St. Mary's Law Journal

Volume 6 | Number 2 Article 5

6-1-1974

The Putative Father's Rights after Roe v. Wade.

William E. Tapovatz

THE PUTATIVE FATHER'S RIGHTS AFTER ROE v. WADE

WILLIAM E. TAPOVATZ

He who decides a case without hearing the other side, though he decide justly, cannot be considered just.

Lucius Annaeus Seneca

The recent United States Supreme Court decision of *Roe v. Wade*[1] held the Texas criminal abortion statutes[2] unconstitutional as violative of a woman's fundamental personal right to decide whether or not to terminate her pregnancy. The Court found that the right to privacy guaranteed under the penumbra of the due process clause of the 14th amendment is broad enough to include the woman's decision to abort.[3] In deciding *Wade* the Court failed, however, to consider any rights which the putative[4] or legal father may assert in opposition to the mother's decision to abort.[5] The woman's right to decide the abortion question is undoubtedly unilateral in that situation where only her personal rights are at issue. If the father, however, in an attempt to enjoin the abortion, contests the mother's decision and asserts his paternal interest in the fetus, the woman's right may become somewhat less than absolute.

EVOLUTION OF THE WOMAN'S RIGHT TO AN ABORTION

The series of decisions which culminated with *Wade* began in 1965 with *Griswold v. Connecticut*.[6] A state statute forbidding the use of contraceptives was held to be an unconstitutional invasion of a married person's right to privacy.[7] In arriving at its conclusion, the Court stated:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.[8]

---

1. 410 U.S. 113 (1973).
2. Tex. Laws 1907, ch. 33, at 55.
3. Roe v. Wade, 410 U.S. 113, 153 (1973). *But see* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 932 (1973), wherein the author argues that no correlation exists between the right to privacy and the right to have an abortion.
4. A putative father is the alleged or reputed father of an illegitimate child. State v. Nestaval, 75 N.W. 725 (Minn. 1898).
5. Roe v. Wade, 410 U.S. 113, 166 n.67 (1973).
6. 381 U.S. 479 (1965).
7. *Id.* at 481-86.
8. *Id.* at 485-86.

In a subsequent decision, the Supreme Court held that the *Griswold* right to privacy was not limited solely to married persons and that unmarried persons as well could not constitutionally be denied the use of contraceptives.[9] The Court was of the opinion that no such governmental interference was authorized in matters which so fundamentally affect the person as the decision to bear or beget a child.[10]

In 1970 it was decided that a Wisconsin criminal abortion statute unconstitutionally invaded a woman's private right to refuse to carry an unquickened[11] embryo.[12] This decision presaged *Young Women's Christian Association v. Kugler*[13] which appears to have been the direct forerunner of the *Wade* decision. The *Kugler* case held that a woman has a constitutional right under the 14th amendment to determine for herself whether to bear a child or to terminate a pregnancy in its early stages free from unreasonable interference by the state.[14] Since the woman's right of choice in the matter of abortion has been determined to be fundamental, any state intrusion into this area must be founded upon a compelling state interest.[15] It is insufficient for the state to demonstrate that such a restrictive regulatory scheme is motivated merely by some rational relationship to a valid state interest.[16]

The Court in *Wade* reaffirmed the woman's right to decide to terminate pregnancy as a fundamental derivative of the right to privacy and held that the Texas abortion statutes were an unconstitutional state infringement upon this right. *Wade*, however, qualified the woman's right in an attempt to balance her interest in privacy with the interest of the state in the fetus. During the first trimester of pregnancy the state has no compelling interest in the prospective life of the fetus that would justify statutory interference with the abortion decision of the woman and her physician.[17] Within the first 3 months of pregnancy, therefore, the state may not regulate or prohibit the woman's decision to abort.[18] During the second trimester the

9. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

10. *Id.* at 453.

11. A "quick child is one that has developed so that it moves within the mother's womb." State v. Timm, 12 N.W.2d 670, 671 (Wis. 1944). Quickening usually occurs at about the middle of the term of pregnancy. State v. Patterson, 181 P. 609, 610 (Kan. 1919).

12. Babbitz v. McCann, 310 F. Supp. 293, 299 (E.D. Wis. 1970). The Wisconsin statute made it a criminal offense to perform an abortion except when necessary to save the life of the mother. The *Babbitz* decision, however, has been criticized for confusing the right to prevent conception with the right to terminate life. *See* Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 372 (1971).

