The Fourteenth Amendment's Protection of a Woman's Right to be a Single Parent Through Artificial Insemination by a Donor

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NOTE

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PATRICIA A. KERN and KATHLEEN M. RIDOLFI*

CONTENTS

I. INTRODUCTION ................................................................................. 251

II. AID METHODS .................................................................................. 253
   A. AID with an unknown donor through a sperm bank or private physician ................. 253
   B. AID with the help of a go-between ........................................................................ 255
   C. AID with a known donor ......................................................................................... 256

III. CONCERNS OF THE SINGLE AID MOTHER ........................................ 257

IV. FOURTEENTH AMENDMENT VIOLATIONS ........................................ 258
   A. Denial of Equal Access to AID Facilities ................................................................. 259
      1) State Action ........................................................................................................ 259
      2) Denial of a fundamental right ................................................................................. 260
      3) Denial of access on the basis of marital status ....................................................... 265
      4) State Interests ....................................................................................................... 266
          a) Illegitimacy ......................................................................................................... 267
          b) Harm to the Prospective Child and Burdens on State Resources ....................... 269
              i) Sterilization ................................................................................................. 269
              ii) Intervention in Existing Parent-Child Relationships .................................. 270
   B. Common Law Recognition of Donor's Rights ............................................................ 272
      1) State Action ........................................................................................................ 272
      2) Denial of a fundamental right ................................................................................. 273
      3) Discrimination on the basis of marital status ....................................................... 275
      4) State Interests ....................................................................................................... 277
          a) Rights of the Donor ......................................................................................... 277
          b) Best interest of the child .................................................................................. 280
   V. CONCLUSION ..................................................................................... 283

I. INTRODUCTION

The profile of the American woman has changed in many important ways in the last two decades.1 Women have achieved increasing independence and control over their own lives, in part

1. For example, the percentage of women in the labor force has increased from 37.8% in 1960 to 52.3% in 1981. The percentage of women heading households in the United
because of greater reproductive freedom. This freedom extends to choices concerning procreation, abortion, sexuality and motherhood.

An increased degree of control over their reproductive capacity has allowed some women to create an alternative approach to motherhood which is outside the traditional family sphere. It is possible for a woman to postpone motherhood until she is economically able to support and to raise a child without a marriage partner.

An unmarried woman can become a parent in several ways. She can parent a child who is not biologically her own through adoption or foster care, or she can assume parenting responsibilities for someone else's child without a legal arrangement. She can also become a single parent by conceiving a child through sexual intercourse or through artificial insemination. If she has intercourse, she can become pregnant with or without the knowledge of the father. If she artificially inseminates, she can do so with or without the knowledge of the donor.

Artificial insemination by donor (AID) is playing an increasingly important role in providing options for the single woman in her reproductive choices. While the procedure is not new, its use as a means of parenting for single women and lesbian couples is gaining popularity.

This paper will focus on AID as a means of reproduction chosen by single women and will discuss the practical considerations and legal implications of that choice. Because of the unconventional subject matter of this work, the authors have chosen to present our underlying premises at the outset. It is our belief that the understanding of controversial issues is fostered by an acknowledgment of the values that support a particular position.

Legal arguments supporting the right of a single woman to be a single parent through AID are based upon what one scholarly article has called the "freedom of intimate association." As used here, this freedom does not mean absolute license to do whatever one pleases. Rather, it is a recognition that such decisions as whether to relate sexually or platonicly, to marry or to remain single, to give birth or to abort, involve serious moral responsibility that rests with the individual making the choice. In a free society, one's moral judgments are not to be predetermined by coercive forces of the state, but should be the expression of the religious beliefs or philosophical convictions unique to each person. Intimate associational choice is at the heart of the values represented by a pluralistic society, and is protected by the liberty and equality guarantees of the United States Constitution.

In the present context, freedom of intimate association renders unfair the suppression of one form of intimate association—that between the single mother and her child—in order to advance or preserve another more conventional form—that between the mother, father and child. However desirable the idealized nuclear family is to the majority, promotion of this ideal constitutes an insufficient justification for the state's suppression of alternative forms of intimate association, absent some showing of independent harm resulting from these alternatives. Restrictions imposed

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States has risen from 9.3% in 1960 to 14.6% in 1980. The rate of single women over 18 years old has risen from 13.7% in 1970 to 17% in 1980. The percentage of unmarried women giving birth to children has increased from 5.3% of all births in 1960 to 17.1% in 1979. The number of mothers in the labor force with children under six years old has increased from 4,500,000 in 1970 to 6,000,000 in 1980. There has also been an increase in the use of contraceptives by women and an increase in the number of abortions. The abortion rate per 1,000 women has increased by 50 percent in the five years between 1972 and 1977. United States Bureau of the Census, Statistical Abstract of the United States (192d ed. 1981).


3. Artificial insemination permits fertilization of the embryo without sexual intercourse. Semen from a donor is inserted into a woman's vagina with the use of a syringe.

4. The earliest artificial insemination in humans was performed in 1790 by John Hunter, a Scottish surgeon. The first reported successful human insemination in the United States was performed by Dr. J. Marion Sims in 1866. The procedure became generally accepted between 1920 and 1930. Gallin & Newman, Whose Child is This?, 8 Human Rights 14 (1979).

5. It has been estimated that 250,000 people in the United States alone have been conceived by artificial insemination. F. Mims & M. Swenson, Sexuality: A Nursing Perspective 192 (1980). See also Lesbian Health Information Project, Artificial Insemination: An Alternative Conception, (1979) (available from Lesbian Health Information Project, c/o San Francisco Women's Centers, 3543 18th St., San Francisco, CA 94110); Woman Controlled Conception (available from Union Wage, P.O. Box 40904, San Francisco, CA 94140); Stern, Lesbian Insemination, Co-evolution Q. (Summer 1980).


7. See id. at 657-58. Karst argues, in the context of prohibitions on homosexual conduct, that there is no legitimacy in an effort by the state to advance one view of morality by preventing the expression of another view.
on the freedom of intimate association, whether through the imposition of burdens or the deprivation of benefits, must be independently justified.

The formal status of marriage is a key to the availability of benefits, such as access to professional AID facilities and judicial enforcement of a woman's right to custody of the AID child against the claims of a semen donor. The following discussion concerns whether deprivation of such benefits constitutes an infringement of single women's rights under the fourteenth amendment of the United States Constitution.

In assessing whether a Constitutional violation exists, we will evaluate the justifications that can be advanced to support this deprivation of benefits, such as the arguments that it is not in the child's best interests to have been conceived through AID, that single parent families burden state resources and that the state may act to discourage illegitimate births. An explanation of the methods of AID conception and the practical and legal concerns that influence a single woman's choice of a particular method precede our discussion of the legal issues raised by AID.

II. AID METHODS

Artificial insemination can be utilized by a single woman in three ways. First, the prospective mother can be inseminated with the help of professional services, either at a sperm bank or through an independent physician. Second, she can conceive through AID outside of a professional arrangement. That is, she can solicit the help of a third party liaison or go-between who selects the donor for her and arranges the insemination. The go-between carries the sperm from the donor to the prospective mother without disclosing the identity of either party to the other. Finally, she may choose to inseminate without anonymity and may work out the arrangements directly with the donor. Each of these methods involves practical considerations and raises different concerns for the prospective AID mother.

A. AID with an Unknown Donor Through a Sperm Bank or Private Physician

For a woman intent on sole legal custody of her child, the major benefit of artificially inseminating through a sperm bank or through a private physician is the minimal risk of a future legal suit by the donor for custody or visitation. Our search did not uncover a single suit initiated by a donor against a woman who had conceived through a professional service. Likewise, there is no record of a suit by a mother against either a sperm bank or a physician-screened donor, or by an AID child against a donor for parental support obligations.

To insure a continuous donor pool, doctors must guarantee that a donor's identity will never be disclosed. In a 1979 survey of doctors who perform AID, anonymity of the donor was found to be of paramount concern. The survey shows that secrecy is deemed important to protect the donor from legal involvement. To guarantee anonymity, physicians often intentionally keep inadequate records or inseminate patients with multiple donors in a single cycle, making the identity of the genetic father uncertain. Physicians justify these practices in light of recent court orders to open the records of adoption agencies.

While these practices are primarily designed to protect the anonymity of a sperm donor, they also minimize the legal risks taken by a donee. One drawback of this method is that the control of the

8. Doctors and clinics frequently follow a policy against providing AID for single women, see infra notes 21-22, 48-52 and accompanying text. Furthermore, states that have statutes governing AID typically limit its administration to licensed doctors so that self-AID may constitute the unauthorized practice of medicine. Shaman, Legal Aspects of Artificial Insemination, 18 J. Fam. L. 331, 346-47 (1979-80).

9. This paper is not intended to be an exhaustive analysis of how the law affects the single woman who decides to bear and raise a child conceived through AID. Rather, it is confined to an examination of the protections offered such a woman by the fourteenth amendment of the United States Constitution. The first amendment and arguments concerning the freedom of expression are relevant to this issue and deserve separate discussion. It is also possible that relevant constitutional and statutory provisions exist in each state which could serve as a basis for additional protections. Furthermore, issues of reproductive freedom can potentially be argued on the basis of federal statutes and on the United States Constitution's thirteenth amendment prohibition against involuntary servitude.

10. Her marital status may preclude her from choosing this method. See infra notes 21-22, 48-52 and accompanying text.


12. Id. at 589.

13. Id.

14. Id.

15. See infra text accompanying note 29.
selection of donors remains in the hands of the professionals involved. Of the 471 doctors surveyed, 91.8% do not allow recipients to select their own donors, and the remaining 8.2% consider input from recipients only rarely. Of the doctors surveyed, "(62 per cent) used medical students or hospital residents; 10.5 per cent used other university or graduate students and 17.8 per cent used both [as donors]." The remaining doctors in the survey "obtained donors from military academies, husbands of obstetric patients, hospital personnel and friends of the physician."16

Although possession of certain genetically transmitted traits would justify rejection of potential donors, the medical screenings reportedly done by the doctors in this survey are superficial at best. While most doctors do take medical histories of the donors, the questioning is most often limited to a report of genetic diseases existing in the family of the donor or the use of a short checklist of common familial diseases.19 Since the information is obtained by questioning the donor, its accuracy depends upon the donor's knowledge and opinions of what constitutes inheritable disorders. The survey reveals that a number of doctors expect medical students and hospital residents to screen themselves prior to donating and noted that donors who are financially motivated to donate may be less than reliable.20

Gaining access to professional facilities is a major problem for the single woman wishing to select a professional AID procedure. The great majority of women currently served by sperm banks and private physicians are married. It was reported in the Curie-Cohen survey that only 9.5% of the women inseminated by doctors were without a male partner.21

There is at least one case challenging the policy of a clinic that refused to accept an application from a woman because she was single.22 The Mott Clinic in Michigan, a division of Wayne State University, had a policy which systematically denied unmarried women the right to apply for AID services. With the assistance of the American Civil Liberties Union (ACLU), the applicant initiated a suit challenging this discrimination by the sperm bank but the clinic abandoned its policy and accepted her application before the case reached a resolution by the courts. It is unclear how the court would have ruled had the case been fully litigated. Requiring the doors of AID facilities to be opened to single women is an affirmative act of enforcement. For reasons to be discussed, the courts may be unwilling to do more than passively ignore the fact that many single women will conceive through non-professional methods. If courts decline to act, single women or lesbian couples part by the State of Michigan, there is state action and state support of the clinic's policy. The plaintiff argued that the policy interferes with her fundamental right to procreate, bear and raise a child. The plaintiff further argued that these fundamental rights are guaranteed by the due process clause of the fourteenth amendment. She relied on Supreme Court decisions finding fundamental rights in marriage and procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) and related rights to contraception, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) and the decision whether or not to terminate a pregnancy, Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). The plaintiff also argued that the policy interferes with her personal right because AID is the only acceptable means for her to have a child. She pointed to the fact that while single parent adoption is acceptable to the state, there is a preference by adoption agencies for two parent families and the chances for actual adoption are minimal. She also argued that to compel her to engage in sexual intercourse would be a clear violation of her personal privacy and that if she were to conceive, the legal rights given to a putative father would interfere with her fundamental right to raise her child. She would be faced with the same interference if she were to conceive by artificially inseminating with a known donor, C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977) (for further discussion of C.M. v. C.C., see Part IV, Section B, infra).

The plaintiff also challenged the marriage requirement because it is overly broad and creates an irrebuttable presumption that all unmarried women are unfit to be mothers. In addition to the due process argument, the plaintiff claimed an equal protection violation since the policy discriminates without a compelling state interest. She addressed the most likely state argument that there is a legitimate societal interest in the welfare of children born through AID. The plaintiff pointed to Zablocki v. Redah, 434 U.S. 374 (1978) a Supreme Court decision stating that the question of whether or not to have a child is a matter of personal conscience and a woman is free "to bring the child into life to suffer the myriad social, if not economic disabilities that the status of illegitimacy brings . . . ." Id. at 386.

17. Id.
18. Id.
19. Id.
20. Id. at 588. Doctors reported that donors are generally paid between $20.00 and $100.00 per ejaculation. "Almost half the doctors (45.7 per cent) paid $25.00 per ejaculation . . . ." Id. at 587.
21. Id. at 588.
22. Although the case was not fully considered by the court, the plaintiff prepared a brief outlining the constitutional arguments supporting her position. Because the clinic is operated by Wayne State University and is funded in large

...
may still be denied access to AID through a professional service.

B. AID with the Help of a Go-between

A second method of artificially inseminating involves the help of a third party go-between. An arrangement is made between the woman seeking AID and another person who chooses the donor, negotiates the arrangements between the woman and the donor, and transports the sperm from the donor to the woman. There is no direct contact between the donor and the prospective mother. This necessarily requires that there be trust between the go-between and each of the parties involved.

