NOT *IF*, BUT *WHEN?*: DISMANTLING THE FLORIDA ADOPTION ACT OF 2001

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INTRODUCTION

On August 27, 2002, a newborn baby boy was discovered abandoned outside Heart of Florida Medical Center.[1] He was wrapped in a blanket and it was determined that he was only "a few hours old when discovered."[2] The hospital later received a letter from a woman claiming to be the child's mother indicating that she intended to abandon the child. Pursuant to Florida law, legal notices were published in the local newspapers that served the surrounding Polk, Flagler and Orange counties, notifying the mother of a hearing to terminate her parental rights were she not to claim the child by the hearing date. When the hearing date came and went in January 2003, the presiding judge in Polk County Circuit Court ruled that the search for the child's parents must continue. The Department of Children and Family Services ("DCF") began to focus instead on finding the father through another series of periodical notices.[3] Adoption advocates speculated that the burden imposed by these legal notice publications heavily influenced the mother's decision to abandon her child.[4]

The law mandating these newspaper ads and notices was section 63.088(5) of the Florida Statutes, amended in the Adoption Act of 2001 ("The Act").[5] Known as the Adoption Act's "publication requirements"[6] or "notice provisions,"[7] this section required that a single mother wishing to give up her child for adoption notify a missing father through such legal notices if he cannot be otherwise found.[8] Not surprisingly, the notice

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1 *See* Amy L. Edwards, *Judge Rules Parents of Baby Must Be Sought*, THE LEDGER (Lakeland, FL), Jan. 16, 2003, at B3.

2 *Id.*

3 *See id.*

4 *See* Candace Critchfield, *Ad Law Encourages Babies' Abandonment*, SUN-SENTINEL (Fort Lauderdale, FL), Nov. 18, 2002, at 27A ("[A]bandonment of a child is legal in the state of Florida if the child is left at a designated site.").

5 FLA. STAT. ANN. § 63.088(5) (2001) (repealed 2003).

6 Letter from Jeb Bush, Governor of the State of Florida, to Katherine Harris, Secretary of State of Florida 3 (Apr. 17, 2001) [hereinafter Jeb Bush Letter] (on file with author).

7 *Id.*

8 *See* Oliver Burkeman, *Women Test Law on Sex History Adverts*, THE GUARDIAN (London), Aug. 9, 2002, at 11 ("Single mothers who cannot trace possible fathers . . . must take out

requirement came under public and legal scrutiny from its inception.[9] That scrutiny led to the undeniable conclusion that the notice requirement had to be eliminated, either judicially or by another act of the Florida legislature.[10]

This note examines the legal and ethical difficulties that the notice provision of the Adoption Act faced since its passage in April 2001, as well as the degree and nature of the public scrutiny that, arguably, led to its demise in June 2003. The note was originally composed as an advocacy piece for the elimination of the provision. However, in the interim period between composition and publication, the state of Florida—through both its courts and legislature—eliminated the provision. This note will focus on the inadequacies and inequities of the provision stemming from individual rights under both the Federal and Florida constitutions. It will also provide a brief history of major aspects of the "family" rights recognized by the Florida courts. Finally, this note will examine the groundbreaking litigation that invalidated the notice requirement, and cleared the path for the state legislature to enact a more sensible controlling law in the summer of 2003.

The elimination of the notice provision of the Adoption Act was just and correct for the people of Florida, as it infringed on federal and state constitutional rights of privacy. Generally, individual rights from government intrusion arise under the Supreme Court's interpretation of the U.S. Constitution.[11] Such rights, and particularly that of privacy, are typically narrowly tailored to specific circumstances and weakened by the fact that no explicit language naming them exists within the Bill of Rights.[12] As such, a comprehensive attack on a statute violating its constituents' privacy rights might not have prevailed simply on the grounds of federal protections. However, Florida maintains a stronger and broader right to privacy, which is explicitly stated in the Florida Constitution.[13] It guarantees to its citizens the "right to be let alone and free from government intrusion into his private life . . .,"[14] strengthening the right of a mother affected by the notice

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advertisements . . . so that birth fathers have an opportunity to contest the adoption.").

[9] *See id; see also* Christopher Swope, *The Scarlet Ad*, GOVERNING MAGAZINE, Jan. 2003, at 17.

[10] *See* Swope, *supra* note 9 (predicting that the notice requirement will be eliminated during the 2003 session of the Florida legislature).

[11] Examples of such rights are found in the Fourth Amendment's protection against unreasonable searches and seizures (U.S. CONST. amend. IV) and the Court's refining of such rights in cases such as Mapp v. Ohio, 367 U.S. 643 (1961) and Kyllo v. United States, 533 U.S. 27 (2001).

[12] *See, e.g.*, Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 857-59 (1992) (explaining that its holding limiting the rule espoused in *Roe v. Wade* would not disturb the fundamental liberty preserved in the *Roe* opinion).

[13] *See* FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from government intrusion into his private life as otherwise provided herein.").

[14] *Id.*; *see also* Honorable Major B. Harding et al., *Right to Be Let Alone? Has the Adoption of Article I, Section 23 in the Florida Constitution, Which Explicitly Provides for a State Right of Privacy, Resulted in Greater Privacy Protection for Florida?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 945, 950 (2000) ("[T]he states, and not the federal government are 'the final guarantors of personal privacy . . . .'") (quoting *In re* T.W., 551 So. 2d 1186, 1191 (Fla. 1989)).

requirement to challenge and defy such a provision.[15] These classes of privacy rights, combined with Florida's general parental rights, as well as the chilling consequences of the enforcement of the notice provision, lead to the unmistakable conclusion that the provision was unjust and that its elimination was the only proper way to ensure protection of Florida's privacy guarantee.

I. GOVERNOR, LEGISLATURE & THE ORIGINS OF THE ADOPTION ACT

The Adoption Act passed into law in April 2001 and took effect on October 1, 2001. The bill's sponsor in the Florida House of Representatives, Senator Wayne "Skip" Campbell (D – Tamarac), proposed the lengthy legislation in each of the six years preceding its eventual passage into law.[16] Over those six years, literally hundreds of amendments to the original proposal were added.[17] The bill's proponents, including Campbell, intended that the bill ensure that all adoptions reach a state of finality, even when the respective rights of adoptive and biological parents remained uncertain under state adjudicative law.[18] Such a situation arose in Illinois in 1993 in the "Baby Richard" case.[19] That case involved a child taken from his adoptive parents after three years of custody because the child's biological mother had deceived the biological father, telling him that the baby had died shortly after birth,[20] and thereby denying the father his right to refuse the child's adoption. The solution presented by the Adoption Act hung on the notice requirements. Although the Act purported to affect an expansion of a missing father's right consistent with the federal due process requirement of notification, requiring the mother to publish her intention to give the child up[21] was at odds with her right to privacy.

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[15] *See* Harding et al., *supra* note 14. While the U.S. Constitution and the Supreme Court's interpretations of it represent the "outer limits" of constitutional rights, states may implement broader standards consistent with the Court's holdings, strengthening the position of an affected mother in that state's courts. *See* Shane R. Heskin, Note, *High Court Studies: Florida's State Constitutional Adjudication: A Significant Shift As Three New Members Take Seats on the State's Highest Court?*, 62 ALB. L. REV. 1547, 1551 (1999) ("A state court is free to afford more protection to individual rights than the U.S. Constitution, and can accordingly declare a law unconstitutional under its state charter that the Supreme Court previously declared valid under the Federal Constitution.").

[16] *See Donahue: Are Florida's Policies for Women Giving Babies Up for Adoption Fair?* (MSNBC television broadcast, Aug. 9, 2002) [hereinafter *Donahue*] ("this bill took six years to develop, hundreds of amendments").

[17] *See id.*

[18] *See* Burkeman, *supra* note 8. Campbell's stated purpose was to prevent situations in which children were adopted before the parental rights of the child's biological parents could be properly and legally terminated. *See Donahue, supra* note 16 ("And what we're trying to do is, we're trying to make sure that adoptions don't fail . . . and we don't have biological fathers coming back and actually claiming that they were not told or notified of the opportunity to be a parent.").

[19] *See In re* Petition of John Doe and Jane Doe, 638 N.E.2d 181 (Ill. 1994).

[20] *See id.* at 182.

[21] *See generally* Stanley v. Illinois, 405 U.S. 645 (1972). *But see Lehr*, 463 U.S. at 248 (Senator

A. *The Offending Provisions*

As noted above, we concern ourselves here with the now-defunct § 63.088, which outlined required procedures that a mother or prospective mother needed to follow if she wished to give her child up for adoption, and knew neither the identity, nor the whereabouts of the man she believed fathered the born or developing child.[22] Subsection (4), applying only to a prospective father whose name the mother knew, required that she undertake a "diligent effort"[23] to locate the father through such means as were listed in the Act. These included, for example, Freedom of Information Act requests to the U.S. Postal Service; inquiries to known relatives or residents of the father's last known locale with similar last names who might be related to him; and tax assessor, utility company and law enforcement records.[24] Some of the means provided were certainly burdensome, considering that the fathers in many cases had not attempted to keep in contact with the mothers.

