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Article 6

# Constitutional Law-Fourteenth Amendment Equal Protection-Rights of the Unwed Father-Consent to Adoption

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# RECENT DEVELOPMENT

**Constitutional Law**—FOURTEENTH AMENDMENT EQUAL PROTECTION—RIGHTS OF THE UNWED FATHER—CONSENT TO ADOPTION

*In re Malpica-Orsini,* 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975)

Until recently, the putative father[1] was generally ignored in adoption proceedings involving his illegitimate children.[2] Although consent to an adoption was normally required from the unwed mother, and from both parents of a legitimate child,[3] most states did not even require that the unmarried father be given notice of a pending adoption.[4] The law presumed that he was an irresponsible

[1] The term "putative father" will be used in this Note to refer to the natural father of an illegitimate child. The term, as used here, is not intended to convey any derogatory implication.

[2] The right to adoption of children, while known to the ancient Greeks and Romans, and recognized by different continental nations under the civil law, was unknown at common law and exists only by statute in the United States. *In re* Malpica-Orsini, 36 N.Y.2d 568, 570, 331 N.E.2d 486, 487, 370 N.Y.S.2d 511, 513 (1975).

The main impediment to development of adoption at common law was the feudal tradition that rights and property could pass only to biological children born during wedlock. An illegitimate child, or one who otherwise became part of a family, would never be considered an heir. S. & E. KLIBANOFF, LET'S TALK ABOUT ADOPTION 181 (1973).

[3] *See, e.g.,* Comment, *The Emerging Constitutional Protection of the Putative Father's Parental Rights,* 70 MICH. L. REV. 1581, 1583-84 (1972).

[4] *Id.* at 1584 n.20. As of 1973, only 12 states made some provision for the putative father's consent through statutes or case law: Alabama, Arizona, Arkansas, Colorado, Indiana, Iowa, Michigan, Minnesota, Nevada, Rhode Island, South Dakota, and Utah. Comment, *Protecting the Putative Father's Rights After Stanley v. Illinois: Problems in Implementation,* 13 J. FAM. L. 115, 138-39 (1973).

As of December 1, 1975, the following statutes generally required consent to an adoption from all locatable putative fathers: ILL. ANN. STAT. ch. 4, §§ 9.1-7, -8, -12a (Smith-Hurd Supp. 1975); MONT. REV. CODES ANN. §§ 61-205, -302 to -305, -325 (Interim Supp. 1975); ch. 640, [1975] Oregon Laws 123 (pamph. 8); R.I. GEN. LAWS ANN. §§ 15-7-2, -5, -6, -9 (Supp. 1975); ch. 274 [1975] Pub. Laws of R.I. 727-28; VA. CODE ANN. § 63.1-225 (Supp. 1975); WASH. REV. CODE ANN. §§ 26.32.030, .040, .080, .085 (Supp. 1974); WIS. STAT. ANN. § 48.84 (Supp. 1975).

As of December 1, 1975, the following statutes required the putative father's consent to an adoption under certain conditions (*e.g.,* acknowledgement or adjudication of paternity, support): ALA. CODE tit. 27, § 3 (1958); ARIZ. REV. STAT. ANN. §§ 8-106, -111 (1974); ARK. STAT. ANN. §§ 56-104, -106 (1971); ch. 1244, §§ 7, 11 [1975] West's Cal. Legis. Serv. 3439-40, 3443-44; COLO. REV. STAT. ANN. §§ 19-1-103(21), -4-107 (1973); DEL. CODE ANN. tit. 13, §§ 901, 906-08, 1101, 1105-07 (1974 & Supp. 1974); D.C. CODE ANN. §§ 16-304, -306 (1973); ch. 75-226 [1975] West's Fla. Sess. Law Serv. 598-600; IND. CODE § 31-3-1-6 (Burns Supp. 1975); IOWA CODE ANN. §§ 600.3, .4 (1950 & Supp. 1975); KY. REV. STAT. ANN. §§ 199.480, .500, .605 (Baldwin Supp. 1974); ME. REV. STAT. ANN. tit. 19, §§ 532-532e

person, who had no concern for the welfare of the children he had fathered.[5]

A major change in this state of affairs began in 1972 with the Supreme Court's decision in *Stanley v. Illinois*,[6] a case that involved a putative father whose illegitimate children were declared wards of the state upon the death of their unwed mother, even though the

(Supp. 1975); MICH. STAT. ANN. §§ 27.3178(555.28)-(555.43) (1975 Current Material Release #1); MINN. STAT. ANN. §§ 259.24, .26, .261 (Supp. 1975); NEB. REV. STAT. §§ 43-104, -104.02 to -.06 (Supp. 1975); NEV. REV. STAT. §§ 127.040, .090, .140 (1973); N.H. REV. STAT. ANN. §§ 170-B:5, -B:13 (Supp. 1975); N.M. STAT. ANN. §§ 22-2-21(H), -23, -25, -30 (Supp. 1975); ch. 48 [1975]N.C. Legis. Serv. 191; S.D. COMPILED LAWS ANN. §§ 25-6-1.1, -4, -17 (1967 & Supp. 1975); UTAH CODE ANN. § 78-30-4 (Supp. 1975).

As of December 1, 1975, the putative father's consent to an adoption was generally not required under the following statutes: ALASKA STAT. §§ 20.15.40, .100 (Cum. Supp. 1975); GA. CODE ANN. §§ 74-403, -408 (1973); HAWAII REV. STAT. § 578-2 (Supp. 1974); KAN. STAT. ANN. § 59-2102 (Supp. 1974); LA. REV. STAT. ANN. §§ 9:421-422.1, 9:425-29 (West 1965); MD. ANN. CODE. art. 16, § 74 (1973); MD. RULES OF PROCEDURE D73, D74 (Supp. 1975); MASS. ANN. LAWS ch. 210, §§ 2-4 (Supp. 1974); MISS. CODE ANN. § 93-17-5 (1972); MO. ANN. STAT. §§ 453.030, .040, .060 (Vernon Supp. 1975); N.J. STAT. ANN. §§ 9:2-13(f), 9:2-16 to -19, 9:3-18(f), -19, -19.1, -23 (1960); N.Y. DOM. REL. LAW § 111 (McKinney Supp. 1975); N.D. CENT. CODE §§ 14-15-05, -06, -11 (1971); ch. 128 [1975] Laws of N.D. 458; ch. 130, §§ 23, 24 [1975] Laws of N.D. 461; OHIO REV. CODE ANN. §§ 3107.04, .06 (1972); OKLA. STAT. ANN. tit. 10, § 60.5 (Supp. 1975); PA. STAT. ANN. tit. 1, §§ 411, 421 (Supp. 1975); P.R. LAWS ANN. tit. 31, § 536, tit. 32, §§ 2691, 2693, 2696 (1968); S.C. CODE ANN. §§ 10-2587.6, .7, .12 (Supp. 1974); TEX. FAM. CODE ANN. §§ 11.01, 16.03, .05 (1975); ch. 476 § 11.09 [1975] Vernon's Texas Sess. Law Serv. 1257; VT. STAT. ANN. tit. 15, §§ 435, 441 (Supp. 1975); W. VA. CODE ANN. § 48-4-1 (Supp. 1975); WYO. STAT. ANN. §§ 1-709, -710.1 (Supp. 1975).

Some statutes have been excluded from the above lists because of ambiguity in their consent provisions. For a discussion of recent changes in state adoption consent statutes, see notes 86-101 and accompanying text *infra*.

[5] 1973/74 ANNUAL SURVEY OF AM. L. 249 (1974), *citing* Tabler, *Paternal Rights in the Illegitimate Child: Some Legitimate Complaints on Behalf of the Unwed Father*, 11 J. FAM. L. 231 (1971).

The putative father has always been somewhat of an outcast in American society. Even social workers considered him a shadowy figure, not of great importance in the mother's problems. Dukette & Stevenson, *The Legal Rights of Unmarried Fathers*, 47 SOCIAL SERVICE REV. 1, 9 (1973). "In general, a social attitude of censure, but also of permissiveness, was common. Only gradually is more realistic information being gathered." *Id.*

The traditional view that the putative father is normally not interested in the welfare of his illegitimate children is apparently shared by Chief Justice Burger:

> [I] believe . . . that . . . on the basis of common human experience . . . the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.

Stanley v. Illinois, 405 U.S. 645, 665-66 (1972) (dissenting opinion).

[6] 405 U.S. 645 (1972).

father had custody of the children at the time.[7] Under the Illinois Juvenile Court Act[8] the state took custody of illegitimate children upon the death of their natural mother, without regard to the actual fitness of the natural father. All parents except unwed fathers were entitled to fitness hearings when the custody of their children was at stake.[9] The Court struck down the statutory procedure, holding that as a matter of due process the father was entitled to such a hearing before his children were taken from him, and that by denying him a hearing and extending it to all other parents the state denied him equal protection of the laws.[10]

While *Stanley* dealt with a custody proceeding,[11] the Court

[7] The father, Peter Stanley, had lived with the mother intermittently for eighteen years, during which time they had three children. *Id.* at 646. He was living with and supporting two of the children at the time they were declared wards of the state. *Id.* at 650 n.4.

[8] ILL. ANN. STAT. ch. 37, §§ 701-1 to 708-4 (Smith-Hurd 1972).

[9] The distinction was derived from the language of ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd 1972), which defined "parents" as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and . . . any adoptive parent." As a result of *Stanley*, § 701-14 was amended in 1973 to read: " 'Parent' means the father or mother of a legitimate child, or illegitimate child, and includes any adoptive parent. It does not include a parent whose rights in any way have been terminated in any manner provided by law." ILL. ANN. STAT. ch. 37, § 701-14 (Smith-Hurd Supp. 1974).