This method of AID promises more security from a possible legal suit than does the method involving a known donor, and the problems of accessibility to professional services are avoided. Nevertheless, when using a third party go-between instead of a professional service, this security is reduced by the high risks of disclosure. Use of a go-between usually requires that the prospective mother and donor be in the same geographic area. Often they have ties to the same community. This creates an increased possibility that anonymity will not be preserved. One can imagine how, in a small community, word might easily travel from one party to another. There is also the possibility that the child will bear a physical similarity to the donor. In addition, the go-between may inadvertently mention one party's name to the other. All of these possibilities raise serious considerations for the participants.

A safeguard that can be employed is to have the go-between gather sperm from several donors but give just one sample to the inseminating woman. This reduces the risk of disclosure because only the go-between knows who the actual donor is. However, this method also multiplies the logistical problems because it requires arrangements and pick-ups from more than one donor.

In addition to anonymity, this method of artificial insemination offers other advantages. Specifically, there is an opportunity for the prospective mother to have input into the choice of donor, access to limited medical information about the donor and access to paternal identity in the future. Because the go-between is someone the woman knows and deals with directly, she can suggest certain traits she desires in a donor, such as race, physical characteristics, or ethnicity. If there is a special need for medical information in the future, the go-between can be asked to contact the donor and request it. And, since access to paternal identity is likely to become important to the child in later life, some arrangements can be made, if all parties are agreeable, to permit disclosure of the donor's name at some set date. For example, the donor's name may be put into a safety deposit box to which the child can have access when s/he reaches a predetermined age. This maintains the minimal risk of a custody suit while the child is of minor age, yet later permits the child to learn the donor's identity.

There are also difficulties with the method. First, a desirable go-between may be difficult to find. Being a go-between involves enormous responsibilities, as well as risks and frequent inconveniences. A person assuming this role must be absolutely committed to it. S/he must be a person with a certain amount of flexibility in her schedule and a willingness to be available when needed. While a woman may be able to estimate the days in a month when she will be ovulating, she cannot control the timing. When the woman is ovulating, the go-between must make arrangements with the donor to have the sperm ready and must be available herself for pick-up and delivery. Inseminations are generally done two or three days during each cycle, and since it is estimated that women who become pregnant by AID are inseminated for an average of 3.7 months these arrangements could become quite time consuming.

Finally, there is the remote yet real possibility that the go-between will be put in a difficult legal situation. This could arise if either party decided

23. A donor's natural inclination to tell his friends that he is contributing to such a process can lead to an inadvertent comment to a friend of the woman receiving the sperm. The friend, who knows the woman is inseminating, is then in the position of either disclosing what s/he knows or of withholding important information from a friend.

24. In one community, a situation did arise where the name of a donor was inadvertently mentioned to a friend of the prospective mother. In another situation, a go-between unintentionally mentioned the prospective mother's first name to her donor. Interview with anonymous, Philadelphia, Pa. (Mar. 1981).

25. See Curie-Cohen survey, supra note 11, at 587 (those who do not become pregnant generally discontinue the program after approximately 6.4 months, id.).
to sue for disclosure. For example, if the mother decided to sue for support, she could bring the go-between to court and the court could order disclosure. The same could happen if the donor chose to sue for paternity rights. These situations could force the go-between to choose between a contempt of court charge for failure to reveal the name of the donor or donee, and the violation of a serious trust if s/he did reveal the name(s).

What rewards are there for the person who is the go-between? In a recent interview, a woman who has acted as a go-between said that her reward is "the pleasure of knowing the woman and having contact with the child that is born." 27

C. AID with a Known Donor

Although AID with a known donor creates the greatest risk that the donor will subsequently claim legal rights to the child, many women are choosing this method. They are willing to accept this risk because this method of AID eliminates potential difficulties in gaining access to medical information, permits the prospective mother to make the choice of donor herself, and allows the child access to paternal roots. Once the donor is found, the logistics of the actual insemination are simple. The procedure can be done at home without professional assistance.

However, for legal reasons, a medical doctor may be asked to participate. Having a licensed physician involved in the insemination may be an asset to a mother's legal defense if the donor later sues for paternal rights. The Uniform Parentage Act includes a provision which says, in essence, that a donor of semen is not the legal father where that donor has given his sperm to a licensed physician for an insemination. While this provision was probably designed to protect donors who provide semen to sperm banks or private physicians, it could also be raised by a mother seeking protection from a paternity suit by a donor.

A second reason for inseminating with the help of a licensed physician is to demonstrate the intent of the parties. Donors who originally claimed they wanted no rights or responsibilities later have been known to demand the right to visitation. If a custody suit were to arise between an AID mother and a donor, the court may view the initial expectations (or intent) of the parties as relevant. Having a medical professional perform the actual insemination may help to de-personalize the relationship between the parties as well as provide a credible witness who can attest to the fact that no paternal expectations existed at the time of insemination.

Intent can also be documented by a written agreement between the prospective mother and donor in which they clearly state their expectations. While a written contract is not binding in a child custody suit, a court may consider it in deciding a case. One danger in having a signed agreement, however, is that it is evidence that the contesting donor is in fact the biological father of the child. A woman who conceives through AID may decide not to document the donor's paternity with a signed contract.

In addition to the legal problems already mentioned, there is also the practical difficulty of finding a desirable donor who will agree to the arrangement desired by the prospective mother. A woman may want a donor to remain entirely removed from the child during the early years, yet be willing to acknowledge his paternity when the child wants to know his/her paternal roots. Some women prefer that the donor always be known to the child but be treated more like a distant uncle.

26. Although there is not a case of this type known to the authors, this concern was expressed by a go-between and we believe it is worthy of mention. Interview with a go-between, Philadelphia, Pa. (Dec. 1980).

27. Id.

NOTE/AID

(1982)

than a father. Whatever the arrangement, it is essential for the donor to understand and accept his role in relation to the AID child.

While it is difficult to find a desirable and willing donor, it is not impossible. A more significant problem is that the donor may have stronger paternal feelings than expected. Even the most well-intentioned donor may feel differently after the child is born and may decide to sue the mother for parental rights. This is a very serious risk, especially in light of the possibility that the courts will grant him those rights.33

III. CONCERNS OF THE SINGLE AID MOTHER

The decision to inseminate by any of the methods mentioned above necessarily depends on the availability of the method. A woman's marital status and her sexual preference may preclude her access to a sperm bank or a private physician's help. If she would prefer the assistance of a go-between, she must find someone who would be able and willing to accept this responsibility. Some of these obstacles are likely to be overcome if she elects to find and deal directly with a known donor. When the identity of the donor is known, however, other important factors must be considered.

If the identity of each party is known to the other, there is an inherent risk to each. The mother's concern is that the donor may one day sue her for custody of the child. The donor bears the risk that the mother will sue him for support.34 Since contracts involving children are generally unenforceable35 the safest way to minimize these risks is to maintain an anonymous relationship.

Anonymity, however, creates its own set of problems; for example, lack of access to medical information that the prospective mother would want to consider in choosing a donor and which later could be valuable in assessing the child's medical needs. Although sometimes it is possible to have the donor provide a medical profile that could be referred to if the need arises, it is probably impossible to include every potentially relevant medical fact that may be needed.36 A complete medical profile by today's standards may not be adequate in future years.

Anonymity also increases the risk of incest. This issue has been expressed as a serious concern in the context of adoption. Although it seems remote, "the specter of incest is real in traditional (secret) adoptions . . . . Intermarriage and incest can only be avoided with certainty when adoptees have the names of their natural parents."37 The potential for incest is likely to be enhanced for the AID child since AID most often involves a donor located in the same geographic locale as the mother.38


34. One man contemplating becoming a donor expressed his fear that the mother would one day abandon the child, leaving him with parental responsibility. Interview with a potential donor, Philadelphia, Pa. (Mar. 1981).

35. Courts have generally held that contracts for the adoption of children in return for pecuniary consideration or for release from support obligations are void as contrary to public policy. See Note, Contracts to Bear a Child, 66 Calif. L. Rev. 611, 613 (1978). The policy being promoted is to protect children from being bought and sold as if they were chattel. While no case was uncovered involving a contract between a donor and an AID mother, it is doubtful that such an agreement would be enforced.

One case that deviates from this trend is Reimche v. First Nat'l Bank of Nevada, 512 F.2d 187 (9th Cir. 1975). In Reimche, the court of appeals upheld an agreement between the natural parents of an illegitimate child where the adoption by the father was in the best interests of the child and where pecuniary gain was not the motivating factor on the mother's part. The mother in that case relinquished the companionship and affection of her child when she agreed to adoption by the father, promised not to regain legal custody, and promised to remain silent about parentage until the father's death. In exchange, the father agreed to care for and support the child and to leave the mother and child a share in his will upon his death.

In upholding the agreement, the court distinguished the case on the grounds that it involved a family agreement. "The fears that approval of such a policy would lead to the bartering or sale of children are not borne out where we deal only with agreements between parents or close family members." Id. at 190. (But see id. at 190, Koelsch, J., dissenting). See also Couch v. Couch, 35 Tenn. App. 464, 248 S.W.2d 327 (1951); Note, Contracts to Bear a Child, 66 Calif. L. Rev. 611 (1978).

36. According to Dr. Elizabeth Omand of the Adoption Forum of Philadelphia, this problem has also been encountered by adoptees, for whom medical information about the natural parents is similarly unavailable. Letter from Dr. Elizabeth Omand to Ms. Hilda Silverman of the American Civil Liberties Union in Philadelphia (Feb. 20, 1981). According to Dr. Omand, serious problems arise when medical information is obtained in advance of adoption. These problems result from incomplete medical forms and lack of knowledge of general family medical problems at the time of adoption. Id.

37. Id. at 2.

38. One lesbian couple living in New York City made arrangements through friends in California to inseminate using a donor from the West Coast. This arrangement minimized contact between the donor and the lesbian family. However, the cost of air fare between the two cities makes
A woman choosing AID by anonymous donor must also consider the possibility that her child will later desire to know his or her biological father. This psychological need to know one’s biological roots has gained increased recognition in the context of adoption, and a growing number of adoptees are urging the courts to relax the closed record policies of adoption agencies. 39

The single woman who chooses AID as a method of becoming a parent usually has two goals: (1) to conceive and bear a child, and (2) to raise her child without intervention by the semen donor (i.e., she wishes to raise the child either alone or in a household in which she and an adult (or adults) other than the donor serve as her child’s nuclear family). The achievement of these goals represents the full realization of single parenthood. The remaining sections of this paper will examine the legal obstacles to their achievement.

40. Because of the similarities between an AID child and an adoptee (in both cases a birth parent might be living but absent), the authors talked to members of the Adoption Forum of Philadelphia about their experiences and about the importance they place on the child’s right to know or have access to genetic roots. While that group is not a representative cross-section of all adoptees, their views do reflect what might be expected from at least some of the children born through AID where the donor is anonymous.

It was the overwhelming consensus of the adoptees interviewed that all people should have the right to know the identities of their birthparents. Lisa Segal, an adoptee and member of the Adoption Forum of Philadelphia, describes the issue as a matter of civil rights. In her view, “no one should have the power to keep the identity of a birthparent from you.” She emphasized the need for an individual to know who his or her birthparent is, and said that having an actual relationship with the birthparent is less important. “For me, I didn’t want or need to develop a relationship with my birthparent, but I really needed to meet and see her.”

Ms. Segal stated that, of the adopted people she knows, almost all believe it important to have access to parental identity. She said that she finds it “hard to understand how someone would not want to know . . . . I want that right and I want others to have that right.” Furthermore, it should be noted that Ms. Segal has found and met her birthparents, and she describes the effect of this meeting as “no I didn’t want or need to develop a relationship with my birthparent, but I really needed to meet and see her.”

IV. FOURTEENTH AMENDMENT VIOLATIONS

The preceding discussion of the concerns of the prospective single AID mother and the options available to her highlight two barriers to full realization of the right to be a single parent through AID. One barrier is the denial of equal access to AID facilities on the basis of marital status. The other is the common law precedent that grants paternity rights to a known semen donor on the basis of his professed parental expectation when the donee is single. 41 The first barrier arises from what appear to be, in many instances, the policies and actions of private institutions. The second barrier arises from the actions of the courts as they interpret and apply state and federal law to family-related issues. The following discussion characterizes each barrier as a form of state action which violates the Constitutionally guaranteed rights of individuals.

The fourteenth amendment of the United States Constitution is the basis of all federal Constitutional claims challenging unwarranted discrimination and infringement of personal liberty by state authorities. The guarantees of the Bill of Rights, which protect citizens from the intrusions of federal authorities, restrict state action only to the extent permitted by the application of the fourteenth amendment. 42 Therefore, in the absence of state constitutional provisions and federal or state legislation guaranteeing additional rights to individuals, the fourteenth amendment is the only legal limitation on state action. 43

The two safeguards of the fourteenth amendment’s guarantee of personal liberty and freedom from discrimination are the due process and equal protection clauses. 44 In evaluating an equal pro-

41. The significance of the fourteenth amendment as a restraint on the states under the due process and equal protection clauses has developed gradually over the years since its ratification. The Supreme Court in Hurtado v. California, 110 U.S. 516 (1884), refused to characterize the fourteenth amendment’s guarantee of due process as an incorporation of the federal Bill of Rights. Subsequently, the Court selectively acknowledged certain privileges as fundamental to the concept of due process on the basis of the merits of the privileges themselves.

42. This assertion is subject to the comments made supra note 9.

43. Section 1 of the fourteenth amendment to the Constitution of the United States reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall
tection claim, it is necessary to identify state action that establishes a classification which acts to deny certain individuals' rights and benefits while granting these rights to others. A substantive due process claim focuses on any deprivation by the state of certain protected personal interests regardless of whether a classification is involved. The due process clause and the equal protection clause are independent and distinct, but not mutually exclusive guarantees of individual rights.