Still more burdensome than the subsection (4) requirements was the so-called notice provision, contained in subsection (5). The notice provision applied where the mother knew neither the identity, nor the whereabouts of the man or men she believed to have potentially fathered the child. It also required that the mother publish a legal notice in a periodical in any and every jurisdiction she believed the putative father(s) might be constructively served[25]—i.e., where she met him; locales of former or assumed potential residence; the city "in which conception may have occurred."[26] In the legal notice, she was required to publish her name, physical description, the time and place of conception and a description of all potential fathers in that jurisdiction:[27]

> Constructive service shall be accomplished by publishing the above described notice once during each week for four weeks in some newspaper published in the counties identified in the petition . . . Proof of publication shall be made by affidavit of the owner, publisher, et al., of the newspaper, setting forth or attaching a copy of the notice and the dates of each publication. If the location or

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Campbell cites *Stanley* as support for the due process purpose behind the Adoption Act. *Stanley* invalidated an Illinois statute, which terminated the parental rights of every unmarried father without a fitness hearing or proof of neglect. *Lehr*, however, concerned a father who made no attempt to support the child or its mother, nor did he enter his name on a "putative father registry" maintained by the state to provide notice to participating fathers. He was rightly denied relief, and *Lehr*—not *Stanley*—is the proper due process standard for a putative father law.).

22 FLA. STAT. ANN. § 63.088(1)-(5) (2001).

23 *Id.* § 63.088(4).

24 *Id.*

25 *Id.* § 63.088(5).

26 *Id.*

27 FLA. STAT. ANN. § 63.088(5) (2001); *see also* FLA. STAT. ANN. §§ 49.011(10), 49.10(1)-(2).

> identity of the father is unknown, the court is precluded from conducting a hearing to terminate rights, or enter judgment, unless the affidavit of constructive service has been filed with the court.[28]

The publication requirement represented the Florida legislature's attempt to buttress the rights of an absent father, who was without notice that he had conceived a child. Unfortunately, the legislature did so at great expense to the mother, who not only had to bear and give up a child alone, but was also forced to go to humiliating lengths to alert a casual sexual partner of his parental rights in a very public and inappropriate forum. It was categorically improbable that any such constructive notice would indeed give actual notice.[29] The probability that a putative father would happen to check the legal notice section of the newspaper during that month if it was not his general practice to do so was obviously minimal. Opponents of the notice requirement argued that its effect was to violate the right of a woman and her child to her autonomy and privacy,[30] and infringe upon the right of a family unit to make the best decisions possible for the child's uncertain future.[31] Unfortunately, the Adoption Act effectively placed the absent father within this family unit, and therefore also entitled him to exercise authority in the adoption decision. Because the putative father retained the parental rights that gave rise to the Adoption Act, there was no explanation for his relationship to his child but to call him a member of the "family." In addition, privacy has thus far proved a difficult foundation on which to base a statutory opposition.[32] Although it has both state and federal bases, it presented the question of whether the mother and child have a right of privacy from the father, as well as from the government.[33]

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[28] *Id.*

[29] *See* Jon Burstein, *State Won't Defend Sex-History Law: Florida Declined to Send a Lawyer to the Challenge of Its Adoption Measure Requiring Notification*, THE ORLANDO SENTINEL, Feb. 16, 2003, at B5 ("[Adoption attorney Jeanne] Tate estimates she has had 75 clients take out newspaper notices. No prospective birth father has responded to any of them."); *see also Donahue*, *supra* note 16 ("And how likely is it that perhaps an adult male, or even a number of young boys, would come forward at this point in time?").

[30] Motion for Declaratory Judgment Regarding Constitutionality of Florida Statute Sections 63.087, 63.088 (2001) at 6, *In re* The Adoption of A Minor Child, L.T. Case Nos. CD02-70 FY; CD02-1880 FZ; CD02-3071 FY (Fla. 15th Cir. Ct. filed May 20, 2002) [hereinafter Motion for Decl. Judgment] ("The right to decisional autonomy is a fundamental right which may not be infringed upon by the state . . . [t]he intimacy of sexual relations is clearly sensitive information which an individual is protected from disclosing under the state right to privacy.").

[31] *Id.* at 8 ("[The confidentiality of adoption proceedings] was intended to allow birth parents to proceed with their lives without their child secure in the knowledge that their private decision to relinquish parental rights would be protected from the child's knowledge forever.").

[32] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985) (allowing search and seizure of materials from a juvenile on school grounds under a "compelling interest" standard); City of North Miami v. Kurtz, 653 So. 2d 1025 (Fla. 1995) (upholding a municipality's anti-smoking hiring practices against a privacy argument.).

[33] *See* Harding et al., *supra* note 14, at 954 ("Those [Florida Supreme Court] cases [in which the right of privacy was implicated] can be divided into three categories: (1) a person's interest in being secure from unreasonable government intrusion, (2) a person's interest in protecting against the disclosure of personal information, and (3) a person's interest in decisional

B. *The Scarlet Memorandum*

On its seventh try, the Adoption Act—then entitled House Bill 141, An Act Related to Adoption[34]—passed through the Florida House and Senate as of March 22, 2001.[35] When it arrived on the desk of Governor Jeb Bush in April 2001, the governor faced several options: he could sign the bill into law; veto the bill and encourage alternatives to problematic passages such as the § 63.088 notice provision; or allow it to pass into law without his signature, definitively the most passive option. Governor Bush chose the last option, submitting an explanatory letter to then-Secretary of State Katherine Harris.[36] The letter highlights some of the weaknesses of the Adoption Act, though it makes only bare mention of the notice requirements.[37]

The most provocative aspect of the letter, however, detailed the political maneuvering behind the governor's support for the passage of the Act. Another proposal, House Bill 415,[38] is described as more efficient and, with regard to the notice provision, a less oppressive alternative law to Bill 141.[39] Governor Bush's letter anticipates later passage of Bill 415,[40] describing its support by 141's proponents as "a pre-condition to . . . allowing House Bill 141 to become law without signature,"[41] and confirming that that the function of Bill 415 would be to "supercede,"[42] not to supplement Bill 141. If the question is prompted as to why the sponsors of Bill 141 would have bothered with its passage when it was bound to be replaced, it is readily answered in the letter. Bush stated that Bill 415 "will be portrayed by some as an elusive attempt to compromise . . ."[43] indicating an obstinate faction of supporters of Bill 141 that opposed its edition. One is led to the conclusion that the political maneuvering in replacing one law with another was merely to allow the sponsors to "save face." No language in the letter indicates a need for immediate action on Bill 141 that would have precluded waiting for a final version of Bill 415. In fact, the letter all but admits the absence of need to conform Bill 415 with Bill 141,[44] stating that the elimination of certain provisions of Bill 141 with the subsequent legislation "should be no reason to stymie reform."[45] Senator Campbell, who assured the Adoption

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autonomy.").

34 H.B. 835, 1999 Leg., 105th Reg. Sess. (Fla. 2003).

35 STATE OF FL., BILL TRACKING REP., H105-835, 105th Reg. Sess. (2003), *available at* http://www.lexis.com (last visited Apr. 22, 2004).

36 Jeb Bush Letter, *supra* note 6.

37 *Id.* at 2-3.

38 H.B. 415, 2001 Leg., 103d Reg. Sess. (Fla. 2001).

39 Jeb Bush Letter, *supra* note 6, at 2-3.

40 *Id.* at 3.

41 *Id.*

42 *Id.*

43 *Id.*

44 Jeb Bush Letter, *supra* note 6, at 3.

45 *Id.*

Act's opponents in 2002 that a "glitch bill," striking the notice requirement would be introduced to the House during its 2003 session,[46] consistently omitted the pre-existence of Bill 415 from media statements in which he had alternatively defended and apologized for the notice provisions.[47] With Governor Bush and the Adoption Act's chief sponsor unwilling to express their support for § 63.088(5), it was incumbent upon the Florida House to take decisive steps to eliminate the notice requirement entirely.

The Adoption Act was not the first occasion that the Florida legislature had faced controversy with adoption-related legislation. As a result of 1979 legislation preventing homosexuals from adopting in Florida,[48] the state received negative media attention from civil rights groups, particularly in the gay and lesbian community.[49] The publication requirement was oppressive in a different way, affecting a different citizenry, but just as absurd. Admittedly, there was a purpose behind the legislation when it was first proposed. Only one year after the "Baby Richard" case in Illinois, Florida's Fourth District Court of Appeal was faced with a similar issue, an adoption disputed by the biological father, who claimed that his parental rights had not properly terminated prior to entry of the adoption.[50] "Baby Emily," owing to an *en banc* rehearing following reversal, was returned to her adoptive parents based on a finding that her father abandoned her.[51] However, according to Charlotte Danciu, counsel for the adoptive parents, "Baby Richard" and "Baby Emily" were motivations for Senator Campbell's early efforts to solidify father's rights so that no further such cases would arise in Florida.[52] But where one problem is solved, another springs up. While overall adoption and abortion statistics statewide are impossible to calibrate precisely, Ms. Danciu estimates that adoptions decreased in 2002, while abortions increased, as a direct result of the notice provisions.[53]

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[46] *See* Swope, *supra* note 9 ("[Senator Campbell] predicts that the legislature will strike it in this year's session . . . .").