13. 342 F. Supp. 1048 (D.N.J. 1972).

14. *Id.* at 1072.

15. *Id.* at 1072.

16. *Id.* at 1072.

17. Roe v. Wade, 410 U.S. 113, 163 (1973).

18. *Id.* at 164.

state's interest in the fetus is not yet compelling, but the state may regulate the abortion procedure in order to protect maternal health.[19] The state may not, during this stage of gestation, prohibit an abortion.[20] When the fetus becomes viable,[21] however, the state's interest in protecting the life of the unborn child becomes compelling. At this point the state's interest becomes superior to the mother's right of privacy, and abortion may be statutorily prohibited, except when necessary to protect maternal life or health.[22]

The *Wade* decision further qualifies the woman's right of privacy in that the decision to terminate pregnancy is not to be hers alone. During the first trimester, the abortion decision, upon request by the woman, is left to the medical judgment of her attending physician.[23] It appears that while the woman has the fundamental right to decide whether or not to terminate pregnancy, she has no right to have an abortion on demand.[24] So perhaps the woman has no "right to an abortion" against a doctor's refusal to perform one, but only a right to "request" an abortion.[25]

When considering the father's right to participate in the abortion decision, one must not lose sight of the various interests contrasted in *Wade*. In delineating the woman's right to terminate pregnancy, the Court was faced with the problem of reconciling her right to privacy with the state's recognized interest in the unborn child. The unborn child's interests as a "person" were not determined; in fact, the question as to when life begins for constitutional purposes was explicitly avoided.[26] There seems to be no doubt that the Court felt that at some time during the gestational period the interest of the state in the child would become superior to the mother's right of privacy.

---

19. *Id.* at 164.

20. *See id.* at 164.

21. An unborn child reaches the stage of viability at the point during the gestational period at which it becomes capable of living outside the womb of the mother. Mitchell v. Couch, 285 S.W.2d 901, 905 (Ky. 1955). "A fetus generally becomes a viable child between the sixth and seventh month of its existence." *Id.* at 905.

22. Roe v. Wade, 410 U.S. 113, 163-64 (1973).

23. *Id.* at 164.

24. *See* Cane, *Whose Right to Life? Implications of Roe v. Wade*, 7 FAMILY L.Q. 413, 430 (1973).

25. *Id.* at 430. The author not only sees the implications of *Wade* as severely limited, but also questions the validity of the decision on factual grounds. The State of Connecticut joined by 14 other states as amici curiae have lodged an appeal for review of the decision under authority of Brookhart v. Janis, 384 U.S. 1 (1966) which requires the Supreme Court to make an independent examination of the evidence in the record when constitutional rights turn on the resolution of a factual dispute. Cane, *Whose Right to Life? Implications of Roe v. Wade*, 7 FAMILY L.Q. 413 (1973). *But see* Rice, *The Dred Scott Case of the Twentieth Century*, 10 HOUS. L. REV. 1059 (1973). The author fears that the decision in *Wade* is a practical license for elective abortion at any stage of pregnancy right up to the last minute before normal delivery. *Id.* at 1062.

26. Roe v. Wade, 410 U.S. 113, 159 (1973).

The Court set that time to correspond with the stage of legal viability.[27] When the Supreme Court declared that women have a personal, fundamental right to an abortion, it immediately qualified that right in consideration of the interests of that ubiquitous second party, the state.[28] It would seem only just that the rights of a ubiquitous third party, the potential father, when asserted, should also be given due consideration.[29] When it is considered that the woman's conditional right to an abortion was determined in a situation in which no contradictory paternal rights were asserted, it appears as though the right is far from indefeasible. Contestation by the father may further qualify the mother's personal right to decide, simply because where the "father's interest is involved, the abortion decision is no longer a private matter."[30]

In arriving at a woman's constitutional right to terminate pregnancy, the Court was greatly concerned with the social and economic effects that an unwanted child has upon the mother, both during the period of gestation and during her post-delivery life.[31] When the father opposes the abortion decision, it is obvious that he wants the child and would either seek its custody or contribute to its support after birth. Consequently, the adverse effects of bearing an unwanted child would be substantially diminished in such a situation. Certainly, once the financial burden and the personal inconvenience of raising the child are eliminated, the extent to which the mother's privacy is invaded is considerably lessened. When the intrusion into the mother's privacy can be minimized in this manner, the interests of the father in his unborn child certainly deserve some consideration.[32]

RIGHTS OF THE PUTATIVE FATHER

In a recent Florida case, *Jones v. Smith*,[33] a potential putative father who

27. *Id.* at 163. This determination appears somewhat arbitrary upon consideration of the fact that for many purposes the viability distinction is considered obsolescent. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56, at 337-38 (4th ed. 1971); Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A. L. REV. 233, 241, 247 (1969); Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 358 (1971).

