

# Plight of the Putative Father in California Child Custody Proceedings: A Problem of Equal Protection

## I. BACKGROUND

Historically, a father's rights and obligations with respect to his offspring were based on legal rather than biological ties. The law refused to recognize any official relationship between father and child if the man was not married to the mother at the time of birth.<sup>1</sup> At common law the child had no claim to support from his father, nor any rights of inheritance;<sup>2</sup> and no method was available by which the father could legitimate the child and thereby establish a familial relationship.<sup>3</sup>

The common law view has been altered in varying degrees in all states by statute as well as by judicial action.<sup>4</sup> Nearly every state provides a method by which a putative father can voluntarily legitimate his illegitimate children<sup>5</sup> and thereby free them of the stigma and disparate treatment that follows classification as illegitimate.<sup>6</sup> Furthermore, the illegitimate father in all jurisdictions can be forced to bear some of the burdens of parenthood by means of actions brought to establish paternity and compel support.<sup>7</sup>

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<sup>1</sup>H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 5.1, at 155 (1968) [hereinafter cited as CLARK]; H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 3 (1971); *Estate of Lund*, 26 Cal. 2d 472, 479, 159 P.2d 643, 647 (1945).

<sup>2</sup>CLARK, *supra* note 1, § 5.1, at 155; H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 4 (1971).

<sup>3</sup>CLARK, *supra* note 1, § 5.1, at 156.

<sup>4</sup>*Id.* § 5.2, at 158, § 5.3, at 162.

<sup>5</sup>*Id.* § 5.2, at 158; For a collection of the applicable statutes, see Ester, *Illegitimate Children and Conflict of Laws*, 36 IND. L.J. 163, 164-169 (1961) and Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1582, n. 6 (1972). For purposes of this article, the terms "putative father" and "illegitimate father" will be used interchangeably.

<sup>6</sup>CAL. CIV. CODE § 230 (West 1954); *Estate of Lund*, 26 Cal. 2d at 482, 159 P.2d at 649 (1945); *Blythe v. Ayres*, 96 Cal. 532, 559-560, 31 P. 915, 916 (1892); *Estate of Maxey*, 257 Cal. App. 2d 391, 396, 64 Cal. Rptr. 837, 840 (1967); *In re Navarro*, 77 Cal. App. 2d 500, 505, 175 P.2d 896, 898-899 (1946).

<sup>7</sup>In *Gomez v. Perez*, \_\_\_U.S. \_\_\_, 93 S.Ct. 872, 875 (1973), the U.S. Supreme Court held that "... once a State posits a judicially enforceable right on behalf of

Concern for the welfare of the illegitimate child has been the motivating factor giving rise to these changes.<sup>8</sup> Thus, while increasing obligations and responsibility have been placed upon the putative father, in many jurisdictions he has continuously been denied parental rights.<sup>9</sup> A recent decision by the United States Supreme Court, however, provides good reason to believe that the plight of the illegitimate father is about to change. In *Stanley v. Illinois*<sup>10</sup> the United States Supreme Court declared an Illinois statute, pursuant to which the children of unwed fathers became wards of the state upon the death of their mother, without a hearing on the father's parental fitness and without proof of neglect, unconstitutional as being violative of the Due Process and Equal Protection Clauses. Hearings on fitness and proof of neglect were required before the State assumed custody of the children of legitimate parents and unmarried mothers, all presumed to be fit to raise their offspring. Unwed fathers, however, were presumed unfit to raise their children; therefore, the State held no individual hearings to determine whether particular fathers were, in fact, fit parents before assuming custody.<sup>11</sup>

Although *Stanley* involved a situation in which the father had physical custody of his children at the time of the mother's death, the Court did not limit its decision to the precise facts of the case. Rather, the Court required that an opportunity for a hearing be extended to all unwed fathers who desire and claim competence to care for their children when the mother declines or is unable to assume custody herself.<sup>12</sup> Subsequent actions of the Court based on

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children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because her natural father has not married her mother." See also CLARK *supra* note 1, § 5.3, at 162; For a collection of applicable statutes, see Note, 30 MO. L. REV. 154, 155 (1965).

<sup>8</sup>Estate of Lund, 26 Cal. 2d at 480, 159 P.2d at 648 (1945); In Darwin v. Granger, 174 Cal. App. 2d 63, 71, 344 P.2d 353, 358 (1959), the court states that the purpose of Cal Civ. Code § 230 (the legitimation statute) is "... to permit the father to make reparation to the child ..." by saving the child from the stigma of the brand of "illegitimate"; Embick, *The Illegitimate Father*, 3 J. FAM. L. 321, 323 (1963).

<sup>9</sup>Embick, *The Illegitimate Father*, 3 J. FAM. L. 321 (1963); See e.g., ORE. REV. STAT. § 109.060 (1971), which provides that, "The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married." However, according to ORE. REV. STAT. § 109.080 (1971), "If a mother has not married the father of her child or the paternity of the child has not been established under ORS 109.070, the mother may give all authorizations for the care, custody, control and welfare of her child; ... The foregoing may be done without any act of the father of the child and without any notice or citation to the father, the same as if the father were dead ..."

<sup>10</sup>405 U.S. 645 (1972).

<sup>11</sup>*Id.* at 647.

<sup>12</sup>*Id.* at 657, n. 9.

*Stanley*<sup>13</sup> and a recent decision of the Supreme Court of Illinois<sup>14</sup> support this interpretation.

This article will deal with the potential impact of *Stanley* upon the status of the unwed father's claim to custody of his child under present California law. The analysis will be limited to one aspect of the unwed father's struggle for custody — his present inability to prevent adoption and gain custody when the child's mother frustrates his attempts at legitimation and relinquishes their child for adoption. Discussion will center on the equal protection problems of the disparate treatment of illegitimate and legitimate fathers.

## II. CURRENT STATUS OF CALIFORNIA ILLEGITIMATE FATHER'S RIGHT TO CUSTODY

### A. FATHER'S RIGHT TO CUSTODY WHEN HE DOES NOT LEGITIMATE HIS CHILD

#### 1. WHEN THE MOTHER WISHES TO KEEP THE ILLEGITIMATE CHILD

The mother of an illegitimate unmarried minor is entitled to its custody, services and earnings.<sup>15</sup> In spite of the fact that both parents are responsible for the child's support,<sup>16</sup> the mother's right

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<sup>13</sup>The Court recently vacated the decisions of the Supreme Court of Wisconsin in *State ex. rel. Lewis v. Lutheran Social Services*, 47 Wis. 2d 420, 178 N.W. 2d 56 (1970), *vacated sub nom. Rothstein v. Lutheran Social Services*, 405 U.S. 1051 (1972) and the Court of Appeals of Illinois in *Vanderlaan v. Vanderlaan*, 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970), *vacated* 405 U.S. 1051 (1972), denying the illegitimate father custody rights and remanded the cases for further consideration in light of *Stanley*. The Illinois case involved a father seeking to retain custody of his illegitimate children and therefore did not extend *Stanley*. The Wisconsin father, however, had never enjoyed custody of his child. Nevertheless, he claimed the right to notice of adoption proceedings and a hearing for the determination of his parental fitness, which if established, should entitle him to custody.

<sup>14</sup>In *People ex. rel. Slawek v. Covenant Children's Home*, 52 Ill. 2d 20, 284 N.E.2d 291 (1972), the Supreme Court of Illinois held that Illinois law which allows an adoption without notice to or consent of the putative father is unconstitutional, basing its decision on *Stanley*, *State ex. rel. Lewis v. Lutheran Social Services*, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated sub nom.*, *Rothstein v. Lutheran Social Services*, 405 U.S. 1051 (1972), and *Vanderlaan v. Vanderlaan*, 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970), *vacated*, 405 U.S. 1051 (1972).

<sup>15</sup>CAL. CIV. CODE § 200 (West 1954); *Guardianship of Smith*, 42 Cal. 2d 91, 93, 265 P.2d 888, 889 (1954); *Darwin v. Granger*, 174 Cal. App. 2d 63, 70, 344 P.2d 353, 357 (1959); *Strong v. Owens*, 91 Cal. App. 2d 336, 340, 205 P.2d 48, 50-51 (1949); *In re Gille*, 65 Cal. App. 617, 619, 224 P. 784, 785 (1924).