The right to be a single parent through artificial insemination by donor involves both 1) the substantive due process guarantee of the fundamental right to conceive, bear and raise a child, and 2) the equal protection guarantee of freedom from discrimination on the basis of marital status. The two above-mentioned barriers to the right to deny certain individuals' rights and benefits to private individuals or groups. Therefore, the discrimination on the basis of marital status.

A. Denial of Equal Access to AID Facilities

1) State Action

The fourteenth amendment protects citizens from governmental actions, but not from actions of private individuals or groups. Therefore, the actions of private entities must be linked to state action before the fourteenth amendment can be invoked.

The circumstances in which the use of discriminatory and wrongful policies by apparently private groups become state action are determined by the particular facts of each case. However, in the context of privately operated AID facilities, the relevant inquiry is the degree of interdependence and cooperation between the state and the AID facilities that deny equal access to single women. In answering this inquiry it is important to investigate the extent of state funding received by the facility, and the degree of state involvement and participation in the actions of the private entity. An additional factor is whether the nature of the services provided are "affected with a public interest." Finally, at least one Supreme Court decision suggests that the state must have been involved in making the particular decision being challenged in order for the state action requirement to be met.

The question of state action is thus essentially one of fact to be resolved on a case by case basis. State action may exist where the AID facility is located in a publicly owned building, receives substantial state funds, is guided in its operations by state regulations, is affiliated with a public entity (such as a University teaching hospital) and

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

45. Id.
46. Id. at 531.
47. Private conduct, "however discriminating and wrongful," cannot be challenged under the fourteenth amendment, The Civil Rights Cases, 109 U.S. 3 (1883). The prohibitions of the fourteenth amendment are addressed to "actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken." Ex parte Virginia, 100 U.S. 339, 346-47 (1880).
48. See Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) ("Only by sifting facts and weighing circum-
stances can the nonobvious involvement of the State in private conduct be attributed its true significance." Id. at 772).
49. See Simkens v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) cert. denied, 376 U.S. 938 (1964), where the court held that a private hospital which received a Hill-Burton grant was sufficiently involved with governmental action to be subject to the prohibitions under the fifth and fourteenth amendments against racial discrimination.
50. See Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). To find state action, the Court in Burton examined the activities, obligations, responsibilities and interdependence of a state Parking Authority in relation to a private restaurant engaged in racial discrimination. The Court placed importance on the fact that the land and building in which the restaurant was located was publicly owned, that the building was dedicated to public uses, and the upkeep, maintenance and costs of construction were all payable out of public funds. But see Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) where Justice Rehnquist stated that the State of Pennsylvania was not sufficiently connected with the challenged termination of electric service to make the utility's conduct attributable to the State for purposes of the fourteenth amendment, where customer showed no more than that Metropolitan Edison was a heavily regulated private utility with a partial monopoly and that it elected to terminate service in a manner that the Pennsylvania Utility Commission found permissible under State law.
51. See Evans v. Newton, 382 U.S. 296 (1966) (state action may be present in the exercise by a private entity of powers traditionally reserved to the state). But see Jackson v. Metropolitan Edison Co., 419 U.S. 345, 355 (1974), where the Court writes that this principle cannot be extended to include actions of regulated businesses, providing arguably essential goods and services affected with a public interest, without more.
52. Id.
provides public services. But how much less than the aggregate of these factors would be sufficient for a showing of state action is difficult to determine on the basis of the cases decided thus far.

2) Denial of a Fundamental Right

Where state action is present in the denial of access to AID facilities to single women, it can be argued that the action effectively denies these women their fundamental right to procreate and their right to personal privacy. The Supreme Court expressly recognized a fundamental right to procreate in *Skinner v. Oklahoma*.53 As Justice Blackmun explained in *Roe v. Wade*, although the Constitution does not explicitly mention the right of privacy, the Supreme Court “has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”54 The opinion further states “that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ . . . are included in this guarantee of personal privacy.”55 Furthermore, the Court in *Roe v. Wade* explains that this privacy right extends to certain activities relating to marriage, procreation, contraception, family relationships, and childrearing and education.56

The Court’s past and current characterization of the right of privacy as it relates to reproductive and childrearing decisions is crucial to an understanding of the protections afforded the single parent of an AID child. The privacy right was first endorsed by the majority of the United States Supreme Court as a constitutionally protected right in *Griswold v. Connecticut*.57 In this case, the court sought to protect the autonomy of the traditional family unit and held that the state could not prohibit the distribution of contraceptives to married couples.58

In *Pierce v. Society of Sisters*, parental rights to direct the education of their children were upheld against state interference.59 The plaintiffs in this case, a Catholic society operating parochial schools and a private military academy, brought suit to enjoin the enforcement of an Oregon statute requiring parents to send children between the ages of eight and sixteen to a public school. The Court found that the statute was unconstitutional because it unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.60

These early decisions involving the privacy right firmly establish its protection of the family’s autonomy from the state in matters concerning the conception and rearing of children.61 That is, the privacy right prevents the state from unnecessarily intruding upon the private relationships, and concerns of the family unit.

53. See 316 U.S. 535, 541 (1942), where the right to procreate was first said by the Court to be “fundamental to the very existence and survival of the race.” This right was not then characterized in terms of privacy.
56. Id. at 152-53. The quotation in full is as follows: . . . the right of (personal privacy) has some extension to activities relating to marriage, Loving *v.* Virginia, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-42; id. at 490, 463-65 (White, J., concurring in result); family relationships, Prince *v.* Massachusetts, 321 U.S. 158, 160 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 533 (1925); *Meyer v. Nebraska*, supra (parallel citations omitted).
57. 381 U.S. 479 (1965).
58. The Court spoke of a concept of personal “liberty” of the fourteenth amendment’s due process clause and of zones of privacy created by several constitutional guarantees in the Bill of Rights. On the basis of either analysis, the Court, speaking through Justice Douglas, made clear that states were to respect the privacy surrounding the marriage relationship.
59. 268 U.S. 510 (1925).
60. Id. at 534-35.
For the purposes of the present discussion, however, a right of privacy rooted in family-based values may not be adequate to protect a woman’s decision to achieve single parenthood through AID. Although her decision to conceive, bear and raise a child is a private concern involving personal values, it must be recognized that she makes this decision as an unmarried woman. When a woman conceives a child without a male partner and raises this child in a non-traditional family arrangement, questions arise concerning the extent to which the Constitution protects such an alternative life style. Federal and state courts have only inconsistently acknowledged that it is irrational to make distinctions between legitimate and illegitimate children, lesbian and heterosexual parents in custody battles, and single and married people in adoption proceedings.

The protection of the reproductive choices of single women, because it involves considerations of the moral and social values held by the majority of the public, must rely on broad interpretation of the privacy right. Such an interpretation upholds a right of privacy based upon principles of individual equality and autonomy. That is, the privacy right protects the integrity of personal decisions concerning individual expression and development. According to this viewpoint, the protection of a woman’s decision to achieve single parenthood through AID is based, at least in part, on a right to personal autonomy in reproductive matters even when the manifestations of such autonomy are contrary to social convention.

Support for a broad interpretation of the privacy right can be found in cases relating to the reproductive decisions of single people. Eisenstadt v. Baird involved a challenge of state statutes that prohibited anyone other than a registered pharmacist or physician from dispensing any article with the intention that it be used to prevent pregnancy. Under this statutory scheme, married persons could obtain contraceptives to prevent pregnancy if they were obtained from doctors’ or druggists’ prescription. Single persons, however, could not obtain contraceptives from anyone to prevent pregnancy. In striking down these statutes the Court observed: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

Less than a year later, in Roe v. Wade, the United States Supreme Court expanded the personal right of privacy to encompass any woman’s decision whether to terminate her pregnancy. At issue in that case were state statutes which made it a crime to “procure an abortion” or to attempt one, except with respect to “an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.” The appellant, an unmarried and pregnant single woman who wished to terminate her pregnancy, contended that the statutes improperly invaded the right to choose not to bear a child. In holding the state statutes to be unconstitutional, the Court said that the right to terminate a pregnancy belonged to the individual “whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people.”

In Eisenstadt and Roe the Court recognized the importance of freedom of individual choice where reproductive decisions are involved. Moreover, in Roe the personal right of privacy was held to protect the autonomy of the individual in a situa-
tion involving social censorship of that individual's choice.\(^{71}\)

In \textit{Carey v. Population Services International}, the Court again acknowledged the importance of personal freedom in reproductive decisions.\(^{72}\) The Court affirmed the decision by the district court which found unconstitutional a statute regulating the distribution of non-prescription contraceptives to minors: "Read in light of its progeny, the teaching of \textit{Griswold} is that the Constitution protects individual decisions in matters of childbearing from unjust intrusion by the state."\(^{73}\)

Examination of these United States Supreme Court decisions reveals a somewhat groping historical development of the privacy right. There is uncertainty surrounding the proper characterization of this right and the extent of the interests it protects. The Constitution does not explicitly mention any right of privacy, but it has been found to exist in the Constitution under various theories and labels. The Court in \textit{Roe v. Wade}, looking back on the cumulative decisions it made concerning privacy interests in different contexts, presumably located the privacy right in the Constitution's liberty guarantee.\(^{74}\)

It is not necessary to pinpoint the particular Constitutional source of privacy interests in order to identify those interests which are acknowledged as protected under the Constitution. What is important is that rights relating to procreation, contraception, family relationships and child rearing have all been deemed "fundamental."\(^{75}\) Once deemed fundamental, the fourteenth amendment protects these rights through the due process clause.\(^{76}\)

Careful identification of the basis of the privacy right under the Constitution becomes much more important, however, when predicting the likelihood of the expansion of Constitutional protections to cover new situations. The single woman's right to be a single parent through AID involves both the right to bear a child and the right to rear a child without a male partner. The fundamental right to procreate and parent without a man has not been asserted by the United States Supreme Court. To expand the interpretation of the privacy right or liberty interest to protect such a decision, the Supreme Court must go further than it has yet been willing to go to protect alternative life styles. A protection of alternative life styles flows more easily from a privacy right based on personal autonomy (such as that recognized in \textit{Eisenstadt} and \textit{Roe})\(^{77}\) than from a privacy right rooted in a tradition of the nuclear family.\(^{78}\)

The United States Supreme Court has not demonstrated a willingness to find Constitutional protections of life styles disfavored by majority norms. There have, in fact, been several conspicuous failures to expand the privacy right to protect nontraditional families.

In \textit{Village of Belle Terre v. Boraas}, the Supreme Court upheld a zoning ordinance that prohibited the occupancy of a dwelling by more than two unrelated persons as a "family" while permitting occupancy by any number of persons related by blood, adoption, or marriage.\(^{79}\) The plaintiffs included three of six unrelated college students who rented a house in the village. The plaintiffs contended that the ordinance violated fundamental rights of association, travel and privacy and was a violation of equal protection.\(^{80}\) Justice Douglas asserted that the case involved no such rights and held that the legislation was rationally related to the permissible state objective of laying out "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."\(^{81}\)

\(^{71}\) The Court in \textit{Roe} refused to recognize any state interests that would justify the denial of the right to choose an abortion altogether. Only the woman, together with her responsible physician is in a position to consider the relevant factors of medical, economic and psychological harm of an unwanted pregnancy. However, important state interests are permitted to qualify this autonomous decision. These interests are the protection of the health of the pregnant woman and the protection of potential human life. Thus, for "the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." \textit{Id.} at 164-65.


\(^{73}\) \textit{Id.} at 687.


\(^{75}\) See supra notes 53-60 and accompanying text.


\(^{77}\) See \textit{supra} text accompanying notes 66-71.

\(^{78}\) See \textit{supra} text accompanying notes 57-61.


\(^{80}\) \textit{Id.} at 7.

\(^{81}\) \textit{Id.} at 9. \textit{But see Moore v. City of East Cleveland}, 431 U.S. 494 (1977), where the Court concluded that housing ordinance which limited occupancy of a dwelling unit to members of a single family deprived appellant of her liberty in violation of the due process clause of the fourteenth amendment. The ordinance operated in such a manner that appellant's household, consisting of her son, two grandsons
In *Doe v. Commonwealth*, the Supreme Court affirmed without comment a judgment made by a three-judge District Court that a Virginia statute making sodomy a crime did not deprive adult males, engaging in regular homosexual relations consensually and in private, of their constitutional rights to due process, freedom of expression and privacy. The Supreme Court’s affirmation thus left unchallenged the District Court’s restrictive interpretation of the privacy right.

In upholding the validity of the statute, the District Court relied upon the precedential value of *Griswold v. Connecticut* and several other cases discussed above. The court noted that these precedents rest exclusively on the precept that the Constitution condemns state legislation that trespasses upon the private incidents of marriage, upon the sanctity of the home, or upon the nurture of family life. According to the District Court majority, these are the only concerns which have justified the nullification of state intrusion on the privacy right.

The dissenting opinion in *Doe* found quite a different message in these precedents:

The Supreme Court has consistently held that the Due Process Clause of the Fourteenth Amendment protects the right of individuals to make personal choices, un fettered by arbitrary and purposeless restraints, in the private matters of marriage and procreation. *Roe v. Wade; accord Doe v. Bolton.* See also *Griswold v. Connecticut* (Harlan, J., concurring) (citations omitted). I view those cases as standing for the principle that every individual has a right to be free from unwarranted governmental intrusion into one’s decisions on private matters of intimate concern. A mature individual’s choice of an adult sexual partner, in the privacy of his or her own home, would appear to me to be a decision of the utmost private and intimate concern. Private consensual sex acts between adults are matters, absent evidence that they are harmful, in which the state has no legitimate interest.

To say, as the majority does, that the right of privacy, which every citizen has, is limited to matters of marital, home or family life is unwarranted under the law. Such a contention places a distinction in marital-nonmarital matters which is inconsistent with current Supreme Court opinions and is unsupportable.