28. Roe v. Wade, 410 U.S. 113, 154 (1973).

29. The interests of the father in the unborn child are no less potential, no more speculative than those of the state. This fact alone should substantiate a judicial hearing in consideration of the father's asserted rights in his unborn child. The fact, however, that no state interest in the fetus arises until the stage of viability is reached is no indication that the father's rights in the fetus do not arise at an earlier time, perhaps even at the time of conception.

30. Note, *Abortion: The Father's Rights*, 42 U. CIN. L. REV. 441, 460 (1973).

31. Roe v. Wade, 410 U.S. 113, 153 (1973).

32. To some analysts, however, it appears rather doubtful that a court would "allow the father to force the mother to carry the fetus to term." Note, *Abortion: The Father's Rights*, 42 U. CIN. L. REV. 441, 461 (1973).

33. 278 So. 2d 339 (Fla. Ct. App. 1973), *cert. denied*, 42 U.S.L.W. 3501 (U.S. Mar. 4, 1974).

had acknowledged his paternal responsibility sought to enjoin the mother from obtaining an abortion. The petitioner was able to show only that he had dated the woman for a period of approximately 6 months and that they had frequently had intimate relations. She refused his offer of marriage and sought an abortion. The Florida Court of Appeals denied the injunction on the basis of the *Wade* decision, holding that during the first trimester of pregnancy the decision to abort is solely that of the woman and her physician.[34] The Supreme Court of the United States denied certiorari.[35] From the decision in *Jones* it appears that the recognition of any right of the putative potential father to participate in the decision to abort will depend upon the establishment of some relational interest between the father and the fetus.[36] If the father is able to establish some cognizable family relationship among himself, the mother and the unborn child, his interest in that child may be substantial enough to provide him with a voice in the abortion decision. To determine the existence of such an interest, one may look to some recent decisions in the fields of tort and family law.

The Adoption Analogy

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.[37] 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.

Generally, the parents of a legitimate child have equal relational interests in their child.[38] These interests are normally considered to be rights to the services of the child and to the society, custody and control of the child.[39] Either parent is entitled to receive notice that the other has placed the child for adoption.[40] Even though the natural parents may be divorced, the noncustodial parent is entitled to notice, inasmuch as his consent is essential to the adoption.[41] Under these circumstances it is impossible for one parent

34. *Id.* at 344.

35. Jones v. Smith, 42 U.S.L.W. 3501 (U.S. Mar. 4, 1974).

36. For excellent discussions of relational interests generally, see Green, *Relational Interests*, 29 ILL. L. REV. 460, 462-63 (1934); Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 181 (1916).

37. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.1, at 602 (1968).

38. *Id.* § 17.4, at 584-85.

39. Green, *Relational Interests*, 29 ILL. L. REV. 460, 479 (1934); Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 181 (1916).

40. *In re* Adoption of a Minor, 160 F.2d 928, 930-31 (D.C. Cir. 1947); H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.2, at 612 (1968).

41. Armstrong v. Manzo, 380 U.S. 545 (1965). An adoption decree entered with-

to place a legitimate child for adoption without the consent of the other parent.

The rights of the putative father in the post partum child differ substantially from those of both the legitimate father and the illegitimate mother. Though a putative father has a duty to support his illegitimate child,[42] his rights in the child are secondary and subordinate to those of the mother.[43] The putative father suffers disabilities in his relationship with the child in that he must gain consent of the mother to legitimate the child; visitation privileges may be disallowed if the mother opposes them; the father's custodial privileges are secondary to those of the mother, and the mother may put the child up for adoption without the consent of the father.[44] These paternal disabilities are generally predicated upon the presumption, reflected in most modern adoption statutes, that the mother is best suited to care for children of tender years.[45] Under the principles of equal protection, however, the constitutionality of these statutory preferences is in serious doubt. The recent plurality decision of *Frontiero v. Richardson*[46] held that classifications based on sex, like those based on race, alienage or national origin, are inherently suspect and must be subjected to strict judicial scrutiny.[47] No