[10] We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.

405 U.S. at 658.

Thus, the *Stanley* Court found that denial of a due process right could also constitute a violation of equal protection, where due process was denied only to certain persons. The Court used a similar line of reasoning in holding that miscegenation statutes violated both the equal protection and due process clauses. Loving v. Virginia, 388 U.S. I, 12 (1967).

Chief Justice Burger believed that the majority's use of this analysis was improper:

This "method of analysis" is, of course, no more or less than the use of the Equal Protection Clause as a shorthand condensation of the entire Constitution: a State may not deny *any* constitutional right to some of its citizens without violating the Equal Protection Clause through its failure to deny such rights to *all* of its citizens. The limits on this Court's jurisdiction are not properly expandable by the use of such semantic devices as that.

Stanley v. Illinois, 405 U.S. at 660 (dissenting opinion).

The dissent was especially critical of the use of a due process analysis, when no due process issue had been raised in the state courts. *Id.* at 659. The majority maintained that it could employ a due process analysis, since it was "a method of analysis readily available to the state court." *Id.* at 658 n.10.

[11] The language of *Stanley* is somewhat unclear as to whether the rights of putative fathers who do not have custody of their children are to be protected. At one point the Court stated that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are *removed from their custody.*" 405 U.S. at 658 (emphasis added). At another point, however, the Court employed more general language: "We note in passing that the incremental cost of offering *unwed fathers* an opportunity for individualized hearings on fitness appears to be minimal." *Id.* at 657 n.9 (emphasis added). This ambiguity has probably been eliminated by the remand of two subsequent cases. *See* note 12 *infra.*

subsequently remanded an adoption case for reconsideration "in light of *Stanley*."[12] *Stanley* has since been read as requiring, at a minimum, notice and hearing for the putative father with custody of his illegitimate children, in all proceedings affecting the legal status of the children.[13] Several state courts[14] and at least one federal court of appeals[15] have invalidated (on the basis of *Stanley*)

[12] Rothstein v. Lutheran Soc. Servs., 405 U.S. 1051 (1972).

*Rothstein* involved the adoption of an illegitimate child in Wisconsin one week after birth. As in *Stanley*, the Wisconsin law did not include unwed fathers within the definition of "parent," and thus the father's consent was not required for the adoption. The father petitioned the court for a writ of habeas corpus to determine legal custody of the child. The state court held that the putative father had no parental rights, and that the failure of the Wisconsin statutes to grant parental rights or notice of a hearing to a putative father was not in violation of the Constitution. State *ex rel.* Lewis v. Lutheran Soc. Serv., 47 Wis. 2d 420, 178 N.W.2d 56 (1970), *vacated sub nom.* Rothstein v. Lutheran Soc. Serv., 405 U.S. 1051 (1972).

The Court also remanded "in light of *Stanley*" the case of Vanderlaan v. Vanderlaan, 405 U.S. 1051 (1972), which involved a dispute between divorced parents over custody of two children born following the divorce decree. An Illinois court awarded custody to the father five years after the divorce. Upon petition by the mother to regain custody, the Illinois Supreme Court held (prior to remand) that the policy behind the Illinois Paternity Act was that " 'a putative father should have no right to the society' of his children born out of wedlock." Vanderlaan v. Vanderlaan, 126 Ill. App. 2d 410, 415, 262 N.E.2d 717, 720 (1970), *vacated*, 405 U.S. 1051 (1972), *quoting* DePhillips v. DePhillips, 35 Ill. 2d 154, 157, 219 N.E.2d 465, 467 (1966).

Because the father did not have custody of the children in *Rothstein* or *Vanderlaan* at the time of the proceedings, the remand of the cases strongly suggests that the Supreme Court did not intend to limit the impact of *Stanley* to custody cases.

[13] *See In re* Anonymous, 78 Misc. 2d 1037, 359 N.Y.S.2d 220 (Surr. Ct. of Erie Co. 1974); Doe v. Department of Soc. Servs., 71 Misc. 2d 666, 337 N.Y.S.2d 102 (Sup. Ct. 1972); *In re* Guardianship of Harp, 6 Wash. App. 701, 495 P.2d 1059 (1972); Slawek v. Stroh, 62 Wis. 2d 295, 215 N.W.2d 9 (1974); State *ex rel.* Lewis v. Lutheran Soc. Servs., 59 Wis. 2d 1, 207 N.W.2d 826 (1973) (on remand). *Cf.* People *ex rel.* Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972); Vanderlaan v. Vanderlaan, 9 Ill. App. 3d 260, 292 N.E.2d 145 (1972) (on remand).

In *Doe*, the court interpreted *Stanley* as requiring notice and a hearing for a putative father (concerning a prospective adoption) where the family court had adjudicated his paternity and he had contributed to the support of the child.

In *Slawek*, the court apparently read *Stanley* to require that all putative fathers be given the same notice and right to be heard as any parent in proceedings which affect their children. 62 Wis. 2d at 303-04, 215 N.W.2d at 14-15. For an analysis of the *Slawek* decision, see 58 MARQ. L. REV. 175 (1975).

[14] *See, e.g.*, People *ex rel.* Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972) (striking down law precluding father of an illegitimate from asserting rights in adoption proceeding); *In re* Guardianship of Harp, 6 Wash. App. 701, 495 P.2d 1059 (1972) (noting unconstitutionality of statute that denied notice of adoption to putative father); State *ex rel.* Lewis v. Lutheran Soc. Servs., 59 Wis. 2d 1, 207 N.W.2d 826 (1973) (invalidating statute requiring only mother's consent and no notice to father when parental rights are being terminated).

In at least one case, the court simply reinterpreted the state adoption statute so as to comply with *Stanley*, rather than declare the statute unconstitutional. Doe v. Department of Social Servs., 71 Misc. 2d 666, 337 N.Y.S.2d 102 (Sup. Ct. 1972).

[15] Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974). The case involved the adoption of an

state adoption laws that discriminated against the putative father in various ways. In addition, many states have taken steps to change their adoption statutes so as to provide for the rights of the putative father.[16]

There is still considerable doubt, however, about the extent to which *Stanley* mandates protection of the putative father's rights. Some courts have interpreted the case to require only procedural due process for unwed fathers during adoption proceedings, and then only if the father has acknowledged his paternity in some way.[17] Other courts have read *Stanley* to require more equal treatment of the putative father, including his consent to an adoption in most cases.[18] Although most authorities agree that the best interests of the illegitimate child are of paramount importance, there is disagreement over whether additional safeguards for the father's rights necessarily detract from the child's welfare.[19]

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illegitimate child in Oregon, who was in the custody of his mother at the time. The mother and father had shared custody of the child for a brief period, but the mother consented to the adoption without consulting or attempting to secure the cooperation or consent of the father. The father sued in a United States district court (jurisdiction based on 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343 (1970)), attacking the constitutionality of the Oregon adoption statute, which provided that for most adoptions of illegitimate children, "the father of the child shall be disregarded just as if he were dead . . . ." ORE. REV. STAT. § 109.326(1) (1973). The United States Court of Appeals for the Ninth Circuit, without elaborating its reasoning, struck down the statute as unconstitutional in light of *Stanley*. The Solicitor General of the State of Oregon had conceded, in effect, that the statute was unconstitutional. 504 F.2d at 1068.

[16] *See, e.g.*, COLO. REV. STAT. ANN. §§ 19-1-103(21), 19-4-107 (1973); CONN. GEN. STAT. REV. §§ 45-61 to -63 (1975); ILL. ANN. STAT. ch. 4, §§ 9.1-8 to -13 (Smith-Hurd Supp. 1975); MICH. STAT. ANN. § 27.3178 (555.28)-(555.43) (1975 Current Material Release #1); VA. CODE ANN. § 63.1-225 (Supp. 1974); WASH. REV. CODE ANN. § 26.32.030 (Supp. 1974); WIS. STAT. ANN. § 48.84 (Supp. 1975); ch. 1244, §§ 7, 11 [1975] West's Cal. Legis. Serv. 3439-40, 3443-44; ch. 640, [1975] Oregon Laws 123 (pamph. 8).

In Missouri, caseworkers are now required to notify the putative father of a planned adoption and to obtain a release if possible. This change from past practice (under which the father was generally ignored) was instituted by new administrative provisions rather than by statutory revision. 39 Mo. L. REV. 573, 574 n.14 (1974).

[17] *See, e.g.*, Department of Health & Rehab. Servs. v. Herzog, 317 So. 2d 865 (Fla. Ct. App. 1975) (holding that father of illegitimate child has no right to notice and hearing unless he has given tangible indication of interest in the child); Doe v. Department of Soc. Servs., 71 Misc. 2d 666, 337 N.Y.S.2d 102 (Sup. Ct. 1972). *See also In re* Morgan, 70 Misc. 2d 1063, 335 N.Y.S.2d 226 (Surr. Ct. of Erie Co. 1972) (putative father denied guardianship of children because of his "attitude" and "lifestyle"); *In re* Connolly, 43 Ohio App. 2d 38, 332 N.E.2d 376 (1974) (holding that mother of an illegitimate child has a legal right to the custody, care, and control of the child superior to that of the natural father).

[18] *See* People *ex rel.* Slawek v. Covenant Children's Home, 52 Ill. 2d 20, 284 N.E.2d 291 (1972). *See also* Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974); Catholic Charities of Dubuque v. Zalesky, 232 N.W.2d 539 (Iowa Sup. Ct. 1975) (holding that notice required to all known putative fathers and consent required from fathers who have cared for the child).

