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NOTES

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I. INTRODUCTION

Parental rights have always enjoyed a favored status in constitutional jurisprudence. The United State Supreme Court has described them as "essential" and among the "basic civil rights of man."[1] As such, they may not be terminated without due process of law.[2] In the past, some courts have assumed that due process protection extended only to the parents of legitimate children and to unwed mothers;[3] unwed fathers whose paternity had not been legally established were not included. As recently as 1970, the Illinois Supreme Court upheld a statute that entirely failed to recognize a putative father's parental status.[4]

However, in *Stanley v. Illinois,* the United States Supreme Court reversed the Illinois decision and unequivocally declared that "family relationships unlegitimized by a marriage ceremony" also must be recognized.[5] The children had been in the father's custody all their lives, but when their mother died, they were declared wards of the state. The father was conclusively presumed to be an unfit parent[6] and was not allowed to object to

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1. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923) and Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

2. Parental rights are liberty rights, protected under the fourteenth amendment. *See generally* Lehr v. Robertson, 463 U.S. 248, 252-62 (1983).

3. *See, e.g.,* Thomas v. Children's Aid Soc'y, 12 Utah 2d 235, 239, 364 P.2d 1029, 1031 (1961); State *ex rel.* Lewis v. Lutheran Social Servs., 47 Wis. 2d 420, 427, 178 N.W.2d 56, 60 (1970).

4. Pursuant to the statute, any child "without a parent, guardian, or legal custodian," could be declared a ward of the state. ILL. REV. STAT. ch. 37, paras. 702-5 (1967), *quoted in* People v. Stanley (*In re* Stanley), 45 Ill. 2d 132, 133, 256 N.E.2d 814, 815 (1970). The term "parent" included only "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child." *Id.* paras. 701-14, *quoted in Stanley,* 45 Ill. 2d at 133-34, 256 N.E.2d at 815.

5. 405 U.S. 645, 651 (1972).

6. "[U]nder Illinois law, Stanley is treated not as a parent but as a stranger to his children, and the dependency proceeding has gone forward on the presumption that he is unfit to exercise parental rights." *Stanley,* 405 U.S. at 648. The Illinois Supreme Court, in comparing Mr. Stanley with prospective custodians and guardians declared, "[P]rior to action by the court, neither the class of prospective custodians and guardians, nor the

their removal from his home. The Court held this presumption constitutionally infirm:

> It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.[7]

Thus under current Supreme Court doctrine, all parents are entitled to constitutional protection. But the due process rights of putative fathers remain uncertain, notwithstanding language in *Stanley* that seems to place them on equal ground with other parents. *Quilloin v. Walcott*[8] and *Caban v. Mohammed*,[9] neither of which dealt with the putative father's right to notice and hearing, recognized important differences between putative fathers and other parents.[10] These cases involved statutes—virtually identical in relevant respects—that limited the

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class of 'unwed fathers', had *any* rights to control or custody." People v. Stanley (*In re* Stanley), 45 Ill. 2d at 134, 256 N.E.2d at 815 (emphasis in original).

7. 405 U.S. at 654 (footnote omitted). The dissenting opinion interprets the statute differently, finding no conclusive presumption of unfitness. 405 U.S. at 661, 662 (Burger, C.J., dissenting). But this does not detract from the Court's unmistakable disapproval of such a presumption.

8. 434 U.S. 246 (1978).

9. 441 U.S. 380 (1979).

10. In *Quilloin*, the natural parents had not married and had never lived together. The father had maintained contact with the mother and visited frequently, but he had never sought to legitimate the child. Eleven years after the child's birth, the mother's husband filed an adoption petition which was granted over the natural father's objection.

The Supreme Court rejected the natural father's contention that his interests were "indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child, and therefore the State acted impermissibly in treating his case differently." *Quilloin*, 434 U.S. at 256. The principal distinction justifying their different treatment was the extent of a married father's parental responsibilities as compared with the duties accepted by Mr. Quilloin.

In *Caban* the natural parents had lived together, representing themselves as being husband and wife. When their children were born, both took responsibility for raising them. After the parents separated, the putative father continued to have contact with the children. But the mother eventually married and her husband sought to adopt the children.

Although the Court disapproved recognition of a "universal difference between maternal and paternal relations at every phase of a child's development," *Caban*, 441 U.S. at 389, it reserved judgment with respect to newborns, *id.* at 392 n.11. And although the law must consider the father's interests if he is available, the Court acknowledged that problems of identification might justify a gender-based distinction in many cases. *Id.* at 392 ("[W]here the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child.").

putative father's right to object to the adoption of his illegitimate child. One statute was upheld, the other struck down, indicating that the basis for *Stanley* was not as clear-cut as might have been earlier supposed.[11]

Recently, the Court decided *Lehr v. Robertson*,[12] which dealt specifically with the right of a putative father to notice and a hearing in an adoption context. In *Lehr*, the mother had married someone other than the child's natural father, and her husband sought to adopt the child. Although the state had actual knowledge of the whereabouts of the putative father, it did not provide him notice of the proceeding. After the adoption was granted, he was not permitted to object.

The father had attempted to establish a parent-child relationship, and even petitioned for visitation rights, but the Supreme Court held that the putative father's due process rights had not been violated. The court based this holding on the father's failure to take advantage of a state filing procedure that would have protected his interest. Thus *Lehr* leaves to the putative father much of the responsibility for protecting his own rights. Notwithstanding the significance of his interest, the state is not obliged to hear him in every case.

Against this background, an interesting line of Utah cases has brought some of the most difficult due process issues into sharper focus.[13] The most recent case, *In re Adoption of Baby Boy Doe*,[14] is the subject of this note.

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11. The Georgia statute at issue in *Quilloin* allowed an illegitimate child to be adopted without the consent of the natural father. The Court noted that a legitimate child could not be adopted under Georgia law without the consent of each living parent. *Quilloin*, 434 U.S. at 248-49. The statute was challenged, unsuccessfully, solely on its disparate treatment of unwed fathers and married fathers. *See id.* at 253 & n.13.

The New York statute at issue in *Caban* also required the consent of the natural mother but not the natural father before their illegitimate child could be adopted. The putative father challenged the statute based on the statutorily-imposed gender distinction. *See Caban*, 441 U.S. at 388-89 & nn.6-7. In the circumstances, the father's relationship with the children may have been comparable to the mother's, so the inflexible distinction created by the statute was held unconstitutional. *Id.* at 394.

12. 463 U.S. 248 (1983).