---

out notice to the child's father "violated the most rudimentary demands of due process of law" and was therefore void. *Id.* at 550; *accord*, H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.2, at 612-13 (1968); Wadlington, *The Divorced Parent and Consent for Adoption*, 36 U. CIN. L. REV. 196 (1967). *See, e.g.*, CAL. CIV. CODE § 224 (West 1954); MASS GEN. LAWS ANN. ch. 210, §§ 2-4 (Supp. 1972). Under some statutes, in certain instances, however, the consent of a divorced father is not necessary to adoption of the child. *See generally* Wadlington, *The Divorced Parent and Consent for Adoption*, 36 U. CIN. L. REV. 196 (1967).

42. Gomez v. Perez, 409 U.S. 535, 538 (1973).

43. Note, *Abortion: The Father's Rights*, 42 U. CIN. L. REV. 441, 455 (1973). *See, e.g.*, Kilgore v. Tiller, 22 S.E.2d 150 (Ga. 1942).

44. Note, *Abortion: The Father's Rights*, 42 U. CIN. L. REV. 441, 455 n.83 (1973).

45. Watts v. Watts, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973). That court stated:

> Until recently, however, there has been a pattern of at least cursory invocation by the courts in New York and elsewhere, of the presumption that children of tender years, all other things being equal, should be given into the custody of their mother.

Id. at 287; *accord*, H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 17.4, at 585 (1968); Remarks of Harry M. Fain, Proceedings, A.B.A. SECTION OF FAMILY LAW 27-9 (Aug. 13, 1963). *See, e.g.*, Boone v. Boone, 150 F.2d 153, 155 (D.C. Cir. 1945).

46. 411 U.S. 677 (1973).

47. Justices Douglas, White and Marshall concurred in Justice Brennan's opinion. Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Blackmun concurred, felt that the statutes in issue did unconstitutionally discriminate against service women, however, disagreed with the conclusion that all classifications based on sex were inherently suspect. *Id.* at 691. In light of congressional approval of the Equal Rights Amendment, Justice Powell felt that the Court was preempting a legislative function through judicial action. *Id.* at 692. *See also* Kahn v. Shevin, 42 U.S.L.W. 4591 (U.S. Apr. 24, 1974), holding that a state tax law reasonably designed to rectify the effects of past discrimination against women did not arbitrarily discriminate against men. *Id.* at 4593. The *Frontiero* case was distinguished in that the statutes considered therein

statute may provide "dissimilar treatment for men and women who are similarly situated."[48] Based on the principles enunciated in *Frontiero*, the Georgia Superior Court in *Murphy v. Murphy*[49] found that alimony statutes which provide for an allowance out of only the husband's estate for support of the wife violate the equal protection clause of the 14th amendment when no such provision is likewise made for the support of the husband.[50] Likewise, in at least one instance the "tender years presumption" in favor of mothers has been held to violate the equal protection clause of the Constitution. In a recent decision[51] the New York Family Court, citing *Frontiero*,[52] held that "the 'tender years presumption' in addition to its other faults, works an unconstitutional discrimination" against the father in a custody proceeding.[53] On the basis of these decisions it appears that any statute placing custody of the child in the mother, on the presumption that because of her sex she can better perform the function of a custodian, will be struck down as violative of the equal protection clause.[54]

The ratification of the Equal Rights Amendment[55] could eliminate any legal presumption favoring mothers over wed or unwed fathers because the statutory differentiations are not based on characteristics unique to one sex. Good parents may be found among either sex and any statutory presumption favoring women in child custody would probably be violative of the amendment. Consequently, a putative father could have an equal voice in the adoption proceeding and would be able to gain custody upon showing that he is the best available guardian.

Under existing law, however, only the mother's consent is required to authorize the adoption of an illegitimate child.[56] An oft-cited rationale for this

---

were "not in any sense designed to rectify the effects of past discrimination against women." *Id.* at 4592 n.8.

48. Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

49. 42 U.S.L.W. 2393 (Ga. Super. Ct. Jan. 24, 1974).