<sup>16</sup>CAL. CIV. CODE § 196(a) (West 1954): "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances . . ."; *Schumm v. Berg*, 37 Cal. 2d 174, 231 P.2d 39 (1951); *Reed v. Hayward*, 23 Cal. 2d 336, 144 P.2d 561 (1943); CAL. PEN. CODE § 270 (West 1970) imposes criminal liability for failure to support.

to custody is absolute and excludes any rights of the father by virtue of his paternity.<sup>17</sup> In sharp contrast, custody rights in a legitimate child are shared equally by both parents.<sup>18</sup>

When the mother chooses to keep her illegitimate child, the putative father has virtually no parental rights.<sup>19</sup> While there is some support for the proposition that California is one of only six states to grant visitation rights to illegitimate fathers,<sup>20</sup> the validity of this contention is questionable.<sup>21</sup>

## 2. WHEN THE MOTHER OF THE ILLEGITIMATE CHILD IS DECEASED

When the mother is dead, the California Supreme Court has been willing to recognize custody rights in the putative father. In *Guardianship of Smith*,<sup>22</sup> that tribunal reversed a lower court order appointing the half-sister of two minors as their guardian upon the mother's death, in preference to the natural father, whom the lower court found to be a fit and proper person. The Court stated that "... while the best interests of an illegitimate child are the important factor, the parents of such a child have a superior claim as against the world to his custody if they are fit and proper."<sup>23</sup> The Court reasoned that its decision was compelled by California statu-

<sup>17</sup>*Guardianship of Smith*, 42 Cal. 2d at 93, 265 P.2d at 889 (1954); *Darwin v. Granger*, 174 Cal. App. 2d at 70, 334 P.2d at 357 (1959); *Strong v. Owens*, 91 Cal. App. 2d at 340, 205 P.2d at 50-51 (1949).

<sup>18</sup>CAL. CIV. CODE § 197 (West 1954).

<sup>19</sup>*Adoption of Laws*, 201 Cal. App. 2d 494, 500, 20 Cal. Rptr. 64, 68 (1962).

<sup>20</sup>See e.g., Lippert, *The Need For a Clarification of the Putative Father's Legal Rights*, 8 J. FAM. L. 398, 407 (1968); Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, (1971); Annot., 15 A.L.R.3d 887, 888 (1967).

<sup>21</sup>The basis for this argument is found in *Strong v. Owens*, 91 Cal. App. 2d 336, 205 P.2d 48 (1949) where the California Court of Appeals, in awarding custody of the child to the natural mother, stated that the father has a right to be admitted to see the infant at all convenient times (*Id.* at 341, 205 P.2d at 51). However, this case is rather questionable authority for establishing visitation rights in the putative father. The natural father in *Strong*, with the consent of his wife, had received the child into his family for seven months and had treated it as his own, strongly indicating that the child had been legitimated pursuant to Cal. Civ. Code § 230. (See discussion of legitimation, *infra*). The court never settled the question of legitimation, nor did it base its decision on this factor. However, if indeed the child had been legitimated, the holding of *Strong* would not be applicable to a case where legitimation is not a factor.

CAL. CIV. CODE § 4601 (West 1970) has the potential of becoming the basis for recognition of visitation rights in the putative father, whether he is classified as a "parent" or "other interested person." The code section provides: "Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interest of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child."

<sup>22</sup>42 Cal. 2d 91, 265 P.2d 888 (1954).

<sup>23</sup>42 Cal. 2d at 93, 265 P.2d at 890.

tory provisions governing questions of guardianship.<sup>24</sup>

The impact of this case as authority establishing parental rights in the putative father is questionable.<sup>25</sup> Arguably *Smith* represents a recognition of the natural father's right to custody against all but the natural mother. However, subsequent cases have not read the decision so broadly. There still exists a route by which a mother, who does not desire custody herself, can prevent the father from ever gaining parental rights.<sup>26</sup> This article will concentrate upon the loopholes left in California law which allow the mother to circumvent the potential impact of the *Smith* decision upon the father's right to custody, and the constitutional problems thereof.

### 3. WHEN THE MOTHER RELINQUISHES THE CHILD FOR ADOPTION

Under the provisions of California Civil Code § 224, a legitimate child cannot be adopted without the consent of both parents;<sup>27</sup> however, the statute gives the mother of an illegitimate child sole authority to consent to adoption.<sup>28</sup> Not only is the putative father denied the right to grant or withhold consent,<sup>29</sup> he is not even entitled to notice of or preference in adoption proceedings brought by others.<sup>30</sup> Once the mother relinquishes the child for adoption, she defeats the father's ability to acquire parental rights.<sup>31</sup>

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<sup>24</sup>CAL. PROB. CODE § 1407 (West 1956) establishes the priority of the right of a parent to be appointed guardian of his child as against all other persons equally entitled in other respects. The fact that the minors in *Smith* were not legitimate was deemed by the Court to be insignificant for purposes of this statute.

<sup>25</sup>Three judges place the illegitimate father in the same position as the legitimate father after the death of the mother. Justice Traynor, concurring, asserts that willingness and intent to legitimate be made a prerequisite to establishing the father's fitness for appointment as guardian. Three dissenting justices deny the illegitimate father's right to priority in guardianship proceedings. For a detailed discussion, see Notes and Recent Decisions, *Custody: A Dominant Right of the Father of an Illegitimate Child After the Death of the Mother?*, 42 CAL. L. REV. 514 (1954).

<sup>26</sup>See e.g., *Guardianship of Truschke*, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); *Adoption of Irby*, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964).

<sup>27</sup>CAL. CIV. CODE § 224 (West 1954).

<sup>28</sup>CAL. CIV. CODE § 224 (West 1954) provides that "A legitimate child cannot be adopted without the consent of its parents if living, . . . ; nor an illegitimate child without the consent of its mother if living."

<sup>29</sup>*Id.*

<sup>30</sup>*Adoption of Laws*, 201 Cal. App. 2d at 500, 20 Cal. Rptr. at 68 (1962).

<sup>31</sup>*Guardianship of Truschke*, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); *Adoption of Irby*, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964). However, in a recent case the Superior Court of San Mateo County awarded custody of an illegitimate child to the father, who was denied permission to marry the mother and who for thirteen months while in the service sent support checks to the mother and child. Upon returning from Vietnam, the father found that the mother was gone and had put their child up for adoption. He was successful in his subsequent court battle against the adoption agency for custody of his child. *San Francisco Chronicle*, March 8, 1973, at 1, col. 1.

Thus, California Civil Code § 224 embodies the feature of California law that is the source of the illegitimate father's most grievous and justified complaint. It vests in a mother who relinquishes her child for adoption the power to defeat the rights of a father who wishes to assume the responsibility of raising and providing for his natural offspring. The following discussion will point out the absurd consequences that have followed the application of this statute and the blatant equal protection problems inherent in this provision.

## B. EFFECTS OF LEGITIMATION ON THE FATHER'S RIGHT TO CUSTODY

Every state has provided a statutory means for legitimation.<sup>32</sup> In California the natural father may legitimate his child by marrying the mother,<sup>33</sup> or "... by publicly acknowledging it as his own, receiving it as such, with the consent of his wife if he is married, into his family, and otherwise treating it as if it were a legitimate child...."<sup>34</sup> Legitimation by the father changes the status of the child to that of a legitimate offspring.<sup>35</sup> From that point on, the rights of both child and parents are the same as if the child had been born legitimate.<sup>36</sup>

In an effort to spare the child the stigma of being classified as illegitimate, California courts have construed this code provision in favor of legitimation.<sup>37</sup> Thus, the father's failure to conceal or deny his paternity has been deemed sufficient public acknowledgement for purposes of the statute.<sup>38</sup> Similarly, "family" within this code section has been defined as a settled place of habitation of which the father is the head and into which the child is received.<sup>39</sup> Finally, in

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<sup>32</sup>CLARK, *supra* note 1, § 5.2, at 158; For a collection of statutes, see Ester, *Illegitimate Children and Conflict of Laws*, 36 IND. L.J. 163, 164-169 (1961) and Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1582, n. 6 (1972).

The Arizona (ARIZ. REV. STAT. ANN. § 14-205 (1956)) and Oregon (ORE. REV. STAT. § 109.060 (1971)) provisions are the most absolute, in that they essentially abolish the status of illegitimacy and provide that all children are the legitimate children of their natural parents.

<sup>33</sup>CAL. CIV. CODE § 215 (West 1954).

<sup>34</sup>CAL. CIV. CODE § 230 (West 1954); *Estate of Maxey*, 257 Cal. App. 2d at 396, 64 Cal. Rptr. at 840 (1967).

<sup>35</sup>*Estate of Lund*, 26 Cal. 2d at 482, 159 P.2d at 649 (1945); *Blythe v. Ayres*, 96 Cal. at 559-560, 31 P. at 916 (1892); *In re Navarro*, 77 Cal. App. 2d at 505, 175 P.2d at 898-899 (1946).

<sup>36</sup>*Estate of Maxey*, 257 Cal. App. 2d at 396, 64 Cal. Rptr. at 840 (1967); *In re Navarro*, 77 Cal. App. 2d at 505, 175 P.2d at 899 (1946).

<sup>37</sup>*Estate of Lund*, 26 Cal. 2d 472, 159 P.2d 643 (1945); *Estate of Maxey*, 257 Cal. App. 2d at 396, 64 Cal. Rptr. at 840 (1967); *Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960).

<sup>38</sup>*Estate of Gird*, 157 Cal. 534, 543, 108 P. 449, 503 (1910); *Blythe v. Ayres*, 96 Cal. at 577, 31 P. at 922 (1892).