[19] *See generally* Schwartz, *Rights of a Father with Regard to His Illegitimate Child*, 36 OHIO

## I

### *In re* MALPICA-ORSINI

The New York Court of Appeals recently added its views to the post-*Stanley* debate in *In re Malpica-Orsini.*[20] The case involved the 1973 adoption of Heather Alison Malpica-Orsini, who was born out of wedlock to Corrine Caberti in November 1970.[21] The father, appellant Hector Orsini, lived with the child and her mother until June 1972. In September 1972, in a proceeding in which the appellant admitted paternity, an order was entered in family court adjudging appellant to be the father of the child and, pursuant to agreement, directing him to pay a monthly sum for support and granting him visitation rights.[22]

Corrine Caberti subsequently married the respondent, Charles Blasi, who then filed a petition for the adoption of Heather. Hector Orsini then moved for an order enforcing his visitation rights, granting him notice and an opportunity to be heard in all proceedings concerning his daughter, and dismissing the petition for adoption.[23] Although the family court did order that appellant be granted notice and an opportunity to be heard in all proceedings concerning his daughter,[24] it subsequently approved the proposed adoption following a hearing at which the appellant appeared. The appellant appealed the decision directly to the New York Court of Appeals[25] and, citing the *Stanley* case, contended that subdivision 3

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STATE L.J. 1 (1975); Comment, *supra* note 3; 39 Mo. L. REV. 573 (1974); 36 MONT. L. REV. 137 (1975).

[20] 36 N.Y.2d 568, 331 N.E.2d 486, 370 N.Y.S.2d 511 (1975). The case was appealed to the Supreme Court but was dismissed for want of a substantial federal question. Orsini v. Blasi, No. 75-5206 (Sup. Ct., dismissed Jan. 12, 1976).

[21] *Id.* at 569, 331 N.E.2d at 487, 370 N.Y.S.2d at 513.

[22] *Id.*

[23] *Id.*

[24] New York law makes no provision for notice to putative fathers in proceedings involving their illegitimate children. Under § 111 of the New York Domestic Relations Law, provision of notice to a putative father (or any parent) rests entirely in the discretion of the judge or surrogate. N.Y. DOM. REL. LAW § 111 (McKinney Supp. 1975). In Doe v. Department of Soc. Serv., 71 Misc. 2d 666, 337 N.Y.S.2d 102 (Sup. Ct. 1972), the court therefore found it necessary, in light of *Stanley*, to read into the New York statute a requirement for notice to putative fathers who acknowledged paternity. *Id.* at 671, 337 N.Y.S.2d at 107.

[25] Under New York law, appeals may be taken directly to the court of appeals from a final judgment of any court of record of original instance, where the only question involved is the constitutionality of a statute. N.Y. CONST. art. VI, § 3(b)(2) (McKinney 1969); N.Y. CIV. PRAC. LAW § 5601(b)(2) (McKinney 1963).

of section 111 of the New York Domestic Relations Law[26] was violative of the due process and equal protection clauses of the United States Constitution, in that the New York state law improperly required consent to the adoption of a child from all natural parents except the father of an illegitimate.

In a five-to-two decision, on the basis of a narrow construction of *Stanley,* the court of appeals rejected Orsini's constitutional claims. In so ruling, Judge Cooke, for the majority, held that under two different tests section 111 complied with the requirements of the fourteenth amendment's equal protection clause. The court first applied the "traditional" equal protection test, which requires that a classification be "reasonable, not arbitrary, and have a fair and substantial relation to the object of the legislation."[27] Noting that a major purpose of adoption laws was to promote the welfare of the child,[28] the court maintained that requiring paternal consent

[26] Section 111 provides, in pertinent part:

> Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:
>
> 1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;
>
> 2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;
>
> 3. Of the mother, whether adult or infant, of a child born out of wedlock;
>
> 4. Of any person or authorized agency having lawful custody of the adoptive child.

N.Y. DOM. REL. LAW § 111 (McKinney Supp. 1975).

The statute also lists a number of circumstances under which the consent of a parent is not required: *e.g.,* where the parent is insane, incompetent, or habitually drunk; where the parent had been judicially deprived of custody on account of cruelty or neglect; and where the parent has abandoned his child. *Id.*

Section 111 lists the general consent requirements for all adoptions, whether by private placement or through an authorized agency. In addition, the New York Social Services Law contains a special provision for the surrender of destitute or dependent children to an authorized agency for adoption. N.Y. SOC. SERV. LAW § 384 (McKinney 1966), *as amended,* (McKinney Supp. 1975). As under § 111 of the Domestic Relations Law, § 384 of the Social Services Law requires only the mother of an illegitimate child to consent to a surrender, while both parents are required to consent to the surrender of a legitimate child. *Id.*

[27] 36 N.Y.2d at 571, 331 N.E.2d at 488, 370 N.Y.S.2d at 515. *See also* Dandridge v. Williams, 397 U.S. 471, 519-20 (1970); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). The test is sometimes referred to as the "rational relation" analysis. *See* notes 44-46 and accompanying text *infra*.

[28] The purpose of adoption laws has not always been to provide for the best interests of the child:

> The early laws and judicial interpretations of them show no consistent philosophy and are a far cry from the modern notion that the purpose of adoption is to serve the best interests of the child. A commonly held view was that adopted children were "the waifs of society, foundlings or children whose parents are depraved and worthless." . . . Children who needed to be adopted were considered inferior. The result was court decisions on the rights of adopted children which favored biological relationships over those formed through adoption.

S. & E. KLIBANOFF, *supra* note 2, at 184-85.

for the adoption of an illegitimate child would hinder the adoption process, thus "denying homes to the homeless . . . depriving innocent children of the . . . blessings of adoption," and continuing the visitations of the "out-of-wedlock stigma" on the child.[29] Because the statute removed a potential obstacle to adoption, the court reasoned, it bore a fair and substantial relationship to the welfare of the child.

The second equal protection test applied by the majority involved the "dual inquiry," or "balancing test," suggested by the Supreme Court in *Weber v. Aetna Casuality & Surety Co.*:[30] "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[31] Focusing on the legitimate state interest of promoting the welfare of the child, the *Malpica-Orsini* majority maintained that the consent "privilege" could not be extended to even a few putative fathers, such as those who acknowledged paternity, since the "mere possibility of a presently existing right on the part of even some fathers . . . [was] enough to discourage a wide range of prospective placements and adoptions."[32] Judge Cooke did not address the question of what fundamental personal rights were involved, stating only that the reasons supporting the classification were "compelling."[33] He denied that *Stanley* had any bearing on the equal protection question before the court, maintaining that *Stanley* required only that, as a matter of procedural due process, the putative father be given notice and a hearing (not the right of

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[29] 36 N.Y.2d at 572, 331 N.E.2d at 489, 370 N.Y.S.2d at 516.

The court offered two basic rationales for its conclusion that adoptions would be reduced if the consent of the putative father were required. First, it suggested that putative fathers were often difficult or impossible to locate, making their consent hard to obtain. Second, the court reasoned that a paternal consent requirement would frighten off parents and agencies potentially interested in adoption, since an absent putative father might reappear at any time and challenge the validity of the adoption. *Id.* at 572-73, 331 N.E.2d at 489-90, 370 N.Y.S.2d at 516. Both rationales seem based on a presumption that the father could veto the adoption at any time during his life. It seems more likely, however, that the consent privilege would be waived if not exercised before the end of the adoption proceedings, provided adequate notice were afforded.

[30] 406 U.S. 164 (1972).

[31] *Id.* at 173. *See* text accompanying notes 81-85 *infra.*

[32] 36 N.Y.2d at 576, 331 N.E.2d at 492, 370 N.Y.S.2d at 519. *See* note 29 *supra.* Even if the court were correct in presuming that existence of a consent privilege in the father would discourage adoptions, the requirement of procedural due process for the father would probably have the same effect in any event. To the extent that the putative father has a "presently existing right" to notice and hearing, he can just as easily interfere with adoptions without the consent privilege, if he so desires. *See id.* at 589, 331 N.E.2d at 500-01, 370 N.Y.S.2d at 531 (dissenting opinion, Jones, J.).

[33] 36 N.Y.2d at 577, 331 N.E.2d at 493, 370 N.Y.S.2d at 520.

consent),[34] and implied that the holding might not apply to adoption cases in any event.[35]

Judge Jones, in dissent, argued that *Stanley* stood for the broad proposition that "a State may not terminate the relationship between an unmarried father and his illegitimate child on any ground other than one on which the relationship of a married father with his legitimate child may be terminated."[36] Maintaining that the rights of a natural father with respect to his own child were "fundamental,"[37] the dissent rejected the equal protection tests used by the majority as inappropriate in this case.[38] Judge Jones contended that when a "fundamental" right is involved, the state must not only show that the interest served by the classification was compelling, but also that the means employed were the least restrictive possible to accomplish the statutory objective.[39] While conceding that the state's interests in the welfare of illegitimate children were sufficiently compelling to pass the first branch of the strict scrutiny test, Judge Jones concluded that section 111 was unconstitutional because it failed to pass the second branch, in that it needlessly restricted the rights of putative fathers who were wholly suited to have custody of their children.[40]

[34] "In *Stanley,* the court found no basis for the classification which resulted in the absence of notice and hearing to appellant. Orsini's rights were protected by the notice and hearing." *Id.* at 577, 331 N.E.2d at 493, 370 N.Y.S.2d at 520. By concluding that Orsini had received procedural due process in this case, the court did not have to reach the issue of whether he was, in fact, *entitled* to notice and hearing. This is still somewhat uncertain in New York, since the Domestic Relations Law contains no provision for notice to putative fathers. *See* note 24 *supra.*

[35] That Judge Cooke might not consider *Stanley* applicable to adoption cases is suggested by his reference to *Stanley* as "[t]hat *custody* case." 36 N.Y.2d at 576, 331 N.E.2d at 492, 370 N.Y.S.2d at 519 (emphasis added). "Although this was an adoption proceeding," he later stated that the *Stanley* requirements of due process were met. *Id.* at 577, 331 N.E.2d at 492, 370 N.Y.S.2d at 520. *Stanley* "does not compel *or even indicate* a determination of unconstitutionality of section 111. . . ." *Id.* at 576, 331 N.E.2d at 492, 370 N.Y.S.2d at 519 (emphasis added). This seems to be a questionable position in view of the two Supreme Court remands subsequent to *Stanley. See* note 12 *supra.*

[36] 36 N.Y.2d at 579, 331 N.E.2d at 494, 370 N.Y.S.2d at 522.