50. *Id.*

51. Watts v. Watts, 350 N.Y.S.2d 285, 291 (N.Y. Fam. Ct. 1973).

52. *Id.* at 290. The court states:

> Recent decisions of the Supreme Court of the United States make clear that differential treatment on the basis of sex of the kind created by the 'tender years presumption' is 'suspect' and therefore subject to the strictest judicial scrutiny.
>
> . . . .
>
> The message of *Frontiero* is clear: persons similarly situated, whether male or female, must be accorded evenhanded treatment by the law.

53. *Id.* at 291.

54. *But cf.* Arends v. Arends, 517 P.2d 1019 (Utah 1974). The Utah Supreme Court stated that the argument might have some merit in a case where the father was "equally gifted in lactation as" the mother. *Id.* at 1020.

55. H.R.J. RES. 208 92d Cong., 1st Sess. § 1 (1971). The amendment states, "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." Thirty-three of the required 38 states have ratified the amendment. San Antonio Light, Parade Magazine, Mar. 31, 1974, at 7.

56. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.2, at 613 (1968). In most instances, consent of the putative father is not required in adoption proceedings. *See, e.g., In re* Brennan, 134 N.W.2d 126, 130 (Minn. 1965).

rule is that, practically speaking, the putative father is seldom concerned about the well-being of the child.[57] The father's consent to the adoption procedure is frequently eliminated statutorily on the presumption that the father is unfit simply because he has never married the mother.[58]

These reasons for the nonrecognition of putative fathers' relational interests in their illegitimate offspring have lately been challenged and are coming under increasing judicial attack. In Minnesota, by statute, the consent of the putative father is not required in an adoption proceeding.[59] In *In re Brennan*,[60] under the authority of this statute, the father of an illegitimate child was denied a voice in the adoption of his child and appealed to the supreme court of that state. The court reasoned that the consent provision of the adoption statute was drafted with the assumption that the putative father would evince no interest in the disposition of his illegitimate child and therefore did not apply in this instance.[61] The court recognized the legal interest of the father in the illegitimate child and decided that he should therefore be entitled to present his views in an adoption proceeding.[62]

The approach toward recognition of the putative father's rights initiated in *Brennan* is considered by some authorities to be a more enlightened view than the blind application of a statutory presumption which is, in itself, of doubtful validity.[63] When the father has established a relational interest in the child by acknowledging paternity, contributing to the support of the child, and displaying a sincere affection for the child, there is no reason why his interest should not be recognized at law.[64]

In its recent decision in *Stanley v. Illinois*,[65] the Supreme Court recognized the putative father's legally enforceable relational interest in his illegitimate children. In *Stanley*, the father, though unmarried, had established a relational interest in his family by living with and supporting the children and their mother. When the mother died, the State of Illinois instigated proceedings to declare the children dependent and neglected and to have them removed from the father's custody. The proceeding was based

57. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.4, at 625 (1968).

58. Stanley v. Illinois, 405 U.S. 645, 650 (1972).

59. MINN. STAT. ANN. § 259.24, subd. 1(a) (1971).

60. 134 N.W.2d 126 (Minn. 1965).

61. *Id.* at 131-32.

62. *Id.* at 131-32.

63. *E.g.*, H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.4, at 626 (1968); Remarks of Harry M. Fain, Proceedings, A.B.A. SECTION OF FAMILY LAW 27-9 (Aug. 13, 1963).

64. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.10, at 668 (1968). *See In re* Brennan, 134 N.W.2d 126, 132 (Minn. 1965). *See also* Caruso v. Superior Court, 412 P.2d 463, 467 (Ariz. 1966); Olney v. Gordon, 402 S.W.2d 651, 653 (Ark. 1966); *In re* Mark T., 154 N.W.2d 27, 39 (Mich. Ct. App. 1967).

65. 405 U.S. 645 (1972).

upon the statutory presumption that a putative father is unfit, because unmarried, and therefore does not qualify as a suitable custodian of his children.[66] Under the statutory proceeding, Stanley had no legally recognized interest in his children and, therefore, no right to notice and hearing of the suit which would deprive him of their custody. The Court, in reversing the decision, found that a putative father who had established a relational interest in his children had a "substantial and cognizable interest" in the custody of those children.[67] Given the legal recognition of Stanley's personal interest in his illegitimate children, his rights could not be terminated without the notice and hearing required by the due process clause of the 14th amendment. The Illinois statute was declared unconstitutional.[68]