<sup>39</sup>*Estate of Baird*, 193 Cal. 225, 278-279, 223 P. 974, 996 (1924); *Estate of*

*Lavell v. Adoption Institute*,<sup>40</sup> a landmark decision, a California Court of Appeals recognized prenatal legitimation. There, a father who lived with his child's mother for two years before the child was born was deemed to have legitimated the child pursuant to Civil Code § 230, despite the fact that the mother left his home before the birth of the child, refused to marry him and gave the child up for adoption.<sup>41</sup>

The California father who succeeds in legitimating his child acquires all rights granted legitimate fathers.<sup>42</sup> He and the mother are then equally entitled to the child's custody, services and earnings.<sup>43</sup> And if the mother is dead or refuses to take custody, the father's right to custody is paramount.<sup>44</sup> Similarly, a child who had been legitimated cannot be adopted without the consent of the natural, and now legal father.<sup>45</sup> Consequently, once a child is legitimated, the natural mother is unable to defeat the father's right to custody by relinquishing the child for adoption without his knowledge and consent.<sup>46</sup>

#### C. INADEQUACY OF LEGITIMATION: MATERNAL CONSENT— THE FATHER'S CATCH-22

While legitimation appears to offer the putative father desirous of gaining custody a simple and adequate course of action, California case and statutory law has provided the mother with a virtually absolute and insurmountable power to frustrate the father's attempts at establishing legal rights to his child.<sup>47</sup> Of course, if the mother refuses to marry the father, legitimation under Civil Code § 215 is

Gird, 157 Cal. at 545, 108 P. at 504 (1910); *Estate of Abate*, 166 Cal. App. 2d 282, 291, 333 P.2d 200, 205 (1958).

<sup>40</sup>185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960); The Court rationalized this recognition on the grounds that the unborn child of unwed parents is an existing person under CAL. CIV. CODE. § 29 (West 1954) for purposes of adoption — thus it can be received into the family of the father and be as much a part of the family as an unborn child of married parents. *See also* *Estate of Abate*, 166 Cal. App. 2d 282, 333 P.2d 200 (1958) and *Adoption of Sarkissian*, 215 Cal. App. 2d 554, 30 Cal. Rptr. 387 (1963).

<sup>41</sup>*Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960).

<sup>42</sup>*In re Navarro*, 77 Cal. App. 2d at 505, 175 P.2d at 899 (1946).

<sup>43</sup>CAL. CIV. CODE § 197 (West 1954); *In re Navarro*, 77 Cal. App. 2d at 505, 175 P.2d at 899 (1946).

<sup>44</sup>CAL. CIV. CODE § 197 (West 1954).

<sup>45</sup>CAL. CIV. CODE § 224 (West 1954); *In re McGrew*, 183 Cal. 177, 190 P. 804 (1920); *Adoption of Sarkissian*, 215 Cal. App. 2d 554, 30 Cal. Rptr. 387 (1963); *Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960).

<sup>46</sup>*In re McGrew*, 183 Cal. 177, 190 P. 804 (1920); *Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960).

<sup>47</sup>*See e.g.*, *Guardianship of Truschke*, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); *Adoption of Irby*, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964); *See also* Embick, *The Illegitimate Father*, 3 J. FAM. L. 321, 324 (1963), and Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 237 (1971).

impossible.<sup>48</sup> Furthermore, the mother can prevent the father from performing the steps necessary for legitimation pursuant to Civil Code § 230 as well.<sup>49</sup>

Since the mother has the right to custody,<sup>50</sup> she is able to frustrate the father's attempts at physically receiving the child into his family,<sup>51</sup> as required by the statute. As a result, the mother's consent or at least acquiescence in the father's attempts to legitimate is an unarticulated requirement for legitimation under Civil Code § 230.

A father's chances of gaining custody without legitimating his child are extremely slim.<sup>52</sup> All parental rights in an illegitimate child exist solely in the child's mother.<sup>53</sup> The natural father is not even entitled to notice of or preference in adoption proceedings brought by others.<sup>54</sup> In short, without legitimation, the father has no parental rights whatsoever.<sup>55</sup> "Maternal consent is his catch-22."<sup>56</sup>

The mother's control over the father's rights is well illustrated by three fairly recent California cases. In *Adoption of Laws*,<sup>57</sup> the natural father of a baby boy legitimated the child by marrying the mother after she gave her consent to adoption. The father filed a motion to dismiss the adoption on the grounds that he had not consented. While a legitimated child is for all purposes deemed to be legitimate from the time of its birth,<sup>58</sup> the California Court of Appeals held that "... legitimation by marriage subsequent to the giving of consent to adoption by a mother then unmarried does not retroactively operate to make the father's consent necessary."<sup>59</sup>

<sup>48</sup>CAL. CIV. CODE § 215 (West 1954). Clearly, the father cannot legally compel the mother to marry him.

<sup>49</sup>To successfully legitimate his child under CAL. CIV. CODE § 230 (West 1954), a father must satisfy three essential requirements: (a) He must publicly acknowledge the child as his own; (b) Receive the child into his family (with the consent of his wife if he is married); (c) Otherwise treat the child as if it were a legitimate child; *Estate of Flood*, 217 Cal. 763, 767, 21 P.2d 579, 580 (1933); *Guardianship of Truschke*, 237 Cal. App. 2d at 78, 46 Cal. Rptr. at 603 (1965); *Darwin v. Granger*, 174 Cal. App. 2d at 71-72, 344 P.2d at 358 (1959).

<sup>50</sup>CAL. CIV. CODE § 200 (West 1954); *Guardianship of Smith*, 42 Cal. 2d at 93, 265 P.2d at 890 (1954); *Guardianship of Truschke*, 237 Cal. App. 2d at 80, 46 Cal. Rptr. at 604 (1965); *Darwin v. Granger*, 174 Cal. App. 2d at 70, 344 P.2d at 357 (1959).

<sup>51</sup>See e.g., *Guardianship of Truschke*, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); *Adoption of Irby*, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964).

<sup>52</sup>*Id.*

<sup>53</sup>*Adoption of Laws*, 201 Cal. App. 2d at 500, 20 Cal. Rptr. at 68 (1962); *Darwin v. Granger*, 174 Cal. App. 2d at 70, 344 P.2d at 357 (1959).

<sup>54</sup>*Adoption of Laws*, 201 Cal. App. 2d at 500, 20 Cal. Rptr. at 68 (1962).

<sup>55</sup>*Id.*

<sup>56</sup>Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231, 237 (1971).

<sup>57</sup>201 Cal. App. 2d 494, 20 Cal. Rptr. 64 (1962).

<sup>58</sup>CAL. CIV. CODE § 230 (West 1954); *In re Navarro*, 77 Cal. App. 2d at 504-505, 175 P.2d at 899 (1946).

<sup>59</sup>*Adoption of Laws*, 201 Cal. App. 2d at 501, 20 Cal. Rptr. at 68 (1962).



The court viewed the natural mother of the illegitimate child as the father's agent in all matters affecting the child.<sup>60</sup> Once adoption proceedings are begun and the mother gives her consent, the court acquires subject matter and personal jurisdiction and retains this jurisdiction until final judgment is entered.<sup>61</sup> If the child is legitimated before entrance of this final judgment, the father's rights are limited to petitioning the court under Civil Code § 226(a) to withdraw the mother's consent.<sup>62</sup> At a subsequent hearing upon the petition, the court decides whether withdrawal of consent to adoption is reasonable and in the best interests of the child,<sup>63</sup> with the burden of proof apparently on the father. If the court determines that the child's interests are better served by adoption, the father's hopes of gaining parental rights are forever terminated.<sup>64</sup>

As bleak as it may appear to be, the plight of the father in *Adoption of Laws* is far better than that of the father who is prevented from ever legitimating his child. Both *Adoption of Irby*<sup>65</sup> and *Guardianship of Truschke*<sup>66</sup> demonstrate the hopeless dilemma of such a father. In *Adoption of Irby*, the child's mother refused the father's offer of marriage and money and consented to direct adoption immediately after birth. Since the father's efforts to receive the child into his family were successfully thwarted, he never legitimated the child<sup>67</sup> and thus acquired no parental rights.<sup>68</sup> The mother's consent to adoption was therefore found to be a sufficient relinquishment to authorize the court to enter a valid decree<sup>69</sup> without granting the father the opportunity to prove his competence and suitability as a parent.<sup>70</sup>

*Guardianship of Truschke*<sup>71</sup> goes even further in denying the putative father parental rights. The facts of *Truschke* are basically indistinguishable from those of *Irby*, except that in *Truschke*, the mother had merely placed the child in pre-adoptive foster care and had not signed any final relinquishment at the time of trial on the father's petition for guardianship.<sup>72</sup> In support of his petition the

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<sup>60</sup>*Id.* at 500, 20 Cal. Rptr. at 68.

<sup>61</sup>*Id.*; *Adoption of Barnett*, 54 Cal. 2d 370, 377, 6 Cal. Rptr. 562, 566, 354 P.2d 18, 22 (1960).

<sup>62</sup>*Adoption of Laws*, 201 Cal. App. 2d at 501, 20 Cal. Rptr. at 68-69 (1962).

<sup>63</sup>*Id.* at 501, 20 Cal. Rptr. at 69 (1962).

<sup>64</sup>*Id.*

<sup>65</sup>226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964).

<sup>66</sup>237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965).