[37] 36 N.Y.2d at 583-84, 331 N.E.2d at 496, 370 N.Y.S.2d at 525-27.

> My conclusion that a natural father's rights and interest in his own child are implicitly recognized and protected by the Constitution stems from my conception of the basic civil rights of man—rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental" (Snyder v. Massachusetts, 291 U.S. 97, 105) and which may be said to have been incorporated into the Constitution (cf. Griswold v. Connecticut, . . .).

*Id.* at 584, 331 N.E.2d at 497, 370 N.Y.S.2d at 526-27 (dissenting opinion) (other citations omitted).

[38] 36 N.Y.2d at 581-82, 331 N.E.2d at 495-96, 370 N.Y.S.2d at 524.

[39] *Id. See* text accompanying notes 63-66 *infra.*

[40] 36 N.Y.2d at 585-86, 331 N.E.2d at 498, 370 N.Y.S.2d at 528-29.

In a separate dissent, Judge Fuchsberg added sex discrimination as a reason for declaring section 111 unconstitutional.[41] While conceding that the Supreme Court's position on sex as a "suspect" classification was "still in a state of ferment," Judge Fuchsberg expressed the view that the court should find a stricter protective constitutional standard for New York.[42]

## II

## THE EQUAL PROTECTION ISSUE

It is clear from the opinions in *Malpica-Orsini* that a determination of the constitutionality of section 111 (or any similar studies that suggest that adoption may *not* always be in the best interests of the illegitimate child, that the presence of the natural

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Although Judge Jones did not suggest any particular statutory alternative to § 111, he did imply that notice and an opportunity to appear would have to be granted to the putative father in every case. He also suggested that "the fact of unmarried fatherhood" might "have to be established as a threshold prerequisite" for consent. *Id.* at 588, 331 N.E.2d at 500, 370 N.Y.S.2d at 531. One court has since cited this language as supportive of the proposition that paternity should be established as a threshold prerequisite for providing notice and hearing to the putative father. *In re* Fernando F., 373 N.Y.S.2d 755 (N.Y. Fam. Ct. of Bronx Co. 1975). Judge Jones seemed quite clear, however, in maintaining that notice and opportunity to be heard would have to be granted "[i]n any event." 36 N.Y.2d at 589, 331 N.E.2d at 500, 370 N.Y.S.2d at 531.

[41] The statute here results in a denial, without regard to the merits, of the natural right of the father, not because the welfare of the child demands it, not because there is any serious question but that he is a model father, but simply because he is the male rather than the female parent.

*Id.* at 591, 331 N.E.2d at 502, 370 N.Y.S.2d at 533 (dissenting opinion).

For an analysis of how the proposed Equal Rights Amendment might affect the rights of the putative father, see Comment, *supra* note 3, at 1609-11.

Several commentaries draw a comparison between the rights of the putative father in adoption proceedings and in the decision by an unwed mother to have an abortion:

> A helpful analogy can be drawn between the putative father's consensual privilege in adoption of the illegitimate child and any consensual privilege that he might assert in the abortion decision. The adoption process is one in which the legal rights and obligations which exist between the child and his natural parents are terminated. The analogy is relevant because in both the abortion and adoption situations the mother seeks to terminate the parental interests in both herself and the father.

6 ST. MARY'S L. J. 407, 411 (1974). *See also* Sherain, *Beyond Roe and Doe: The Rights of the Father,* 50 NOTRE DAME LAW. 483, 486-95 (1975).

[42] 36 N.Y.2d at 591, 331 N.E.2d at 502, 370 N.Y.S.2d at 533. Although the appellant had argued that sex was a "suspect class," requiring application of the strict scrutiny test to § 111, the majority opinion did not even mention the point. In his dissent, Judge Jones found the argument "relevant and interesting," but noted that only four Justices of the Supreme Court had concluded that sex was a suspect class, citing Frontiero v. Richardson, 411 U.S. 677 (1973). 36 N.Y.2d at 583 n.5, 331 N.E.2d at 496 n.5, 370 N.Y.S.2d at 526 n.5.

statute) depends upon which test of equal protection is applied. Since the *Stanley* Court was not explicit as to the standard of equal protection employed, courts have used a variety of formulations in analyzing the constitutionality of statutes that affect the rights of putative fathers.[43] The impact of *Malpica-Orsini* will thus depend in large measure on the validity of its equal protection analysis as measured against the various tests that could have been applied.

A. *The Traditional "Rational Relation" Test*

The traditional test of equal protection requires only that there be a rational relationship between the statutory classification and a legitimate state purpose. Under this test, the Supreme Court has generally taken a very permissive view toward state laws, setting aside classifications only if "no grounds can be conceived to justify them."[44] The traditional test does not require that a statute separate with mathematical precision those who are targets of the statute's purpose from those who are not.[45]

Almost any legislation can survive the rational relation test, and section 111 is probably no exception.[46] Few would argue that providing for the welfare of illegitimate children by facilitating adoptions is not a legitimate state function. Moreover, it is possible to conceive of several grounds that might justify the separate classification of putative fathers in the name of protecting the child's best interests.

The *Malpica-Orsini* majority provided several such "rationales" for section 111 in its traditional equal protection analysis. The court began with the presumption that adoption of illegitimate children was generally desirable, and that by requiring consent of the father such adoptions would often be impeded or blocked altogether.[47] According to the court, couples and philanthropic agencies would be dissuaded from adopting if a presently unlocatable father could reappear at some future date and veto the adoption.[48] Moreover, the court suggested that putative fathers might withhold their consent out of spite or a desire to "get back" at the unwed mother.[49] Noting recent disclosures of the black market

[43] *See generally* 9 GONZAGA L. REV. 826, 830 (1974); 39 MO. L. REV. 573, 574 (1974).

[44] McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969).

[45] *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970); Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-89 (1955).

[46] *See* Comment, *supra* note 3, at 1587-88; 39 MO. L. REV. 573, 575 (1974).

[47] 36 N.Y.2d at 572-73, 331 N.E.2d at 489-90, 370 N.Y.S.2d at 516-17. *See* notes 29 & 32 *supra*.

[48] 36 N.Y.2d at 572-73, 331 N.E.2d at 489-90, 370 N.Y.S.2d at 516-17.

[49] *Id.*

sales of children for adoption, the majority contended that unwed fathers would use their consent power for extortion.[50] As an added undesirable result, it was argued that marriages would be discouraged, since a prospective husband would be reluctant to marry an unwed mother without an assurance that he could become the adoptive father.[51]

In addition to those cited by the court, there are other reasons that have been offered to support the exclusion of putative fathers from the adoption process. The mere fact that the mother is present at birth provides a rationalization for requiring her consent, since her connection with the child is firmly established.[52] There is also the traditional view that the unwed mother is usually more concerned about her child's welfare than is the unwed father, thus providing a more positive influence on the adoption proceedings.[53] Moreover, it has been argued that by failing to signify his devotion to the mother through a marriage ceremony, the putative father "waives" the legally enforceable rights that marriage bestows upon parents as a matter of course.[54]

A number of conceivable reasons might therefore be advanced to support the enactment of section 111. Realistically, however, the validity of the rationales outlined above is questionable, and whether they have anything to do with the welfare of the illegitimate child is doubtful. The *Malpica-Orsini* majority provided little in the way of statistical data or sociological research to support its presumptions about the putative father.[55] There are, in fact,

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[50] *Id.*

[51] *Id.*

[52] *See* Stanley v. Illinois, 405 U.S. 645, 661 n.1 (1972) (dissenting opinion).

[53] *See* note 5 *supra.*

[54] This argument was employed by counsel for Illinois in *Stanley,* and noted by Chief Justice Burger in his *Stanley* dissent:

> [C]ounsel noted that in the case of a married couple to whom a legitimate child is born, the two biological parents have already "signified their willingness to work together" in caring for the child by entering into the marriage contract; it is manifestly reasonable, therefore, that both of them be recoguized as legal parents with rights and responsibilities in connection with the child. There has been no legally cognizable signification of such willingness on the part of unwed parents, however, and "the male and female . . . may or may not be willing to work together towards the common end of child rearing." To provide legal recognition to both of them as "parents" would often be "to create two conflicting parties competing for legal control of the child."

Stanley v. Illinois, 405 U.S. 645, 661 n.1 (1972) (dissenting opinion).

[55] The court cited a 1961 study in Florida of 500 independent adoptions, which showed that 16% of the couples who had direct contact with the natural parents reported subsequent harassment, compared with only 2% of couples who had no contact. 36 N.Y.2d at 572-73, 331 N.E.2d at 489, 370 N.Y.S.2d at 516. Even if the 14% difference can be considered significant, the study is only tenuously related to the potential impact of requiring the father's

father can be very beneficial,[56] and that putative fathers are often willing to marry the mother and contribute to the support of the child.[57] Some sociologists also disagree with the notion that delays in adoption necessarily cause serious harm to the child, arguing that the "quality" of the adopting parents is a far more important consideration.[58]

There is no evidence that requiring the father's consent will necessarily impede adoptions any more than requiring the mother's consent.[59] Suggestions that putative fathers would act out

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consent to adoptions. There is no reason to suspect that requiring the father's consent would necessarily involve more "direct contact" with the natural parents.