In arriving at its decision in *Stanley*, the Court cited a series of cases which emphasize the basic and essential nature of man's right to conceive and rear children.[69] Recognition of the putative father's rights arises out of what the Court referred to as the substantial and cognizable personal interest of a man in the children he has sired and raised, an interest which may not be negated absent a powerful countervailing state interest.[70]

Having established in the father a cognizable personal interest in his illegitimate offspring, logical progression demands the recognition of a similar prospective interest in his unborn children. In a California case, just such an interest was given legal protection.[71] The plaintiff brought a cause of action against the doctor who, with the consent of the plaintiff's wife, had performed an abortion for her. The wife's consent to the operation barred a suit for battery, and no wrongful death action was available because the unborn child was not a "minor person" within the meaning of the statute.[72] The court found the defendant liable for what was, in actuality, a new tort, by holding that the father had a legally protectable interest in his unborn child separate from his wife's interest and therefore unaffected by her consent.[73] The plaintiff was allowed to recover for what the court termed "a direct invasion of the plaintiff's personal rights in the prospective relationship with his unborn child."[74] Though it cannot be cited as unassailable

66. *Id.* at 650.
67. *Id.* at 652.
68. *Id.* at 658.
69. *Id.* at 651. The cited cases are: May v. Anderson, 345 U.S. 528, 533 (1953), holding that the right to raise children is "far more precious . . . than property rights." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), declaring that the rights of marriage and procreation are "basic civil rights of man." Meyer v. Nebraska, 262 U.S. 390, 399 (1923) in which the right to conceive and raise children is deemed "essential."
70. Stanley v. Illinois, 405 U.S. 645, 651 (1972).
71. Recent Development, 14 STAN. L. REV. 901 (1962), *citing* Touriel v. Beveniste, Civil Doc. No. 766790 (Los Angeles Super. Ct., Oct. 20, 1961).
72. Recent Development, 14 STAN. L. REV. 901 (1962).
73. *Id.* at 904.
74. *Id.* at 901-902.

legal precedent, the case does stand as the logical culmination of the decisions in *Meyer v. Nebraska*,[75] *Skinner v. Oklahoma*,[76] and *May v. Anderson*,[77] which treat the conception and rearing of children as basic civil rights. Given the recognition of a protectable relational interest of the putative father in his post partum children, there appears to be no reason why the prospect of that interest should not be recognized and protected.[78]

Where the putative father has acknowledged his paternity, lived with and supported the natural mother and the fetus, his prospective rights in the unborn child can effectively be protected through the utilization of procedural due process. When the mother makes the decision to abort, the putative father's interest in the fetus could be established in a judicial hearing similar to that provided in the *Stanley* case. Professor Louisell advocates such a procedure for the protection of the unborn child's right to life;[79] however, his argument necessarily involves the seemingly unanswerable question of the fetus' standing as a person.[80] If we adopt the procedural method employed in *Stanley* to allow the putative father to propound his own civil rights in contesting the mother's decision to abort, the interests of all parties concerned are adequately served: (1) the mother is allowed to exercise her constitutionally guaranteed option to abort unless the father succeeds in proving a protectable relational interest in the unborn child; (2) if judgment is entered for the father, the mother's right to an abortion has not been unconstitutionally infringed upon because the denial of her right has come about through the exercise of due process of law; and (3) it becomes unnecessary to determine whether or not the unborn child has the benefit of constitutional protection because the existence of any such right depends wholly upon the outcome of a judicial analysis of the natural parents' competing interests. If, however, the father fails to assert his rights in the unborn child within a reasonable time after the mother's decision to abort, he forfeits his right to a hearing under the equitable doctrine of laches and the mother's decision prevails.[81] This procedure would alleviate the necessity

75. 262 U.S. 390, 399 (1923).

76. 316 U.S. 535, 541 (1942).

77. 345 U.S. 528, 533 (1953).

78. Under the *Stanley* decision, however, the interest of the putative father would go unrecognized unless established by him through acknowledgement of his paternal responsibility, cohabitation and support of the mother and fetus. If the father fails to allege and establish this relational interest in the unborn child, the mother's unilateral decision to abort should prevail.

79. Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. REV. 233, 251 (1969).

80. Louisell's argument is valid only if one accepts the contention that the fetus is a "person" vested with constitutional rights and privileges from the moment of conception.

