffman v. United States*, 341 U.S. 479 (1951); *Brown v. Walker*, 161 U.S. 591 (1896). See generally L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 405-32 (1986). Criminal penalties are implicated only if she presents false testimony, which is a crime anyway under state perjury statutes, and is not affected by the self-incrimination clause; the fifth amendment does not confer a "right to lie." Cf. *Nix v. Whiteside*, 475 U.S. 157 (1986) ("[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*") (emphasis in original). There is also no valid argument that the statute would violate the eighth amendment by punishing the status of "unwed mother." See *Robinson v. California*, 370 U.S. 660 (1962). The statute does not punish one for her status as an unwed mother. Rather, the statute provides punitive sanctions for the affirmative act of deceiving the court; the fact that the offense can be committed only by unwed mothers is irrelevant. See *Powell v. Texas*, 392 U.S. 514 (1968) (plurality). Therefore, there is no eighth amendment violation.

<sup>422</sup> See *supra* notes 356-57, 371-75, 380-88 and accompanying text.

attempt to protect the right to know perhaps should be abandoned.<sup>423</sup>

In particular, it must be determined what adverse effect a right to know statute would have on: the state's interest in encouraging an unwed mother to surrender her child for adoption, when surrender is in the best interest of the child;<sup>424</sup> the state's interest in efficiency and administrative convenience in adoption proceedings;<sup>425</sup> and, the state's interest in not encouraging abortions.<sup>426</sup>

Finally, a right to know statute must be examined to ascertain whether any other negative consequences would flow from its enactment.<sup>427</sup> In other words, the statute must be sufficiently tailored to serve its desired end.<sup>428</sup> If it would open the floodgates to undesirable consequences, such ramifications might counsel against its enactment.

### CONCLUSION

In some ways, unwed fathers have come a long way with respect to rights regarding their children. There is no question that they stand in a far more advantageous position than they did only a few years ago. Despite our progressiveness, however, one major obstacle—whether its foundation lies in nature, sociology, or the law—prevents unwed fathers from ever achieving a parental status comparable to that of their female counterparts:

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<sup>423</sup> This is a judgment call. The fact that one of these considerations would be impacted upon is not determinative. The question rather is whether and to what extent enactment of a right to know statute would preclude a state from achieving its desired end.

<sup>424</sup> See *supra* notes 356-57 and accompanying text.

<sup>425</sup> See *supra* notes 371-75 and accompanying text.

<sup>426</sup> See *supra* notes 380-88 and accompanying text.

<sup>427</sup> Common experience shows that any number of acts can, and often do, result in unforeseen—and, in many cases, unforeseeable—consequences. The enactment of a statute is no exception. No attempt, therefore, has been made to anticipate what incidental consequences would flow from the enactment of a right to know statute. The concern has been only on the protection of the right to know's impact on those areas, particularly adoption, upon which it is *supposed* to impact.

<sup>428</sup> This statement should not be read to imply that a right to know statute should be subjected to a "strict scrutiny" test, which requires that a statute serve a compelling governmental interest and be narrowly tailored to achieve that objective. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

the knowledge of their parenthood. This Note has examined whether and to what extent an unwed father does, and should, have a legal right to be informed of his child's existence. Nowhere is the protection of this right more critical than in cases in which a newborn infant, whose very existence is unknown to his or her father, is surrendered for adoption by the child's mother. The unknowing father forever loses every opportunity to experience the joys and heartaches of accompanying his son or daughter through his or her life—being there and watching as the child grows from infancy to adulthood.

Why was he not told? A different answer is supplied every time it is asked—with justifications ranging from the understandable to the absurd, with rationalizations ranging from protectiveness to pure self-centeredness, and with motivations ranging from the most altruistic to the most evil. The decision to surrender a child for adoption without informing the father is undoubtedly one of the most difficult decisions the mother will be forced to make in her life—implicating the entire spectrum of feelings, fears, and emotions. Yet, in the final analysis, the reasons for the decision—whatever their apparent validity—seem to pale in comparison to the consequences thereof. The effect on the father is the same regardless of reasons given for making the decision. The unilateral decision by one individual to deprive a person of the opportunity to know his child—without any showing of fault on the part of the person so deprived—would not, it is submitted, be accepted—or tolerated—in any other context. It is difficult to see why the legal status of an “unmarried male” serves to alter our perceptions. The real question seems not to be whether the right to know should be protected, but rather why it has taken us so long to ensure that it is.

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