13. Ellis v. Social Serv. Dep't of the Church of Jesus Christ of Latter-day Saints, 615 P.2d 1250 (Utah 1980); Wells v. Children's Aid Soc'y, 681 P.2d 199 (Utah 1984); Sanchez v. L.D.S. Social Servs., 680 P.2d 753 (Utah 1984); *In re* Adoption of Baby Boy Doe, 717 P.2d 686 (Utah 1986).

14. 717 P.2d 686 (Utah 1986).

II. The Nature of the Problem

A. The Factual Setting

A cursory review of *Stanley* and its progeny reveals that the putative father's due process rights are heavily fact-dependent. In some cases, a mere recognition of the putative father's interest is sufficient to establish his right to a hearing.[15] In the typical case, however, the existence of numerous important countervailing interests makes the analysis more difficult. For example, protection for the putative father in *Lehr* could be provided only at the expense of the adoptive family. The extent of the protection afforded to putative fathers in most cases affects the interests of adoptive parents, unwed mothers, and adopted children.

The existence of these other interests necessitates a careful factual inquiry, followed by a balancing process that accounts for all affected parties. In the factual setting of *Baby Boy Doe,* the balancing is particularly difficult. The mother, a California resident, had come to Utah to have the baby. In California, she had lived with the baby's father. In Utah, she lived with members of her family, who disapproved of the father and encouraged adoption for the child. The father maintained contact with the mother throughout her pregnancy, and made it known to the mother and her family that he was opposed to adoption. He also expressed a desire to continue his relationship with the mother after the baby was born.

In reliance on the mother's assurances that she would live with him, the father found a job and a place to live in Arizona, then went to California to move their things. He was en route from California to Arizona on the day of the baby's birth. Three days later, the father discovered that his child had been born—earlier than expected. Unfortunately, he also discovered that the mother had relinquished her parental rights and that an adoption petition had been filed. He immediately drove to Utah and filed a claim of paternity.

The issue that divided the *Baby Boy Doe* court was whether due process guaranteed this father a right to oppose the adoption. Pursuant to the Utah statute at issue in the case, his rights were effectively terminated by the filing of the adoption petition because of his failure to register a notice of his paternity claim

15. *See, e.g.,* Stanley v. Illinois, 405 U.S. 645 (1972).

prior to the petition.[16] As applied to this father, the Utah court found the statute unconstitutional.

The following factual elements—each discussed in turn below—are important in analyzing the outcome of *Baby Boy Doe:* First, this father obviously had a significant parental interest in his child which is worthy of note merely because of his *biological tie* with the child. Second, there was no opportunity for the father to develop a *parent-child relationship* with his child before the adoption petition was filed, which distinguishes *Baby Boy Doe* from the Supreme Court precedents. Third, this father had a limited opportunity to establish a *legal tie* with the child. Although the state paternity file would have provided such an opportunity, the mother apparently indicated that there would be no adoption, and thus no need to file. Finally, the father objected to the adoption before another *family unit* had become well-established.

B. The Biological Relationship

The significance of the biological tie between the putative father and his child is explained in *Lehr v. Robertson:* " 'Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.' "[17] The chief significance of the putative father's biological tie is that it gives him a unique opportunity to develop a "more enduring" relationship that will merit constitutional protection. The tie is therefore important, but the interest society actually seeks to protect " 'stems from the emotional attachments that derive from the intimacy of daily association.' "[18]

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16. UTAH CODE ANN. § 78-30-4 (Supp. 1985). The statute provided:

(a) A person who is the father . . . of an illegitimate child may claim rights pertaining to his paternity of the child by registering with [the state] a notice of his claim . . . .

(b) The notice may be registered prior to the birth of the child but must be registered . . . prior to the filing of a petition by a person with whom the mother has placed the child for adoption. . . .

(c) Any father of such child who fails to file and register his notice of claim to paternity and his agreement to support the child shall be barred from thereafter bringing or maintaining any action to establish his paternity of the child. Such failure shall further constitute an abandonment of said child and a waiver and surrender of any right to notice of or to a hearing in any judicial proceeding for the adoption of said child . . . .

17. 463 U.S. 248, 260 (1983) (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

18. *Id.* at 261 (quoting Smith v. Organization of Foster Families for Equality and

Only after a period of intimate daily contact does the father's interest become worthy of significant constitutional protection.

With the passage of time, the biological relationship becomes less important, and eventually loses its constitutional significance. In *Quilloin v. Walcott*,[19] no advantage was given to the natural father by virtue of his biological tie with his eleven-year-old child. The case was decided only with reference to the child's best interests. The diminishing significance of the biological tie is also illustrated by *Caban v. Mohammed*,[20] in which the state of New York, in defending the constitutionality of its adoption procedures, argued that the mother's interest in her children is naturally superior to the father's. The basis for the argument must be the mother's more significant biological connection.[21] But the Supreme Court did not agree that this connection merits deference indefinitely:

> [B]oth the mother and the father participated in the care and support of their children. There is no reason to believe that the Caban children—aged 4 and 6 at the time of the adoption proceedings—had a relationship with their mother unrivaled by the affection and concern of their father.[22]

The biological relationship was tremendously important to the putative father in *Baby Boy Doe* because he had nothing else upon which to base his claims. It was the only source of his parental rights. While other factors, such as the putative father's good faith or his opportunity to establish a legal relationship, are undoubtedly relevant, only the biological tie gives rise to parental rights in the first instance.

Reform, 431 U.S. 816, 844 (1977)).

19. 434 U.S. 246 (1978).

20. 441 U.S. 380 (1979).

21. *Id.* at 388-89. It is of course possible that the argument was based partially on social factors, i.e., since mothers are generally expected to develop a close relationship with their children, it is statistically probable that mothers will in fact develop such a relationship more fully than fathers. But this is essentially the empirical approach already rejected in *Stanley*. *See supra* note 7 and accompanying text. Due process protection cannot be made to hinge on the probability that a putative father's claims will be persuasive on their merits. The *Caban* court understood the state's argument to be that there existed an *inherent* difference between a maternal and a paternal relationship. Such differences must necessarily arise from biological factors, whatever the specific aspects of these relationships may be. *See id.* at 397 (Stewart, J., dissenting) ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.").

22. *Id.* at 389 (footnote distinguishing *Quilloin* omitted).