81. The practical considerations of holding an immediate judicial hearing to determine the rights of the competing parties would require a timely decision on the part of the mother and a prompt reply by the father. Theoretically, the doctrine of laches

of resorting to the irreconcilable religious, legal and scientific arguments to determine when life begins, a task which the Supreme Court has, to date, skillfully managed to sidestep.[82]

Furthermore, if an illegitimate father has established a relational interest in his unborn child which would qualify him for due process protection under *Stanley*, his rights should be substantial enough to warrant protection of laws equal to that provided the mother in such circumstances under *Frontiero v. Richardson*.[83] Employing the adoption analogy, the father should have an equal voice in the abortion proceeding which would mean that his consent would be required before an abortion could be performed. The relational interest of the legitimate father is presumed and his consent is required under the adoption statutes; likewise, his consent should be required before an abortion may proceed. The results, if the Equal Rights Amendment is ratified, should be the same.

The Wrongful Death Analogy

Recent developments in litigation in the area of wrongful death recoveries also show a distinct tendency toward establishment of a protectable relational interest of the putative father in his unborn child. Generally all states have wrongful death statutes which provide recovery for the benefit of those survivors who are either dependent upon or responsible for a decedent.[84] In recent years the majority of these statutes have been construed to allow a parent to recover for the wrongful death of a fetus.[85] Under these statutes, however, viability of the fetus has often been the determining factor in allowing recovery[86] which generally depends on whether the fetus is a "person" within the meaning of the statute.[87] Though some courts have refused to permit the action where the fetus had not reached the stage of viability at the time of the injury, the "slight majority have been more con-

---

could cut both ways. If the mother fails to make a timely decision to abort and it becomes impossible for the father to be provided with a hearing prior to the stage of viability, she could be estopped from obtaining the abortion.

82. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) where the Court states, "[w]e need not resolve the difficult question of when life begins." *Id.* at 159.

83. 411 U.S. 677 (1973).

84. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127, at 902 (4th ed. 1971); S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1.11, at 15 (1966).

85. *See* Gullborg v. Rizzo, 331 F.2d 557, 560 (3d Cir. 1964); Porter v. Lassiter, 87 S.E.2d 100, 103 (Ga. Ct. App. 1955); Mitchell v. Couch, 285 S.W.2d 901, 906 (Ky. 1955); Valence v. Louisiana Power & Light Co., 50 So. 2d 847, 850 (La. Ct. App. 1951); Stidam v. Ashmore, 167 N.E.2d 106, 108 (Ohio Ct. App. 1959); Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107, 112 (Wis. 1967). *See also* Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 359 (1971); Recent Development, 70 MICH. L. REV. 729, 737 (1972).

86. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 337 (4th ed. 1971) and cases cited therein.

87. *Id.* § 55, at 338.

cerned with compensation for a distressing wrong in the loss of a child, and have allowed it."[88] These decisions seem to fulfill more adequately the purpose behind the enactment of wrongful death statutes. The statutes are designed to provide a recovery for the destruction of the relational interest which the parent has in the child. The fetus represents an entity which, if nature is allowed to take its course, will develop into a child. The death of either the fetus or the post partum child terminates this family relationship, the protection of which is the essence of recovery under the statutes. When the prospective nature of the parents' interest in the child is analyzed in this respect, considerations of viability become irrelevant.

Though parents of legitimate children are now allowed to recover in most jurisdictions for the wrongful death of a non-viable fetus, recovery has traditionally been denied in situations where an illegitimate relationship is concerned.[89] Three recent Supreme Court decisions, however, have raised serious doubts as to the constitutional validity of these traditional statutory disqualifications. In *Levy v. Louisiana*[90] an illegitimate child was allowed to recover for the wrongful death of his mother. The Court held that disqualification of illegitimate children under the Louisiana wrongful death statute which allowed legitimate children to recover was a violation of the illegitimate child's right to equal protection of the laws.[91] In arriving at this decision, the Court stated:

> While a State has broad power when it comes to making classifications, [citation omitted] it may not draw a line which constitutes an invidious discrimination against a particular class . . . .
>
> . . . .
>
> . . . [I]n her death they suffered wrong in the sense that any dependent would.[92]

On remand, it appears that the Louisiana Supreme Court interpreted the decision in *Levy* to apply as well to a suit by a child to recover for the wrongful death of his putative father.[93] In the 1972 decision of *Weber v. Aetna Casualty & Surety Co.*,[94] this interpretation by the Louisiana Supreme Court was confirmed. Two illegitimate children were allowed to recover for

88. *Id.* § 55, at 338.