<sup>67</sup>CAL. CIV. CODE § 230 (West 1954); *Estate of DeLavego*, 142 Cal. 158, 169, 75 P. 790, 795 (1904).

<sup>68</sup>*Adoption of Laws*, 201 Cal. App. 2d at 500, 20 Cal. Rptr. at 68 (1962).

<sup>69</sup>CAL. CIV. CODE § 224 (West 1954); *Adoption of Irby*, 226 Cal. App. 2d at 242, 37 Cal. Rptr. at 882 (1964).

<sup>70</sup>*Adoption of Irby*, 226 Cal. App. 2d at 241, 37 Cal. Rptr. at 882 (1964).

<sup>71</sup>237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965).

<sup>72</sup>*Guardianship of Truschke*, 237 Cal. App. 2d at 77, 46 Cal. Rptr. at 603 (1965).

father cited Probate Code §1407 (relied upon by the father in *Guardianship of Smith*<sup>73</sup>), which gives preference to a parent in awarding guardianship of a minor. In rejecting his argument and denying his petition, the court held that Probate Code §1407 is subordinate to Civil Code §200, so that the mother's right to custody — including her right to place the child up for adoption<sup>74</sup> — is in no way hindered by the natural father's assertion of a right to guardianship of his child.<sup>75</sup>

#### D. SUMMARY

Thus, the absurd state of California law. The natural mother of an illegitimate child has an absolute and exclusive right to custody.<sup>76</sup> If the mother dies, making no provision for guardianship, the putative father's claim to custody is paramount.<sup>77</sup> If the father lives with the mother before the child is born, he has a good chance of proving prenatal legitimation, thereby acquiring complete parental rights.<sup>78</sup> Similarly, if the father succeeds in legitimating his child after birth but before the mother relinquishes custody to an adoption agency, his status before the law is that of a parent whose child was not born out of wedlock.<sup>79</sup> And even when the father legitimates his child after the mother consents to adoption, his "inchoate rights of parenthood"<sup>80</sup> vest to the extent that he has a right to petition for withdrawal of consent under Civil Code §226(a) and to present his case at a hearing.<sup>81</sup> Yet the father who is unable to ever legitimate his child as the result of maternal opposition is completely powerless and without rights.<sup>82</sup>

Accordingly, California law in this area has developed in a way that gives the mother virtually absolute control over the destiny of her illegitimate child — she may keep the child herself,<sup>83</sup> give the child up for adoption<sup>84</sup> or permit the father to legitimate the child

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<sup>73</sup>42 Cal. 2d 91, 265 P.2d 888 (1954).

<sup>74</sup>CAL. CIV. CODE § 224 (West 1954).

<sup>75</sup>*Guardianship of Truschke*, 237 Cal. App. 2d at 80, 46 Cal. Rptr. at 604 (1965).

<sup>76</sup>CAL. CIV. CODE § 200 (West 1954).

<sup>77</sup>*Guardianship of Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954).

<sup>78</sup>*Adoption of Sarkissian*, 215 Cal. App. 2d 554, 30 Cal. Rptr. 387 (1963); *Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960); *Estate of Abate*, 166 Cal. App. 2d 282, 333 P.2d 200 (1958).

<sup>79</sup>*Estate of Lund*, 26 Cal. 2d at 482, 159 P.2d at 652 (1945); *In re Navarro*, 77 Cal. App. 2d at 505, 175 P.2d at 899 (1946).

<sup>80</sup>*Adoption of Laws*, 201 Cal. App. 2d at 501, 20 Cal. Rptr. at 69 (1962).

<sup>81</sup>*Id.* at 501, 20 Cal. Rptr. at 69.

<sup>82</sup>*Guardianship of Truschke*, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); *Adoption of Irby*, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964); *Adoption of Laws*, 201 Cal. App. 2d at 500, 20 Cal. Rptr. at 68 (1962); *Darwin v. Granger*, 174 Cal. App. 2d at 70, 344 P.2d at 357 (1959).

<sup>83</sup>CAL. CIV. CODE § 200 (West 1954).

<sup>84</sup>CAL. CIV. CODE § 224 (West 1954).

and thereby gain custody rights equal to those of other parents.<sup>85</sup> Why should the mother be allowed to play God in determining her child's future? Most courts rationalize their decision as being "in the best interests of the child."<sup>86</sup> It is extremely doubtful, however, that the child's best interests are always the mother's prime concern; or even if they are, that her decision will necessarily promote those best interests. Whether the natural father acquires any rights in his child in no way depends upon a consideration of the child's best interests, but rather is often a matter of pure chance. Did he live with the mother before she gave birth?<sup>87</sup> Can he convince her to marry him before she consents to adoption?<sup>88</sup> Is he able to gain physical custody of the child long enough to legitimate it?<sup>89</sup> Did the mother die without providing for the child's future?<sup>90</sup> Undoubtedly the child's best interests do not govern the outcome of the father's struggle for parental rights.

### III. EQUAL PROTECTION PROBLEMS OF PRESENT CALIFORNIA LAW

The above discussion demonstrates that at present legitimate fathers and all mothers enjoy extensive custodial rights, while illegitimate fathers in California have no existing or vested parental rights<sup>91</sup> and cannot acquire such rights save at the unfettered discretion of the mother. Thus, the potential for equal protection problems is obvious.

The Fourteenth Amendment of the United States Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." In determining whether state law is in violation of the Equal Protection Clause, the United States Supreme Court considers ". . . the facts and circumstances behind the law, the interests which the state claims to be protecting, and the interests of those disadvantaged by the classification."<sup>92</sup>

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<sup>85</sup> *Adoption of Sarkissian*, 215 Cal. App. 2d 554, 30 Cal. Rptr. 387 (1963); *Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960); *In re Navarro*, 77 Cal. App. 2d at 505, 175 P.2d at 899 (1946).

<sup>86</sup> *See e.g.*, *Adoption of Irby*, 226 Cal. App. 2d at 242, 37 Cal. Rptr. at 882 (1964); *Adoption of Laws*, 201 Cal. App. 2d at 501, 20 Cal. Rptr. at 67 (1962).

<sup>87</sup> *Adoption of Sarkissian*, 215 Cal. App. 2d 554, 30 Cal. Rptr. 387 (1963); *Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960).

<sup>88</sup> CAL. CIV. CODE § 215 (West 1954).

<sup>89</sup> CAL. CIV. CODE § 230 (West 1954).

<sup>90</sup> *Guardianship of Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954).

<sup>91</sup> *Adoption of Laws*, 201 Cal. App. 2d at 501, 20 Cal. Rptr. at 68 (1962).

<sup>92</sup> *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *See also Carrington v. Rash*, 380 U.S. 89 (1965) and *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

Generally, states are given great latitude and power in making classifications.<sup>93</sup> Every disparate classification embodied in a statute does not result in a constitutional violation.<sup>94</sup> If the interest prejudiced by the classification is not deemed by the Court to be fundamental, a presumption of statutory validity and constitutionality arises;<sup>95</sup> and so long as the distinction drawn by the state bears some rational relation to a legitimate state purpose, and some ground can be conceived to justify it, the Equal Protection Clause is not violated.<sup>96</sup> However, when the distinction imposed by state law infringes upon a fundamental right, this constitutional provision requires strict scrutiny of the classification to determine whether it is warranted or justified by a subordinating compelling state interest promoted by the statutory classification.<sup>97</sup>

Thus, two types of inquiries must be made to determine whether California's method of distinguishing between legitimate and illegitimate fathers with regard to determining their custody rights in a child relinquished for adoption violates the Equal Protection Clause. First, if a father's interest in the custody of his child can be deemed "fundamental," then California is faced with a virtually insurmountable burden of proof.<sup>98</sup> Second, if the interest cannot be labeled "fundamental," then the analysis is limited to determining whether any legitimate state interest is served by the present law.<sup>99</sup>

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<sup>93</sup> *Ferguson v. Skrupa*, 373 U.S. 726, 732 (1962); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

<sup>94</sup> *Williams v. Rhodes*, 393 U.S. at 30 (1968).

<sup>95</sup> *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 808-809 (1969); *McGowan v. Maryland*, 366 U.S. 420, 425 (1960).

<sup>96</sup> See e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970): The right to receive greater welfare benefits for a larger family is not fundamental; *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969): The right to receive an absentee ballot is not a fundamental right; *McGowan v. Maryland*, 366 U.S. 420 (1960): The right of certain vendors to sell merchandise on Sundays is not fundamental; *Goesaert v. Cleary*, 335 U.S. 464 (1948): The right of a woman to engage in the occupation of bartending is not fundamental.

<sup>97</sup> Such interests as freedom from discrimination based upon race (*McLaughlin v. Florida*, 379 U.S. 184 (1964)), the right of an individual to associate for the advancement of political beliefs (*Williams v. Rhodes*, 393 U.S. 23 (1968)), the right of qualified voters, regardless of their political persuasion, to cast their votes effectively (*Williams v. Rhodes*, 393 U.S. 23 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964)), freedom from monetary discrimination for those involved in the criminal process (*Rinaldi v. Yeager*, 384 U.S. 305 (1966)), freedom to travel throughout the United States (*Shapiro v. Thompson*, 394 U.S. 618 (1969)) and freedom to exercise other basic civil rights (*Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)) have been classified as fundamental by the United States Supreme Court.