[47] *Compare id.* ("The provision was an honest mistake . . . ."), and Burstein, *supra* note 29 ("The state senator who spearheaded the sweeping revisions to Florida's adoption statutes that included the notification provision now is seeking to get rid of the requirement . . . [h]e said a bill is being drafted for the upcoming legislative session that will eliminate the notice requirement . . . '[i]t was a problem and we had to fix it . . . [u]nfortunately, like many laws, there were unintended consequences'"), *with Donahue, supra* note 16.

[48] FLA. STAT. ANN. § 63.042(3) (1980) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

[49] *See, e.g.*, John C. Roth, *Florida's Ban on Adoption By Gays Needs to Be Repealed*, ST. PETERSBURG TIMES, Aug. 18, 1991, at 2; Victor Epstein, *Gay Adoption Ban Challengers Look for Statewide Victory*, MIAMI DAILY BUSINESS REVIEW, May 9, 1997, at B1.

[50] *In re* The Adoption of Baby E.A.W., 647 So. 2d 918 (Fla. Dist. Ct. App. 1994).

[51] *Id.* at 920 (establishing bandonment by evidence of the natural father's treatment of the natural mother prior to and during the pregnancy, as well as his failure to timely object to the adoption despite actual and constructive knowledge that the mother would pursue it).

[52] *See* Telephone Interview with Charlotte Danciu, Esq., Charlotte Danciu, P.A. (Oct. 9, 2002) [hereinafter Interview w/ Charlotte Danciu].

[53] *See id.* (Feb. 5, 2003).

During the same period, however, as the first cases challenging the statute advance through the Florida courts, opponents of the notice provision hoped that § 63.088 would be found unconstitutional,[54] and that no further debate, litigation or corrective legislation would be necessary. In the end, the Fourth District Court of Appeals invalidated the notice provision as unconstitutional under the Due Process Clause of the Fourteenth Amendment, as well as Article 1, section 23 of the Florida Constitution.

II. PRIVACY UNDER THE FEDERAL CONSTITUTION

Surely many of those who have been restrained in their personal freedom by governmental action took that freedom for granted before its restraint. We take freedoms for granted when we believe them to be protected either by a specific provision of the Bill of Rights or by the court-held application of one of those rights to state actions. Is the notice provision entirely prohibited by the Constitution? Is the right of a mother-to-be to privacy in her decision to surrender her child protected? The simple answer is that there is no right to general privacy enumerated in the Constitution.[55] Certain activities have been protected by the courts based on their relationships to certain specified rights—such as the right against an unreasonable government search of one's home or person,[56] but the Supreme Court has been reluctant to extend these rights to cover privacy in all cases.[57]

A. *Wielding* Griswold*: Curing the Notice Provision Through Substantive Due Process*

In examining whether the Florida Adoption Act fits into the rights guaranteed by the Constitution, certain cases concerning the "expectation of privacy" and autonomy of the family unit will prove most helpful in scrutinizing Florida's experiment, and whether other states should or should not be willing to follow suit. One of those is the seminal application of familial privacy to rights conferred by the Constitution came in *Griswold v. Connecticut*.[58] In *Griswold*, the Supreme Court, invalidating a statute that outlawed the distribution of contraceptives, held that certain vague and

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[54] *Id.*

[55] *See* Katz v. United States, 389 U.S. 347, 350-51 (1967) (explaining that there is no constitutional right of privacy, as such. "[The Fourth] Amendment protects individual privacy against certain kinds of government intrusion, but its protections go further, and often have nothing to do with privacy at all . . . the protection of a person's *general* right to privacy—his right to be let alone by other people—is . . . left largely to the law of the individual states.").

[56] U.S. CONST. amend. IV.

[57] *See* Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986) ("There should be . . . great resistance to expand the substantive reach of [the Fifth and Fourteenth Amendments' Due Process] Clauses, particularly if it requires redefining the category of rights deemed to be fundamental."), *overruled by*, Lawrence v. Texas, 123 S. Ct. 2472 (2003).

[58] 381 U.S. 479 (1965).

implicit rights emanate from those enumerated in the Constitution, among them a "zone of privacy" that protects the First Amendment right of free association.[59] *Griswold* involved a married couple whose familial relationship was instrumental in the application of the doctrine of "substantive due process"—that rights fundamental to preserving the "liberty" guaranteed by Fourteenth Amendment Due Process are, themselves, also protected.[60] That is, the Court extended the right of privacy to the marital relationship to protect that relationship, rather than all relationships. Although we do not, in our examination of the Adoption Act, rely on the First Amendment's right of association, the privacy guaranteed to the familial relationship by *Griswold* was crucial to the Act's invalidation.

The notice provision prompted several questions such as: if a right to privacy protects against its requirements, to whom does the protection extend? In a typical situation in which the Act might apply, the putative father's identity is unknown to the mother and she is A) determined to give the child up for adoption, and B) understandably reluctant to publish her identity in order to find him. In other words, does the mother have a right to keep her sexual history private? Does the child have a right to keep the identity of his biological mother private if he is to be adopted? Does the father have a right to know about the child that overrides the mother's privacy? Do the parents have, jointly and severally, a right to keep their relationship from the prying eyes of the public, not to mention the government officials and newspaper employees who are more likely to come across the content of such a published notice in the course of their work? Which of these relationships constitutes a protected "family" entitled to privacy under *Griswold*?

Griswold established a tenuous right to privacy in the marital relationship. Essentially, since *Griswold* remains in effect we are faced with two categories of Supreme Court views on behavioral privacy:[61] those in which a certain relationship gives rise to privacy, and those without such a relationship.[62] Since the Adoption Act is prohibited by federal Due Process

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[59] *Id.* at 484 ("Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . .").

[60] *See* Roe v. Wade, 410 U.S. 113, 167-68 (1973) (Stewart, J., concurring) ("The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.").

[61] Cases distinguish between "behavioral" and "disclosural" privacy, both subject to the same test of a compelling state interest to interfere with them. Disclosural privacy, however, has historically placed a lighter burden on the state in proving such interests in disclosural matters. *See, e.g.*, Whalen v. Roe, 429 U.S. 589 (1977); Nixon v. Administrator of General Servs., 433 U.S. 425 (1977).

[62] *Compare Bowers*, 478 U.S. at 191 ("No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . ."), *with* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (holding that a local ordinance may not restrict recognition of the family unit to that of a nuclear family). *But*

principles, a protected relationship must exist among the parties to the creation of the child (the mother, father and child, which also has certain privacy rights in Florida[63]). If no such protected relationship exists, perhaps the Adoption Act could still have been found invalid through the reproductive privacy rights established in *Roe v. Wade*,[64] upon which the Adoption Act certainly impinges.

B. *Constitutionally-Protected Relationships*

We now examine some of *Griswold's* progeny as they apply a right of privacy to the family unit and to certain relationships that *are* constitutionally protected. The case of *Moore v. City of East Cleveland*[65] examined the constitutionally of a zoning ordinance that restricted the residents of a single-family dwelling unit to members of the owner's "nuclear family." Holding the statute invalid as violative of due process, the Court reinforced the *Griswold* rule saying that the right of privacy could not be limited to the nuclear family, and that as a relative, a grandmother is entitled to house her grandchildren at her option.[66] *Moore* recognized that the ordinance could have been upheld had the city demonstrated some compelling public interest, but held that its propounded purposes of "minimizing traffic and parking congestion and avoiding an undue financial burden on [the] school system" did not qualify.[67]

While *Moore* recognized a right of privacy to particular family arrangements, the Supreme Court has established standards to clarify that *Griswold* and other holdings recognizing privacy rights protect families and marriages, but not some of their non-traditional counterparts. The Court, in *Bowers v. Hardwick*, upheld a Georgia statute that outlawed homosexual sodomy. The petitioner, a gay man, asserted his right to privacy within his home under both the *Griswold* cases and the applications of privacy theory in *Stanley v. Georgia*,[68] an obscenity case in which the Court found that the criminalization of possessing obscene materials in one's home violated Due

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see Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (invalidating under the Equal Protection Clause—not Due Process—a statute prohibiting distribution of contraceptives to single adults, and recognizing "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").

63 *See T.W.*, 551 So. 2d at 1186.

64 410 U.S. 113 (1973); *see also infra* Part II.C.

65 431 U.S. 494 (1977).