89. S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 10.4, at 587 (1966). This differentiation in statutes patterned after Lord Campbell's Act arises from the use of the word "kin" in that statute which has been strictly construed to pertain only to legitimate kin. Therefore, modern statutes which use the words "father," "mother," "children," "brother" or "sister" are construed to apply only to legitimate "fathers," "mothers," "children," "brothers" or "sisters."

90. 391 U.S. 68 (1968).

91. *Id.* at 72.

92. *Id.* at 71-72.

93. Levy v. State, 216 So. 2d 818, 820 (La. 1968); Krause, *The Bastard Finds His Father*, 3 FAMILY L.Q. 100, 101 (1969).

94. 406 U.S. 164 (1972).

the wrongful death of their father on the same equal protection grounds utilized in *Levy*.[95] In consideration of the children's claim, the Court remarked:

> Here, as in *Levy*, there is impermissible discrimination. An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children whom Louisiana law has allowed to recover.[96]

Likewise, the mother of an illegitimate child was allowed to recover for the wrongful death of her child in *Glona v. American Guarantee & Liability Insurance Co.*[97] in which the Court stated:

> To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses. . . .
>
> Where the claimant is plainly the mother, the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock.[98]

Thus, the illegitimate child may recover for the wrongful death of either parent on the basis of equal protection as can the mother recover for the death of her illegitimate child. The question becomes whether the putative father should be provided with a recovery for the wrongful death of his child on the same constitutional grounds. Once the putative father has established a cognizable and protectable relational interest in his child, as did the plaintiff in *Stanley v. Illinois*,[99] these rights should have the benefit of equal protection of the laws. The putative father who acknowledges his children, lives with and supports them, has without doubt established a familial relationship very similar to that which a legitimate father has. The primary difference between the two relationships is merely that which is artificially imposed by law for lack of a marriage license. Even this defect in the parents' marital relationship has not prevented recovery by the illegitimate child for the death of either parent or by the mother for her illegitimate child. Under these circumstances, not only are the putative father and legal father similarly situated, but so are the putative father and the mother of his children. It seems that the Supreme Court's decisions in *Levy, Weber, Glona* and *Frontiero* demand equal protection for the father under these circumstances and would allow him to recover uder the wrongful death statutes.

---

95. *Id.* at 172.
96. *Id.* at 169.
97. 391 U.S. 73, 76 (1968).
98. *Id.* at 75-76.
99. 405 U.S. 645 (1972).

Where both parents are living together as a family unit with their children, there is no justification under equal protection standards for a statutory preference which benefits only the mother in wrongful death recoveries. As in a valid marital relationship, both parents have an equally vested and cognizable interest in their relationships with their children. Both of these interests deserve similar legal consideration under the doctrine of equal protection of law. Following the line of reasoning employed in these cases, recovery by the putative father for the death of his child under the wrongful death statutes appears to be a constitutional necessity. Once the putative father's cause of action for the death of his post partum child is recognized, that cause of action should logically be extended to protect his, as well as a legal father's, prospective interest in an unborn child.

CONCLUSION

The trend of recent decisions in both adoption and wrongful death litigation indicates a distinct tendency toward legal recognition of a protectable relational interest of the putative father in his unborn children. The abandonment of the viability consideration[100] in the field of tort law indicates the recognition of an enforceable interest of the father in his child from the date of conception. The enforcement of this interest for the benefit of the father will not substantially curtail the exercise of the mother's abortion rights simply because in most instances the father, putative or legal, will not contest the mother's decision.[101] The father's interest, when asserted in opposition to the mother's decision to terminate pregnancy, must be given due consideration. Due process should require that the putative father at least be provided with the benefit of a hearing to determine the strength of his parental right which the mother, through abortion, seeks to terminate.

---

100. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 338 (4th ed. 1971); Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A. L. REV. 233, 241, 247 (1969); Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 358 (1971).

101. As a practical matter, the putative father is seldom interested in asserting any rights in his illegitimate child in adoption proceedings. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 18.4, at 625 (1968). In light of this fact, the mother's decision to abort, in most instances, will probably go uncontested. It must be assumed that in the large majority of cases the married mother's decision to terminate pregnancy is the product of a mutual agreement between herself and her husband. It is highly doubtful that the husband would thereafter dispute the decision to abort.