<sup>98</sup> *McDonald v. Board of Election Commissioners*, 394 U.S. at 807 (1969); *Williams v. Rhodes*, 393 U.S. at 31 (1968).

<sup>99</sup> *Dandridge v. Williams*, 397 U.S. at 484-485 (1970); *McDonald v. Board of Election Commissioners*, 394 U.S. at 808-809 (1969); *McGowan v. Maryland*, 366 U.S. at 425 (1960).

## A. FUNDAMENTAL INTEREST ANALYSIS

1. CUSTODY OF ONE'S ISSUE —  
A FUNDAMENTAL INTEREST

The importance of the family and the fundamental and essential nature of the right to conceive and raise one's children have been firmly established and frequently emphasized by the United States Supreme Court.<sup>100</sup> In numerous decisions in which the Court has attempted to give meaning to the term "liberty" as employed in the Fourteenth Amendment, it has included within the confines of this term the right of a parent to bring up his child.<sup>101</sup> This right has been described by the Court as "cardinal,"<sup>102</sup> "essential,"<sup>103</sup> and "far more precious than a property right."<sup>104</sup> The Supreme Court recently stated:

It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when an appeal is made to liberties which derive merely from shifting economic arrangements.'<sup>105</sup>

Nor has the existence and recognition of a basic fundamental right to custody of one's children been limited to cases involving legitimate offspring. In *Stanley v. Illinois*, the United States Supreme Court held that an Illinois statute depriving unwed fathers of the right to retain custody of their illegitimate children without a hearing on parental fitness or proof of neglect was repugnant to both the Due Process and Equal Protection Clauses.<sup>106</sup> While the Court did not expressly hold that the father's interest in custody of his children is fundamental, an analysis of the Court's reasoning in light of other decisions compels this conclusion.<sup>107</sup>

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<sup>100</sup> *United States v. Kras*, \_\_\_ U.S. \_\_\_, 93 S.Ct. 631 (1973); *Stanley v. Illinois*, 405 U.S. at 651 (1972); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Skinner v. Oklahoma*, 316 U.S. at 541 (1942).

<sup>101</sup> *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972); *Griswold v. Connecticut*, 381 U.S. at 495 (1965) (concurring opinion of Mr. Justice Goldberg); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>102</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *See also Stanley v. Illinois*, 405 U.S. at 651 (1972).

<sup>103</sup> *Meyer v. Nebraska*, 262 U.S. at 399 (1923).

<sup>104</sup> *May v. Anderson*, 345 U.S. at 533 (1952); *See also Stanley v. Illinois*, 405 U.S. at 651 (1972).

<sup>105</sup> *Stanley v. Illinois*, 405 U.S. at 651 (1972), *citing Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (concurring opinion).

<sup>106</sup> *Stanley v. Illinois*, 405 U.S. at 658 (1972).

<sup>107</sup> Two United States District Courts have so interpreted *Stanley*. *See Reed v. Nebraska School Activities Association*, 341 F. Supp. 258, 261-262 (D. Nev. 1972) and *Mancuso v. Taft*, 341 F. Supp. 574, 580 (D. R. I. 1972); *See also Note, Constitutional Law — Stanley v. Illinois: New Rights for Putative Fathers*, 21 DEPAUL L. REV. 1036, 1039 (1972) and *Note, Right of Unwed Father to a Fitness Hearing Prior to State Imposition of Wardship Over His Illegitimate*

The principal defect of Illinois' statutory scheme was its denial of procedural due process to fathers desirous of retaining custody of their illegitimate offspring. "The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property."<sup>108</sup> These interests include the fundamental personal liberties grounded in the Constitution<sup>109</sup> and the property interests established and defined by existing rules or understandings that stem from an independent source such as state law.<sup>110</sup> Before the Court could determine that due process protects a father's interest in the custody of his illegitimate children, it had to classify this interest as a fundamental liberty or a property right.<sup>111</sup> Since illegitimate fathers had no recognized right to custody of their children under Illinois statutory or case law,<sup>112</sup> the label of "property" is inappropriate to rationalize the Court's decision. Therefore, the conclusion that the illegitimate father's custody right is a basic fundamental interest within the scope of the Constitutional guarantee of "liberty" is unavoidable.

The fact that this right is not expressly enumerated in the Constitution does not foreclose it from the protection given other fundamental personal liberties.<sup>113</sup> In *Griswold v. Connecticut*,<sup>114</sup> the Court recognized "... that specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance."<sup>115</sup> Within these penumbras the Court has included the right to marital privacy,<sup>116</sup> freedom to use contraceptives,<sup>117</sup> the right of procreation,<sup>118</sup> the right to an abortion,<sup>119</sup>

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*Children*, 7 SUFFOLK U.L. REV. 159, 163 (1972).

<sup>108</sup> Board of Regents v. Roth, 408 U.S. at 569 (1972).

<sup>109</sup> Board of Regents v. Roth, 408 U.S. at 572 (1972); *Griswold v. Connecticut*, 381 U.S. at 485 (1965); *Id.* at 488-489 (concurring opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1933); *Gitlow v. New York*, 268 U.S. 652, 666 (1924).

<sup>110</sup> Board of Regents v. Roth, 408 U.S. at 577 (1972); *See e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970): Welfare benefits received pursuant to statutes defining eligibility requirements are property interests protected by the Due Process Clause, as are a citizen's interest in retaining a driver's license (*Bell v. Burson*, 402 U.S. 535 (1971)) and receiving unemployment compensation (*Sherbert v. Verner*, 374 U.S. 398 (1963)).

<sup>111</sup> Board of Regents v. Roth, 408 U.S. at 570-71 (1972).

<sup>112</sup> *Stanley v. Illinois*, 405 U.S. at 650 (1972).

<sup>113</sup> *Roe v. Wade*, — U.S. —, 93 S. Ct. 705, 726 (1973); *Griswold v. Connecticut*, 381 U.S. at 488-92 (1965) (concurring opinion of Mr. Justice Goldberg).

<sup>114</sup> 381 U.S. 479 (1965) (plurality opinion).

<sup>115</sup> *Id.* at 484.

<sup>116</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>117</sup> *Roe v. Wade*, — U.S. —, 93 S. Ct. 705, 726 (1973); *United States v. Kras*, — U.S. —, 93 S. Ct. 631, 637 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>118</sup> *Skinner v. Oklahoma*, 316 U.S. at 541 (1942).

<sup>119</sup> *Roe v. Wade*, — U.S. —, 93 S. Ct. 705 (1973); *Doe v. Bolton*, — U.S. —, 93 S. Ct. 739 (1973).

freedom to marry a person of another race,<sup>120</sup> "... the right of an individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, ... and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men."<sup>121</sup> In *Stanley*, the Court added parental custody rights to this list of fundamental interests.

The fact that the Court based its decision on the Equal Protection Clause as well as the Due Process Clause further supports the argument that *Stanley* establishes a fundamental right to custody in the illegitimate father.<sup>122</sup> Once the Court concluded that all Illinois parents are constitutionally entitled to a hearing on fitness before their children are removed from their custody, it had no trouble determining that granting such a hearing to some parents while denying it to others "... is inescapably contrary to the Equal Protection Clause."<sup>123</sup> Were the father's interest in custody not "fundamental," then according to previous decisions of the Court, *Stanley* would have had the burden of proving that no legitimate state purpose can be conceived to justify Illinois' classification.<sup>124</sup> Since this was not the approach taken by the *Stanley* court,<sup>125</sup> there remains little doubt that this case recognizes the fundamental nature of the father's right to retain custody of his illegitimate offspring.

Subsequent actions of the Court strongly indicate that the interest recognized in *Stanley* is not limited to those fathers seeking to *retain* custody, but rather is shared by fathers who wish to *assume* the responsibilities of parenthood as well.<sup>126</sup> The Court recently vacated the decision of the Supreme Court of Wisconsin, which denied an illegitimate father who had never enjoyed custody of his child the right to notice of adoption proceedings and a hearing on parental

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<sup>120</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>121</sup> *Board of Regents v. Roth*, 408 U.S. at 572 (1972), *citing Meyer v. Nebraska*, 262 U.S. at 399 (1923).

<sup>122</sup> *Stanley v. Illinois*, 405 U.S. at 658 (1972).

<sup>123</sup> *Id.*

<sup>124</sup> *Dandridge v. Williams*, 397 U.S. 471 (1970); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969); *McGowan v. Maryland*, 366 U.S. 420 (1960).

<sup>125</sup> *Stanley v. Illinois*, 405 U.S. at 654-56 (1972): The Court felt that even if most unmarried fathers are unsuitable and neglectful parents, this is an inadequate reason to justify the Illinois presumption that all fathers are in this category and to deny all unwed fathers a hearing on parental fitness. Thus, a state's interest in administrative convenience and efficiency in determining custody disputes is insufficient to overcome the putative father's interest in retaining custody of his child.