66 *Id.* at 504-05 ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family . . . millions of our citizens have grown up in [non-nuclear households], and most, surely, have profited from it . . . [o]ut of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home.").

67 *Id.* at 499-500.

68 394 U.S. 557 (1969).

Process.[69] The Court limited the *Griswold* cases to circumstances involving "family, marriage or procreation,"[70] defining the modern limits of privacy under substantive due process. It also denied Hardwick's association of the cases to *Stanley*, observing that while *Stanley* addressed a right "firmly grounded in the First Amendment,"[71] to engage in homosexual sodomy was not a "fundamental right,"[72] and so was not protected by the Due Process Clause.[73] From here, we must look to the Adoption Act. Surely, if consenting adults who have conceived a child have the choice of whether to terminate the pregnancy[74] or to use contraception,[75] they must, by association have a right to privately and cooperatively terminate their parental rights and allow the child to be adopted.[76] However, under the general privacy applications of substantive due process there might have been no justification for excluding a wayward father from the ring of privacy that the members of a family share. Further, that means that under the traditional argument structure, a challenge to the notice provision's constitutionality might have failed.

However, the holding in *Bowers* was largely based on two preconceived notions: 1) that privacy in sexual conduct and relations does not qualify as "fundamental" in our societal structure and need not be protected, and 2) that any fundamental right to privacy in relationships should have its basis in the historical acceptance of the relationship. These notions, as well as *Bowers* itself, were overruled by the Supreme Court in June 2003 in *Lawrence v. Texas*,[77] on similar facts to those that precipitated *Bowers*. The potential effects of this outcome on the validity of the notice requirements of the Adoption Act—although they are moot, due to their invalidation—are discussed below.[78]

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[69] *Id.* at 568.

[70] *Bowers*, 478 U.S. at 191.

[71] *Id.* at 195.

[72] *Id.* at 191.

[73] *Id.* at 192 ("It is obvious to us that neither of [the] formulations [that historically indicates an extension of judicial protection under substantive due process] would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.").

[74] *See* Roe v. Wade, 410 U.S. 113, 154 (1973) ("We . . . conclude that the right of personal privacy includes the abortion decision . . . .").

[75] *See Eisenstadt*, 405 U.S. at 453 ("If the right to 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.").

[76] *See* Caban v. Mohammed, 441 U.S. 380 (1979) (invalidating as violative of the Equal Protection Clause a New York statute allowing unwed mothers—but not unwed fathers—to block adoption proceedings by simply withholding consent).

[77] 123 S. Ct. 2472 (2003).

[78] *See infra* Part VII.

C. *The Protections of* Roe v. Wade

There is also, in the case of the Adoption Act, a potentially close association with *Roe v. Wade*, which granted personal autonomy to the petitioner under a broad application of substantive due process.[79] A decision such as abortion, or to give a child up for adoption, that is, by its nature, personal and private, assures the decision-maker the protection of the substantive due process analysis under the Due Process Clause of the Fourteenth Amendment.[80] A court that deems the rights enumerated in *Roe* sufficiently fundamental would have been willing to apply that same theory to a single mother deciding to give up her child. After all, the *Roe* court granted no explicit right to the putative father of a terminated child to enjoin the abortion. In Due Process terms, it is certainly appropriate that a similar rule would be implemented with regard to the Adoption Act. However, given the trend in adoption law, as illustrated in *Caban*[81] and *Stanley*,[82] to protect the rights of the natural father alongside those of the mother, it is perhaps, surprising that Florida's Fourth District Court of Appeals was willing to align itself with such a ruling in its invalidation of the notice provision.

The Court's position as to privacy is best summarized as applying to "marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education."[83] These "zones of privacy"[84] may only be infringed upon subject to a "compelling state interest"[85] standard, but only come into existence when the party claiming privacy is found to have "legitimate expectations of privacy."[86]

At this time, an important new development in the laws of privacy and substantive due process definitely bears mentioning. The above-mentioned case of *Lawrence v. Texas*, decided by the Supreme Court in June 2003, marked a tremendous reversal in the general treatment of privacy in sexual relationships. Clearly, there are implications from this case in all matters of constitutionally alleged privacy. The question is raised, then, whether the *Lawrence* decision expanded privacy rights to such a degree that it might have

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79 *Roe*, 410 U.S. at 154-56.

80 *Id.* at 167-68.

81 441 U.S. 380 (1979).

82 405 U.S. 645 (1972).

83 *Roe*, 410 U.S. at 152-53.

84 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

85 *Id.* at 485.

86 *See, e.g., T.L.O.*, 469 U.S. at 340 (setting a balancing test between the personal privacy of a schoolchild and the compelling need for school officials to maintain order in the school environment); *see also* Jon Mills, *Sex, Lies, and Genetic Testing: What Are Your Rights to Privacy in Florida?*, 48 FLA. L. REV. 813, 815 (1996) ("Essentially, an individual's reasonable expectation of privacy is arrived at based on the individual's experiences and values derived from his or her own culture.").

invalidated the notice provisions without any further effort from Florida courts or the legislature. After all, *Lawrence* concretized the notion that what goes on between two consenting adults in the privacy of the bedroom is crucial enough as a privacy interest that it cannot be criminalized, consistent with due process. However, the answer still seems to be no. A mother wishing to give her child up for adoption is still required to give notice to the putative father—to the extent she is able—and must submit to an adoption procedure administered and regulated by the state. The question as to the notice requirement is whether the state's method simply goes too far, and not whether it may get involved at all. While *Lawrence* reinforced the expectation of privacy, its factual application to the notice provisions seems to be misplaced, and would likely have had no special effect on adjudication of the provision's constitutionality.

In sum, although it was certainly appropriate, the willingness of the Florida District Court of Appeals to apply the traditional privacy rights of the Due Process clause to the notice provisions of the Adoption Act is, to some extent, surprising. The Constitution and the Supreme Court's interpretations of it protect privacy under limited conditions, including a family's choice to raise or, presumably, in allowing another to raise their children. Because of the possible construction of the structure between a putative father, the mother and the child as "familial," the Court certainly could have justified a refusal to apply the privacy right to circumstances arising under the Adoption Act. Certainly, its broad application of the doctrine was a just and fair treatment to the mothers who brought the action.

III. PRIVACY UNDER THE FLORIDA CONSTITUTION

Currently, Florida is one of four states with an explicit right to general privacy in its constitution. The amendment granting this right was proposed by then-Chief Justice Ben F. Overton at the 1978 meeting of the Constitutional Revision Commission,[87] but was defeated and ultimately proposed by the legislature two years later when it took effect.[88] A slight variation on the version ratified was rejected, containing a single word: unwarranted. The extra word, it was determined, weakened the purpose of the amendment by allowing for broad interpretation of what would be "warranted."[89] It was omitted to make the right stronger. "However, it is critical to recognize that this provision protects only against intrusions by the government. It does nothing to protect citizens from intrusions by private or

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[87] The Honorable Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection From Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 34 (1997).

[88] *Id.* at 35.

[89] *See* Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985).

commercial entities."[90]

As one of the few states that has enacted an explicit constitutional right of privacy[91] more protective than that guaranteed by the *Griswold* and *Roe* cases, Florida is often forced to examine their own statutory regulations that might perhaps infringe upon personal privacy.[92] This is especially true with regard to parental rights and family situations. It is germane to those rights, however, to introduce the general application of the provision initially, to exemplify its broad protection when compared to the federal guarantee.[93] Prior to the provision's passage in 1980, Florida litigants that argued a right of privacy were forced to rely on the *Griswold* cases and had no better stance on privacy than they would have had in Federal court. For example, in *Laird v. State*, the Florida Supreme Court ruled that the constitutional right of privacy did not permit the petitioner to smoke marijuana in the privacy of his home because to do so is simply not a fundamental right.[94] This was essentially the same argument espoused nine years later in *Bowers*.[95] The Court addressed both the "behavioral privacy" issues of *Laird* and "disclosural privacy"[96] under its pre-amendment standards. In *Shevin v. Byron, Harless*[97] the Florida Supreme Court "waffled" on disclosural privacy,[98] holding that some documents on candidates prepared by private consultants to fill a government position were public records, subject to revelation to the media.[99] Preparatory notes on the candidates, however, were not considered

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90 Overton & Giddings, *supra* note 87, at 26.

91 FLA. CONST. art. I, § 23 ("Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.").

92 *See, e.g.*, Jones v. State, 619 So. 2d 418 (Fla. Dist. Ct. App. 1993) (affirming the convictions of three men who had sexual relations with girls under the age of consent. The court, in upholding the constitutionality of the statutory rape law, allowed the men standing "to assert the young women's rights to privacy," but was unwilling to extend the privacy right to minors having consensual sex with adults.).

93 *See* Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985) ("The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23 . . . it can only be concluded that the right is much broader in scope than that of the Federal Constitution.").

94 *See* Laird v. State, 342 So. 2d 962, 963-64 (Fla. 1977).