C. *The Parent-Child Relationship*

A father creates his strongest claims to his children by discharging his parental responsibilities toward them. As rights inherently implicate duties, a father's claim to parental rights is firmly established by (perhaps even contingent upon) fulfillment of the duties attendant to fatherhood.[23] Consequently, if he establishes a substantial parental relationship through personal contact with the child or through financial support, he is entitled to enhanced due process protection; if he fails to establish such a relationship, his entitlement to constitutional protection is significantly diminished.

The Supreme Court cases have identified the putative father's relationship with his child as a matter of central concern in defining his constitutional rights. For example, the Court noted in *Stanley* that the father claimed an interest in "the children he ha[d] sired and raised."[24] But the father in *Lehr*, had only an "inchoate relationship with a child whom he ha[d] never supported and rarely seen in the two years since her birth."[25]

The father in *Baby Boy Doe* cannot claim this source of parental rights; he must rely wholly on his biological tie, which, according to *Lehr*, provides only the opportunity to *acquire* parental rights. Yet *Baby Boy Doe* forces us to go beyond the dicta and inquire—what if the father is afforded no opportunity to develop an ongoing relationship with his child? All of the Supreme Court opinions seem to assume such an opportunity,[26]

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23. *See* Lehr v. Robertson, 463 U.S. 248, 257-58 (1983); J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973); Schwartz, *Contested Adoption Cases: Grounds for Conflict Between Psychology and the Law*, 14 PROF. PSYCHOLOGY: RES. & PRAC. 444, 454-55 (1983). See also the discussion of *Quilloin* and *Caban* *supra* note 10.

It is significant that parental rights which arise out of marriage or filing with the state of Utah are attended by an obligation of support. *See* UTAH CODE ANN. § 78-30-4 (Supp. 1985). But the biological relationship alone does not give rise to any such obligations until it is legally established. *See* State *ex. rel.* Wingard, 576 P.2d 620 (Kan. 1978).

24. 405 U.S. 645, 651 (1972); *see also Caban*, 441 U.S. at 389 ("The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother.").

25. 463 U.S. at 249-50. The Court noted, "The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant." *Id.* at 261. In *Quilloin* the Court observed, "[The putative father] has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Quilloin*, 434 U.S. at 256.

26. In *Stanley*, of course, the opportunity was realized. *Caban* applies only to older

whereas Baby Boy Doe—two days old—was given up for adoption before his father had a reasonable opportunity to even see him. *Lehr* defines the putative father's rights largely in terms of this opportunity,[27] so it would be odd to maintain that it makes no difference in the constitutional analysis.

D. The Legal Relationship

Besides the biological link and day-to-day contact, there are legal methods of establishing a parent-child relationship. The most obvious of these is marriage.[28] If the father is married to the mother, he automatically enjoys a protected right in his offspring which is independent of the biological relationship. For putative fathers, who do not always have the option of marriage, other methods of legitimating the child or otherwise protecting their rights are available. In Utah, filing a notice of intent to claim paternity entitles them to notice and a hearing before

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children, not to newborns. *See* 441 U.S. at 392 & n.11. In *Quilloin*, the Court was quick to point out that the father had 11 years in which to develop a relationship. *See supra* note 25. *Lehr* is discussed *infra* note 27.

27. The Court opined: "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. . . . We are concerned only with whether New York has adequately protected his opportunity to form such a relationship." *Lehr*, 463 U.S. at 262-63.

One of the difficulties in interpreting *Lehr* is the very different characterization of the facts in the majority and dissenting opinions. The dissent, relying on the putative father's complaint, refers to incessant attempts to establish a relationship with the child. But the mother made contact nearly impossible and then disappeared entirely. *See id.* at 269 (White, J., dissenting). It is unclear whether the majority simply refused to acknowledge the putative father's attempts, or whether it considered them irrelevant. Some of the majority's language strongly indicates that the father *acquires* constitutional protection only through marriage or an actual relationship with the child. *Id.* at 260 n.16. The protection is therefore not afforded until the relationship develops. " '*[I]f and when one develops*, the relationship between a father and his natural child is entitled to protection . . . .' " *Id.* at 260 (quoting *Caban*, 441 U.S. at 414) (emphasis added in the *Lehr* opinion). *But see id.* at 272 (White, J., dissenting) (arguing that the fulfillment of parental duties merely adds weight to the father's rights rather than giving rise to them in the first instance). On the other hand, the majority declares that the unwed father can acquire "substantial protection" under the due process clause by demonstrating a full commitment to his parental responsibilities. *Id.* at 261. Surely this would include such things as the putative father's visits to the mother in the hospital, his offers of financial assistance, and his attempts to contact the child after she was born, *see id.* at 269 (White, J., dissenting), yet the majority fails to mention these things. The Court did consider it significant that the putative father had not offered to marry the mother. *See id.* at 252.

28. *See id.* at 256-57 (recognizing the "critical role" that marriage has played in "defining the legal entitlements of family members"); *see also id.* at 263; *Caban*, 441 U.S. at 397 (Stewart, J., dissenting).

their rights are terminated.[29] Assume, however, that the putative father has not availed himself of this opportunity—as in *Baby Boy Doe*. What effect does the availability of the file have on his basic rights?[30]

Pursuant to the Utah statute, failure to take advantage of the paternity file terminates the putative father's rights by giving rise to a conclusive presumption of abandonment.[31] Naturally, if the availability of the paternity file could justify such a presumption in every case, failure to file would make notice and a hearing unnecessary.[32] However, for fathers who do not file for legitimate reasons, the statutory presumption is insufficient to foreclose the opportunity to be heard.

Arguably, the paternity file itself constitutes an opportunity to be heard, adequate to satisfy the demands of due process. Through the file, the putative father may assure himself of an opportunity to receive notice in the event his rights are challenged. This places at least part of the burden of receiving notice on the putative father, and allows him to effectively waive his rights inadvertently. But if notice cannot otherwise be assured—which seems likely—legal opportunities to establish parental rights may be the only way of avoiding great harm to innocent persons.

The Supreme Court decisions are comparatively unhelpful on this issue. On the one hand, *Quilloin* expresses a reluctance to deprive the father of rights simply because he did not file.[33] On the other, *Lehr* emphasizes that a paternity file puts the right to receive notice completely within the putative father's control,[34] which suggests the adequacy of the file as a protection. However, Mr. Lehr had the benefit of legal advice and presumably knew of his rights when it was still possible to protect them.

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29. UTAH CODE ANN. § 78-30-4 (Supp. 1985).