[56] [I]t is hard to deny that a special affinity is usually created between a child and the parent who helped conceive him. Though not all parents feel this affinity, and even some who initially do may never reflect it in any meaningful relationship with the child, the fact remains that it can be a very real and valuable thing. And it may be an advantage for the child because it gives him a better chance for a healthy parent-child relationship than he might otherwise have.

S. & E. KLIBANOFF, *supra* note 2, at 194-95.

A value for the child from both a psychological and a genetic point of view would result from knowledge that his father, as well as his mother, participated in responsible planning for his future and that information was available about his paternal as well as his maternal background.

Dukette & Stevenson, *supra* note 5, at 7. "If the unmarried parents are given skilled social service, the involvement of the father [in guardianship plans] may have benefit for the mother." *Id.* at 8. "Many young couples are living together responsibly without being legally married. . . . In this context, the transfer of children to unrelated families by their mothers within a legal structure that excludes their fathers may be a less congenial pattern than in earlier years." *Id.* at 14. Also, see M. GOLD, STATUS FORCES IN DELINQUENT BOYS 123 (1963). *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1974).

[57] Schlesinger, *The Unmarried Father,* 21 CANADIAN HEALTH AND WELFARE 408 (1966), *cited in* Juhasz, *The Unmarried Adolescent Parent,* 9 ADOLESCENCE 263, 268 (1974). *Cf.* Pannor, Evans & Massarik, *The Unmarried Father: Findings and Implications for Practice,* National Council on Illegitimacy, *Bulletin* NR-1, *cited in* Juhasz, *supra.* The Schlesinger study found that "in many ways the unmarried father resembled the unmarried mother." Juhasz, *supra* at 268.

[58] It has long been thought that delay in adoptive placement is deleterious to the child, either because it destroys the "continuity" of living with the same parents, or because it requires some interim child-care arrangement that is generally damaging to the child's development. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 56, at 31-34; S. & E. KLIBANOFF, *supra* note 2, at 196; Dukette & Stevenson, *supra* note 5, at 7.

A recent study, however, disagrees with this traditional view:

Continuity is not the sine qua non of the adjusted child or the happy parent-child relationship. . . . As the evidence clearly shows, it is the nature of the relationship rather than its temporal duration that is important to the development of attachment behaviors.

Mahoney & Mahoney, *Psychoanalytic Guidelines for Child Placement,* 19 SOCIAL WORK 688, 690-93 (1974). *But see Points and Viewpoints,* 20 SOCIAL WORK 154-55 (1975) (letters commenting on the article by Mahoney & Mahoney, *supra*).

[59] The concern about discouraging adoptions seems somewhat inconsistent with the present acute "shortage" of adoptable babies. *See* Friedman, *Why are They Keeping Their*

of vengeance, or that they would resort to extortion, are given no empirical support by the court, and are based on the old stereotype of the putative father as being somehow more "evil" than the unwed mother.[60] Even if unwed mothers are generally more concerned with the welfare of the child (which would be difficult to prove), there is little logic in excluding *all* putative fathers from the adoption proceeding simply because some are disinterested in the outcome. Nor is there any reason to assume that a marriage by the unwed mother to a man other than the putative father would necessarily be discouraged by a requirement of paternal consent to adoption or that such a marriage would necessarily be in the best interests of the child. Finally, the suggestion that the consent privilege is a legal right unavailable to those who do not marry would justify denying the consent privilege to *both* unwed parents, rather than just the father.

There is some support for the contention that requiring the putative father's consent can sometimes complicate adoption proceedings, where the putative father is difficult or impossible to locate.[61] Such difficulties, however, are not inherent in a statutory

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*Babies?*, 20 SOCIAL WORK 322 (1975). The shortage is due, in part, to the fact that young unwed mothers are keeping their babies far more often today than they did a few years ago. "Suprisingly, the father of the baby and the girl's family seem to have little to do with the decision to keep the child. Whether they approve, assist, or agree does not make any appreciable difference." *Id.*

In 1971 there were 169,000 adoptions in the United States, down from a total of 175,000 in 1970. This was the first decrease in the number of annual adoptions since 1952. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 302 (1974). Illegitimate births totaled 398,700 in 1970, of which 317,000 involved mothers between 15 and 24 years of age. *Id.* at 56. There were 8,056 adoption petitions granted in New York during the period from July 1, 1973 to June 30, 1974. STATE OF NEW YORK, REPORT OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE FOR THE JUDICIAL YEAR JULY 1, 1973 THROUGH JUNE 30, 1974, at 72-73 (1975). This represents the continuation of a steady decline in the number of petitions granted, from a total of over 11,000 in 1970-71. *See id.* (1971-74 volumes). However, the number of petitions withdrawn, denied, or dismissed has remained fairly constant, at an average of about 180 per year over the last five years. Illegitimates have consistently constituted a majority of the adoptees: 60% (or 4,837) of all adoptees in New York in 1972-73, 56% in 1971-72, 72% in 1970-71, 73% in 1969-70, 72% in 1968-69. *Id.* (1971-75 volumes).

[60] "The putative father, traditionally, has been viewed as 'the villian in the case,' 'the sexual exploiter,' to he punished or ignored. However, research has revealed that in most cases, these are erroneous conceptions." Juhasz, *supra* note 57, at 267.

This is not to say that acrimony, vengeance, or extortion are never motivating factors in the withholding of consent of an adoption. The point is that *either* parent can engage in such behavior. *See* S. & E. KLIBANOFF, *supra* note 2, at 195-96; Dukette & Stevenson, *supra* note 5, at 10.

[61] *See* S. & E. KLIBANOFF, *supra* note 2, at 196; Brown & Brieland, *Adoptive Screening: New Data, New Dilemmas*, 20 SOCIAL WORK 291 (1975); Dukette & Stevenson, *supra* note 5, at 7;

scheme requiring consent, because the law can be drafted to require that the privilege to veto an adoption be exercised within a reasonable time after the filing of the adoption petition.[62]

B. *Strict Scrutiny*

Although section 111 might be able to stand under a traditional rational relation test, it is clear from the above discussion that it could not withstand a more rigorous examination. Under the strict scrutiny test of equal protection, a classification must not only serve a compelling state interest, but must also employ the least restrictive means available.[63] As pointed out in Judge Jones's dissent,[64] section 111 has far too broad a sweep to survive the latter test, since it denies the right of consent to *all* putative fathers, while the welfare of the child could often be protected by denying only *some* putative fathers the right of consent.[65]

The strict scrutiny test is applied only when the classification is "suspect" or interferes with "fundamental" rights.[66] In the case of

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Kadushin, *Beyond the Best Interests of the Child: An Essay Review*, 48 SOCIAL SERV. REV. 508, 511 (1974). *See also* note 97 *infra*.

[62] *See* the discussion of statutory alternatives in notes 86-101 and accompanying text *infra*.

[63] In contrast to the rational relation test, the strict scrutiny test *does* require that a statute separate with mathematical precision those who are targets of the statute's purpose from those who are not. *See* Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[64] In support of his analysis, Judge Jones cited Dunn v. Blumstein, 405 U.S. 330 (1972), where the Court held that a Tennessee durational residence law requiring a voter to have been a resident one year in the state and three months in the county violated the equal protection clause. Since there were adequate means of ascertaining bona fide residents on an individual basis, the state could not conclusively presume nonresidence from failure to satisfy the waiting period requirements of its durational residency laws. 36 N.Y.2d at 586-88, 331 N.E.2d at 498-99, 370 N.Y.S.2d at 528-30 (dissenting opinion). Judge Jones also noted Carrington v. Rash, 380 U.S. 89 (1965), where the Court struck down a Texas statute that denied the right to vote to all servicemen for the asserted purpose of restricting the electorate to bona fide residents. 36 N.Y.2d at 586-87, 331 N.E.2d at 499, 370 N.Y.S.2d at 529. Also, *see* Stanley v. Illinois, 405 U.S. 645, 654-58 (1972); Bell v. Burson, 402 U.S. 535, 542-43 (1971).

[65] "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. . . . But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." Stanley v. Illinois, 405 U.S. 645, 654 (1972).

[66] *See* Kramer v. Union Free School Dist., 395 U.S. 621, 627-28 (1969). Some examples of "suspect" classifications are race (McLaughlin v. Florida, 379 U.S. 184, 191-94 (1964)), national origin (Hernandez v. Texas, 347 U.S. 475 (1954)), and alienage (*In re* Griffiths, 413 U.S. 717 (1973)). Rights deemed by the Court to be "fundamental" are the right to vote (Kramer v. Union Free School Dist., 395 U.S. 621, 627-28 (1969)), the right to travel (Shapiro v. Thompson, 394 U.S. 618 (1969)), and the right to procreate (Skinner v. Oklahoma, 316 U.S. 535 (1942)). For other cases, see Judge Jones's dissent, 36 N.Y.2d at 581 nn.2-3, 331 N.E.2d at 495 nn.2-3, 270 N.Y.S.2d at 524 nn.2-3.

section 111, the classifications that might be considered suspect are illegitimacy, since the distinction between the unwed father and all other parents is based on the birth status of the child, and sex, since the mother and father of the illegitimate child are treated differently. The Supreme Court has expressly declined to pass on the issue of whether illegitimacy is a suspect class.[67] And since a majority of the Court has also refused to denominate sex as a suspect class,[68] the application of the strict scrutiny test to section 111 depends (at least for now) on whether that statute interferes with a fundamental right.