95 *Compare id.* at 965 ("[W]e have determined that there is no fundamental right to smoke marijuana . . . ."), *with Bowers*, 478 U.S. at 191 ("[*Bowers*] would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.").

96 *See* Daniel R. Gordon, *Upside Down Intentions: Weakening the State Constitutional Right to Privacy, A Florida Story of Intrigue and A Lack of Historical Integrity*, 71 TEMP. L. REV. 579, 580 (1998) ("The Florida appellate courts have developed two types of state constitutional privacy rights – behavioral and informational.").

97 Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633 (Fla. 1980).

98 "Respondent's claim is far afield from [the *Griswold*] line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest . . . His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be 'private,' but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner." *Id.* at 638.

99 *Compare id. with* post-privacy-amendment *Winfield*, 477 So. 2d at 547 ("The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This

public.[100]

Since the passage of the privacy provision, the Florida Supreme Court has occasionally construed broad personal privacy rights, most notably in *In re T.W.*[101] In the tradition of *Roe v. Wade*, the Court invalidated a statute requiring a minor seeking an otherwise legal abortion to obtain parental consent before undergoing the procedure.[102] The opinion makes clear two important concepts: first, the states' constitutional right of privacy is a fundamental one and one "clearly implicated in a woman's decision whether or not to continue her pregnancy."[103] Second, based on the language of the privacy amendment ("every natural person"), the right to privacy *is* guaranteed to minors and the government may no more infringe on it for a sixteen-year-old than for a sixty-year-old.[104] *T.W.* also reaffirms the "compelling state interest" standard, explicitly shifting the burden to the state to justify its impingement.[105]

Nonetheless, Florida's courts have exercised a degree of caution in expanding the privacy right.[106] The seminal case generally limiting such rights came to the Florida Supreme Court in 1985 in *Winfield v. Division of Pari-Mutuel Wagering*,[107] in which family members under investigation by the state Department of Business Regulation balked at the Department's subpoena of their banking records.[108] The *Winfield* case established the general Florida standard mentioned in *T.W.*, requiring that the state demonstrate a "compelling state interest" to pierce the shield of privacy, and

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test shifts the burden of proof to the state to justify an intrusion on privacy."). It bears mentioning that the facts in these two cases also bear on the post-amendment application of the right to privacy. Robert Shevin might well have been protected by the amendment had it existed at the time of adjudication, since no compelling state interest induces a public entity to disclose information. The Winfields, on the other hand, were the subject of a state investigation and could claim no similar protection.

100 *See Shevin*, 379 So. 2d at 640-41.

101 551 So. 2d 1186 (Fla. 1989).

102 *See id.* at 1192 (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1337-38 (2d ed. 1988) ("Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when, and how one's body is to become the vehicle for another human being's creation; second, when and how. . . one's body is to terminate its organic life.").

103 *Id.*

104 *See id.* at 1192-93 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976)) ("Minors are natural persons in the eyes of the law and "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.").

105 *See id.* at 1192 ("We reaffirm, however, that this is a highly stringent standard, emphasized by the fact that no government intrusion in the personal decisionmaking cases cited above has survived.").

106 *See* Timothy O. Lenz, *"Rights Talk" About Privacy in State Courts*, 60 ALB. L. REV. 1613, 1620-21 (1997) ("The Florida Constitution explicitly declares a general and unqualified right to privacy, but Florida judges explain their decisions in terms of fundamental rights, compelling state interests, the reasonableness of individual rights claims and government powers, expectations of privacy, due process of law, and balancing of interests.").

107 477 So. 2d 544, 546 (Fla. 1985).

108 *Id.*

to exercise that interest through the "least intrusive means." At the same time, "reasonable expectations of privacy" are required for the shield to take effect,[109] borrowing from the standard set by the U.S. Supreme Court in *New Jersey v. T.L.O.*[110]

Other circumstances have bested privacy in Florida, solidifying the *Winfield* standard and widening the field of exceptions to the amendment. Notably, in 1993, three men convicted of statutory rape appealed to Florida's Fourth District Court of Appeal,[111] claiming standing rights to argue the privacy rights of the three teenage girls—ostensibly, their respective rights to have consensual sex with a man over the age of consent despite the governing statute.[112] Finding that the convictions did "not substantially [burden]" the rights of the girls, the Court upheld both the convictions and the statute.[113] In another instance, the Florida Supreme Court issued a narrow holding allowing the state government, in its capacity as an employer, to require job applicants to affirm that they had not smoked or chewed tobacco for one year prior to their respective applications.[114] Though it is not difficult to agree that such a requirement intrudes into an applicant's personal habits, the Court found that no expectation of privacy existed when a personal habit is publicly and prominently displayed, as smoking tends to be.[115] Further, it noted a compelling state interest in keeping health insurance costs down for its employees[116] and upheld the statute.[117] As a result, the Florida privacy guarantee is limited in its scope.

Still, the District Court of Appeals found the question of the notice requirement sufficiently crucial, as a matter of public policy, to expand their interpretation of the privacy amendment to mothers and their children. This was an appropriate decision in the face of *T.W.*, especially given the absence of a truly compelling government interest in the invasion of the mother's privacy. The structure of Florida's procedure for the termination

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[109] *Id.* at 547; *see also generally* Shannon Brewer, *Ending the Expansion of the Florida Privacy Amendment:* Krischer v. McIver, *697 So. 2d 97 (Fla. 1997)*, 49 FLA. L. REV. 818, 825 (1997) ("The instant court suggested the absence of a reasonable expectation of privacy in this case of personal decisionmaking—a situation where a privacy right has almost always attached before.").

[110] *T.L.O.*, 469 U.S. at 340.

[111] *See* Jones v. State, 619 So. 2d 418 (Fla. Dist. Ct. App. 1993).

[112] *See id.* at 421 ("If . . . a sixteen-year-old girl has a right to engage in consensual sex, what compelling state interest can deny this 'right' to a fifteen, fourteen or thirteen-year-old girl?").

[113] *Id.* at 422.

[114] *See* City of North Miami v. Kurtz, 653 So. 2d 1025, 1026 (Fla. 1995).

[115] *See id.* at 1028.

[116] *See id.* at 1028-29 ("[E]ach smoking employee costs the city as much as $4,611 per year in 1981 dollars over what it incurs for non-smoking employees . . . and . . . the City is a self-insurer who pays 100% of its employees' medical expenses.").

[117] *See id.* at 1028 ("[W]e emphasize that our holding is limited to the narrow issue presented . . . [W]e are not addressing the issue of whether an applicant, once hired, could be compelled by a government agency to stop smoking . . . [N]either are we holding that a government entity can ask any type of information it chooses of prospective job applicants.").

of parental rights, described below, was prone to such an infringement because of the sensitive privileges that it sought both to protect and eliminate. The state was bound to intervene, and though its initial method in the form of the notice provision was flawed, a better alternative was proposed and ultimately adopted by the legislature.[118]

IV. FAMILY LAW IN FLORIDA

Crucial to a discussion of the Adoption Act is the general treatment of adoption and family disputes in the Florida courts. Florida's publication requirement was the first of its kind in any state.[119] Although it is not likely to be duplicated by other states due to the overwhelmingly negative response from both its affected citizens and the national press—not to mention its subsequent constitutional invalidation—a look at how it generally treated families in adoption disputes is certainly relevant.

A. *Parents' Rights in Florida*

One of the key factors employed by the courts in determining parental rights is the involvement of and support given by the putative father to the pregnant mother prior to the birth. It can determine the amount, if any, of financial support the father may be required to provide the mother and child and whether he shall be allowed to participate in the decision of whether a child might be adopted. The 1989 case *Adoption of Doe*[120] started drawing lines in determining when the father's behavior is so callous as to constitute abandonment, which consequently, allows the mother to place the child up for adoption.[121] In this case, a father-to-be, unsure of his commitment to his child's mother, refused to marry her and provided no meaningful support during the pregnancy.[122] Only after she had signed a consent to adoption, terminating her parental rights to the child, did he agree to marry her, primarily out of objection to the adoption.[123] When the natural parents reneged on the consent, the adopting couple sued. The court found that the father had done little to assist the mother during her pregnancy, and that his lack of responsibility constituted abandonment of the child, and that the mother's initial consent was valid and could not be

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118 *See infra* Part VIII.

119 *See Donahue, supra* note 16 ("The other 49 states . . . do not have any requirement such as this publication.").

120 543 So. 2d 741 (Fla.), *cert. denied*, 493 U.S. 964 (1989).

121 *See id.* at 749 ("The failure to assume parental responsibility is abandonment and, under *Lehr* [*v. Robertson*], is sufficient ground to deny parental rights.").

122 *See id.* at 742-43 (Though the two saw each other regularly, the natural father provided the pregnant mother with no financial support, even after she lost her job and was forced to survive on "public welfare and private charity." He still refused to marry her, but would later object to the adoption.).