30. In some cases, of course, failure to file may have an important bearing on the equities, even if the existence of the file is not viewed as affecting the father's basic interest. A good example is Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984), in which the father was advised of his responsibility to file. He failed to do so until he had assured himself that he was in fact the father, and his claim did not reach the state agency in time. It seemed fair under those circumstances to dismiss his objection to the adoption of the child. His rights would not need to be determined solely by the availability of the file. Rather, his particular acts could be viewed as indicating a waiver of his rights.

31. UTAH CODE ANN. § 78-30-4 (Supp. 1985).

32. *See infra* notes 56-60 and accompanying text.

33. 434 U.S. at 246, 254.

34. 434 at 263-64.

For most putative fathers, an awareness of the paternity file must simply be assumed.[35]

E. The Integrity of the Family Unit

Many of the constitutional rights accorded to parents and children arise out of a public policy that fosters and encourages family integrity. Rather than focusing on the individual rights of family members, this policy focuses on the family unit itself.[36] *Quilloin* noted, for example, that an adoption by the child's stepfather would sanction the existing family arrangement.[37] In *Caban,* the New York Court of Appeals suggested that facilitating adoption by stepparents would encourage marriages.[38]

Significantly, this policy includes not only formal family units, but also relationships between illegitimate children and their parents. In *Stanley,* for example, the state of Illinois argued that its law sought to protect the welfare of minors and strengthen their family ties.[39] The Supreme Court approved the goal, but it eschewed the means employed to achieve it. "What is the state interest in separating children from fathers without

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35. The Utah courts are apparently willing to indulge in the assumption that putative fathers are aware of the file. *See* Sanchez v. L.D.S Social Servs., 680 P.2d 753, 755 (Utah 1984). Note, however, that knowledge of the law was not presumed in the two cases involving nonresident putative fathers. *In re* Adoption of Baby Boy Doe, 717 P.2d 686 (Utah 1986); Ellis v. Social Servs. Dept. of the Church of Jesus Christ of Latter-day Saints, 615 P.2d 1250 (Utah 1980). *Lehr* indicates that ignorance of the law would be no excuse, as long as the opportunity to file is available. 463 U.S. at 264.

36. The Court observed in *Lehr,* "[S]tate laws almost universally express an appropriate preference for the formal family." 463 U.S. at 257 (citing Trimble v. Gordon, 430 U.S. 762, 769 (1977) ("No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society."). According to one court, "[T]he crucial issue [in determining parental rights] is the best interest of the child. The constitutional concerns are not entirely parental because the preservation of family integrity 'encompasses the reciprocal rights of both parent[s] and children.'" McGaffin v. Roberts, 193 Conn. 393, 407, 479 A.2d 176, 183 (1984), A. 2d. 176, 183 (1984) (quoting Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977)), *cert. denied,* 470 U.S. 1050 (1985).

37. 434 U.S. at 251. The Court also cites with apparent approval the Georgia Supreme Court's reasoning, which heavily stressed a "policy of rearing children in a family setting." *Id.* at 252 (citing Butler v. Butler, 238 Ga. 230, 232 S.E.2d 246 (1977)). "[U]nlike the father in *Stanley,* appellant [the putative father] had never been a *de facto* member of the child's family unit." *Id.* at 253.

38. Caban v. Mohammed, 441 U.S. 380, 390-91 (1979). The majority did not disparage the goal, and the dissent expressly endorsed it. *See id.* at 407 (Stevens, J., dissenting).

39. Stanley v. Illinois, 405 U.S. 645, 652 (1972).

a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents."[40]

In *Baby Boy Doe,* the interest in family integrity is equivocal because the relevant family unit is not easily identifiable. One might choose to favor the biological relationship, the currently existing relationship, the longest existing relationship, or the traditional relationship (involving two parents). None of these presents itself as the obvious alternative in *Baby Boy Doe,* because the putative father never had custody and the adoptive family had only been in existence for a short time.

III. The Interests Involved

Since the putative father's protectable interest is highly fact-sensitive, his rights to notice and a hearing should arguably be made absolute, to ensure that all relevant factors are brought to light. If the putative father has constitutional rights with respect to his child (the argument would go), the state is powerless to deprive him of an opportunity to protect those rights. Thus, any adoption petition filed without notice to the father is voidable if the father later objects.[41]

On the other hand, even the fundamental due process requirements of notice and a hearing have never been deemed absolute, even in the context of putative fathers' parental rights. *Stanley,* which rejected Illinois' conclusive presumption of unfit-

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40. *Id.*

41. The Supreme Court decisions indicate that the putative father's right to challenge the adoption is not unlimited. Hence, even if the right to a hearing were absolute, the adoption petition must not be voided before all relevant interests have been considered.

A more restrictive approach is taken by Terrazas v. Riggs (*In re* Riggs), 612 S.W.2d 461 (Tenn. Ct. App. 1980), *cert. denied,* 450 U.S. 921 (1981), which does not discuss countervailing interests at all.

> [The putative father] has established, through his sperm and through his efforts to find his natural child, such a relationship with the child as to entitle him to due process of laws in any proceeding adverse to his parental rights. *No court could have constitutionally deprived this father of his child without giving him notice.*

Id. at 468 (emphasis added); *see also* Hernandez v. Scott (*In re* Adoption of Lathrop), 575 P.2d 894, 898 (Kan. 1978).

The dissenters in *Baby Boy Doe* accuse the majority of taking the same approach. "[T]he majority . . . simply declares as an *ipse dixit* that the father in this case has a constitutional right to the child he has fathered, and that he must be given notice before his right can be terminated." 717 P.2d at 694 (Stewart, J., dissenting).

ness, nevertheless endorsed a flexible, nontechnical approach to due process:

> [W]e recognize, as we have in other cases, that due process of law does not require a hearing "in every conceivable case of government impairment of private interest." [One] case explained that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation" and firmly established that "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[42]

It therefore becomes necessary to evaluate the various private interests[43] affected by the outcome of a case like *Baby Boy Doe.*

A. The Putative Father's Interest

The putative father's special interest grows out of his biological connection with his child and may be heightened through daily association and the exercise of parental responsibilities. The resulting emotional attachment is both compelling and constitutionally cognizable. Of course, some fathers develop no such emotional attachment. Some take little interest in their offspring. But this analysis must assume otherwise.[44] The putative

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42. 405 U.S. at 650 (citations omitted); *accord* Nelson v. Jacobsen, 669 P.2d 1207, 1213 (Utah 1983); Worrall v. Odgen City Fire Dept. 616 P.2d 598, 602 (Utah 1980); Rupp v. Grantsville City, 610 P.2d 338, 341 (Utah 1980).