<sup>126</sup> *State ex. rel. Lewis v. Lutheran Social Services*, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated sub nom.*, *Rothstein v. Lutheran Social Services*, 405 U.S. 1051 (1972); *Vanderlaan v. Vanderlaan*, 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970), *vacated*, 405 U.S. 1051 (1972).

fitness, and remanded the case for further consideration in light of *Stanley*.<sup>127</sup> Since California's statutory scheme results in a similar denial,<sup>128</sup> the State must demonstrate a compelling interest to justify this discriminatory treatment of illegitimate fathers.<sup>129</sup>

## 2. CALIFORNIA'S INTEREST IN DENYING THE PUTATIVE FATHER THE RIGHTS GRANTED LEGITIMATE FATHERS WHEN THE MOTHER RELINQUISHES THEIR CHILD FOR ADOPTION.

California courts have advanced numerous arguments to justify denying the illegitimate father notice of adoption proceedings, a chance to be heard and the right to grant or withhold consent. The most persuasive is that in favor of administrative efficiency and the smooth operation of child placement agencies.<sup>130</sup> If the father's custody rights are fundamental and therefore must be protected in every adoption proceeding, the result would be an increased workload for those who must secure the necessary consents and potential delay when the father could not be found.<sup>131</sup> What should the State do if the mother provides a list of five possible fathers and cannot identify which is the real one? What if the individual identified by the mother denies paternity? What if the father cannot be located for personal service?

In *Stanley*, the United States Supreme Court expressly rejected the administrative convenience argument as a sufficient reason to deny the illegitimate father a chance to establish his competence to care for his children.<sup>132</sup> While the potential problems of granting the

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<sup>127</sup> See *State ex rel. Lewis v. Lutheran Social Services*, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated sub nom.*, *Rothstein v. Lutheran Social Services*, 405 U.S. 1051 (1972).

<sup>128</sup> Under CAL. CIV. CODE § 224 (West 1954), only the consent of the mother to adoption is necessary where an illegitimate child is concerned. The father is denied even notice of the adoption proceedings and a chance to be heard. (*Adoption of Laws*, 201 Cal. App. 2d at 500, 20 Cal. Rptr. at 68 (1962)).

<sup>129</sup> *McDonald v. Board of Election Commissions*, 394 U.S. at 807 (1969); *Williams v. Rhodes*, 393 U.S. at 31 (1968).

<sup>130</sup> *Adoption of Irby*, 226 Cal. App. 2d at 242, 37 Cal. Rptr. at 882 (1964); See also Comment, *Disposition of the Illegitimate Child — Father's Right to Notice*, 1968 U. ILL. L. FOR. 232, 236.

<sup>131</sup> *Adoption of Irby*, 226 Cal. App. 2d at 242, 37 Cal. Rptr. at 882 (1964).

<sup>132</sup> *Stanley v. Illinois*, 405 U.S. at 656-657 (1972): The Court stated:

[T]he establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy



putative father the procedural safeguards guaranteed other parents are real and substantial, they are not insurmountable and do not justify depriving those fathers anxious and able to assume custody the opportunity to do so.<sup>133</sup> When a legitimate child is relinquished for adoption by the mother, obtaining the consent of the legitimate father can also lead to administrative difficulties, delay and uncertainty.<sup>134</sup> Yet no one asserts that he should not receive notice of the proceedings, or that his consent should not be required.<sup>135</sup> California Civil Code § 224 provides for notification of adoption proceedings by publication if a father who does not have custody and who has for one year willfully failed to pay for the care, support and education of his child cannot be located for personal service. This procedure could be used when the identity of the illegitimate father could not be ascertained or when he could not be located.<sup>136</sup> The statute lists several situations under which the consent of one or both of the parents is not required for a valid adoption. The need for consent of an illegitimate father who has shown no interest in his child and who does not respond to notification of adoption proceedings (whether personal or by publication) could be dispensed with.<sup>137</sup> Moreover, the putative father interested in obtaining custody of his child is not likely to be difficult to locate. He probably will have performed certain acts (for example, acknowledging the child, keeping in close contact with the mother, contributing to its support) establishing his paternity.<sup>138</sup>

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that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

<sup>133</sup> Stanley v. Illinois, 405 U.S. at 656-657 (1972); See also Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. at 1607 (1972).

<sup>134</sup> Comment, *Disposition of the Illegitimate Child — Father's Right to Notice*, 1968 U. ILL. L. FOR. at 237.

<sup>135</sup> CAL. CIV. CODE § 224 (West 1954).

<sup>136</sup> In Note, *Domestic Relations — Putative Father's Right to Custody of His Child*, 1971 WIS. L. REV. 1262, 1270-71, the author discusses the problems presented by notice by publication of adoption proceedings of an illegitimate child — namely, "the unhealthy notoriety which would befall those involved." While there is some validity to this argument, our society is changing and developing a more open attitude towards the problems of illegitimacy. It is unlikely that notice by publication would have any long-term detrimental effect upon those involved, especially the child, whose name is likely to be changed after completion of adoption proceedings.

<sup>137</sup> See Stanley v. Illinois, 405 U.S. at 657, n. 9 (1972).

<sup>138</sup> Comment, *Disposition of the Illegitimate Child — Father's Right to Notice*, 1968 U. ILL. L. FOR. at 237.

Along the same line of reasoning, the State asserts that unmarried fathers so seldom desire custody of their children and are so seldom fit parents that it is justified in denying all such fathers any rights.<sup>139</sup> This type of argument has been unsuccessful in a number of cases decided by the United States Supreme Court involving both fundamental and non-fundamental rights.<sup>140</sup> In *Stanley*, the alleged fact that most unmarried fathers are unsuitable and neglectful parents<sup>141</sup> was found to be an insufficient basis for the Illinois presumption that all unmarried fathers fall within this category.<sup>142</sup> The Court felt that all fathers should at least be granted the opportunity to prove their fitness and retain custody if successful in establishing their suitability as parents.<sup>143</sup> Similarly, the fact that most illegitimate fathers may have no interest in their child is no reason to deprive those fathers who do desire custody the rights and responsibilities that generally accompany parenthood.<sup>144</sup>

In support of its treatment of the putative father, the State also claims that if he were permitted to block adoption proceedings and gain custody, unmarried mothers would refuse to relinquish their illegitimate offspring to adoption agencies<sup>145</sup> and potential adoptive parents would be discouraged "... from opening their hearts and homes to unwanted children..."<sup>146</sup> for fear that the father could subsequently set aside an adoption decree. Yet if the mother's decision to retain or relinquish custody is motivated by a desire to frustrate the establishment of a relationship between father and child, she should not exercise the control she now has in determining her child's destiny. Granting the father parental rights works to reduce the mother's power and thereby avoids these potential problems. Furthermore, if a court acquires jurisdiction to commence adoption proceedings only after furnishing the putative father notice, a chance

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<sup>139</sup> *Stanley v. Illinois*, 405 U.S. at 654 (1972).

<sup>140</sup> In *Carrington v. Rash*, 380 U.S. 89 (1965) the Court found that a Texas statute denying all servicemen, not residents of Texas before induction, the right to vote in Texas, violated the Equal Protection Clause. While the Court recognized that Texas had a legitimate interest in restricting its electorate to state residents, it felt that better methods were available for distinguishing servicemen who were in fact residents from those who were not without depriving all servicemen of the vote. (*Id.* at 95-96); In *Bell v. Burson*, 402 U.S. 535 (1971) a Georgia license suspension system by which the license of drivers involved in accidents was suspended without a hearing on the question of fault was found to be repugnant to the Due Process Clause in spite of the fact that most drivers involved in accidents are likely to have been wholly or partially at fault.

<sup>141</sup> Argument advanced by Illinois in *Stanley v. Illinois*, 405 U.S. at 654 (1972).

<sup>142</sup> *Stanley v. Illinois*, 405 U.S. at 654-655 (1972).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 657, n. 9.

<sup>145</sup> *Adoption of Irby*, 226 Cal. App. 2d at 242, 37 Cal. Rptr. at 882 (1964).

<sup>146</sup> *Adoption of Irby*, 226 Cal. App. 2d at 241, 37 Cal. Rptr. at 882 (1964); *Adoption of Laws*, 201 Cal. App. 2d at 498, 20 Cal. Rptr. at 66 (1962).

to be heard and the right to consent to the adoption, no uncertainty would exist as to whether an adoption decree could subsequently be set aside.