The reasoning in the *Doe* dissent is very similar to that expressed by the majority of the Supreme Court of New Jersey two years later in *State v. Saunders*. In *Saunders*, the court struck down as violative of the state constitution a statute that criminalized fornication between consenting adults. The court found that “as an official sanction of certain conceptions of desirable lifestyles, social mores or individualized beliefs, [the statute] is not an appropriate exercise of the police power.” In protecting the privacy right, and the right to make personal decisions regarding intimate relationships, the court held that “the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy.”

It is significant that the New Jersey Supreme Court clearly distinguished its refusal to condone certain kinds of behavior, such as fornication, from the necessity nevertheless to grant such behavior protection under the New Jersey Constitu-

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82. *Id.* at 1203 (Merhige, J., dissenting).
83. *Id.* at 219, 381 A.2d 333 (1977).
84. In *Saunders* the decision was made under the state Constitution. The court declared that “the lack of constraints imposed by considerations of federalism permits this Court to demand stronger and more persuasive showings of a public interest in allowing the State to prohibit sexual practices than would be required by the United States Supreme Court.” *Id.* at 217, 381 A.2d at 341.
85. *Id.* at 219, 381 A.2d at 342.
86. *Id.* at 213-14, 381 A.2d at 339:
We conclude that the conduct statutorily defined as fornication involves, by its very nature, a fundamental personal choice. Thus, the statute infringes upon the right of privacy. Although persons may differ as to the propriety and morality of such conduct and while we certainly do not condone its particular manifestations in this case, such a decision is necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard.
87. *Id.* at 220, 381 A.2d at 343.
The court refused to use the state constitution as a means of imposing majoritarian values upon the individual in the guise of public interest. This restraint is also evident in two other recent New Jersey decisions, concerning euthanasia and involuntary sterilization, where the court favored fundamental personal privacy choices after weighing them in balance with legitimate state interests.

The Saunders court believed that its analysis of the privacy right was consistent with United States Supreme Court decisions on privacy and procreative decision-making:

The Court in Carey and Wade underscored the inherently private nature of a person’s decision to bear or beget children. It would be rather anomalous if such a decision could be constitutionally protected while the more fundamental decision as to whether to engage in the conduct which is necessary prerequisite to child-bearing could be constitutionally prohibited.

The Saunders opinion, by including activities that lead directly to conception within the protected right of procreative privacy, also appears to support the single woman’s right to choose to conceive through AID. The decision to utilize the AID method of conception is “at least as intimate and personal as those [considerations] which are involved in choosing whether to use contraceptives.”

Perhaps if the United States Supreme Court were faced with a case involving prohibitions of heterosexual fornication rather than homosexuality, it too would extend the protections of the privacy right to such activities. This would admittedly be small comfort, however, to the prospective lesbian AID mother.

Nevertheless, the United States Supreme Court has not yet expanded the privacy right as far as the Supreme Court of New Jersey did in Saunders. Instead, the one principle that clearly emerges from Griswold and its progeny is that there is a right to choose to procreate through traditional sexual intercourse. To that extent that the single AID mother is comparable to a single woman who conceives a child through the sexual act, she is similarly protected by this case law.

The fact that the AID mother’s conception takes place without any heterosexual relationship, however, may support restrictions on the procreative right if the following two factors are found to be significantly harmful to state interests. First, the unconventional nature of AID conception, as distinguished from conception by sexual intercourse, may be found to make AID less deserving of protection than are other forms of “illicit sex.” Second, the single AID mother has deliberately rather than accidentally chosen the course of parenthood without a male partner. These distinctions between AID and conception by sexual intercourse may be interpreted to justify state restrictions on the single woman’s access to professional AID facilities.

The use of AID as a method of conception does not involve sexual intercourse, and therefore is not subject to the legal proscriptions applicable to sexual activity. The courts have refused to equate the use of AID with immoral sexual conduct, at least in those cases that sought to find married women who conceived their children through AID guilty of adultery. While it is unsettled whether AID outside the context of marriage is somehow more “immoral” than AID by married women, there is no legal basis for asserting that single women who artificially inseminate are any more guilty of im-

91. Id. at 219, 381 A.2d at 342.
92. See In re Quinlan, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976) where it was held that a person has a constitutional right to discontinue use of artificial life-sustaining apparatus when the prognosis for returning to cognitive or sapient life is poor. In Quinlan, the patient’s constitutional right of privacy outweighed the public interest in preserving her life and presented a compelling reason for judicial intervention. See also In re Grady, 85 N.J. 235, 426 A.2d 467 (1981). In that case, judicial intervention was held to be essential to protect the constitutional rights of a woman too mentally impaired to make a conscious choice to be sterilized. “What is at stake is not simply a right to obtain contraception or to attempt procreation. Implicit in both these complementary liberties is the right to make a meaningful choice between them.” Id. at 250, 426 A.2d at 474.
94. Id.
95. Id.
96. See Shaman, Legal Aspects of Artificial Insemination, 18 J. Fam. L. 331, 334-35 (1979-80). In most jurisdictions AID is not considered adultery unless there has been actual sexual intercourse. Strong public policy in favor of legitimacy supports this position. See also In re Adoption of Anonymous, 74 Misc.2d 99, 345 N.Y.S.2d 430 (Surr. Ct. 1973); People v. Sorensen, 68 Cal.2d 280, 437 P.2d 405, 66 Cal. Rptr. 7 (1968).
moral conduct than women engaging in extramarital sex.

Single AID mothers have planned their conception as a deliberate, considered event whereas other single women often become pregnant unintentionally as a result of sexual intercourse. It follows, then, that the single woman’s right to conceive and bear a child through AID is closely related to the right to rear a child without a male partner. To permit AID conception by single women is to permit planned single parent households.

The planned nature of AID conception renders it a more preventable occurrence than conceptions resulting from non-marital sex. This is true at least in the context of restricting access to professional AID facilities. Thus, to the extent that prevention of AID conception by single women serves important state interests, denying access of single women to AID facilities could be justified.

In reality, however, barring access to AID facilities is an irrational means of achieving this state interest, since it would restrict single women’s procreative choice while accomplishing no preventive purpose. Many women would still conceive through AID with a known donor or with the assistance of a go-between. The simplicity of the method renders AID conception potentially as clandestine and unpreventable as premarital sex.

Thus, the prevention of planned single parent households would not be achieved by restricting access to professional AID facilities. The use of other AID methods or sexual intercourse are possible alternatives for single women determined to have children. Limiting access to AID facilities only serves to subtract one particular method of AID conception from the choices available to single women.

The limited effectiveness of restricting access does not minimize the importance of professional AID facilities as an option desired by many single women. A single woman who conceives with the assistance of professional AID facilities benefits from a safe source of anonymous donors, and is most likely thereafter to experience single parenthood free from donor challenges. For some women this is preferable to the risks and inherent difficulties of finding and screening potential known donors privately. Professionally conducted AID is also preferable for many other single women who believe that sexual intercourse with a man outside marriage, or solely for the purpose of conceiving a child, is not an alternative consistent with their personal values.

Denying these single women equal access to AID facilities is a deprivation of their right to choose an appropriate method of conception. The question then becomes whether the deprivation of a choice of method effectively operates as a deprivation of the fundamental right to procreate. If so, the state must be prepared to justify this deprivation by demonstrating that compelling state interests are thereby served.

3) Denial of Access to AID Facilities on the Basis of Marital Status

We have just considered arguments that could support a claim under the due process clause that the denial of equal access to AID facilities is an unconstitutional barrier to the exercise of a single woman’s fundamental rights of procreation and privacy. These arguments also support a claim rooted in the equal protection clause. As stated previously, an equal protection claim involves a classification which acts to deny certain individual rights and benefits while granting these rights to others. In the present context, the equal protection claim arises from the fact that some professional facilities and some state statutes discriminate on the basis of marital status. Opening the doors to married women while closing them to single women is a scheme of distribution of benefits that raises a claim under the equal protection clause.

Critics of AID for single women may argue that the state has no affirmative duty to make avail-

97. See discussion of state interests, infra Part IV, Section A(4).
98. See supra Part II, Section A.
99. See supra Part II, Section C.
100. See infra note 104 and accompanying text.
101. It should be mentioned that there is yet another means to attack the denial of equal access to AID facilities. This attack challenges the same conduct, i.e., discrimination on the basis of marital status, but characterizes it as a violation of due process. This argument is based on allegations that an institution’s policy which denies single women access to AID is overly broad on its face and thereby creates an irrebuttable presumption of unfitness. This argument is not advanced in this paper because it is probably not the strongest means of attacking the policy. See infra text accompanying notes 105-06; see also supra note 22.
102. See supra text accompanying notes 22, 8.
able new methods of conception to those who are otherwise unable to conceive. That is not the issue
before us, however. Here, states have elected to provide AID, but only as an option available to
married women. Marital status is a classification used to control access to a particular means of
procreation.

In the preceding section we considered whether the fundamental right of procreation and privacy
protects an unmarried woman's decision to conceive through AID. When access to facilities is
denied on the basis of marital status, the issue involved is whether the state may limit a single
woman to conception through the sexual act or non-professional AID methods even when a pro-

tessional facility would be a more personally suitable alternative.

4) State Interests

A court will not necessarily protect a right simply because it has fourteenth amendment dimen-
sions. The determining inquiry is whether the state can justify the infringement of an individ-
ual's right by demonstrating a sufficient state interest.

Under some circumstances, a state can justify an infringement by demonstrating a rational basis
for its action (rational basis analysis). When a fundamental right or suspect class is involved,
however, the state must demonstrate that the challenged action is necessary to promote a com-
pelling state interest (strict scrutiny analysis).

More specifically, the equal protection clause mandates that a classification be judged by the
"standard of whether it promotes a compelling state interest"\textsuperscript{105} when it either singles out a sus-
pect class for any reason or affects a non-suspect class' exercise of a fundamental right that is pro-
tected by the due process clause. Such a classification "cannot be upheld unless it is supported by
sufficiently important state interests and is closely tailored to effectuate those interests."

A single woman's right to artificially inseminate, when that right is freely exercised by mar-
ried women, involves the dual interests of both equal protection and due process. Although mar-
tial status is not a suspect class, artificial insemination, it has been argued above, is a fundamental
right under the due process clause. State restrictions on a single woman's right to artificially in-
seminate thus affect a non-suspect class' exercise of a fundamental right and must be strictly scruti-
nized.

In applying strict scrutiny to analyze state regulations of artificial insemination, it is important to
note that the rights of procreation and privacy are not absolute, even if fundamental. The Court's
decisions recognizing these rights acknowledge that some state regulation in areas protected by
that right is appropriate. In \textit{Roe v. Wade}, for instance, the Court found that the state interests
in the life and health of the mother and the unborn fetus could justify narrowly drawn state regu-
lation of a mother's right to an abortion during certain stages of her pregnancy.

State policies which prevent a single woman from conceiving a child through artificial inse-

\textsuperscript{103} See, \textit{e.g.}, Dandridge v. Williams, 397 U.S. 471 (1970); Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Comm'n's, 330 U.S. 552 (1947).


The reader may question the need to employ strict scrutiny analysis under the equal protection clause when the presence of a fundamental right already calls for such analy-
sis under the due process clause. We have argued that the limitation of any woman's right to artificially inseminate is an infringement of her fundamental right to privacy under the due process clause unless such limitation is necessary to promote a compelling or overriding state interest. A chal-

gene to state regulation under the due process clause is most appropriate when the law limits the liberty of \textit{all} persons to engage in some activity. An absolute denial by law of fundamental rights to everyone who could otherwise exercise these rights is rare, however. Rights are more often selectively denied to certain groups of people while other groups freely exercise these same rights. In the case of artificial insemina-
tion, single women are selected out of the general population of women and are subjected to greater restrictions. It is

\textsuperscript{105} Shapiro v. Thompson, 394 U.S. 618 (1969). The Court held that "even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting period require-
ment clearly violates the equal protection clause." \textit{Id.} at 638.


\textsuperscript{107} 410 U.S. 113, 162-64 (1973).
nation will probably focus on the welfare of the AID child and of society as a whole for their justification. The state would rely on its recognized interest in protecting the welfare of children to justify its interference with a single woman's fundamental right ot procreate. Therefore, the state is likely to make the following arguments: a) the child will suffer as a result of his or her legal or social status as illegitimate, and prospective parents of illegitimate children are therefore deserving of discriminatory treatment that will discourage them from procreating; b) the child will not be provided with suitable care or will be psychologically harmed by having one parent and by being denied contact with the biological father and paternal roots. Each argument will be addressed separately.

a) Illegitimacy

Historically, illegitimate children experienced both social and legal consequences as a result of their disfavored status as the products of illicit sex. During the last decade, however, the Supreme Court has found that the equal protection clause will not permit laws that discriminate against children on the basis of birth status. The Court's determination to prevent such discrimination has been evident in cases involving wrongful death statutes, child support statutes, workman's compensation laws providing benefits to dependents, social security benefits, and statutes on intestate succession.108

Legal classifications based on illegitimacy have not been struck down under the strict scrutiny standard of review. Instead, in these cases a lesser standard of review has evolved which is more demanding than the rational basis analysis but requires only that the statutory classification in question be substantially related to permissible state interests.109 This intermediate standard of review has apparently been developed in an attempt to protect innocent children from society's disapproval of the parents' illicit liaisons, while still deferring to the state's regulatory power in certain matters.110

While the Court has usually protected illegitimate children, it has left unchallenged a state's inclination to discourage illegitimate relationships through regulation of adult behavior. Parham v. Hughes111 is perhaps the best known Supreme Court decision upholding this type of state regulation. In Parham, the Court affirmed a state's ability to single out illegitimate fathers for discriminatory treatment because of the illegitimacy relation. In this case, the father of an illegitimate child was barred from bringing a wrongful death action after his child and the child's mother were killed in an auto accident. If the mother had not been killed she would have been entitled to damages for the wrongful death of her child. The father was denied this same right because he had not filed a petition in court to legitimate his son during the son's lifetime.112

It is important to note that the Parham decision cannot be explained as an effort by the Court to punish the father for irresponsible behavior. In this case, there was evidence that the father, as well as the mother, was involved in the upbringing of the child.113 The father had signed the child's birth certificate, had supported the child and had visited him regularly. The child had taken the father's name. What the father had failed to do was to take the unusually sophisticated step of petitioning the court for legitimation.