43. Due process also involves a balancing of state interests against "the individual interest sought to be protected by the Fourteenth Amendment." Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950). But since the state's interest in restricting such protection derives from the interests of children, unwed mothers, and adoptive parents, only private interests need be discussed here. While a few state interests could be considered from a purely administrative standpoint—such as preserving the finality of adoptive placements and avoiding litigation—these probably have little significance when compared with the constitutional rights of putative fathers. *See* Wells v. Children's Aid Soc'y, 681 P.2d 199, 204 (Utah 1984) (discussing state interests by reference to adopted children and unwed mothers); Sanchez v. L.D.S. Social Servs., 680 P.2d 753, 755 (Utah 1984) (discussing state interests by reference to adopted children and unwed mothers). *But see* Lehr v. Robertson, 463 U.S. 248, 265 (1983) (apparently emphasizing administrative concerns); *Caban*, 441 U.S. at 408-09 (Stevens, J., dissenting).

44. *Lehr*, 463 U.S. at 272 (White, J., dissenting) ("Any analysis of the adequacy of the notice in this case must be conducted on the assumption that the interest involved here is as strong as that of *any* putative father.") (emphasis in original); *see also Caban*, 441 U.S. at 391-92; *Stanley*, 405 U.S. at 654.

father's interest must be treated as if it were as substantial as the interest of any other parent. Undoubtedly, the decision to sever his relationship with his child is a grave one.

B. The Natural Mother's Interest

Because the mother in *Baby Boy Doe* chose to relinquish her parental rights, her parental interests have no bearing on the disposition of the case. However, the precedent created by allowing the father to challenge the adoption is likely to be very important to other unwed mothers, whose interests certainly are relevant.

Guaranteeing notice to the putative father implicates the mother's constitutional privacy rights,[45] since she may wish to keep his identity a secret. If she is required to identify the father—or potential fathers—as a prerequisite to adoption, this may amount to requiring the forfeiture of a constitutional right in exchange for the dubious privilege of giving up her child. Since the state cannot vigorously defend the putative father's rights without getting the mother to identify him, the conflict is unavoidable.

The interests of unwed mothers also have great practical significance. If the mother is required to bear the burden of guaranteeing notice to the putative father, no positive results can be assured. Since she may be unable or unwilling to identify the father, notification may simply be impossible. Obviously, if she cannot identify the father or discover where he is, it would be senseless to disallow the adoption on the pretext of protecting his rights. If the mother falsely claims that she cannot identify the father or fraudulently identifies the wrong party, the state has little choice but to allow the adoption to proceed. If she chooses not to make false claims, she may set aside her judgment regarding the child's best interests and keep her baby.

It is important to realize in this regard that unwed mothers are intensely interested in the welfare of their children. The decision to give them up for adoption is almost always a difficult one, made possible only by the mother's conviction that she is

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45. *Caban*, 441 U.S. at 408 (Stevens, J., dissenting) ("Furthermore, questions relating to the adequacy of notice to absent fathers could invade the mother's privacy . . . ."); *see also Lehr*, 463 U.S. at 264; Wells v. Children's Aid Soc'y, 681 P.2d 199, 206 (Utah 1984). *But see* Doe v. Norton, 365 F. Supp. 65, 73-78 (D. Conn. 1973).

doing what is best for the child.[46] For many unwed mothers, knowing that the child's father might successfully challenge the adoption could make her decision traumatic.[47]

From the unwed mother's perspective, it is important to cut off the putative father's rights as early as possible. This perspective is of course limited, since she has no legitimate interest in fraudulently depriving the putative father of his constitutional rights. But it need not be assumed that only mothers with fraudulent intentions would wish to be certain of the consequences of their decision to relinquish parental rights—namely that their children will be raised in an adoptive home without a disruptive legal contest.

C. The Child's Interest

Although the rights at issue belong to the putative father, the most important interests to be considered are probably those of the child.[48] This is not to say that the father's rights are to be determined solely by reference to the probable interests of the child; as we learn from *Stanley,* the state may not presume the suitablility or unsuitability of parents and so deprive a putative father of notice and a hearing. But the state may consider the interests of the child—without reference to the prospective parents—in determining how much protection the father must have.

The most critical interest of the child (which does not rely on a presumption applied to the parents) is the stability of the family unit. Authorities agree that stability is an unequivocal positive for any child.[49] To that end, as soon as a child is placed

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46. *See* K. SILBER & P. SPEEDLIN, DEAR BIRTHMOTHER, 10-24, 111-26 (1983).

47. *See* Brief of Amici Curiae in Support of Petition for Rehearing add. at 3, 5, *In Re* Adoption of Baby Boy Doe, 717 P.2d 686 (Utah 1986) (No. 20392) (affidavit of Delbert T. Goates, M.D.); *id.* at 8, 9-10 (affidavit of Audrey Perkins) (also suggesting that mothers will keep their babies if there is any uncertainty surrounding immediate and final adoptive placement).

Note also that if the mother is "forced" to retain custody, the child will very likely be harmed. *See* Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing* Stanley v. Illinois, 9 FAM. L.Q. 527, 542 (1975).

48. *See Lehr,* 463 U.S. at 257; *Caban,* 441 U.S. at 397 (Stewart, J., dissenting); Orsini v. Blasi, (*In re* Adoption of Malpica-Orsini), 36 N.Y.2d 568, 574, 578, 331 N.E.2d 486, 490, 493, 370 N.Y.S.2d 511, 517, 521 (1975). *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 23. Note also that many arguments for the preservation of family integrity focus on the interests of the children, rather than the adults. *See supra* note 36.

49. *See* Brief of Amici Curiae in Support of Petition for Rehearing add. at 3, 4, *Baby Boy Doe,* 717 P.2d 686 (Utah 1986) (No. 20392) (affidavit of Delbert T. Goates,

for adoption, his best interests are probably served by leaving him in the adoptive home.[50]

The interests of the child also suggest that at some point after placement in the adoptive home, the putative father's rights should be conclusively terminated, since the possibility of future litigation may impede the development of relationships within the adoptive home.[51] An adoption challenge would naturally introduce a significant disruption. Even if no challenge actually occurs, however, uncertainty surrounding the validity of the adoption may make development of an intense emotional bond with the child difficult for the adoptive parents—to the child's detriment.