Another problem the State foresees in granting the illegitimate father the right of "first refusal"<sup>147</sup> is the potential for fraud, coercion, grave abuses in adoption proceedings<sup>148</sup> and the possibility of the illegitimate child "...becoming the prey of designing persons."<sup>149</sup> In other words, the State fears the opening of a market for the purchase of paternal consents by anxious adoptive parents and a consequent deluge of fraudulent assertions of fatherhood for purposes of economic gain. The likelihood of problems with sale of parental consents, however, is far greater under existing law. Since unwed mothers have sole authority to consent to adoption, they have ample opportunity to engage in conduct of this type. Requiring the father's consent curtails the mother's power to determine who acquires custody of the child, thereby making her consent a far less marketable commodity. Furthermore, any potential problem of this sort could be avoided by sufficiently limiting the putative father's power to frustrate adoption. His right to withhold consent should be restricted to those situations in which he desires custody of the child himself and is in a position to provide a suitable home.<sup>150</sup> The need for his consent could be dispensed with if he does not wish to assume custody or if after hearing the father, a court determines that he is not a fit parent, and the child's best interests would be better promoted by adoption.<sup>151</sup>

The overriding factor which is said to determine every court decision is the "best interests of the child."<sup>152</sup> Yet why are the best

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<sup>147</sup> *Adoption of Irby*, 226 Cal. App. 2d at 241, 37 Cal. Rptr. at 882 (1964).

<sup>148</sup> *Id.* at 241-242, 37 Cal. Rptr. at 882 (1964).

<sup>149</sup> *Adoption of Irby*, 226 Cal. App. 2d at 241, 37 Cal. Rptr. at 882 (1964); *Adoption of Laws*, 201 Cal. App. 2d at 498, 20 Cal. Rptr. at 66 (1962); CAL. CIV. CODE § 224 (West 1954).

<sup>150</sup> H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 254 (Proposed Uniform Legitimacy Act, Section 25) (1971).

<sup>151</sup> *Id.*; The United States Supreme Court confronted similar arguments in *Glover v. American Guarantee and Liability Insurance Company*, 391 U.S. 73 (1968) when it decided that Louisiana state law giving only mothers of legitimate children the right to bring a wrongful death action for the death of her child violated the Equal Protection Clause. While recognizing that extending this right to mothers of illegitimate children may invite fraudulent assertions of motherhood, the Court stated that "[w]here the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." (*Id.* at 76). Since the State's interest in preventing fraud does not warrant discrimination on the basis of legitimacy where a purely economic interest is at stake, it cannot justify the discriminatory treatment of the illegitimate father with respect to custody. (*Stanley v. Illinois*, 405 U.S. at 651 (1972)).

<sup>152</sup> *Guardianship of Smith*, 42 Cal. 2d at 93, 265 P.2d at 890 (1954); *Adoption of Irby*, 226 Cal. App. 2d at 242, 37 Cal. Rptr. at 882 (1964).

interests of an illegitimate child furthered by treating him differently than a legitimate child as far as his relationship with his father is concerned?<sup>153</sup> How can a court determine that it is in the best interests of a child to be adopted by strangers rather than to be brought up by his father, when the father is denied the opportunity to prove his fitness and suitability as a parent?<sup>154</sup> Are the child's best interests necessarily promoted by permitting the mother to foreclose the natural father's chances of gaining custody?<sup>155</sup> If the father is able to present his case, the court is faced with all possible alternatives as to the child's future. With this information, the court will be better equipped to determine where the best interests of the child do in fact lie.<sup>156</sup>

If the father wishes to assume custody and the child's best interests are thereby served, the law should not frustrate his desire to accept the rights and responsibilities of parenthood on the basis of the fact that the child was born out of wedlock. If indeed *Stanley* recognizes a parent's interest in the custody of his child as one of the fundamental personal liberties grounded in the Constitution,<sup>157</sup> then California's treatment of the illegitimate father is constitutionally indefensible and a blatant denial of equal protection.

## B. NON-FUNDAMENTAL INTEREST ANALYSIS

A defensible though unpersuasive argument remains that *Stanley* cannot be interpreted as establishing the fundamental nature of parental custody rights.<sup>158</sup> While the Court in *Stanley* had the opportunity to expressly and unambiguously recognize such a fundamental right, it failed to do so.<sup>159</sup> Instead it concluded that "... Stanley's interest in retaining custody of his children is cognizable and substantial."<sup>160</sup> Since the United States Supreme Court has already rejected the contention that all classifications on the basis of legitimacy are

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<sup>153</sup> Under CAL. CIV. CODE § 224 (West 1954), a legitimate child cannot be adopted without the consent of both parents, while for adoption of an illegitimate child, only the consent of the mother is necessary.

<sup>154</sup> Adoption of Laws, 201 Cal. App. 2d at 500, 20 Cal. Rptr. at 68 (1962).

<sup>155</sup> See e.g., Guardianship of Truschke, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964).

<sup>156</sup> See Comment, *Disposition of the Illegitimate Child — Father's Right to Notice*, 1968 U. ILL. L. FOR. at 238; Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 502 (1967).

<sup>157</sup> There is good reason to believe that it does. (See discussion in text at note 107, *supra*).

<sup>158</sup> Note, *Stanley v. Illinois: Expanding the Rights of the Unwed Father*, 34 U. PITT. L. REV. 303 (1972); Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1597 (1972).

<sup>159</sup> This was the argument advanced in Brief for Appellant at 19, *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>160</sup> *Stanley v. Illinois*, 405 U.S. at 652 (1972).

inherently suspect,<sup>161</sup> the putative father under this analysis would bear the burden of proving that no legitimate state interest is furthered by denying him the rights granted other parents in adoption proceedings.<sup>162</sup> While this burden is extremely difficult to bear, it is not insurmountable.<sup>163</sup>

The Court has held that when a state grants certain rights to one group of people, but denies them to others similarly situated, there must be some state interest promoted by the classification to constitutionally justify its existence.<sup>164</sup> The Court already determined that illegitimate children, mothers and fathers are situated similarly

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<sup>161</sup> See *Labine v. Vincent*, 401 U.S. 532 (1971) in which the Court, over the strong dissent of four justices, upheld Louisiana's intestate succession laws barring illegitimate children from sharing in their father's estate as legitimate children are able to do. The Court stated that:

Levy did not say and cannot be read to say that a state can never treat an illegitimate child different from legitimate offspring. (*Id.* at 536)

<sup>162</sup> *Dandridge v. Williams*, 397 U.S. 471 (1970); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969); *McGowan v. Maryland*, 366 U.S. 420 (1960).

<sup>163</sup> Where equal protection is an issue in litigation, the burden on an individual seeking to establish that no legitimate state interest is furthered by a statutory classification denying him a non-fundamental right is not as great as the burden on a state attempting to establish a compelling interest which justifies denying certain citizens fundamental rights. While the United States Supreme Court has rarely recognized the existence of a compelling state interest sufficient to override fundamental rights, individuals have been able to carry their less stringent burden of proof in a number of cases (See note 164, *infra*).

<sup>164</sup> See e.g., *Gomez v. Perez*, —U.S.—, 93 S. Ct. 872 (1973) (granting paternal support rights to legitimate children, while denying them to illegitimate children, violates the Equal Protection Clause); *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972) (Louisiana's Workmen's Compensation Statutes denying unacknowledged dependent illegitimates recovery rights enjoyed by legitimate children and acknowledged illegitimate children for the death of their father violated the Equal Protection Clause); *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimate children were denied equal protection by a law precluding them from bringing a wrongful death action for the death of their mother, as legitimate children were permitted to do); *Glonn v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968) (Louisiana state law giving only mothers of legitimate children the right to bring a wrongful death action for the death of her child violated the Equal Protection Clause); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (a state cannot deny access to its courts to individuals who seek judicial dissolution of their marriages solely because of their inability to pay the costs of bringing the action); *Douglas v. California*, 372 U.S. 353 (1963) (indigent defendants were denied equal protection of the law when they were not given the assistance of counsel on appeal since the result was that the kind of appeal a man enjoys would depend on the amount of money he has); *Griffin v. Illinois*, 351 U.S. 12 (1955) (Illinois granted the right of appellate review on non-constitutional grounds to those who could afford to buy a trial transcript. Therefore, the poor were denied appellate review when appeal was based on non-constitutional grounds. This was held to be an unconstitutional denial of equal protection to the poor); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (a state law which provided for sterilization of criminals convicted of committing certain types of crimes, without prescribing sterilization for those convicted of committing the same quality of offense was held unconstitutional).

with legitimate children, mothers and fathers as far as familial relationships, rights and responsibilities are concerned.<sup>165</sup> Therefore, if state law imposes a distinction on the basis of legitimacy alone, and no legitimate state purpose is promoted by the classification, it violates the Equal Protection Clause of the Fourteenth Amendment.<sup>166</sup>

The putative father in California is armed with a persuasive argument that state law denies those illegitimate fathers whose identity is known or readily ascertainable and who desire custody of their children the equal protection of the laws by depriving them of notice of adoption proceedings, a chance to be heard and the right to grant or withhold their consent to adoption.<sup>167</sup> Limiting custody rights to those fathers who have in some way made their identity known — for example, by acknowledging the child as their own, contributing to or attempting to contribute to the mother's expenses and the child's support, attempting to legitimate the child — and who desire custody completely negates any rationale for distinguishing between this father and a father who has succeeded in legitimating his child. A state would encounter no greater administrative problems in notifying and granting a hearing to illegitimate fathers whose identity and whereabouts are known than it does in granting these rights to a divorced legitimate father or to a father who was able to satisfy the requirements of legitimation. Nor is there reason to presume that a father who has succeeded in legitimating his child is more likely to be a fit parent than a father whose attempts at legitimation were frustrated by the mother. No problems of fraud or abuse in adoption proceedings will result if parental rights are limited to those fathers anxious to gain custody. Moreover, it is impossible to determine whether the child's best interests are promoted by adoption without considering the alternative available when the natural father seeks custody. Therefore, narrowing the claim for equal treatment to those illegitimate fathers who are readily identifiable and who desire custody of their children compels the conclusion that California's statutory and judicial scheme denying these fathers custody rights

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<sup>165</sup> *Gomez v. Perez*, — U.S. —, 93 S. Ct. 872 (1973); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1973); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glonn v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968).