It is not certain upon what basis the Court has distinguished between the need to protect the ille-

108. See Trimble v. Gordon, 430 U.S. 762 (1977) (intestate inheritance cannot depend upon child's illegitimate status); Jimenez v. Weinberger, 417 U.S. 628 (1974) (illegitimate children entitled to same benefits from their parents' Social Security disability insurance as legitimate children); Gomez v. Perez, 409 U.S. 535 (1973) (illegitimate children have same right to child support as do legitimate children); Weber v. Aetna Casualty and Sur. Co., 406 U.S. 164 (1972) (illegitimate children may recover in wrongful death action and workers' compensation claim arising from father's death); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimate children have same right to bring wrongful death action as do legitimate children); Glona v. American Guar. and Liab. Ins. Co., 391 U.S. 73 (1968) (mother may recover for wrongful death of illegitimate child). But see Lalli v. Lalli, 439 U.S. 289 (1978). In Lalli, the Supreme Court found that a state's compelling interest in the orderly intestate descent of property justified a state statute that required illegitimate children to have a court declare paternity during the father's lifetime and within two years of the child's birth in order to inherit by intestate succession from their fathers. The court claimed that this statute, unlike that challenged in Trimble, was not based on the impermissible state goal of encouraging legitimate relationships by punishing the child.

109. See Lalli, 439 U.S. at 265.
112. Id. at 353-57.
113. The father in Parham had unsuccessfully challenged the statute on the grounds of sex discrimination, id.
gitimate child and the validity of denying the parents certain benefits of the parent-child relationship when there is no formal marriage between mother and father. The innocence of the child and the guilt of the parent is involved, of course, but it should not be the state's responsibility to punish "sinful" associations unless there is a constitutionally sound, secular policy for doing so. One possible policy justification could be the state's interest in promoting the welfare of children. That is, illegitimate births should be discouraged because of the supposed social stigma that illegitimate children suffer.

The fact of being different in any way from their peers often causes children to suffer. There is therefore some truth to the expectation that children born in this world without legitimate fathers are likely to feel stigmatized. Whether this is detrimental to the child's well-being, however, is likely to turn on other factors such as the love and support of the primary caretakers and the characteristics of the child's peer group.

Regardless of the strength of the social reproach experienced by the child, the Court has acknowledged that while it can protect the individual from laws that discriminate, social stigma is an area beyond its control.\(^{114}\) Furthermore, a woman is free "to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings."\(^{115}\)

Although the Court cannot protect the prospective children of illegitimate liaisons from society's disapproval, it may attempt to prevent illegitimate births resulting from AID conception by supporting state restrictions on access to AID facilities. The Court may presume a state duty to intervene to prevent the birth of an illegitimate child through AID which justifies state restrictions on the right of procreation prior to conception.

At least when racial discrimination is the motive, a state cannot restrict a prospective parent's constitutional rights in order to avoid supposed harm to the offspring. In Loving v. Virginia,\(^{116}\) one of the state purposes advanced to justify a statute prohibiting a white person from marrying anyone other than another white person was to avoid the consequence of a "mongrel breed of citizens."\(^{117}\) The Court found this unpersuasive and ruled that "[u]nder our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be impinged by the State."\(^{118}\)

The Court's particularly strict enforcement of the fourteenth amendment in cases involving official state sources of invidious discrimination renders the precedential value of Loving in cases involving mothers of AID children doubtful. Perhaps a better analogy can be made to cases that deal with a state's power to regulate sterilization, since sterilization also involves intervention in procreative choice prior to conception. These cases are discussed in the following section.\(^{119}\)

Another policy justification for state discouragement of the illegitimacy relation is the protection of legitimate status. This policy has been the guiding light to legal restrictions of illegitimacy in the past, when the law was applied to assure that a man's status and wealth would attach to a woman only when he chose to formalize the union, and would pass only to the children of such a formal union.\(^{120}\) One can expect that this policy will be increasingly subject to challenge in a society that emphasizes achievement and de-emphasizes ascription in awarding status,\(^{121}\) that becomes more diverse in family organization such that women-headed households are secondary norms,\(^{122}\) and as sex discrimination in statutes becomes more disfavored.

Without substantial state interests to justify a policy of favoring legitimate associations by disfavoring alternative associations which nevertheless foster the nurturance and security of children, the regulations discouraging illegitimacy per se cannot be constitutionally supported. Accordingly, equal access to AID facilities cannot be denied

114. In Weber v. Aetna Casualty and Sur. Co., 406 U.S. 164, 176 (1972), the Court stated that it is "powerless to prevent the social opprobrium suffered by illegitimate children."

117. Id. at 6.
118. Id. at 12.
119. See infra Part IV, Section A(4)(b)(i).
122. Karst, supra note 6, at 677, referring to Adams, An Inquiry into the Nature of the Family, in Family in Transition 72, 82 (1971).
single women solely on the basis of their marital status if the sole state interest is in preventing illegitimate births.

b) Harm to the Prospective Child and Burdens on State Resources

Beyond the question of illegitimacy, the state may assert an interest in the future well-being of the prospective child, as well as an interest in avoiding the burden on society of single parent families. Two possible ways to analyze these state interests are by analogy to sterilization cases and by analogy to those cases where the courts have intervened to terminate parental rights.

i) Sterilization

In 1927, the United States Supreme Court upheld a state statute which permitted the superintendent of a mental institution to order the sterilization of a patient if, in his opinion, it would be in the best interests of the patient and society to do so. Since then the practice of sterilizing select members of society continues, although theories justifying this procedure are shifting.

Sterilization cases provide a useful analogy because, as with legislation forbidding procreation for single women through use of professional AID facilities, the state is seeking to prevent conception. The state might argue, however, that less justification is needed for legislation prohibiting AID since a fertile single woman has the capacity to procreate by other means, whereas sterilization is most often a permanent condition which absolutely bars procreation. Additionally, the burden on the sterilized individual is greater since she must undergo a surgical procedure.

It is conceded that the surgical, frequently permanent nature of sterilization makes this procedure physically more burdensome than is the denial of access to AID facilities. However, a single woman’s supposed capacity to procreate without AID is often a practical falsehood. The denial of access to AID for many single women has the profound effect on constitutional rights that courts have recognized in sterilization cases. This is because alternative methods of procreation are not realistic options for the woman who is chilled from exercising them because of fear of a paternity suit, or for the woman who believes it immoral to have sexual intercourse with a man who is not her husband, or for a lesbian woman who does not relate sexually to men. For these women, denial of AID amounts to a denial of the fundamental right to procreate.

State-ordered sterilization has generally been supported by three theories: 1) a state’s right to protect itself from future generations of mentally disabled people; 2) a state’s interest in protecting the prospective child; and 3) a state’s duty to substitute consent for the woman not capable of giving her own consent. Only the second of these is relevant to the analogy between sterilization and denial of access to AID facilities.

The state’s interest in the well-being of the prospective child might be asserted in terms of the state’s right to protect itself from the consequences of single women conceiving through AID and burdening state resources. The state might allege that denying single women access to AID would serve a legitimate state interest since unmarried mothers are likely to go on welfare and become an economic burden on the state. Further, the state may argue that a child raised without a father will have emotional problems and will put a strain on already limited social services.

124. Most laws promote the sterilization of mentally ill people on the basis of eugenics. Recently, the notion that mental illness is an inheritable trait has come under attack. Perhaps for this reason, cases on the subject are now developing a theory of substituted consent, which is not based on the notion of protecting future generations but rather on the protection of the patient herself. Substituted consent is an exercise of state parens patriae power where the subject of the sterilization is not herself capable of consent. See, e.g., In re Grady, 85 N.J. 235, 426 A.2d 467 (1981).
125. There are some sterilization procedures performed on women which may be reversed; however, these procedures are still in an experimental stage. E.S.E. HAFFER, T.N. EVANS, HUMAN REPRODUCTION (1973).
129. The state’s right to protect itself from future generations of mentally disabled people is not implicated in the access of single women to AID facilities. The theory of substituted consent will not be analyzed here since it does not apply to the prospective AID mother, who is capable of making her own decisions.
130. While it is true that the majority of welfare recipients are comprised of one parent families, this is due, at least in part, to welfare regulations. Of the 3,842,534 families on welfare, only 5 percent of 192,603 are two parent households. However, in 24 of the 50 states, two parent families do not qualify for welfare no matter what their income. CHARACTERISTICS OF STATE PLANS FOR AID TO FAMILIES WITH...
state may even go so far as to say that these children will necessarily be maladjusted and will not contribute to society either because they will become criminals or will be deviant in some other way.

Even if it were true that single mothers are likely candidates for welfare rolls, the state would not thereby be justified in limiting access to AID. Since women are frequently poor as a result of discrimination, the state should not be permitted to compound these inequities by further discriminating against single women in the protection of their constitutional rights. Also, it should not be assumed that because a woman is not married she will be the sole economic support for her child. Many women seeking AID are part of lesbian couples or extended family arrangements and plan to raise the child in a family environment with other adults sharing parenting responsibilities. Further, there is a compelling argument that a woman who goes through the trouble of artificially insemination wants very much to be a mother and has economically prepared for the expense of child-rearing. These are significant factors in the development of a well-adjusted child who will not grow up to be a burden on society.

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133. "Termination involves the elimination of any legal recognition of a continuing parent-child relationship and, usually, the end of any social recognition of the relationship. This remedy may be contrasted with a custody order which vests a non-parent with temporary authority over a child, but does not eliminate the parent's residual right to reclaim the child at some later date." Boskey & McCue, Alternative Standards for the Termination of Parental Rights, 9 SETON HALL L. REV. 1, 4 (1978) (footnotes omitted).

134. A similar argument was used by the state in Stanley v. Illinois, 405 U.S. 645 (1972), but the Supreme Court...
The “unfitness” standard focuses on the behavior of the parent. Most legislation adhering to this view lists specific behavior deemed to constitute unfitness.\textsuperscript{135} Often, this list includes a category labelled “neglect” which may be given a broad interpretation. For example, “neglect” may include: physical abuse, inadequate supervision or housekeeping, emotional neglect, inadequate parenting, sexual abuse, failure to provide medical care, parental conduct that contributes contributing to the delinquency of a minor, and immoral or unconventional parental behavior.\textsuperscript{136}

This standard focuses on the parent’s qualifications for parenting. Intervention may therefore reject the state’s presumption that unwed fathers are unfit per se.\textsuperscript{137} Thus there have been cases, seemingly aberrational, where the state has removed children from parents because the parents were unmarried or because the parent was the mother of an illegitimate child.\textsuperscript{138} These cases reflect a judicial presumption that the children of such parents are morally depraved.

It is conceivable that a presumption of immoral or unconventional parental behavior would also influence state policy concerning single women’s access to AID facilities. Yet morality and conventional definitions of moral neglect traditionally are formulated on the basis of societal norms. As changes take place in the American family and accommodations to these changes evolve, it becomes increasingly difficult for a court to label a person presumptively unfit solely because she is not married.\textsuperscript{139} The court cannot be blind to the fact that nearly one in five families with children is maintained by only one parent and more than 17.1\% of all births are to unmarried women.\textsuperscript{140}

**BEST INTEREST STANDARD**

A best interest test focuses on the particular circumstances of the child rather than on the behavior or lifestyle of the parent. It is commonly opinion, the judgment could be justified on that ground alone.  
\textit{id.} at 692 (footnote and citations omitted). The court also cited the following cases in support of its conclusion: Yount v. Yount, 366 S.W.2d 744, 748-49 (Mo. Ct. App. 1963); l. v. B., 305 S.W.2d 713, 718 (Mo. Ct. App. 1952); Graves v. Wooden, 291 S.W.2d 665, 669 (Mo. App. 1956); In re Morrison, 259 Iowa 301, 305, 144 N.W.2d 97, 102-03 (1966); In re Welfare of Three Minors, 50 Wash.2d 653, 655, 314 P.2d 423, 427 (1957); In re Johnson, 9 Wisc.2d 65, 72, 100 N.W.2d 383, 380 (1960). See generally Note, \textit{The Custody Question and Child Neglect Rehearings}, 35 U. CHI. L. REV. 478, 485 (1968).  

But see \textit{In re Baya}, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (1967) (fact that the mother was living with a man to whom she was not married was not sufficient to justify adjudication of public wardship of her children); \textit{In re Cager}, 251 Md. 473, 248 A.2d 384 (1968) (illegitimate child cannot properly be judicially found to be neglected because of sole fact that he lives with a mother who has another illegitimate child living with her); Craig v. McBride, 8 FAM. L. REP. (BNA) 2229 (Alaska Sup. Ct. Jan. 29, 1982) ("To avoid even the suggestion that a custody award stems from a life style conflict between a trial judge and a parent, we reiterate that trial courts must scrupulously avoid reference to such factors . . . ."").

\textsuperscript{136} But see supra note 138.

\textsuperscript{140} Today, more than 17.1\% of all births are to unmarried women and nearly one in five families with children is maintained by only one parent. United States Bureau of the Census, Statistical Abstracts of the United States (102d ed. 1981); Developments in the Law—The Constitution and the Family, 93 Harv. L. Rev. 1156, 1159 (1980). See also supra note 138, for discussion of cases dealing with this issue.
employed to settle custody disputes rather than termination petitions. Nevertheless, parental rights have been cut off without proof of unfitness in cases where the court determined that termination was in the child's best interest.141

A relaxation of the unfitness prerequisite for the termination of parental rights does not bode well for a liberalization of the parental rights of single women. Access to AID facilities can be no more protected than the right upon which it is based—the right to establish a home and bring up a child. Looking at the circumstances surrounding the child rather than the parent, the state could allege as a basis for restricting access to AID facilities that an AID child who is born to a single woman (and who is without access to a father) would be in danger of suffering psychological harm. Such psychological harm is not in the best interest of a child, and on this basis a state employing the best interests standard could conceivably block prospective single mothers from access to AID facilities.