D. The Adoptive Parents' Interest

The courts have tended to overlook the interests of adoptive parents in discussing the rights of putative fathers.[52] Yet in the

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M.D.); J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 23.

Goldstein, Freud and Solnit's book, which sets forth a "psychological parenthood" theory giving little weight to biological ties, has received a mixed reaction. Some commentators have criticized the theory on the grounds that it fails to provide a panacea for determining all custody issues and that it may work injustice in cases where a parent has lost custody temporarily but wished to reassert his or her rights. A review of the negative reactions reveals that they are generally inapplicable to the situation being discussed here. *See* Crouch, *An Essay on the Critical and Judicial Reception of* Beyond the Best Interests of the Child, 13 FAM. L.Q. 49 (1979) (reviewing several different opinions).

50. *See* J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 23; Schwartz, *supra* note 23, at 446-47.

51. *See Baby Boy Doe*, 717 P.2d at 695 (Stewart, J., dissenting) ("[P]redictability is essential to the welfare of adopted children."); *see also* Sanchez v. L.D.S. Social Servs., 680 P.2d 753, 755 (Utah 1984); Brief of Amici Curiae in Support of Petition for Rehearing add. at 3, 4, *Baby Boy Doe*, 717 P.2d 686 (Utah 1986) (No. 20392) (affidavit of Delbert T. Goates, M.D.).

The rights of the putative father should be terminated very early, as the court in Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984), noted:

> The state has a strong interest in speedily identifying those persons who will assume the parental role over [illegitimate] children, not just to assure immediate and continued physical care but also to facilitate early and uninterrupted bonding of a child to its parents. The state must therefore have legal means to ascertain within a very short time of birth whether the biological parents (or either of them) are going to assert their constitutional rights and fulfill their corresponding responsibilities, or whether adoptive parents must be substituted.
>
> To serve its purpose for the welfare of the child, a determination that a child can be adopted must be final as well as immediate.

Id. at 203.

52. For example, *Wells* treats the adoptive parents as if they were merely providing a public service. While the opinion refers at one point to the " 'time, effort, expense and emotional involvement' " of adoptive parents, 681 P.2d at 203 (quoting *In re* Adoption of

Baby Boy Doe context, their interests are significant. By the time the putative father asserts his rights, the adoptive parents will have acquired a compelling interest in the child by developing "the emotional attachments that derive from the intimacy of daily association."[53] But their entitlement to protection begins immediately when the child is placed in their home. The feelings of adoptive parents for a newborn infant may very well be as intense as the feelings of its natural parents, since many adoptive parents cannot have children of their own and must look to adoption as the only means of experiencing the joys of parenthood. The placement of a newborn child in their home may represent the culmination of months—even years—of frustration and waiting, of hope and anticipation. The bond between the adopted child and the adoptive parent does not arise out of a biological tie. But it is nonetheless deserving of protection.

IV. WHAT PROCESS IS DUE?

The basic requirements of due process are perhaps best stated in the familiar language of *Mullane v. Central Hanover Bank & Trust Co.*:

> Many controversies have raged about the cryptic and abstract words of the Due Process clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.[54]

Thus, some form of notice and some opportunity to be heard is required in all cases. The extent of the requirement depends on the nature of the particular case.[55] *Mullane* also teaches that the

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F—, 26 Utah 2d 255, 262, 488 P.2d 130, 134 (1971)), it is only the child who appears to deserve protection: "If infants are to be spared the injury and pain of being torn from parents with whom they have begun the process of bonding and if prospective parents are to rely on the process in making themselves available for adoptions, such determinations must also be final and irrevocable." *Id.* at 207.

In some cases, such as Terrazas v. Riggs (*In re* Riggs), 612 S.W.2d 461 (Tenn. Ct. App. 1980), *cert. denied*, 450 U.S. 921 (1981), the adoptive parents are scarcely mentioned. They are viewed simply as intruders on the putative father's rights. *See supra* note 41.

53. Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977), *quoted in* Lehr v. Robertson, 463 U.S. 248, 261 (1983).

54. 339 U.S. 306, 313 (1950).

55. The chosen procedures must be reasonably certain to inform those affected, but *only* if an alternative better than the one chosen exists. *See id.* at 315. *But see* Graham v. Sawaya, 632 P.2d 851 (Utah 1981) (purporting to follow *Mullane* but suggesting that the best notice available may not be sufficient). *Lehr* demonstrates that the opportunity

appropriateness of Utah's treatment of putative fathers must be determined by balancing interests. "Against th[e] interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment."[56]

A. The Basic Conflict

Normally, the person claiming due process protection does not bear the burden of protecting his own rights. Rather, the burden falls upon the opposing party, who must give notice as a prerequisite for asserting claims against the defendant. If a judgment is entered against a defendant who has not been duly notified, that judgment may later be nullified—fully protecting the rights of the defendant at the expense of the opposing party. In an adoption proceeding, however, the putative father must be expected to bear a portion of the due process burden. It is impossible to protect his interests without some affirmative action on his part.

Consider first, that the putative father is often unavailable and cannot be located.[57] Usually, the adoptive parents do not even know who he is. The only ways to protect the putative father's rights are to give him an opportunity to identify himself before an adoption petition is filed or allow him to challenge the adoption later on. Moreover, since the interests of the child are ongoing and cannot be suspended while the disputants attempt to locate each other, the state is forced to make an immediate decision with respect to parental rights whether or not the fa-

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to be heard may be contingent on the affirmative acts of the protected party in some cases.

56. *Mullane*, 339 U.S. at 314.

57. *See, e.g., Caban*, 441 U.S. at 405 (Stevens, J., dissenting); Wells v. Children's Aid Soc'y, 681 P.2d 199, 203 (Utah 1984); Brief of Amici Curiae in Support of Petition for Rehearing add. at 8, 9, *Baby Boy Doe*, 717 P.2d 686 (Utah 1986) (No. 20392) (affidavit of Audrey Perkins).