123 *See id.* at 743.

rescinded. The court's language, in validating the mother's initial decision to give up the child, is certainly relevant to circumstances that could have arisen with regard to the Adoption Act:

> Respondent natural father's argument that he has no parental responsibility prior to birth and that his failure to provide prebirth support is irrelevant to the issue of abandonment is not a norm that society is prepared to recognize. Such an argument is legally, morally, and socially indefensible.[124]

> If the biological father retains an absolute veto over the decision of the abandoned pregnant mother to place the child for adoption, the mother's ability to provide for the best interests of the child and herself are nullified. Clearly this is not legislative intent.[125]

> The rights of the parents are a counterpart of the responsibilities they have assumed.[126]

The Supreme Court of Florida is clearly not convinced that *every* natural father deserves the opportunity to raise his own child, at least on a second chance to do so. We will see, however, that although such strong language and trends buttress the arguments of those who opposed the notice requirements, the courts have other considerations as well.

As mentioned earlier, the courts also addressed evidentiary issues as to determinations of a father's pre-birth behavior in the *Baby Emily* case.[127] An abusive biological father sought to nullify the adoption of Baby Emily, claiming that since he had not voluntarily terminated his parental rights to the child, she was therefore not available for adoption. The issue taken by the court was whether sufficient evidence was presented to warrant a finding that the father had abandoned the child by virtue of his treatment of her mother prior to the former's birth.[128] Final determination of the issue was not a simple undertaking:

> After an evidentiary hearing, the trial court determined that there had been no abandonment. Upon rehearing the trial court reversed its decision, found abandonment, and approved the adoption . . . This court, in a three-judge panel two-to-one opinion issued earlier, reversed the trial court's judgment, finding the record evidence

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124 *Id.* at 746.

125 *Adoption of Doe*, 543 So. 2d at 746, *cert. denied*, 493 U.S. 964 (1989).

126 *Id.* at 748 (quoting *Lehr*, 463 U.S. at 257) (The *Lehr* language is especially relevant not only as standing federal law, but also in its factual similarity to *Adoption of Doe.*).

127 *In re* The Adoption of Baby E.A.W., 647 So. 2d 918 (Fla. Dist. Ct. App. 1994).

128 *See id.* at 922 (Abandonment was established by a combination of factors, including the mutual hatred between the natural parents, his demand for her A.F.D.C. check and food stamps "to supplement the money that he was bringing in as a painter," his attendance at only one visit with a health care provider and his resumption of a sexual relationship with a former girlfriend during the pregnancy after the pregnant girlfriend had been injured in an accident).

> insufficient to support a finding of abandonment. Upon motion filed by a party, we agreed to reconsider our position en banc as raising issues of exceptional importance. We now affirm the final judgment, approve the adoption, and certify a question to our supreme court [which affirmed].[129]

The source of the indecisiveness was the question of who was entitled to determine, based on the evidence, what constituted abandonment under the circumstances presented. This ordinarily is the responsibility of the fact-finder alone, who determines the events leading up to the litigation and applies existing statutory and case law to those events. Here, the appellate judges, addressing only applied legal standards did not initially approve those standards that the trial court eventually applied to the facts as relevant in determining abandonment. While the final outcome was based in large part on the holding of *Adoption of Doe*,[130] existing standards were unclear enough to warrant the disagreement illustrated by the quoted paragraph above. The validation of the *Doe* standards in *Baby Emily* is itself validated by its role in the origins of the Adoption Act notice provision.[131] That is, Senator Campbell's reliance on *Baby Emily* in justifying the provision, stating that he wished to better protect children like her from natural fathers like hers is ironic when the publication requirement stripped away that protection from her and her mother in favor of the father's rights.

Such putative fathers, for the most part, have maintained little or no contact with the mother during the course of the pregnancy, ignorant of it entirely in many cases, and have had no occasion to support the mother financially or emotionally throughout it. It is also noteworthy that the court recognized it as behavior towards *the child* vicariously through treatment of the mother, an important distinction in contests that arose from new benefits of the father under the publication requirement. For example, courts might have begun to take judicial notice of treatment of the mother outside the bounds of pregnancy in weighing whether to enforce the requirement, given the probable nature of many such "relationships."[132] Therefore, although

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129 *Id.* at 919, 920.

130 *Id.* at 927 (Pariente, J., concurring) (discussing *Adoption of Doe*, 543 So. 2d at 741) ("We are faced with supreme court precedent in *Doe*, as well as statutory directive, that pre-birth 'conduct' of the biological father toward the biological mother is a factor to consider on abandonment. In this case, as in *Doe*, pre-birth conduct, by necessity, is the only factor we may consider because of the timing of the adoption.").

131 *See* Interview w/ Charlotte Danciu, *supra* note 52; *see also Donahue*, *supra* note 17 ("Well, [cases of natural fathers disrupting incomplete adoptions] have happened. The Baby Emily case . . . almost happened.").

132 The idea that a woman is forced to contact a man who may have physically abused or assaulted her is facially unreasonable, but circumstances involving parties married to others and various other "one-night stand" scenarios may bear convincing evidentiary weight to exempt certain otherwise-affected women from the publication requirement. *See Donahue*, *supra* note 17 ("There's all kinds of scenarios where this goes bad. He's married, she's married, he's been falsely accused."). At this point, a Florida court had already invalidated enforcement of the

these cases present a crucial starting point in Florida courts' treatment of adoption law, they might not have represented the final word on the publication requirement.

B. *The "Best Interests" Rule*

Another point of contention in Florida family law is the application of the so-called "best interest rule," which some courts have employed to take on the responsibility themselves in choosing where or with whom a child should be raised. There are, of course, the inevitable problems when a court briefly takes over the role of a parent in making such a determination. The representation of home life for one parent, foster family or grandparent seeking custody cannot always be depicted consistently during court proceedings and temporary financial difficulties for a qualified caretaker can certainly work against him or her. Courts have also faced claims that such a rule interferes with the privacy inherent in family affairs.

The Florida Supreme Court addressed the constitutionality of a statute that granted visitation rights to a child's grandparents upon a determination that it is in the best interests of the child in the case of *Beagle v. Beagle*.[133] The case literally pit the child's grandparents against their son and his wife, and the son contested their claim under the statute as violative of the Florida privacy provision.[134] He claimed that the state could not interfere with his determination of his child's best interests and the Florida Supreme Court agreed that under the presented circumstances, this was true. In limiting its holding to apply only to intact families with two "natural parents," the court found the statute unconstitutional when applied to an "intact nuclear family," requiring a showing of harm as a compelling state interest in order to apply the statute under the privacy provision.[135] Such a limited holding allowed for a very different result in *Von Eiff v. Azicri*[136] the following year. There, the natural grandparents of a child claimed visitation rights under the same statute and prevailed due to the unconventional nature of the family unit. The child's mother had died and her husband remarried a woman who adopted the child. When the couple divorced, the new wife took custody of the child, having grown very close to her in their short time

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notice provision in cases of forcible rape. *See In re* The Adoption of a Minor Child, L.T. Case Nos. CD02-70 FY; CD02-1880 FZ; and CD02-3071 FY (Fla. 15th Cir. Ct. July 24, 2002) (order granting in part and denying in part motion for declaratory judgment) at 17, *rev'd sub nom.*, G.P., C.M., C.H., and L.H. v. Fla., 842 So. 2d 1059 (Fla. Dist. Ct. App. 2003) [hereinafter 15th Circuit Court Order].

133 678 So. 2d 1271 (Fla. 1996).

134 *See id.* at 1274 ("[T]here was no reason to assume that intact families were more deserving of constitutional privacy protections than were those families that were not intact.").

135 *See id.* ("We find . . . that without a substantial danger of harm to the child, a court may not constitutionally impose its own subjective notions of the 'best interests of the child' when an intact, nuclear family with fit, married parents is involved.").

136 699 So. 2d 772 (Fla. Dist. Ct. App. 1997).

together. The grandparents claimed that their visitation with the child would be in her best interests, but both parents disagreed. The court found that where families are "disrupted by death or divorce," unlike the circumstances in *Beagle*, the court may step in and apply the best interest rule.[137] Here they determined the grandparents to be a positive presence in the child's life and upheld the controlling statute.

In a case not involving a conventional, "nuclear" family, as in the *Beagle* case, the court applied a less stringent standard as to the structure of the family. In *S.G. v. C.S.G.*,[138] the First District Court of Appeals firmly stated that the right of a natural parent to raise his/her child countermands a court's determination as to the best interests of the child.[139] The child's paternal grandmother, who kept custody of the child for a time while the mother found the means to care for the child, contended that the court should apply the best interests standard and thereby award her, not the mother, custody of the child. While the facts seemed to indicate a more responsible grandmother than mother, who was a minor when the child was born, the court "rejected the grandmother's argument that . . . grandparents with custody of a child are now on equal standing with natural parents in a custody dispute." The child would be returned to its natural mother absent a showing of abandonment, unfitness or harm to the child as a result of granting the parent custody.