However, there is serious debate over the constitutional validity of applying this standard in termination proceedings. Critics allege that it is unconstitutionally vague, gives impermissibly broad discretion to judges, and fails to give the proper protection to the rights of parents to raise their children.142 The best interest test fails to spell out the possible grounds for termination and rests on subjective judicial evaluation of all “relevant” criteria.

In Santosky v. Kramer, the Supreme Court recently cast serious doubt on the state's power to terminate parental rights absent proof of unfitness.143 In that case, the Court was not faced with deciding the constitutionality of the best interests test. There is dicta in the opinion, however, which strongly suggest that any test which does not require proof of unfitness is unconstitutional.144

In essence, then, while the state may presently succeed in denying procreative rights under a mere best interests test, this standard may not withstand constitutional attack.

B. Common Law Recognition of Donor Paternity Claims

The preceding section of this paper characterized the denial of equal access to AID facilities as a barrier to the exercise of a single woman’s right to privacy in making decisions concerning procreation and childrearing. The present section characterizes the common law recognition of donor paternity claims as a second barrier to a single woman’s exercise of privacy rights and also as a barrier to the exercise of the right to sole custody of the AID child.

1. State Action

When challenging a donor paternity claim under the fourteenth amendment, the first inquiry is whether a state court’s recognition of the paternity claims of a known donor can be deemed state action. If so, the likelihood that such state action could be held to violate the rights of single mothers of AID children must be assessed.

The actions of a member of a state judiciary in his or her official capacity may constitute state action within the meaning of the fourteenth amendment.145 In New York Times Co. v. Sullivan, the court characterized judicial action as


144. “The Family Court judge in the present case expressly refused to terminate petitioners' parental rights on a 'non-statutory, no-fault basis.' Nor is it clear that the State constitutionally could terminate a parent’s rights without showing parental unfitness.” Id. at 4337 n.10. See also, Quillin v. Walcott, 434 U.S. 246, 255 (1978); Smith v. Organization of Foster Families, 431 U.S. 673, 686-688 (1973).

145. See Ex parte Virginia, 100 U.S. 339, 347 (1880).

“Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition, and as he acts in the name and for the State, is clothed with the State’s power, his action is that of the State.” See also Shelley v. Kraemer, 334 U.S. 1 (1948); Hughes v. Superior Court, 339 U.S. 460 (1950); New York Times v. Sullivan, 376 U.S. 254 (1964); NAACP v. Alabama, 377 U.S. 288, (1964).
state action, stating that "[t]he test is not the form in which state power has been applied but, whatsoever the form, whether such power has in fact been exercised." 146

Donor paternity claims emerged as a second barrier to the single woman's right to single parenthood through AID in the New Jersey Superior Court decision in C.M. v. C.C. 147 This case involved a known donor who professed expectations of parenthood, even though the child's mother opposed the granting of such rights. 148 The decision involved judicial consideration of the respective rights of the particular donor and donee. 149

The decision in C.M. v. C.C. signals potentially adverse consequences for single women who choose AID arrangements with known donors. It is a common law precedent that may well deter the practice of extra-professional methods of AID by persons similarly situated to the parties in that case. The court's refusal to recognize the mother's desire to be free from a donor's intervention in childrearing could in some cases curtail the single woman's right to conceive through AID altogether.

2) Denial of a Fundamental Right

The presence of state action in the form of a judicial decision regarding parental rights to a single mother's AID child, in conjunction with a denial of access to AID facilities, obstructs the single woman's right to procreate at two levels. While the denial of access to AID facilities limits the use of anonymous donors, the common law recognition of paternity claims discourages the use of known donors. A woman who is denied access to professional AID facilities, or who otherwise chooses to conceive by known donor, risks the deprivation of her asserted right to single parenthood after her child is born.

In asserting a right to single parenthood a single AID mother appears to be claiming for herself greater rights than are possessed by any other mother. In fact, however, the rights and responsibilities of mothers of AID children are similar to the rights and responsibilities of mothers of other illegitimate children. The assertion of a right to be free from paternity claims in the case of AID mothers arises from the distinctions between donors and fathers of other illegitimate children. These distinctions will be discussed in more detail below. 150 At this point, it should be noted that a donor, unlike other fathers, is probably not obligated to assume any responsibility for his offspring unless he subsequently elects to do so. A donor is thus free from legal responsibilities until he claims legal rights. 151

Those engaging in sexual relations assume responsibility for potential parental consequences.

148. Id.
149. C.M. v. C.C. was never appealed. However, a challenge to state common law as Constitutionally invalid could possibly be brought before either the state or federal courts. See Nolen v. Wilson, 372 F.2d 15, 17 (1967): "The states themselves have a large capacity for self-correction of their institutions and officers. But when violations of fundamental rights or interests of the individual are both alleged and proved, which controlling law has determined to be protected under the Constitution and laws of the United States, intervention by the federal district court to grant appropriate relief is justified."

150. See infra Part IV, Section B(4).
151. Research has revealed no paternity suits initiated by a donee against a donor. Nevertheless, at least in the case of an anonymous donor of semen provided to a licensed physician for use by a married woman, a donor's freedom from responsibility is a likely outgrowth of the People v. Sorensen rationale, see infra notes 165-67 and accompanying text. This approach has been legislated in at least six states that have essentially adopted the following provision of the Uniform Parentage Act §5(b): "The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." see Cal. Civ. Code § 7005 (West Supp. 1980); Colo. Rev. Stat. § 19-6-106 (1978); Mont. Code Ann. § 61-306 (Supp. 1977); Nev. Rev. Stat. § 126.061 (1979); Wash. Rev. Code Ann. § 26.26.050 (Supp. 1982); Wyo. Stat. § 14-2-103 (1980).

The question then becomes whether the donee's marital status will affect the donor's legal responsibilities. A recent article in the Harvard Women's Law Journal can be read to stand for the proposition that, at least where a professional AID facility is used, a donor would not be obligated to the AID child of an unmarried woman:

... the mother who wishes to separate herself totally from the child's father is well advised to be inseminated only with the sperm of an anonymous donor.

The solution must lie in allowing unmarried women to conceive by A.I. with anonymous donors, such as is now done by married women.

Kritchevsky, The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family, 4 HARV. WOMEN'S L.J. 1, 16 (1981).

The remaining issue, then, is whether an unmarried woman's use of a known donor would (or should) make a difference with regard to the donor's rights and responsibilities, see discussion of C.M. v. C.C. infra note 168-71 and accompanying text.
The selection of an AID method of conception and the absence of sexual relations between a donor and a donee implies a concerted effort to avoid these same consequences and to develop a wholly new understanding between biological parents. A donor's ability to subsequently breach this understanding without the donee's consent is the basis of donor paternity claims.

Equal access to AID facilities would permit single women to conceive through the use of anonymous donors with professional assistance. In their attempt to protect donors from potential paternity suits that might be instituted by donees, AID facilities are strict in their preservation of donor anonymity. The incidental reciprocal advantage of these policies for donees is the security of knowing that anonymous donors are unlikely to discover the identity of their children. The protection afforded by this anonymity is particularly important if courts continue to recognize the paternal interests of known donors.

It seems, then, that opening doors of AID facilities to single women, without a corresponding recognition of the right to single parenthood through private and non-clinical AID methods, creates an inherently coercive situation. Women who want to be single parents will be forced to use professional AID facilities in order to preserve their parental rights. The possibility that known donors may be granted paternity rights by the courts is clearly an inducement to use anonymous donors.

As women turn to the use of professional AID facilities to the exclusion of other options, AID conception will be under increasing state control. In the interests of public health and safety, the state can claim the power to regulate the process by choosing which genetic material is stored, selected, and distributed. The intensely private act of conception may be taken into the social sphere of reproductive engineering when AID is involved.

Unlike women who conceive in traditional ways, the AID mother may well feel compelled to acquiesce in such state eugenic policies. Her desire to maintain autonomous control over conception, the dangers of clinical donor screening, and the political implications of eugenic decisions made without her input may pale in comparison to her desire to conceive free from the risks associated with known donors.

A limited necessity for state control of AID facilities arises from the difficulties associated with an anonymous donor pool. For example, the failure to keep permanent records of donors and their issue in order to conceal their identity results in a potential for consanguinity, inbreeding, and the repeated transfer of inheritable disease. These problems indicate a need to regulate the anonymous donor pool. However, there is no corresponding rationale to limit or regulate the use of known donors. One can expect no greater genetic problems in children that result from the private

152. The authors can think of only one situation where this may not be the case. This is when the donee and donor are an unmarried couple who have turned to AID after having unsuccessfully attempted to conceive through sexual intercourse. This situation is similar to that of a married couple's use of AIH (Artificial Insemination by Husband). In these unusual cases, however, it should be a fairly simple matter for the donor to present evidence of parental expectations, and thus gain the rights of other unwed fathers. See infra notes 199-206 and accompanying text for discussion of the comparisons and distinctions between donors and unwed natural fathers.

153. See Annas, Fathers Anonymous: Beyond the Best Interests of the Sperm Donor 14 Fam. L. Q. 1 (1980). The thesis of this article is that most of the informal policies concerning AID as it is presently practiced in the United States are based on exaggerated fear of potential suits for parental obligations against donors. Recordkeeping on donors is minimal or non-existent as a result of this fear, even though there are no such suits reported. See also text accompanying notes 11-14 (the Curie-Cohen survey revealed that 92.2% of the doctors surveyed kept permanent records of recipients, 36.9% kept permanent records on children born after artificial insemination, and only 30.4% did so on donors. Curie-Cohen survey, supra note 11, at 588).

154. Id.


156. Although there may be general agreement with the practice of negative eugenics (prevention of eugenic diseases), the practice of positive eugenics (genetic improvement) is controversial. Donor selection is often done by physicians not trained for the task and clearly reflects their bias. See Kindregan, State Power Over Human Fertility and Individual Liberty, 23 Hastings L.J. 1401 (1972).

157. See supra Section II, Parts A-C.

158. Id. Using a single donor for many recipients may result in inadvertent consanguinity or inbreeding. AID practitioners inadequately protect against this result. Few have policies limiting the number of times a single donor will be used within one community. Since permanent records of donors are seldom kept and the identity of donors is almost always concealed, a recipient may be inseminated with the semen of a relative and two AID children sharing the same genetic father could conceivably mate.

Donors are usually selected by the physician who performs the insemination. They may find the donors themselves, or use sperm banks or donors selected by associates.
selection of a donor by a donee or go-between than result from the random selection of mates throughout the population.

Single women who resist this coercion and privately arrange artificial insemination with known donors may do so based on concern for the child's future health. The increasing importance of preventive health measures that utilize family health records, and the possible psychological importance to the children of being able to identify their roots, makes knowledge about donors crucial. If this is the woman's judgment, then she presently assumes the risks associated with the court's power to transform a donor into a father with equal rights in the AID child. 159

3) Discrimination on the Basis of Marital Status

Discrimination by the state in the enjoyment of privacy rights is apparent in granting paternity rights to known donors to single women when anonymous donors to married women have no such rights. The decision in C.M. v. C.C. 160 constitutes a special exception to the established policy that the status of a donor cannot be equated with that of a legal father. 161 Arguably, this exception was made "because of" rather than "in spite of" the marital status of the donee, and constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. 162

Court decisions concerning custody, support and visitation of AID children have declined to view the donor as the legal father when the donee is married. 163 Furthermore, although the donor is not legally considered the father, courts have been reluctant to announce the AID mother's husband as the legal father even when he had consented to the conception; instead courts have deemed AID children illegitimate. 164 It was not until recently, in People v. Sorenson, 165 that the court imposed the status of legal father on the husband of a married donee where he had given his consent to the procedure. In that case the court wrote:

A child conceived through heterologous (AID) artificial insemination does not have a "natural father" as that term is commonly used. The anonymous donor of the sperm cannot be considered the "natural father," as he is no more responsible for the use made of his sperm than is the donor of blood or a kidney . . . . Since there is no "natural father," we can only look for a lawful father . . . . [A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carried with it the

demonstrate that discriminatory impact on a group can be traced to a discriminatory purpose when making an equal protection claim. The Court wrote that "'discriminatory purpose,' . . . implies more than intent as violation or intent as awareness of consequences . . . . (citation omitted). It implies that the decisionmaker . . . . selected or reaffirmed a particular course of action at least in part 'because of,' and not merely 'in spite of,' its adverse effects upon an identifiable group." Id. at 279.


165. 68 Cal.2d 280, 437 P.2d 495, 66 Cal. Rptr. 7 (1968).
legal responsibilities of fatherhood and criminal responsibility for non-support.  

Past decisions indicate that the best interest of the AID child was not always the determinative factor in the proceedings. For instance, the court has proclaimed a child illegitimate or as being without either a legal or natural father rather than imposing responsibility for a child upon an unwilling husband.  

In the decisions concerning husbands of AID mothers, the granting of legal father status occurs when the husband indicates voluntary assumption of the responsibilities of fatherhood by giving his consent to the procedure. By focusing on the husband's consent, the courts reveal a concern for protecting the husband from parental responsibilities not of his choosing. Though none of these decisions involve known donors, the courts are likely to similarly protect a known donor if he resists the responsibilities of fatherhood and lacks paternal expectations at the time of the insemination.  

In C.M. v. C.C. the court professed to grant the legal status of father to a known donor because "there was no one else who was in a position to take upon himself the responsibilities of fatherhood when the child was conceived." The court went on to say that "C.M.’s consent and active participation in the procedure leading to conception should place upon him the responsibilities of fatherhood. The court will not deny him the privilege of fatherhood."  