The difficulty of establishing paternity in the father's absence has led the Supreme Court to completely dispense with the notice requirement in another context. *See* Lalli v. Lalli, 439 U.S. 259 (1978). That case involved the right of illegitimate children to inherit from their fathers. Although the issues differed in many respects from those being considered here, the Court was concerned with the unavoidable danger that someone might turn up after the estate was settled, claiming to be a child of the deceased. *Id.* at 270. The only options were to offer the children an opportunity to identify themselves before their father's death, or to allow them to present their claims later. The latter alternative would have cast a cloud over many estates, which was unacceptable to the Court. Although the principal concern here is not proof of paternity, the problems of providing prior notice and the options available to the state are precisely analogous.

ther has been notified. In most cases, this means allowing the adoption to proceed.[58]

This creates a dilemma because the person who is best able to identify the putative father for notification purposes (the natural mother) is not likely to be an interested party when the father asserts his rights.[59] This means that the burden of failing to protect the putative father's rights will inevitably be borne by the adoptive parents, and possibly the child—both of whom are completely innocent parties.[60]

Terrazas v. Riggs, (In re Riggs),[61] a Tennessee appellate court decision, illustrates the point. The mother became pregnant in California. Without informing the father, she left the state and lived in a convent in Nevada until the baby was born. Through the assistance of a priest, arrangements were made to have the child adopted in Georgia. Under a false name, the mother signed an affidavit in which she surrendered her parental rights and denied knowledge of the identity or whereabouts of the baby's biological father. By the time the father had located the mother, an adoption petition had already been filed, but the father was allowed to successfully challenge the adoption decree.

Presumably, the father acted diligently and in good faith. The inequitable conduct of the mother naturally arouses sympathy for him and compels the conclusion that he was not treated fairly. Although the mother's conduct in *Baby Boy Doe* was less dramatic, the injustice to the putative father in that case is equally apparent. But why penalize the adoptive parents and possibly the child for the natural mother's inequitable conduct? The good faith of the mother and her willingness and ability to identify the father are only relevant as attending circumstances

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58. Theoretically, the determination could be temporary, as by placing the child in a foster home, but it is difficult to imagine what practical benefit would result.

59. This would not be true if the parent seeking to adopt the child were the mother's spouse, since the mother would not have relinquished her rights in such a case.

60. It is conceivable that the adoptive parents would be aware of the mother's fraud, in which case they would not be entirely innocent. This is perhaps the best justification for the outcome in *Baby Boy Doe*—not that the mother's acts could be attributed to the adoptive parents, but that their awareness of the putative father's objection leaves their interest more vulnerable to challenge immediately following the adoption.

It may also be noted that the Utah statute cuts off the father's rights as soon as the child is placed with an adoption agency. UTAH CODE ANN. § 78-30-4(3)(b) (Supp. 1985). If the father has not forfeited his rights, this approach is probably unconstitutional, as the countervailing interests of the adoptive parents and the child are absent.

61. 612 S.W.2d 461 (Tenn. Ct. App. 1980), *cert. denied,* 450 U.S. 921 (1981).

and should not diminish the rights of adoptive parents or establish the inadequacy of the procedural protection afforded.

B. The Utah Cases

As between the putative father and the adoptive parents, the Utah statute places the burden of receiving notice on the father by requiring notice only if he has filed a claim of paternity. The constitutionality of the statute was first considered in *Ellis v. Social Services Department of the Church of Jesus Christ of Latter-day Saints.*[62]

The mother had travelled from California to Utah several days prior to the birth of her baby without the putative father's knowledge. When the baby was born, custody was relinquished to an adoption agency. Two days later, the father contacted an attorney who advised the agency of the father's interest and apparently demanded custody of the child. Pursuant to the applicable Utah statute,[63] the father's rights had been terminated when the agency took custody of the child.

The Utah Supreme Court upheld the facial constitutionality of the statute by observing that most fathers reasonably should know approximately when and where their children will be born.[64] In the case before the court, however, it was not clear that the father could reasonably have expected the child to be born in Utah. If he could not, the application of the statute would be invalid.

> [A] situation may arise when it is impossible for the father to file the required notice of paternity prior to the statutory bar, through no fault of his own. In such a case, due process requires that he be permitted to show that he was not afforded a reasonable opportunity to comply with the statute.[65]

Subsequently, the Utah court clarified this standard in *Wells v. Children's Aid Society.*[66] The case involved a teenage father who was a Utah resident and was aware that the baby would be born in the state. Upon being informed of the preg-

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62. 615 P.2d 1250 (Utah 1980).

63. UTAH CODE ANN. § 78-30-4 (Supp. 1985); *see also supra* note 60 regarding the constitutionality of cutting off the putative father's rights before the child is placed with adoptive parents.

64. 615 P.2d at 1256.

65. *Id.*

66. 681 P.2d 199 (Utah 1984).

nancy, he had broken off his relationship with the mother. He did not indicate an intention to assert his parental rights until the baby was born, although he knew the mother would give the child up for adoption.

In holding that the young father's due process rights had not been violated, *Wells* interpreted *Ellis* as requiring both impossibility of filing a notice of intent to claim paternity and the absence of fault before the statutory requirements could be waived.[67] The trial court was therefore not required to hear evidence that the putative father had no reasonable opportunity to file. *Wells* also expanded *Ellis* by suggesting that the impossibility of filing should not depend exclusively on the father's expectation that the child might be born in Utah. By drawing attention to a number of other factual considerations (distinguishing the case from *Ellis*)[68] the court suggested that these are also to be considered in establishing the possibility of complying with the statute.

The rights of putative fathers were again considered in *Sanchez v. L.D.S. Social Services.*[69] The father—a Utah resident—had often expressed a desire to continue his relationship with the child's mother after the child was born, and even asked her to marry him. He visited the mother in the hospital and attempted to sign the baby's birth certificate. But he failed to meet the statutory requirements that would have made his interest legally protectable, and the child was adopted.

Sanchez added no new refinements to the standard established in *Ellis* and *Wells.* Since the putative father could have filed—if he had known about the statute—the adoption was upheld. Although a dissenting justice objected that the putative father could not have protected his interest,[70] the majority found no violation of due process.

Baby Boy Doe purports to follow these cases, and retains the impossibility standard. But its holding is stated in factual

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67. *Id.* at 208.

68. "[The father had] ample advance notice of the expected time of birth and the fact that the mother intended to relinquish the child for adoption, advice of counsel on filing the required form, and a copy of the form provided by a social worker for the department." *Id.* at 207-08.

69. 680 P.2d 753 (Utah 1984).

70. The dissent emphasized subjective factors bearing on the reasonability of expecting the father to file. *Id.* at 756 (Durham, J., dissenting) (The putative father "was not informed of [the mother's] intent to release the child for adoption until after it was too late . . . [and] . . . had no knowledge of his statutory obligation.").

terms, which makes it difficult to determine how the court meant to define "impossible." The basic requirements of *Ellis* and *Wells* are clearly not met since the father knew the baby would be born in Utah for at least three months. One can only guess at the significance of the factors that distinguish this case from the others.