The question now to be asked is: how would courts have utilized the best interests of the child rule and measure the pre-birth behavior of a putative father who benefits under the notice requirements of the Adoption Act? It seems that as long as the *Beagle* decision is not applied to a wider range of family units, the best interests standard would apply and the rights of a putative father opposing adoption proceedings granted accordingly. The *Von Eiff* holding would seem to support such a policy, but we must take notice of the particular facts and applications of the rule in that case. *Von Eiff* was not an action to terminate parental rights of any biological parent, to whom the courts seem to give great deference. It was simply an action to enforce visitation with the natural grandparents and should not be construed so as to do what conforms with opposition to the publication requirement: terminate the rights of an absent biological father involuntarily. Therefore,

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137 *Id.* at 775. ("The [*Beagle*] Court repeatedly emphasized that its decision requiring a showing of harm in the context of an intact family did not change any other application of the best interests test. Hence, it is manifest that the Court did not intend for the demonstrable harm requirement to extend to situations, such as the provision at issue here, which do not involve an intact family.").

138 726 So. 2d 806 (Fla. Dist. Ct. App. 1999).

139 *See id.* at 810 ("Besides the constitutional infirmity, there is an inherent problem with utilizing a best interest analysis as the basis for government interference in the private lives of a family . . . It permits the State to substitute its own views . . . for those of the parent. It involves the judiciary in second-guessing parental decisions.").

if courts would apply the best interests standard, they would likely have favored the erstwhile absent father over a healthy adoptive family because of Florida's great deference to the natural family unit and the rights associated with it.

As to the behavior of a father towards the mother and unborn child during her pregnancy, the outcome is less clear, but could have turned out the same. It is true that a father who lends no financial or emotional support to the pregnant mother has been held to have abandoned the child and that such behavior can be used against him in proceedings to terminate his rights as a parent. However, the courts would, no doubt, have taken notice in their deferential posture towards the natural parent that such a father who has had no notice whatsoever of a pregnancy cannot be judged on such behavior exclusively, since it cannot be determined whether his attitude towards the child—and, perhaps, the mother—would have changed had he known that his sexual partner had conceived. Though we are reluctant to lend him sympathy for his cause, the courts might have given him the benefit of the doubt, and stayed the termination of parental rights proceedings pending a determination of his fitness as a parent. As this was the purported purpose of the Adoption Act provisions in the first place—that is, to give an absent father the opportunity to provide directly for his natural child—the courts will likely favor the father under otherwise ordinary circumstances.

V. THE TEST CASE: *G.P., C.M., C.H. & L.H. V. FLORIDA*

Florida litigation on the issues presented by the notice provision arose from a single group of petitioners, each of them a mother affected directly by its requirement. Specifically, they all wished for their respective children to be adopted and were prepared to comply with the statutory requirements for terminating their respective parental rights as to their children.[140] They were, however, reluctant to follow through with termination proceedings because they did not wish to publish the circumstances of each child's conception in the hopes of locating the putative father.[141] On May 28, 2002, the six mothers filed motions with the 15th Circuit Court of Palm Beach County in southern Florida to have the notice requirements of sections 63.087 and 63.088 of the Act declared unconstitutional under the Fourteenth Amendment of the U.S. Constitution and the privacy clause of the Florida Constitution.

In addressing whether the notice provisions unconstitutionally violated the privacy of the mothers, the court applied several of the same standards

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140 *See* § 63.087 (4)-(6).

141 *See Donahue, supra* note 16 ("So this adoption hangs in limbo, as do many others where either the mother will not consent or the parents of the minor child who was trying to place her child for adoption will not consent to the publication of her name and the boys or men, perhaps, even adults, that slept with the minor child.").

discussed in the cases above.[142] It found that the women did have a legitimate expectation of privacy in carrying the adoption process through,[143] based in part on the closing of TPR proceedings concretely established in *The Natural Parents of J.B.*[144] It also required that Florida demonstrate a compelling state interest in imposing the notice requirements on the mothers.[145] Unfortunately for the mothers, the court found one.

A. *The Ruling*

In upholding the constitutionality of the statutory provisions, Judge Peter D. Blanc recognized sufficient state interests in 1) "strengthening and maintaining the bond between parent and child; and 2) in reducing the "financial burden on the state" that might go to support the birth mother should the birth father not come forward to accept financial responsibility for the child.[146] One could disagree with the first reasoning from a purely philosophical viewpoint, arguing that it is neither the state's responsibility nor within its capabilities to build a relationship between a child and the biological father, for whom the child is neither the product of love nor responsibility, but merely the by-product of a sexual act otherwise meaningless to him. After all, had the relationship between such a father and the mother of the child had any further meaning, surely he could be expected to, at most, accept parental and financial responsibility for the child and, at the least, to know of the pregnancy through some communication with the mother.[147] To be fair, the court reinforced this reasoning with a boilerplate statement of the putative father's Fourteenth Amendment equal protection interest in having access to his biological child.[148] Seemingly, such an interest would defeat even a woman's enumerated right to privacy under the state constitution through simple principles of federalism. However, perhaps out of a lack of confidence in the equal protection characterization, the court inoculates its ruling against any proposed balancing test between the two interests by also assigning the father such a privacy right, "to determine the care and upbringing of his

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142 *See, e.g.*, Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985) ("The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means . . . However, before the right of privacy is attached . . . a reasonable expectation of privacy must exist.").

143 *See generally* 15th Circuit Court Order, *supra* note 132.

144 780 So. 2d 6 (Fla. 2001).

145 *See* 15th Circuit Court Order, *supra* note 132, at 11, 18.

146 *Id.* at 11.

147 *See Lehr*, 463 U.S. at 248.

148 *See* 15th Circuit Court Order, *supra* note 132, at 18.

children free from government interference."[149] The inclusion prompts a question as to whether such a rationalization can stand for much longer, or withstand closer scrutiny by Florida judges and attorneys.

The second reason the court gives in its order is familiar as part of the justification for upholding the privacy-violative statute in *City of North Miami v. Kurtz*.[150] There a government-*qua*-employer smoking ban was found justified in its impingement due mainly to a lack of expectation of privacy in habitually smoking.[151] The purported reason behind the statute itself, however, was in part, the reduction of public spending on insurance and other health costs associated with employing smokers.[152] On that basis, the court's reasoning here might have held some legitimacy had it not ignored one simple fact: there are no costs to be borne by the birth mother after the adoption that the birth father would reasonably be expected to bear. The six petitioners wished to give their children to families better suited to raise them, relieving the mothers not only of parental responsibility for the children, but financial responsibility as well. The court's second justification, therefore, bears no real relationship to the purpose for which the Adoption Act was purportedly passed in the first place: preservation of the natural father's rights. This disparity would not, however, go unnoticed by the appellate court.

B. *Construction of the Notice Provisions:* Lehr v. Stanley

An issue apparently central to the decision in *Minor Child* relates to its analogy to other seminal family law matters. According to Ms. Charlotte Danciu, counsel for four of the six petitioners, a specific point of contention stemmed from petitioners' likening of circumstances triggering the notice requirement to those adjudicated in the U.S. Supreme Court case of *Lehr v. Robertson*.[153] She believes that the Circuit Court instead mistakenly applied the standard espoused in *Stanley v. Illinois*, whose facts cannot reasonably be held analogous to those claimed by the Act's provisions.

The *Lehr* Court required that a biological father opposing an adoption order on equal protection grounds must show that he established a parental relationship with the child prior to his opposition.[154] The petitioning father had not taken advantage of the relevant state's "putative father registry,"

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149 *Id.*

150 653 So. 2d 1025 (Fla. 1995).

151 *See id.* at 1028.

152 *See id.* at 1028-29.

153 463 U.S. 248 (1983); *see also* Interview w/ Charlotte Danciu, *supra* note 52.