<sup>166</sup> *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glonn v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968).

<sup>167</sup> Under CAL. CIV. CODE § 224 (West 1954), legitimate parents and illegitimate mothers enjoy these rights. Even a father who for one year has willfully failed to pay for the care, support and education of his child when able to do so is entitled to personal notification of adoption proceedings and a chance to be heard.

must fall even by the less stringent test applied when non-fundamental interests are threatened.<sup>168</sup>

#### IV. CONCLUSION

A number of jurisdictions have recognized the putative father's right to grant or withhold consent to adoption under the proper circumstances.<sup>169</sup> Some states require the father's consent where his paternity has been established by a court,<sup>170</sup> where he has acknowledged his child<sup>171</sup> or where he has voluntarily contributed to the child's support.<sup>172</sup>

Other states have recognized custody rights in the illegitimate father superior to the rights of all but the mother on the theory that the statutory duties and obligations which have been imposed on the unwed father give rise to corresponding rights and privileges.<sup>173</sup> In establishing the father's right to custody on these grounds, the New Jersey Juvenile and Domestic Relations Court reasoned:

Since the father's duty to support and educate the child is to the same extent as if the child was born in lawful wedlock, it should follow that the father's right to custody should be almost as coextensive. Thus, while his right is not as great as that of the mother, it is certainly far greater than that of a stranger. It is clear that the present trend of legal and popular thinking is that a willing father of an illegitimate child should have a right to custody if it is in the best interests of the child, particularly where the mother has abandoned the child, either actually or constructively, by surrendering the child to an agency for adoption.<sup>174</sup>

California is among the vast majority of states imposing support obligations upon the putative father.<sup>175</sup> Yet it has been unwilling to recognize the right-duty relationship in custody disputes over an illegitimate child.

Custody rights have also been granted the putative father on the reasoning that a father, expressing a sincere interest in and concern

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<sup>168</sup> See e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glon v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968).

<sup>169</sup> See Lipert, *The Need for a Clarification of the Putative Father's Legal Rights*, 8 J. FAM. L. 398, 408-411 (1968).

<sup>170</sup> ARIZ. REV. STAT. ANN. § 8-103 (1956); ARK. STAT. ANN. § 56-106(c) (1947).

<sup>171</sup> ARIZ. REV. STAT. ANN. § 8-103 (1956).

<sup>172</sup> See *In re Adoption of a Minor*, 155 F.2d 870 (D.C. Cir. 1946); See also IND. STAT. ANN. § 3-120 (1968) which requires the court to consider the objections of a father who has adequately contributed to his child's support.

<sup>173</sup> See *State in Interest of M*, 25 Utah 2d 101, 476 P.2d 1013 (1970); *In re Guardianship of C*, 98 N.J. Super. 474, 237 A.2d 652 (1967).

<sup>174</sup> *In re Guardianship of C*, 98 N.J. Super. 474, 237 A.2d 652, 658-59 (1967).

<sup>175</sup> CAL. CIV. CODE § 196(a) (West 1954); *Schumm v. Berg*, 37 Cal. 2d 174, 231 P.2d 39 (1951); *Stargell v. Stargell*, 263 Cal. App. 2d 504, 69 Cal. Rptr. 715 (1968); CAL. PEN. CODE § 270 (West 1970) imposes criminal liability for failure to support.

for his child, should have a chance to present his case in court.<sup>176</sup> Denying the father this right is not only prejudicial to his interests, but may also work to deprive the child of a potential meaningful and important relationship:

The relationship of the child born out of wedlock with those who assume the parental role, the putative father or otherwise, could well be the most important relationship in his life. It may be as meaningful a relationship as he ever achieves, and it should not be subject to termination at the judicially unreviewable fiat of the mother and a placement agency.<sup>177</sup>

On this reasoning, Michigan has granted the illegitimate father custody rights when the mother relinquishes their child for adoption, if he acknowledges paternity and is a fit parent.<sup>178</sup> The Michigan court felt that a father's love for his child "... entails rights of the highest order, rights which should not be subject to easy elimination by actions of a third party."<sup>179</sup>

Finally, *Stanley* and subsequent cases remanded for further consideration in light of *Stanley* convinced the Supreme Court of Illinois that the provisions of Illinois' Adoption and Paternity Acts denying the putative father those rights granted other parents are unconstitutional violations of equal protection principles.<sup>180</sup> The Illinois Court's decision in *People ex rel. Slawek v. Covenant Children's Home*<sup>181</sup> indicates that the illegitimate father, like other parents, will now be entitled to notice of adoption proceedings, the right to grant or withhold consent and custody of his child unless he is proved unfit in judicial proceedings.

Regardless of the basis for recognition of parental rights in the putative father, future establishment and expansion of his rights are inevitable.<sup>182</sup> While California has been willing to follow this trend under some circumstances,<sup>183</sup> its present law still contains ridiculous

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<sup>176</sup> *Torres v. Gonzales*, 80 N.M. 35, 450 P.2d 921, 922 (1969); *In re Mark T*, 8 Mich. App. 122, 154 N.W.2d 27, 42-43 (1967).

<sup>177</sup> *In re Mark T*, 8 Mich. App. 122, 154 N.W.2d 27, 39 (1967).

<sup>178</sup> *In re P*, 36 Mich. App. 497, 194 N.W.2d 18 (1972); *In re Mark T*, 8 Mich. App. 122, 154 N.W.2d 27 (1967).

<sup>179</sup> *In re P*, 36 Mich. App. 497, 194 N.W.2d 18, 20 (1972).

<sup>180</sup> *People ex. rel. Slawek v. Covenant Children's Home*, 52 Ill. 2d 20, 284 N.E.2d 291, 292 (1972).

<sup>181</sup> 52 Ill. 2d 20, 284 N.E.2d 291 (1972).

<sup>182</sup> See e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *State ex rel. Lewis v. Lutheran Social Services*, 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated sub nom.*, *Rothstein v. Lutheran Social Services*, 405 U.S. 1051 (1972); *Vanderlaan v. Vanderlaan*, 126 Ill. App. 2d 410, 262 N.E.2d 717 (1970), *vacated*, 405 U.S. 1051 (1972).

<sup>183</sup> See e.g., *Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960) in which a California Court of Appeals recognized prenatal legitimation, and *Guardianship of Smith*, 42 Cal. 2d 91, 265 P.2d 888 (1954) in which the California Supreme Court granted custody rights to the putative father upon the mother's death.



inequities and inconsistencies in its treatment of the illegitimate father.<sup>184</sup>

Statutory revision offers the most effective means of remedying these inequities and inconsistencies. California Civil Code §224 should be amended to require that reasonable efforts be made to notify the putative father of adoption proceedings and to provide for notice by publication if the father cannot be identified or located. The statute should ensure that the putative father have the opportunity to present his case at custody proceedings, and should require his consent to adoption of the child by third parties. The father's right to grant or withhold consent should be limited to those situations in which he desires custody himself and is in a position to provide a suitable home for the child. The necessity of his consent should be dispensed with if the court, after hearing the father, determines that an award of custody to him would be detrimental to the child, and that adoption by third parties would better promote the child's best interests.<sup>185</sup>

No persuasive reason exists for permitting a mother who seeks to relinquish her child to defeat the rights of a father who wishes to raise and provide for it.<sup>186</sup> Nor is there a rational basis for granting a legitimate father, a father who has legitimated his child, or an illegitimate father who seeks custody after the child's mother has died, full and complete parental rights, while granting the father whose attempts at legitimation have been frustrated no rights whatsoever. It cannot be assumed that the reasons for granting legitimate fathers and all mothers parental rights do not apply with equal force to the illegitimate father. Is the bond of blood and the natural love and affection between a parent and child necessarily weaker because the child is born out of wedlock?<sup>187</sup> Does it necessarily follow that a father loves his child only when he is married to the mother at the time of birth?<sup>188</sup> If indeed the best interests of the child are to be the overriding consideration, legitimacy should not be a factor in determining custody disputes.

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<sup>184</sup> See e.g., *Guardianship of Truschke*, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); *Adoption of Irby*, 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964).

<sup>185</sup> See H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 254 (Proposed Uniform Legitimacy Act, Section 25) (1971).

<sup>186</sup> *In re Brennan*, 270 Minn. 455, 134 N.W.2d 126, 132 (1965).

<sup>187</sup> *In re Guardianship of C*, 98 N.J. Super. 474, 237 A.2d 652, 662 (1967).

<sup>188</sup> *Id.*