In ruling for the donor, the court did not limit itself to addressing the best interests of the child. Rather, the court emphasized the donor's expectations as a determining factor in conferring the status of legal father.  

The decision in C.M. v. C.C. considers the parental expectations of the father and then seems to assume that the existence of a man willing to be a father is bound to be in the best interests of the child. No corresponding consideration is given to the mother's expectations, or the possibility that single parenthood would be in the best interests of the child. Instead of carefully considering the two possible arrangements, the court makes a presumption in favor of the father. The presumption that a father per se is good for the child can be seen as purposeful discrimination against single women, and lacks consideration of the child’s interests.  

If the presumption that a legal father is always good for a child were truly based on the child’s best interests, then it would be applied in all cases whether the woman was married or not. Yet in some cases, such a presumption in favor of legal fatherhood was not applied even when there was a husband available to assume the role.  

The presumption is more likely based upon a bias in favor of the traditional family structure and opposed to a family that is the result of only a mother’s efforts. However, denial of single motherhood is not a rational or effective means of promoting this traditional family unit, since fatherless children are far more often the result of illegitimacy and divorce than of AID. An attempt to stifle the single woman's use of AID will not significantly diminish the number of women-headed households.  

A presumption in favor of paternal rights can be expected to restrict the definition of parenthood to the more traditional mother/father household. However preferable this may seem, in it remains to be answered whether it is appropriate to discourage single women, who are capable and desirous of loving and providing for children, from doing so. In light of the many single parent households that presently exist, it is possible that the "ideal" family is so far from common reality that the professed state interest in paternal rights serves primarily as an excuse to prohibit the legal recognition of new family relationships.  

In dealing with these questions, the presumption that any father who expressed parental interest is always better than no father at all needs closer examination. The more appropriate standard would be for courts to determine what is truly in the child’s best interests on a case-by-case basis.

166. Id. at 284-85, 437 P.2d at 498-99, 66 Cal. Rptr. at 10-11.  
167. See supra note 164.  
169. Id. at 168, 377 A.2d at 825.  
171. See Curie-Cohen Survey, supra note 11, at 588 (survey estimates 5,400 AID births per year).
4) State Interests

The preceding section characterized the common law recognition of donor paternity claims as a barrier to the single woman’s achievement of single parenthood through AID. This barrier represents potential violations of due process and equal protection. The due process violation arises from the court’s use of marital status as a classification that serves to deny single women the freedom from donor paternity claims that is granted to married women.

As discussed earlier in this paper, the denial of a fundamental right invokes strict scrutiny of the state interests that are offered in justification of this denial. Therefore, it is necessary to identify the state interests and to determine whether they are sufficiently compelling to justify abridgment of the asserted constitutional rights. The common law recognition of donor paternity claims is rooted in state policies that a) protect the constitutional rights of unwed fathers and b) promote the best interests of children in custody decisions.

a. Rights of the Donor

The state’s interest in protecting the rights of the donor can be traced to cases recognizing the equal protection and due process rights of illegitimate fathers. The landmark case in this area is Stanley v. Illinois.

In Stanley v. Illinois, petitioner contested an Illinois law which provided that parents were entitled to a hearing on their fitness before their children could be removed from their custody, but denied such a hearing to unmarried fathers. Denial of a hearing, the petitioner argued, was a violation of his right to procedural due process. Further, since the statute did not apply to unwed mothers, the petitioner argued that he had been denied equal protection of the law. The Court analyzed each claim separately and ultimately found for petitioner on each point.

The Court held the statute unconstitutional because it presumed all unmarried fathers were unfit per se. In evaluating the privacy interest at stake in Stanley, the Court wrote that “the rights to conceive and to raise one’s children have been deemed ‘essential,’ . . . ‘[r]ights far more precious . . . than property rights.’ . . .” Custody and control of one’s children cannot be denied any parent without a hearing on the question of parental fitness. Presuming rather than proving parental unfitness, even if more convenient and efficient for the State, is repugnant to the Constitution and impermissible.

In Caban v. Mohammed an unwed natural father of two children challenged the constitutionality of a New York statute that granted an unwed mother the authority to block the adoption of her child by withholding her consent, but did not give an unwed father a similar right. The statute was held to violate the equal protection and due process clauses because it withheld from the father substantive rights granted to all other classes of parents.

In these cases the Court has recognized the protectible due process interests of parents in the “companionship, care, custody, and management of his or her children.” The privacy interest involved here, “that of a man and the children he sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.” The unwed father is entitled to notice and the opportunity for a hearing that is granted to all other classes of parents.

One can applaud this line of cases upholding the rights of illegitimate fathers as an encouragement of male involvement in the responsibilities and benefits of child rearing. If men are to be more involved with the nurturing of the children that they bring into the world as a result of their relationships with women, they must benefit equally from the legal protections available to mothers.

Nevertheless, while the strengthening of the legal parental rights of illegitimate fathers may be laudable, those same parental rights should not automatically be applicable to a donor. Rights

174. Id. at 651 (citations omitted).
175. 441 U.S. 380 (1979).
176. Id. at 391, 394.
178. Id.
179. Id. at 658.
180. Judge Testa in C.M. v. C.C. had a different opinion, and wrote that “if an unmarried woman conceives a child through artificial insemination from semen from a known man, that man cannot be considered to be less a father

and responsibilities should be commensurate with the actions that invoke them.

The Court has shown itself to be fully capable of recognizing such distinctions. In Quilloin v. Willcott, the Court found that the principles of the equal protection clause did not give an unmarried father the same authority as a divorced father to veto the adoption of his child. The state was not foreclosed from recognizing the “difference in the extent of commitment to the welfare of the child” between that of an unwed father who had never shered any significant responsibility for the child's rearing and that of a divorced father who at least will have borne some responsibility for the child's rearing. 182

The Quilloin court examined the unwed father's due process claim separately, and determined that his substantive parental rights were not overridden by the state's finding that adoption was in the best interests of the child. 183 The Court wrote that:

the Due Process Clause would be offended “[i]f a State were to attempt to force the breakup of a natural family over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.” 184

In Quilloin, however, the adoption gave “full recognition to a family unit already in existence, a result desired by all concerned, except appellant.” 185 The unwed father never had or sought actual legal custody, so no finding of unfitness was necessary. 186 A finding in favor of the adoption according to “the best interests of the child” standard did not offend the unwed father's due process rights. 187

Stanley and Caban can be reconciled with Quilloin by examining the different standards used by the Court to protect the paternal interests in each situation. In Stanley and Caban the court required proof of the fathers' unfitness before their due process interests in the child could be terminated. 188 In Quilloin, the father's interests were held to be adequately protected by the “best interests of the child” standard under both the due process and equal protection clauses of the fourteenth amendment. 189

Thus, courts apply different standards depending upon whether a relationship with the children as de facto fathers has been established by the biological fathers before the court. 190 In Quilloin, the biological father had never lived with the child nor shared childrearing responsibilities. In Stanley and Caban, on the other hand, the fathers had maintained a relationship with their children as psychological parents. They resided with the mothers and children as part of a family unit at some point in time and contributed to their support.

The status of the biological fathers as de facto parents presented the Court with the question of whether an existing family could be justifiably altered. The Stanley Court decided that when the issue is the dismemberment of a family, the state must prove rather than presume unfitness of the parent. 191 This was the only sound means of promoting the Court's stated interest in preserving “the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety or the protection of the public cannot be adequately safeguarded without removal.” 192

In Quilloin, the father's involvement in the lives of his biological children as a de facto father

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182. Id. See also Parham v. Hughes, 441 U.S. 347 (1979), for an example of a factual context in which the state can limit the paternal rights of illegitimate fathers. In Parham a statute that denied the father of an illegitimate child the right to sue for the child's wrongful death was upheld. The Court held that the statutory bar against illegitimate fathers was not discriminatory and was rationally related to the legitimate state interest of maintaining an accurate and efficient system for disposition of property at death. Although mothers of illegitimate children were permitted to sue, the Court found no basis for a sex discrimination claim since the varying treatment was based on actual differences in their situation rather than on overbroad generalizations regarding sex. Only a father could make an illegitimate child legitimate by voluntary, unilateral action under the state's law.


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

185. Id.

186. Id.

187. Id.

188. 405 U.S. 645 (1972); 441 U.S. 380 (1979).


190. Sutton, Lesbian Family, supra note 131.


192. Id. at 652 (quoting Ill. Rev. Stat., c.37, § 701-2, the Illinois child neglect statute).
was minimal. Absent this de facto parental relationship, the state was required to demonstrate only that the adoption and denial of legitimation was in the “best interests of the child.” This standard served the substantial state interest in maintaining continuity for the children of an existing family unit.

This analysis of the rights of unwed fathers is by no means intended to convey the idea that an anonymous donor has the same paternal interests in the AID child as belong to the natural father of an illegitimate child. The anonymous donor is not the natural father as that term is normally used. In donating his sperm for professional services with the clear expectation of preserving anonymity, the donor has no expectation of enjoying the paternal rights ordinarily due biological fathers under the due process clause. It has been succinctly stated that “the donor’s biological tie triggers Stanley rights, but his lack of familial expectations regarding any assertion of those rights under the circumstances of the donation operate both as his consent to their relinquishment and as his elimination as the child’s natural father at law.”

When a known donor is involved in the conception of an AID child, the situation is more complex. If the donor wishes to claim paternity rights in the AID child, he shares the same burdens as those imposed on illegitimate fathers. First, the donor must prove his biological paternity. Even if the donor is able to prove biological fatherhood, it is doubtful that the court would then equate the legal status of a known donor with that of an illegitimate father, without more. For example, in a paternity proceeding against a natural father, proof of biological fatherhood would result in support obligations regardless of the father’s expectations. However, there has not yet been a case imposing obligations of fatherhood on a proven known donor when these obligations are not consistent with his expectations. One may assume that if a donee instituted suit against a known donor for support, the court will find it necessary in the interests of fairness to receive evidence regarding the donor’s familial expectations at the time of the donation before imposing such obligations.

Accordingly, in the interests of fairness to the single mother of an AID child, the court should find it relevant to consider the familial expectations of a known donor before recognizing the donor’s paternal rights in a suit brought by the donor against the donee. The donor should be required to come forth with evidence that it was his intention at the time of insemination that he would be a father to the child. The donee should be given the opportunity to rebut this evidence and to come forth with her own contrary information.

Serpico was represented by Karen DeCrow, a prominent feminist and former president of the National Organization for Women. The supposed objective of the defense was equality between the sexes in matters of procreative choice. Defense counsel argued that a support order would deny Serpico his constitutional right to choose whether or not to become a parent. This right, based on Supreme Court decisions authorizing the availability of contraceptives and abortion, applied to men as well as to women. Trial Judge Demby held for Serpico in that the “petitioner’s wrong precludes her transfer to him of her financial burden for the child she alone chose to bear.” It is not clear whether the judge based this decision on the mother’s fraud, the father’s claimed right to choose, or both.


In evaluating the validity of parental expectations in the context of children conceived through intercourse, it is important to distinguish three distinct aspects of procreative choice: 1) the right to conceive, 2) the right to bear and 3) the right to rear a child. Only a woman is entitled to the protection of her right to choose whether to bear a child. Thus, a father’s rights of choice in the decisions to conceive or rear a child are distinguishable from the “right to choose” to abort accorded women in Roe. It is fair to say, however, that men and women should have equal rights in the conception and rearing of children. This would place the burden of contraception as well as child support on both sexes. A man who chooses not to have a child should be held responsible for child support even if he personally took the necessary contraceptive precautions. To find otherwise would allocate the risks associated with birth control and the burden of unintentional births exclusively on women. It is prohibitively difficult to prove whether a conception resulted from defective birth control or intentional planning.

We suggest that no such difficulty exists in the situation of an AID donor. The act of abstaining from sexual intercourse indicates a decision to forgo the associated risks and to reject parental rights and responsibilities.
If the donor makes a sufficient showing of familial expectations a court could be justified in recognizing the paternal interests of a donor as being similar to those of an unwed father. That is, proof of the donor's parental expectations is the threshold requirement for standing to assert even those limited paternal rights automatically vested in unwed natural fathers.

The known donor who meets this threshold requirement, like the recognized natural father, is entitled to certain due process procedural protections which are accorded all unwed fathers. These include the right to notice and the opportunity for a hearing before changes in custody arrangements are made. It is uncertain, however, whether such a donor is entitled to have his substantive rights protected by the application of the standard used in Quilloin or that used in Stanley. Quilloin holds that, in the absence of a de facto parental relationship, an unwed father's substantive rights are adequately protected by application of the "best interests of the child" standard. In Stanley, the unwed father had maintained a relationship with his two children for years, and was entitled to recognition and preservation of his parental rights absent a showing of his "unfitness." Donor paternity claims are distinguishable from the unwed father's claims that have been recognized in cases employing the strict unfitness standard. These distinctions allow a court to find against a donor without an actual showing of the donor's unfitness. First, both Stanley and Caban involved the protection of an existing paternal relationship against competing custodial claims of the state. In comparison, the known donor does not compete with the custodial claims of others who are seeking to supplant his existing paternal role, but with the single mother seeking sole custody. Second, Stanley and Caban sought to protect an existing family unit in which the unwed father exercised the role of a de facto parent. In the case of a known donor's paternal claims, however, the state would not be breaking up a natural family unit by denying paternal custody or visitation to the known donor. In fact, the recognition of the paternal rights of a donor may result in the disruption of the family unit to which the single woman already belongs.