Certain language in the *Stanley* decision suggests that the interest of a putative father in his children is "fundamental." As Justice White stated for the majority:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. . . . The rights to conceive and to raise one's children have been deemed "essential," . . . "basic civil rights of man," . . . and "rights far more precious . . . than property rights."[69]

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[67] Jimenez v. Weinberger, 417 U.S. 628, 631-32 (1974). The appellants in *Jimenez* petitioned the Court to strike down a provision of the Social Security Act that treated illegitimates and legitimates differently for purposes of disability insurance benefits, on the ground that illegitimacy was a "suspect" class. The Court ruled that "[w]e need not reach appellants' argument" that illegitimacy is a suspect class, because it was possible to strike down the statute under the less rigorous test employed in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). In *Weber,* the Court had ruled that no legitimate state interest justified a Louisiana statute under which an unacknowledged illegitimate child could not recover under workmen's compensation on the same basis as a legitimate child or an acknowledged illegitimate child.

In Labine v. Vincent, 401 U.S. 532 (1971), a case decided shortly before *Weber,* the Court seemed to indicate that illegitimacy was not a suspect class. In *Labine,* the Court upheld a Louisiana statute that differed in its treatment of illegitimates and legitimates for purposes of inheritance, noting that the "statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State." *Id.* at 536 n.6.

Prior to *Labine,* the Court struck down statutes that denied wrongful-death benefits to illegitimate children (Levy v. Louisiana, 391 U.S. 68 (1968)), and that denied wrongful-death benefits to the mother of illegitimate children (Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968)). *See* Comment, *supra* note 3, at 1592-97. *See also* Andrews v. Drew Municipal Separate School Dist., 371 F. Supp. 27 (N.D. Miss. 1973), *aff'd,* 507 F.2d 611 (5th Cir.), *cert. granted,* 44 U.S.L.W. 3179 (No. 74-1318 Oct. 6, 1975) (striking down restrictions on employment of unwed mothers as teachers).

[68] Frontiero v. Richardson, 411 U.S. 677 (1973). The Court has recently invalidated a number of gender-based classifications, but without designating sex as a suspect class. Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971). *But see* Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 516 U.S. 351 (1974).

[69] Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted).

That the *Stanley* Court intended to classify the rights of the father regarding his children as "fundamental" is supported by the Court's subsequent decision in *Weinberger v. Wiesenfeld.*[70] In *Wiesenfeld,* the Court cited *Stanley* in support of the proposition that the right of a father to the companionship, care, custody, and management of his children is a "constitutionally protected right."[71] In view of the Court's previous definition of "fundamental rights" as those "explicitly or implicitly guaranteed by the Constitution,"[72] the decision in *Wiesenfeld* offers strong support to a fundamental right of the putative father in the care and companionship of his children.[73] Nevertheless, in the absence of a Supreme Court case that is explicit on the matter, courts may still feel free to treat the rights of the putative father regarding his children as something less than "fundamental."

### C. *Other Approaches*

#### 1. *A More Demanding Rational Relation Test*

Even if the strict scrutiny test is not applicable to cases involving putative fathers, there are other standards of equal protection under which section 111 might be found constitutionally invalid. In recent years, the Supreme Court has struck down a number of statutes using a rational relation analysis, even though the statutes did have conceivable rationalizations that probably would have been sufficient for the purposes of the traditional test. For example, the Court has invalidated as having no rational relation to legitimate state interests statutes that give preference to

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[70] 420 U.S. 636 (1975).

[71] *Id.* at 652. *Wiesenfeld* involved a provision of the Social Security Act under which survivors' benefits based on the earnings of the father were paid to both the mother and children, while benefits based on earnings of the mother were paid only to the children. The Court struck down the provision, citing language from *Stanley:*

> It is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the "companionship, care, custody, and management" of "the children he has sired and raised . . . ."

*Id., quoting* Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[72] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

[73] There are other fundamental rights that § 111 could be said to violate. For example, it could be argued that by denying the consent privilege to putative fathers, the state is somehow interfering with their fundamental right to privacy, as outlined in Roe v. Wade, 410 U.S. 113 (1973), and Griswold v. Connecticut, 381 U.S. 479 (1965). Both *Roe* and *Griswold* involved intra-family matters, suggesting that the privacy being protected is some form of "family-unit privacy." Sherain, *supra* note 41, at 484.

*See also* 39 Mo. L. Rev. 573, 580-81 (1974), *citing* Eisenstadt v. Baird, 405 U.S. 438 (1972), and Skinner v. Oklahoma, 316 U.S. 535 (1942).

men over women in the appointment of administrators of decedents' estates,[74] that provide a different age of majority for men and women,[75] and that treat illegitimate children differently than legitimate children in the distribution of disability insurance benefits.[76] In all of these cases there were "rational" reasons that might have supported the classification under the traditional test's presumption of reasonableness.[77] That the Court evidently demanded a higher degree of justification is evidence of a more demanding approach, which gives greater consideration to individual rights.

If examined under this more demanding test of reasonableness, the classification of putative fathers under section 111 might not survive. It is far from clear that there is any convincing basis for the statute's underlying presumptions about the putative father's capabilities as a parent; it is at least equally unclear whether adoption is always in the best interests of the children.[78] The statute seems vulnerable not only because of its distinction between unwed fathers and all other fathers, but also on the basis of its somewhat arbitrary distinction between unwed mothers and unwed fathers. Recent decisions indicate that the Court will not hesitate to strike down gender-based classifications using a stricter rational relation approach.[79] In *Wiesenfeld,* for example, the Court invalidated a gender-based distinction in the Social Security Act, while admitting that there was empirical evidence to support the classification.[80]

2. *The "Balancing" Test*

Another method of equal protection analysis used in recent years rejects the "two-tier" approach commonly used in the past, in favor of a more "realistic examination of the conflicting policies and interests [involved] in the challenged statute."[81] This approach,

[74] Reed v. Reed, 404 U.S. 71 (1971).

[75] Stanton v. Stanton, 421 U.S. 7 (1975).

[76] Jimenez v. Weinberger, 417 U.S. 628 (1974).

[77] For example, in *Reed,* the Idaho Legislature concluded that, on the whole, men were better qualified to administer estates than were women. Similarly, in *Stanton,* the statute was based, in part, on a belief that women mature at an earlier age than men, and that men require support from their parents for a longer period. Although these rationales seem dubious, it is not inconceivable that they have some basis in fact.

[78] *See* notes 55-60 and accompanying text *supra.*

[79] Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971).

[80] 420 U.S. at 651.

[81] Comment, *Illegitimacy and Equal Protection,* 49 N.Y.U.L. REV. 479, 485-86 (1974), *citing* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-73 (1972).

which is one of the tests Judge Cooke purported to employ,[82] involves a weighing of the state interests promoted against the fundamental rights endangered by the classification. Whether these are the same "fundamental rights" required under the strict scrutiny test, or are something less, it is evident from the language of *Stanley*[83] and *Wiesenfeld*[84] that the interest of the putative father in his children would certainly deserve consideration if the "balancing" test were applied to section 111. When weighed against the possibility that a less restrictive statute could protect the state's interests (for example, by requiring that a paternal veto be exercised within a reasonable time), while at the same time protecting the rights of the concerned putative father, the provisions of section 111 could very well fail to pass the test.

The *Malpica-Orsini* majority seems to have misapplied the balancing approach by ignoring the "fundamental rights" half of the test. The court discussed only the state interests promoted by section 111's classification, and never recognized any rights of the putative father with which the classification might interfere. Ironically, the very opinion cited by Judge Cooke as the model for his analysis came down on the side of individual rights, by striking down a statute that discriminated against illegitimates in the awarding of workmen's compensation benefits.[85]

## III

## STATUTORY ALTERNATIVES

### A. *The Proposed Revision of Section 111*

The importance of the *Malpica-Orsini* case lies mainly in its potential influence on the reform of adoption consent laws that state legislatures are considering in the wake of *Stanley*.[86] This is

[82] 36 N.Y.2d at 574-75, 331 N.E.2d at 490-91, 370 N.Y.S.2d at 517-18.

[83] 405 U.S. 645, 651 (1972). *See* text accompanying note 69 *supra*.

[84] 420 U.S. 636, 651-52 (1975). *See* notes 70-72 and accompanying text *supra*.

[85] *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[86] At least five state legislatures are considering reform of adoption consent laws as of this writing. Proposals in Wyoming and Kansas would require the consent of the putative father in some cases. 1 FAM. L. REP. 2182, 2196 (Jan. 21 & 28, 1975). In Massachusetts, House Bill No. 3875, 1975 Legislative Session, would entitle a putative father to notice of any adoption proceeding involving his illegitimate children, provided he files a "Paternal Responsibility Claim" at some time prior to the adoption proceedings. 1 FAM. L. REP. 2591 (July 15, 1975). The Ohio House of Representatives has passed a comprehensive adoption reform bill, which includes a requirement that all independent adoptions be made through authorized adoption agencies. 1 FAM. L. REP. 2720-21 (Sept. 2, 1975). The proposed revision

especially true in New York, where the legislature was already considering a revision of section 111 when *Malpica-Orsini* was decided. The proposal, drawn up by the New York State Law Revision Commission ("the Commission"), would require the consent of a putative father "having lawful custody" of his illegitimate child prior to an adoption.[87] Consent would not be required from other putative fathers, although notice would be provided any putative father whose paternity has been adjudged or acknowledged.[88]

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in the New York adoption consent law is discussed in notes 87-94 and accompanying text *infra.*

[87] The Commission recommends the amendment of § 111 to read as follows:

> Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:
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> 1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;
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> 2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;
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> 3. Of the mother, whether adult or infant, of a child born out of wedlock;
>
> 4. Of any person, *including the father of a child born out of wedlock,* or authorized agency having lawful custody of the adoptive child.