> Under the circumstances of this case, however, including the clearly articulated intent of the father to keep and rear the child, the full knowledge of that intent on the part of all involved, the representations made by the mother, the actions of her family, the premature birth, and the non-residency of the father coupled with his absence at the time of birth, we cannot say that this was either a usual case or that notice may be implied.[71]

Each of these factors—though not analyzed by the court—all appear to relate to the father's awareness of the need to protect his rights. Thus, impossibility is determined by the father's personal expectations, and the reasonableness of his opportunity to protect his rights.[72]

C. *The Proper Balance*

In *Baby Boy Doe,* the variables determining the putative father's rights bear exclusively on his opportunity to develop a parental relationship beyond his biological tie with the child. The burden of assuring notice and a hearing is allocated solely by reference to his perspective. To some extent, this is inevitable since the other parties have no way of protecting their own in-

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71. 717 P.2d at 691.

72. The court's discussion of the standard may be objected to on several grounds, some of which are set forth in Brief of Amici Curiae in Support of Petition for Rehearing, *Baby Boy Doe*, 717 P.2d 686 (Utah 1986) (No. 20392). The petition, filed in behalf of adoption agencies and adoption-related entities, sought a clearer statement of the standard that would de-emphasize subjective fairness to the father. As subjective fairness cannot be assured before the baby is placed, *id.* at 11-12, even if actual notice can be given, *id.* at 10-11, overemphasis of the putative father's particular circumstances may prove 'devastating' . . . [to] the entire adoption process," *id.* at 10.

The reaction of the adoption agencies is not unfounded. *Baby Boy Doe* is a confusing opinion. Although it purports to follow established law, some aspects of the case are strikingly inconsistent with the earlier decisions. In Sanchez v. L.D.S. Social Services, 680 P.2d 753 (Utah 1984), for example, the putative father's subjective awareness of the need to file was considered irrelevant. *Id.* at 755 & n.2. In Wells v. Children's Aid Society, 681 P.2d 199 (Utah 1984), a "reasonable opportunity" test was explicitly rejected. *See Baby Boy Doe*, 717 P.2d at 692-93 (Stewart, J., dissenting). It is difficult to discern the difference between that test and the one espoused by the *Baby Boy Doe* majority.

terests. However, the extent of the opportunities available to the putative father must be appropriately limited so as to protect the other interests involved.

In striking a balance, the state must choose between the putative father's biological tie and the adoptive parents' daily contact with the child. The choice is difficult because the Supreme Court has identified both factors as being important to the establishment of parental rights,[73] and as clearly giving rise to very significant interests. The public policies seeking to protect family relationships only heighten this tension by lending legitimacy to the claims of both sides.

This returns the analysis to the importance of the parties' opportunities to protect themselves, which is left so uncertain both in the Supreme Court cases and in *Baby Boy Doe*. The adoptive parents can obviously be afforded no such opportunities. They must rely on the law and the passage of time and hope the father remains unidentified. The father who brings a child into the world out of wedlock can be given only limited opportunities to protect his rights because of his anonymity. This leaves the state with no truly satisfactory means of protecting the interests of both parties or preventing those interests from coming into conflict.

Whereas the protection of a paternity file may appear inadequate in some cases, the file allows the putative father to identify himself before the rights of others arise. If it is possible for him to take advantage of the file, he should be required to bear the risk of failing to do so.[74] Otherwise, the adoptive parents must share the risk.[75]

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73. *See supra* notes 18-27 and accompanying text.

74. The extent of the risk is determined by the way in which "possible" is defined. If, for example, subjective factors are not considered, he would bear the risk of his own lack of knowledge. If subjective factors are considered, he may only bear the risk of his own lack of judgment. However, the *possibility* of filing (even the father's reasonable opportunity to file) must not be made dependent upon his judgment with respect to the *necessity* of filing. If he believes that the mother will not choose to give up her child for adoption, for example, he should bear the risk that she may prove him wrong. *See Sanchez*, 680 P.2d at 754-55 (mother told putative father she might give the child up for adoption, but he assumed otherwise).

75. Under any definition of "possible" the adoptive parents should not be required to bear the entire burden of failure to give notice. Rather the adoption must at some point become absolutely irrevocable, whether or not the putative father is unjustly harmed thereby. He must bear this much risk as a result of his choice to bring a child into the world in a way that makes his rights inherently difficult to protect.

> It is not too harsh to require that those responsible for bringing children into the world outside the established institution of marriage should be required

The proper allocation of this risk, though impossible to define rigidly, must initially favor the putative father, and shift toward the adoptive parents over time. As the biological tie loses significance, the rights of the adoptive parents—based on the fulfillment of parental duties—quickly increase. At the same time, the interests of the state in protecting unwed mothers, in affording permanent homes for illegitimate children, and in providing efficient adoption procedures all favor an early date for terminating the putative father's rights. After a time, even the putative father's diligence and good faith become irrelevant.

The state should therefore statutorily specify a point in time when the combined interests of the child, the state, and the adoptive parents conclusively outweigh the significance of the father's biological connection. Beyond this point—say fifteen days[76]— no right to a hearing need be recognized. Prior to this point, the putative father's rights would depend on the opportunities he has had to protect himself, taking into account the fairness of requiring other parties to bear the risk of error. Such an approach preserves certainty and finality while allowing a degree of flexibility appropriate to the interests of all concerned.

Carl Belliston

> either to comply with those statutes that accord to them the opportunity to assert their parental rights or yield to the method established by society to raise children in a manner best suited to promote their welfare.

Sanchez, 680 P.2d at 756. This view does not condemn the unwed father for his choice but merely requires him to bear the naturally attendant risks associated with his decision.

76. This time period would guarantee a putative father some opportunity to assert his parental rights after the adoption petition has become part of the public record. Such an opportunity would not eliminate the possibility of injustice, but it would provide some protection from inequitable conduct by the mother or other circumstances beyond the control of the state. After the 15-day period, the state's obligation to provide due process would be conclusively satisfied. A hearing for the putative father would no longer be "due" because of the strength of competing interests.

In a case involving a father who does not know where his child will be born, who acts in complete good faith, and who is diligent in trying to assert his rights, it is reasonable to require the adoptive parents to share the risks of a challenge for the full 15 days. Yet if the father can assert his claim within five days, or two, or one, he should be required to do so. In a case such as *Wells*, due process does not require that the father be given any time to object beyond the filing of the petition.