It should be mentioned that the known donor who petitions for paternal rights immediately after the AID child's birth has not had the opportunity to serve as a de facto parent. The application of the Quilloin "best interests" standard rather than the Stanley "unfitness" standard is not a punitive measure, however. Rather, it is a recognition that the best interests of the child should be the court's foremost concern whenever the unwed father's commitment to the child is minimal. A known donor, even one with parental expectations, exhibits a commitment to the child which is as minimal as that of any unwed father who contributes nothing more than genetic material. The courts may therefore refuse to acknowledge the paternal interests of the known donor if it can be shown that it would be in the best interest of the child to do so. This standard offers adequate protection of the donor's interests under the due process and equal protection clauses.

b. Best Interest of the Child

In any custody dispute between a donor and the mother of an AID child, the courts will weigh three competing interests: the asserted rights of the AID mother, the asserted paternity claim of the donor, and the best interest of the AID child. Before an analysis based upon the intersection of these interests can be considered, it is necessary to set out the manner in which courts have treated each of these issues as they have arisen within more traditional frameworks. This section will present, briefly, the historical treatment of child custody actions.

Judicial treatment of custody actions has, for the most part, paralleled society's treatment of women and roles within the family. Historically, English common law gave custody of children to fathers at the termination of a marriage.

202. See supra text accompanying notes 173-95 for full discussion of these standards.
205. For discussion of the exception to this statement, see supra note 152.
207. For a socioeconomic analysis of family law as it developed in the United States, See WOMEN AND REVOLUTION (L. Sargent ed. 1981); See also J. MITCHELL, WOMEN'S ESTATE (1971), F. ENGELS, The Origins of the Family, Private Property and the State, in SELECTED WORKS II (1962).
These decisions were consistent with the then prominent idea that a man, as head of his family, had a paramount right to the custody, care and services of his children. This was a valuable property right at that time, since children were a financial asset to the family unit.

This presumption favoring paternal rights had been written into Roman Law and was carried over to the English and American legal systems.\(^{208}\) One American decision reflecting this view is an 1857 case decided in New York. In \textit{People v. Humphries}, the court, while acknowledging that the husband was a wife beater, found that fact no bar to his right to the custody of his children.\(^{209}\) The only perplexing question seen by that court was how to separate a breastfeeding child from the bosom of her mother. Thus, the court stated,\(^{210}\)

The only difficulty, if any, in the present case in regard to the right of the father to retain the child, arises from the child being of tender age, and deriving its sustenance, in part, from the breast of the mother. But upon the evidence, I think these circumstances form no obstacle to the father’s right.\(^{210}\)

After considering the question, the court still found the father’s right to override the interests of the mother and the child.

The judicial policy favoring a father’s right to custody was replaced over time by a policy which granted a nearly prima facie right to the mother. This trend occurred simultaneously with changes in the socio-economic role of women. As industrialization moved “breadwinners” away from the home, the woman’s role as the sole caretaker of the family became more pronounced. Woman’s work became more clearly defined as distinct from the role of the husband and the father. The fact that the man had a job outside of the home forced the woman to accept full responsibility for maintaining the home and the children in it. This division of labor was justified by the view that, because the woman is the one who conceives and bears the children, her role as mother must be accepted as her biological destiny. Since the woman was believed to be the prime nurturer and caretaker of children, it was also assumed that it was in the best interest of the children to be in the custody of their mother. As one court put it, there is no substitute for “motherly love.”\(^{211}\)

This “tender years” doctrine holds that, absent a compelling reason for placing custody elsewhere, a mother is entitled to the custody of her children. When both parents are deemed fit, the doctrine swings the scale in favor of the mother if the child is of “tender years.”\(^{212}\)

Gradually, this presumption came to be looked at with skepticism. Some jurisdictions that continued to apply it no longer relied on the romantic idea that a mother is somehow more fit for custody than a father. Instead, these courts utilized the doctrine as a procedural tool for deciding custody where the facts did not dictate a contrary result.\(^{213}\)

In recent years, an increasing number of jurisdictions have abandoned gender-based doctrines altogether and have embraced a sex-neutral standard intended to consider only the “best interest of the child.” Under the best interest rule, courts consider the physical, intellectual, moral and spiritual well being of the child. Any factor bearing on the child’s well-being is relevant.\(^{214}\) Since the courts have wide discretion in this area, and because matters such as these are subjective, parents in custody actions in which the best interest standard is applied are subject to the personal opinions and beliefs of the judge hearing the case.\(^{215}\)


\(^{209}\) 24 Barb. 521, 523 (1857).

\(^{210}\) Id.

\(^{211}\) Meinhart v. Meinhart, 261 Minn. 272, 111 N.W.2d 782 (1961).

\(^{212}\) A child is considered to be of tender years until the beginning of his or her teenage years. H. Krause, \textit{Family Law in a Nutshell} (1977).

\(^{213}\) The “tender years” presumption does not reflect or derive from the mother’s “right,” whether that right be characterized as “prima facie” or otherwise. It is procedural only. One party or the other must have the burden of proof. Commonwealth \textit{ex rel.} Grillo v. Shuter, 226 Pa. Super. 229, 312 A.2d 58 (1973).

\(^{214}\) Factors which courts might consider in deciding a child custody case include issues of a parent’s morality, character, past misconduct, past mental or emotional illness, current marital status, neglect and cruelty, interracial marriage, full-time employment, characteristics of the proposed home, preference of the child, religion, homosexuality and financial ability. \textit{Penn. Bar Institute, Factors Determining the Award of Custody Between Parents} (1979).

\(^{215}\) For instance, in \textit{Krabel v. Krabel}, the court ruled that the mother could only retain custody if she “has either married or broken off the relationship, and her present conduct establishes the improbability of future lapses.” 8 FAM. L. REP. (BNA) 2249 (Ill. App. Ct. 4th Dist. Dec. 18, 1981,
In many cases, competing parties in custody actions stand in relatively equal positions before the deciding judge. Custody disputes often follow the break-up of a marriage between two people of similar backgrounds and social position. Both parties are fit to be parents, and it remains for the judge to determine what is best for the child.

The "best interest" standard presumes that neither parent is necessarily more fit because of his or her gender. Custody must be determined according to the character of the individual parents and their specific family situations. Persons involved in less conventional custody disputes, however, are more likely to suffer from this broad judicial discretion than are their counterparts in more traditional family settings. This is because of the judicial preference for two-parent heterosexual families. This bias is boldly stated in C.M. v. C.C: "It is in a child's best interest to have two parents whenever possible."

Such an attitude clouds the specific circumstances of each custody case, as the judge may be unable to prevent his belief that the traditional nuclear family is best from influencing his view of the needs of single parent children. The judicial discretion permitted to make each custody decision unique cannot be free from social bias, thus obscuring the individual circumstances of each case.

Although the best interest standard was designed to correct the bias inherent in gender-based doctrines, the application of this standard raises serious constitutional questions in some cases. The dominant social influence of majoritarian values precludes the judicial consideration of the rights of non-traditional parents under the best interest standard. However, this majoritarian preference is vulnerable to challenge on fourteenth amendment equal protection and due process grounds, as well as on grounds that such bias violates the parent's rights under the first amendment to freedom of expression and association.

The case of C.M. v. C.C. is a good example of the problems that arise in an unconventional custody dispute. A careful analysis of that case reveals: (1) the failure of the best interest standard to accomplish its presumed goal of focusing on the individuality of each case rather than applying a blanket stereotype; (2) the inconsistency with which courts deal with donors; and (3) the absence of concern for the individual rights of the single AID mother.

In C.M. v. C.C., the court does not even entertain the possibility of leaving the child in the sole custody of the mother, without interference by the donor. The court did not attempt to weigh the competing arrangements to determine which would be in the child's best interests. Instead it adopted the judicial "policy favoring the requirement that a child be provided with a father as well as a mother." The case can be interpreted in a number of ways. On the one hand, the court claimed to be protecting the parental expectation of the donor. On the other hand, the case may be expanded to stand for the rigid enforcement of traditional values upholding the nuclear family.

A recent article on the subject of AID stated that C.M. v. C.C. could also be extended to hold that a known sperm donor must be recognized as the father of an unmarried woman's child in a case where neither party intended the man to act as the father or to play any greater

released Jan. 25, 1982. See also Jarrett v. Jarrett, 78 Ill.2d 377, 400 N.E.2d 421 (1979) (open and continuing cohabitation of mother with her boyfriend was sufficient reason to remove children from mother's custody and grant custody to father).

On the other hand, a recent Alaska Supreme Court decision held that "[t]o avoid even the suggestion that a custody award stems from a lifestyle conflict between a trial judge and a parent, we reiterate that trial courts must scrupulously avoid reference to such factors . . . . ." Craig v. McBride, 8 Fam. L. Rep. (BNA) 2229 (Alaska Sup. Ct. Jan. 29, 1982). A court's failure to explicitly refer to lifestyle factors in custody cases does not mean that these factors are not considered, however. For a discussion of how judicial biases regarding lifestyle affects the outcome of termination of parental rights cases, see supra note 138 and accompanying text.


217. It has been argued that the tender years doctrine is a violation of equal protection and due process under the Fourteenth Amendment of the United States Constitution as well as a violation of the Equal Rights Amendments of the various state Constitutions. The United States Supreme Court has not reached the question. But see Springs v. Carson, 470 Pa. 274, 368 A.2d 635 (1977); McGowen v. McGowen, 248 Pa. Super. 41, 374 A.2d 1306 (1977).

218. For a thorough analysis of First Amendment rights within the context of lesbian custody cases, see, Sheppard, Lesbian Custody and a Quest for Normative Standards—Women's Rts L. Rep. ( ).


220. Id.

221. Id. at 166, 377 A.2d at 824.

222. See supra text accompanying notes 168-171.
role in the child’s development than providing the sperm for its conception.223

Furthermore, although the court in C.M. v. C.C. mentions that “[i]t is in the child’s best interests to have two parents whenever possible,”224 the opinion fails to examine the possibility that the home created by C.C. may have been better for her child than one in which C.M. may intervene. The court ignores the problems and antagonism that may arise as a result of the donor’s intervention into an established family unit, and the effect that such antagonism could have on the AID child.225

In the process, the court also effectively denies single mothers the right to the full realization of single parenthood through AID.

V. Conclusion

Recognition of a single woman’s desire to conceive a child through AID conception as a fundamental right guaranteed by the Constitution of the United States requires a broader interpretation of the fundamental rights of procreative privacy, than has yet been explicitly endorsed by the United States Supreme Court. Case law dealing with contraception and abortion clearly protects a single woman’s decision to prevent an unwanted pregnancy, and the right to choose which is the heart of this case law demands protection of a single woman’s decision to conceive. The decision of a single woman to conceive necessarily involves a non-traditional family arrangement, however, so protection of this decision additionally requires at least passive acceptance of alternative lifestyles. The single parent family that results when a single woman gives birth as a consequence of sexual intercourse is in fact a passively accepted arrangement in American society. However, given the unique circumstances of AID conception, the question becomes one of whether the state may constitutionally prevent this particular type of single parenthood.

The state interests that can be asserted to support restrictions on a single woman’s right to conceive, bear and raise a child through AID conception (e.g. the prevention of illegitimacy, avoidance of potential harm to the child and protection of the child’s best interests) are not any more compelling in the AID context than they are in the context of other single mothers. Therefore, the single AID mother should not be subject to any greater suppression of her procreative rights than is directed towards other single mothers. Limiting access to AID conception on the basis of marital status is no more acceptable than attempts to prohibit conception through sexual intercourse on the basis of marital status. The fact that AID conception may be more susceptible to successful prohibition does not render the prohibition more justified.

In determining how much suppression of conception is permissible, it is important to distinguish the state’s ability to encourage certain desired forms of behavior through legitimate state regulation from the state’s deprivation of fundamental rights. The state may choose to make contraception freely available or to subsidize sterilization procedures, but it cannot force or prohibit an individual’s use of contraceptives or submission to sterilization without such action being subject to strict scrutiny. Similarly, the state may treat parents of legitimate children and parents of illegitimate children differently if such treatment is rationally related to some legitimate state interests, but such treatment cannot result in the deprivation of a fundamental right unless it is the least restrictive means of serving compelling state interests.

Furthermore, due to the availability of alternative methods of conception, blocking access to AID facilities on the basis of marital status does not effectively serve any state interest in the prevention of conception of illegitimate children or the avoidance of potential harm to such children. This lack of access does, however, infringe on the single woman’s rights of privacy and procreation as they relate to her choice of the means of conception most consistent with her personal values. Restrictive access thus functions as a deprivation of at least some single women’s fundamental rights while being an impermissibly broad means of advancing the compelling state interest in the welfare of children.

The state interests asserted to justify the common law recognition of a donor’s paternity rights—i.e., the rights of unwed fathers and the determination of the best interests of children—
should not be protected by an automatic finding that two parents are always better than one. The protection of a single woman's right to be a single parent through AID can be consistent with the promotion of these asserted state interests because 1) a donor does not have the same constitutional rights as other unwed fathers unless he had parental expectations at the time of donation; and 2) a woman can responsibly and conscientiously choose the option of single parenthood without necessary detriment to the child.

A court that is sensitive to a single woman's right to be a single parent through AID, to the protection of the rights of unwed fathers, and to the best interests of the AID child may often decide in favor of single parenthood through AID. Such a court would require that a donor who wishes to assert a claim of paternal rights in the AID child must prove his biological paternity and the existence of parental expectations at the time of the insemination before his constitutional rights as a father would be recognized. The recognized constitutional rights of unwed fathers are minimal in the absence of a de facto parental relationship and are adequately protected when the court's decision is made in the best interests of the child.

In making a determination of the child's best interests, the court must weigh in each case the potential benefits that would result from the denial of a donor's paternity rights with the benefits that would result from the granting of such rights. This balancing must include an honest, unbiased appraisal of the woman's ability to care for the child without the assistance of the donor, and of the potentially disruptive impact of the donor's involvement into the mother's existing family group. This balance essentially weighs the benefits of the home in which the single mother intended to raise her AID child without the donor's interference against the benefits of the known donor's subsequent involvement in that home. At the very least, the court must be able to appreciate the mother's preference as a valid alternative in order to adequately protect the mother's individual constitutional rights as well as the best interests of her child.