*Report of the Law Revision Commission for 1975,* in 1975 McKinney's Session Law News of N.Y. A-126 (emphasis indicates new language) [hereinafter cited as N.Y. Law Revision Comm'n Report].

It is unclear how the language added to subsection 4 (*i.e.,* "including the father of a child born out of wedlock") actually changes existing law. Section 111 already requires the consent of *any* person with lawful custody, including, presumably, a putative father. The addition suggested by the Commission would only be necessary if the father of an illegitimate were not considered a "person" under present law: a distinction which is not, in fact, made anywhere in the Domestic Relations Law.

[88] *Id.* at A-126 to -127. Because § 111 presently makes no provision for notice, the proposed notice provisions occupy an entirely new § 111-a:

> If a father of a child born out of wedlock does not have lawful custody of such child at the time adoption proceedings are instituted, his consent is not required; but he must be given ten days' notice by certified mail at his last known address of the examination before the judge or surrogate required by sections one hundred twelve or one hundred fifteen of this title only if, prior to the institution of the adoption proceeding, he has been adjudicated to be the child's father by a court of competent jurisdiction or he has acknowledged the paternity of such child in open court or by a verified written statement filed with the family court of any county of the state of New York.

*Id.* The bill facilitates the notice requirements of section 111-a through a minor amendment to § 543 of the Family Court Act, which presently provides a central registry system for all paternity orders. The bill extends this registry system to include paternity acknowledgements as well. The bill also amends § 384 of the Social Services Law to require the signature of a natural father on an instrument surrendering an illegitimate child to an authorized agency for adoption whenever the father has custody of the child. N.Y. Law Revision Comm'n Report A-126 to -127. See note 26 *supra,* for provisions of the present law.

The proposed revision was passed in its entirety by the General Assembly on June 17, 1975 (A. Intro. No. 3956), and was pending before the Senate Judiciary Committee (S. Intro. No. 2689) at the close of the 1975 regular session. 1975 NEW YORK LEGISLATIVE RECORD AND INDEX A-374.

In a memorandum supporting the proposed changes,[89] the Commission states that the bill is needed to bring New York adoption statutes into compliance with *Stanley*, which "held that an unwed father with custody of his illegitimate child must be given the same rights as all other parents in proceedings to involuntarily terminate parental rights."[90] The Commission notes that many adoption agencies in New York are making no attempt to interpret or comply with *Stanley*'s mandate, and expresses concern that challenges to ostensibly finalized adoptions may result.[91]

When read in the context of the Commission's memorandum, the proposed statutory revision appears as a very limited attempt to comply with the minimum requirements of *Stanley*. The impetus for the statute comes not so much from a concern for the rights of the putative father, as from a desire to protect finalized adoptions from subsequent litigation.[92] In interpreting *Stanley*, the Commission apparently confined the impact of the case to its facts, inferring that only the putative father with *custody* of his children is constitutionally entitled to the same privileges as the unwed mother.[93] The provisions in the proposed revision for notice to

[89] *Relating to the Rights of Fathers of Illegitimate Children in Adoption Proceedings*, N.Y. Law Revision Comm'n Report A-125 to -126.

[90] *Id.* at A-125.

[91] Many adoption agencies in New York are making no attempt to interpret or comply with *Stanley*'s mandate, but are simply fulfilling the present invalid statutory requirements. Since an invalid consent results in an invalid adoption, this practice could have tragic consequences. New York's statutory law should be revised to provide unwed fathers with their constitutional rights, so that adoptive parents can be assured of final, valid adoptions.

*Id.* at A-126.

[92] This concern was also expressed by the *Malpica-Orsini* majority. 36 N.Y.2d at 573-74, 331 N.E.2d at 490, 370 N.Y.S.2d at 517. It should be noted, however, that this problem is the result of *uncertainty* about the law after *Stanley*, and is not inherent in a statutory scheme requiring consent. A "nonretroactive" clause could protect existing adoptions under a statute enacted to require paternal consent. Moreover, in its remand of Rothstein v. Lutheran Soc. Serv., 405 U.S. 1051 (1972) (*see* note 12 *supra*), the Supreme Court specifically allowed for "due consideration for . . . the fact that the child has apparently lived with the adoptive family" for a considerable time.

[93] In *Stanley*, the father had physical custody of his children, but not a legally recognized right to that custody. By holding that the father had a right to notice and hearing, the Court indicated that physical custody was sufficient to establish the father's interest in the children, regardless of the legal status of that custody. The Commission appears to have missed this distinction in requiring that a person have "lawful" custody before his consent is required for an adoption. Moreover, the meaning of "lawful custody" under New York law is uncertain. "Lawful custody" is defined in N.Y. DOM. REL. LAW § 109(6) (McKinney 1964) as "a custody (a) specifically authorized by statute or (b) pursuant to judgment, decree or order of a court or (c) otherwise authorized by law." This provision has been construed to include only natural or appointive guardians as "lawful" custodians. *In re* Erhardt, 27 App. Div. 2d 836, 277 N.Y.S.2d 734 (1967). It is unclear, however, whether a putative father can qualify as a "natural guardian" merely because he has physical custody of

putative fathers who have acknowledged paternity can be seen as a response to *Stanley*'s emphasis on the right of the putative father to procedural due process.

Under the more rigorous standards of equal protection, *i.e.*, standards other than the traditional rational relation test, the proposed New York law has serious shortcomings. The requirement that a putative father have lawful custody of a child before his consent to an adoption is required is essentially an arbitrary distinction; whether or not the father has custody often has little to do with his interest in the children, or in his ability to be a good parent. Moreover, to the extent that custody is any indication of a parent's interest in a child, the statute is inconsistent in requiring the consent of other parents whether or not they have custody. Nor is the custody requirement necessary to preclude delays in adoption proceedings that might be caused by lengthy searches for absent putative fathers. Since the court must take the time, in any event, to give notice and hearing to any acknowledged putative father, no appreciable delay would be added by requiring the consent of such a father who appears at the proceedings.

Indeed, the proposed revision makes no changes in section 111 that would significantly alter the treatment of that statute under the various equal protection tests discussed above. The law would still treat putative fathers differently from all other parents, it would still bear a questionable relation to the child's welfare, and it would still treat men and women differently. Moreover, the statute might create an additional equal protection problem, since it treats putative fathers with custody of their children differently than all other putative fathers.

Nevertheless, the New York Legislature should have no constitutional qualms about the proposed legislation if it relies on the *Malpica-Orsini* opinion. Indeed, under Judge Cooke's analysis it is not even constitutionally necessary to require (as does the proposed revision) the consent of putative fathers who have custody of their illegitimate children. The court's narrow reading of *Stanley* suggests that only procedural due process, *i.e.*, notice and

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the child. Only in the unusual case where the unwed father has been appointed legal guardian of his child is it certain that he has "lawful custody." The Law Revision Commission recognized this ambiguity (N.Y. Law Revision Comm'n Report A-125), but did nothing to remedy it under the proposed revision. Under the "new" § 111, the term "lawful custody" is still used, and the definition of that term under § 109(6) of the Domestic Relations Law remains the same. *See generally* 15 N.Y. JUR. *Domestic Relations* §§ 462-65 (1972); 25 N.Y. JUR. *Guardian and Ward* §§ 5-7 (1962).

hearing, is required, and only for putative fathers who have custody.[94] Thus, even the notice provisions of the Commission's proposal may be broader than necessary under *Malpica-Orsini,* since they extend procedural due process to any acknowledged father.

In fact, if the legislature is so inclined, *Malpica-Orsini* provides a rationalization for leaving section 111 completely unchanged. By ruling that the consent of a putative father is never required for an adoption, the court of appeals has removed the uncertainty that prompted the Commission to recommend a revision in the first place.

B. *Other Statutory Approaches*

A major premise of Judge Cooke's equal protection analysis was that there was no way to protect the state's interest in speedy and permanent adoptions without denying the consent privilege to all putative fathers. The variety of adoption law reform bills enacted since *Stanley* tends to belie this conclusion. These new statutes fall into three basic categories (although there may be variations within each group), based primarily on how narrowly or broadly they construe *Stanley.*

The first group includes statutes that do not require the consent of any putative father to an adoption, and that require notice only to those fathers who have acknowledged paternity.[95] Such statutes are obviously based on a very narrow reading of *Stanley*—that unwed fathers are entitled only to procedural due process, and then only if they have taken positive steps to show "interest" in the child. Since this approach is basically the same as that of section 111 (as presently written) insofar as consent is concerned, the same equal protection arguments will apply as those raised with respect to *Malpica-Orsini.*

A second type of statute takes a very broad view, requiring notice to, and consent from, all biological fathers, acknowledged or otherwise.[96] Under this approach, *Stanley* is interpreted as mandating equal rights for the putative father, *i.e.,* the same rights as all other parents, in any proceeding involving his children. It is likely that a statute following this view could survive any test of

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[94] *See* notes 34-35 *supra.*

[95] *See, e.g.,* MD. ANN. CODE art. 16, § 74 (1973); MD. RULES OF PROCEDURE D73, D74 (Supp. 1975). *Cf.* REVISED UNIFORM ADOPTION ACT §§ 5, 6, 11.

[96] *See, e.g.,* WASH. REV. CODE ANN. § 26.32.030 (Supp. 1974); WIS. STAT. ANN. § 48.84 (Supp. 1975).

equal protection since it really makes no classifications at all. The practical administration of such a statute might be quite complicated, however, especially where the location, or even the identity, of the putative father is unknown. Notice by publication might be required in many cases, with the likelihood of embarrassment and possible hardship to the parties involved.[97] Moreover, unless the statute contained some time limitation on the exercise of the consent privilege, the requirements could lead to delay in adoption proceedings or disruption of completed adoptions.

Statutes that attempt to deal with such practical problems, while still protecting some of the putative father's rights, fall into a third group.[98] The idea underlying such statutes is that *Stanley*

[97] The problems attendant to providing notice to unknown putative fathers have prompted the most widespread objection to the *Stanley* decision. Professor Barron of the George Washington University Law School argues that in the vast majority of cases the identity and location of the father are unknown, and that notice by publication is usually futile. Requiring procedural due process in every case therefore has the effect of holding up adoptions for long periods of time. In addition, Professor Barron maintains that requiring the mother to identify the father is a very severe invasion of her privacy. *Adoption, Adoptees' Rights Debated at ABA Meeting*, 1 FAM. L. REP. 2736, 2737-38 (1975). *See also* Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing Stanley v. Illinois*, 9 FAM. L.Q. 527 (1975). To date, however, there is little statistical evidence as to the effect of the notice requirement on the speed of the adoption process.

Recently, the Supreme Court heard argument on the constitutionality of a Connecticut Statute (CONN. GEN. STAT. REV. § 52-440b (1975)) that required the mother of an illegitimate child to divulge to designated officials the name of the putative father of the child. Noncompliance with the statute was a contempt punishable by imprisonment up to one year and a fine of up to $200. The statute applied to mothers of illegitimate children receiving Aid to Families with Dependent Children. The appellants argued that the statute resulted in a denial of due process and equal protection, and also that its application caused an impermissible invasion of privacy. The Supreme Court, without reaching the constitutional questions involved, remanded the case in light of recently enacted amendments to the Social Security Act, which require that unwed mothers cooperate with the state in finding the father as a condition of eligibility for aid. Roe v. Norton, 422 U.S. 391 (1975).

[98] *See, e.g.*, MICH. STAT. ANN. §§ 27.3178 (555.28)-(555.43) (1975 Current Material Release #1); ch. 640, [1975] Oregon Laws 123 (pamph. 8).

The Michigan statute requires the consent of the father if he has filed a notice of intent to claim paternity prior to the birth of the child. If no declaration of paternity has been filed, the court must determine whether the father was ever notified of the child's birth, and whether the father has provided support for the child, or whether the parents have married subsequent to the birth of the child. If the court finds one of these situations to exist, then efforts must be made to notify the father.

The Oregon statute is similar to Michigan's, but establishes different criteria for providing notice to unacknowledged putative fathers. Notice is provided by personal service and, if necessary, by publication if the putative father has contributed to or attempted to contribute to the support of the child during the year immediately preceding the initiation of an adoption proceeding, or if the child has resided with the putative father during the 60 days immediately preceding the initiation of an adoption proceeding. If a father responds to such notice, his consent to the adoption may still be required, upon a determination of his

requires the abolition of only those classifications of putative fathers that are not essential to compelling state interests. Under this approach, the consent of the putative father is required for adoption, but only if the father has taken some positive step to show his interest in the child; for example, by acknowledging paternity, providing support, or visiting the child frequently. This could very well be acceptable under a "demanding" rational relation test, since it protects the rights of most putative fathers who are truly concerned with the welfare of their illegitimate children.

If the father's interest in his children is deemed to be "fundamental," however, the strict scrutiny test would be applied, and the state would have to explain why certain putative fathers were denied the same consent privilege given to other parents. It might be very difficult to produce convincing evidence that a father was presumably unfit merely because he had not taken the particular "positive step" required by the statute. To be sure, the state might argue that a less restrictive classification would impose notice requirements so burdensome as to seriously endanger the welfare of the child by delaying adoption and/or cause an impermissible invasion of the mother's privacy if notice by publication were required.[99] However, there is probably insufficient evidence to justify such a sweeping conclusion at the present time. Although social workers and adoption agencies are complaining about difficulties created by the *Stanley* decision, it is unclear whether the problems derive from the notice requirements per se, or simply from uncertainty about the nature of those requirements.

Whether or not a state is willing to undertake the measures required by the strict scrutiny test, it is clear that the rights of the putative father can be protected to some degree without seriously impeding orderly adoptions. Requiring notice to, and consent from, all acknowledged putative fathers whose whereabouts are known would seem to be a minimal step which can easily be taken. Moreover, there is no reason that a judge cannot at least make inquiries at adoption proceedings to determine if the identity and location of the unwed father is ascertainable.[100] The judge might

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fitness by the judge. Failure of the father to appear, however, frees the court to act in his absence and without his consent.

[99] *See* note 97 *supra*.

[100] The Illinois statute states that the court *may* direct notice to the father upon petition from any interested party in the proceedings. ILL. ANN. STAT. ch. 4, § 9.1-12a (Smith-Hurd Supp. 1975).

be given the power to require the consent of an unacknowledged father, where he determines that such father may still be found and brought into the proceedings. Finally, to the extent that courts are allowed to dispense with the consent of an unwed father, they should also be allowed to dispense with the mother's consent for the same reasons.[101] Thus, if the statute requires the father to demonstrate his interest in the child in some way before his consent is required, the same demonstration of interest should be required of the mother. Indeed, a statute that set the same prerequisites for both the mother's and the father's consent would be relatively free of potentially offensive classifications and might be able to survive even the strict scrutiny test.

## CONCLUSION

The Supreme Court's opinion in *Stanley* has brought into doubt the constitutionality of many state statutory provisions that

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[101] The California adoption statute seems to take this approach, at least to a degree. The statute provides several factors under which the court can dispense with the consent of either parent. ch. 1244, § 244, [1975] West's Cal. Legis. Serv. 3440.

One court has suggested that a judge should be allowed to waive the consent of *either* parent where the child's best interests would thereby be served. *In re* Commitment of Tyease "J", 373 N.Y.S.2d 447 (Surr. Ct. of New York Co. 1975). This would, in effect, equate "downward" the rights of the unwed father and mother by making those rights secondary to the child's welfare. Under § 111, as presently constituted, the mother can veto an adoption even when the adoption is clearly in the child's best interests, as long as her veto power is not waived under one of the specific statutory exceptions (*e.g.*, abandoment, insanity, and drunkenness). *See* note 26 *supra.* New York law does recognize the child's best interests (as determined by the court) as the sole consideration when a parent attempts to revoke a previous surrender instrument or adoption consent. N.Y. DOM. REL. LAW § 115-b(3) (McKinney Supp. 1975); N.Y. SOC. SERV. LAW § 385(5) (McKinney Supp. 1975). Moreover, a judge can act to protect the child's best interests in some cases by exercising his discretionary power under § 111 to provide notice and an opportunity to be heard to genuinely concerned parents whose consent may not be required for some reason. It seems unlikely, however, that New York courts will adopt a broad "best-interests-of-the-child" standard for all adoption cases in the absence of further action by the legislature. Far from favoring a flexible scheme in which a judge can order or block an adoption clearly in the child's interest, the *Malpica-Orsini* majority strongly endorsed the rigid presumptions of the present law under which a maternal veto power is *always* considered consistent with the child's best interests.

The Illinois adoption law contains a provision that makes the best interests and welfare of the person to be adopted of "paramount consideration" in the construction and interpretation of the Act. ILL. ANN. STAT. ch. 4, § 9.1-20a (Smith-Hurd Supp. 1975). This provision, along with several provisions of the Illinois adoption law, has been used to justify judicial waiver of the consent requirement where adoption is clearly in the child's best interests. *See* Stines v. Vaughn, 23 Ill. App. 3d 511, 516-17, 319 N.E.2d 561, 564-65 (1974). The Ohio Supreme Court has given a similar interpretation to that state's adoption law. State *ex rel.* Portage County Welfare Dep't v. Summers, 38 Ohio St. 2d 144, 311 N.E.2d 6 (1974). *See also* 60 VA. L. REV. 718 (1974) (discussing Virginia statute that allows court to waive consent requirement when child's best interests will be served).

treat putative fathers differently than other parents. The most immediate effect of the *Malpica-Orsini* decision should be to foreclose any such doubts as to the putative father's right to veto a New York adoption of his illegitimate child. By ruling that the putative father's consent is never required for an adoption, the court of appeals has effectively precluded the possibility that a putative father might successfuly challenge a finalized New York adoption on equal protection grounds. *Malpica-Orsini* does not, however, clarify the nature and extent of the putative father's right to notice and hearing under New York law. Since section 111 does not *require* notice to a putative father, it still might be possible for him to challenge an adoption on due process grounds, if he was never granted notice and an opportunity to be heard in the adoption proceeding.

To the extent that *Malpica-Orsini* is followed in other states, it could very well have the effect of slowing the reform of adoption consent statutes prompted by the *Stanley* decision. Judge Cooke's opinion provides a ready analysis, purportedly consistent with *Stanley*, which denies that state adoption laws requiring only the consent of the unwed mother are in any way violative of the Constitution. The decided lack of interest in the rights of putative fathers prior to *Stanley* suggests that legislatures are not particularly interested in the problem, and many may be relieved to discover a rationale under which statutory change is not required.

On the other hand, it is likely that some courts and legislatures will be dissatisfied with the equal protection analysis used by the *Malpica-Orsini* court and with the result it reached. *Stanley* brought increased attention not only to constitutional questions about the rights of putative fathers, but also to human interests that have often been ignored under past practices. A greater awareness of the concern that many putative fathers hold for the welfare of their children could lead to modification of adoption consent laws that presently presume that all unwed fathers are unfit parents. To that end, reasonable measures are available to protect the rights and interests of the putative father, without compromising the state's concern for the best interests of the illegitimate child.

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