154 *See Lehr*, 463 U.S. at 267 ("Whereas [the natural mother] had a continuous custodial responsibility for Jessica, appellant never established any custodial, personal, or financial relationship with her. If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights.").

which would have afforded him notice of a pending adoption prior to commencement of the proceedings. Lehr did not actually learn of the mother's husband's plan to adopt the child as his own until well into the proceedings and by the time he petitioned for a stay of the proceedings, the Family Court (Ulster County, NY) had already entered the adoption order.[155] The U.S. Supreme Court deemed Lehr's "biological link" less significant to the Fourteenth Amendment's protection than a father's "com[ing] forward to participate in the rearing of his child . . . ,"[156] It denied his petition and, Ms. Danciu contends, Florida would be best served applying the same standard to those putative fathers who might benefit from the Act's notice requirements, considering Florida's similar use of a putative father registry.[157]

If Danciu's assertion that the Adoption Act encouraged, and the Circuit Court mistakenly applied, the standard of *Stanley v. Illinois* is later deemed correct, she and opponents of the notice requirement could see positive results. *Stanley* concerned the rights of a biological father heavily infringed upon by an Illinois statute, which removed children from the custody of an unwed father on the death of the child's (children's, in this case) mother. The statute did not require that the state prove Stanley's unfitness as a parent before removing the children and placing them as wards of the state.[158] Stanley had taken some significant part in the raising of the children and raised the equal protection claim that the statute inherently treated married fathers and unwed mothers differently from unwed fathers, requiring a showing of unfitness by the state before removing children of the former two.[159] The Supreme Court agreed with Stanley, and held that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."[160]

There are clear and legitimate differences between the facts of *Stanley* and the typical circumstances to be faced by a mother affected by Florida's notice requirements. Peter Stanley seemed, by all accounts, to be something of a responsible and attentive parent under the standards generally applied to questioning a parental affiliation. Specifically, he established one or more of a "custodial, personal or financial relationship"[161] with his children. None of this can be said of the *Lehr* case, nor of any putative father under the

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155 *See id.* at 264 ("[T]he right to receive notice was completely within appellant's control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica.").

156 *Id.* at 267 (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979).

157 Interview w/Charlotte Danciu, *supra* note 52 (This registry was in place prior to Senator Campbell's initiation of the notice provision legislation).

158 *See Stanley*, 405 U.S. at 646.

159 *See id.*

160 *Id.* at 658.

161 *Lehr*, 463 U.S. at 267.

notice requirement who has failed to even maintain a communicative relationship with a sexual partner who would bear his child to the simple extent that he at least know of the child's conception. While the Adoption Act's proponents contend that the purpose behind the notice requirements was to prevent the sort of circumstances and patent unfairness to a putative father as was claimed (and vindicated) in *Stanley*,[162] the Act simply does not address the same set of circumstances. While the Illinois statute in *Stanley* plainly oppressed any responsible and loving father who happened to be unwed when the mother of his children died, the notice provisions reward irresponsibility and indifference and require no examination as to the putative father's fitness or qualification to object to "his" child's adoption. The comparison to the *Stanley* case is certainly suspect, and less apt than that to *Lehr v. Robertson.*

C. *The Omission*

A crucial aspect of the *Winfield* standard for the circumvention of the Florida privacy right is that an executed compelling interest must be implemented by the least intrusive means available.[163] As a material aspect of the above standard, the language of *Winfield* indicates that it is, as such, a lynchpin of that circumvention. That is, if it is determined that the least intrusive available means have not been applied, then the party claiming a right of privacy must prevail. In *Minor Child*, as the case was anonymously named, there had been no determination made as to whether the publication requirement is the least intrusive means through which to accomplish the state's goals,[164] and on that basis, the court denied the petitioners relief. While, on the other hand, this absence of information itself hardly qualifies as an invalidation of the publication requirement, further facts in the form of statistics reflecting the drop in adoptions for the year 2002, the first full year the Adoption Act was effective, certainly contributed to convincing the Fourth District Court of Appeal that the publication requirement was not the least intrusive means.[165]

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[162] *See Donahue, supra* note 17 ("It was, fortunately, staff that said this [the notice provision] is how we have to go out of our way . . . to make sure . . . that there's compliance with the *Stanley* decision.").

[163] *See* Mills, *supra* note 86, at 824 ("If society is going to intrude, the goal is to only do so as much as is necessary to meet the public purpose.").

[164] While this discussion is germane to the case as it stands, it is once again noted that the "compelling interest" enumerated by the court as justification for sustaining the statute falls far short of convincing.

[165] In taking note of these extrinsic facts, the court noted:

> [T]here is a compelling state interest in providing an unidentified and/or unlocated father with notice of hearing on the mother's or legal custodian's petition to terminate parental rights . . . The question remains, however, whether the State's interest is accomplished by the least intrusive means. In this area the Court finds the record before it to be deficient. The Court has been presented

The puzzling question under these limited evidentiary conditions is why the court was fixated on the effectiveness of the notice provision in accomplishing its "goals" as dispositive of the least intrusive means question? No authority has been found to suggest that "effective" is synonymous, or definitively co-existent with "least intrusive." While certainly the state is entitled to undertake its own examination of whether its means of satisfying its compelling interest are effective, that examination bears no relationship to whether other means of satisfying the interest are less intrusive than that of which the petitioners complain. The Fourth District Court of Appeal, whose opinion is described below, certainly agreed with this assessment.

D. *A Minor Reprieve*

The trial court's ruling on this petition was not a complete loss to opponents of the Act's notice requirement. The first two descriptions above describe two of the petitioners as minors. The first became pregnant after being sexually assaulted and the second had, apparently, unprotected intercourse with several partners. Florida's statutory rape provisions do not require a vicious will of their violators,[166] and so both of these women are considered victims of rape. The court distinguishes, however, between the victim of sexual battery and the promiscuous teen, saying that the forcible rape "does not create any paternal rights recognized by law. Consequently, there is no compelling state interest justifying the publication requirements . . . when the . . . birth is the result of a 'forced' sexual battery."[167] The court chose not to draw such a distinction as to the statutory rape "victim," cutting off the compelling state interest "where the crime is based only on the age of the victim"[168] and not on an assault.

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with no empirical data or statistics to establish the success (or failure) rate resulting from the existing notice requirements. It has been suggested that publication methods using less specific identification information such as initials of birth mothers instead of names would be both equally effective in providing notice as well as less intrusive. Although it would seem that such efforts would be less intrusive, again there is no data to establish that these alternative methods would be more or less effective than the existing notice requirements.

If this Court were permitted to speculate, it might be suggested that even the existing notice requirements are not particularly effective. But with no evidence to rely upon, this Court cannot speculate. Lacking solid evidence, this Court cannot find that the existing publication requirements contained within sections 63.087 and 63.088 do not accomplish their goal through the use of the least intrusive means. This Court has received no evidence that these statutes accomplish their intended goal at all. However, with no evidence that these statutes are ineffective or that the goals of the statutes could be accomplished with equal success through less intrusive means, the challenge to the constitutionality of these statutes . . . must fail.

15th Circuit Court Order, at 18-19.

166 *See id.* at 17.

167 *Id.*

168 *Id.*

Of course, this distinction was of little solace to five of the six petitioners, as well as other Florida mothers who wished to give up their children for adoption. The trial court's ruling would be challenged in the Fourth District Court of Appeals, sitting in Palm Beach County, in the early months of two thousand and three. After three months of both state and petitioners waiting for the second shoe to drop, an opinion was handed down that drastically upset Judge Blanc's ruling.

VI. THE APPELLATE SHOE DROPS

Just two years and three weeks after passage of the Florida Adoption Law containing the notice requirement, on April 23, 2003, the Fourth District Court of Appeals reversed the Declaratory Judgment of the Fifteenth Circuit Court, holding that the notice provisions themselves violated the appellant-petitioners' rights to bodily privacy under both the federal and Florida constitutions.[169] Recognizing, apparently, the heinous impingement on the lives of its citizens that the statute brought, "[t]he Attorney General of Florida . . . intentionally failed to file a contesting brief and neither the attorney general nor the Palm Beach County State Attorney appeared at the hearing . . . ."[170]

The court, in describing the trial court's ruling, recognized that the trial court placed the burden of proving that the state lacked a compelling interest in invading their privacy on the appellants.[171] Certainly, this characterization is inconsistent with the lines of cases governing substantive due process and interpretation of the Florida constitutional privacy provision, as both are clear that the burden of legitimizing a purported state interest to sustain an impingement on the right to privacy from the government is placed on the state.[172] The court made appropriate use of the constitutional interpretation term "strict scrutiny," placing a heavy burden on the state to prove the validity of its conduct, and comments specifically on the error of the trial court.[173] It properly replaced the burden of proving the state interest on the government, which had announced in advance that it would not contest the appeal.[174] The conclusion of the opinion remarked explicitly that the procedural reason for reversal in the face of the appellants' recognized privacy interests was the failure of the state to meet its burden of proof "in demonstrating the validity of the challenged provisions," and did not, of course, proceed to the next logical question of whether such

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169 *See* G.P., C.M., C.H., and L.H. v. State, 842 So. 2d 1059 (Fla. Dist. Ct. App. 2003).

170 *Id.* at 1061.

171 *See id.* at 1063.

172 *See, e.g.*, Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985); City of North Miami v. Kurtz, 653 So. 2d 1025 (Fla. 1995).

173 *See G.P.*, 842 So. 2d at 1063.

174 *See* Burstein, *supra* note 29, at B5.

an interest could be met by less intrusive means than the statute provides.[175] Such an inquiry is simply unnecessary because the existence of a compelling state interest is paramount to its means, and no compelling state interest was recognized by the court.

The court made incidental mention of alternative means of attaining the stated goals of the notice requirements.[176] While it did not purport to act as a legislature and to comment on the legitimacy of the alternative proposed by the appellants, certainly its presence is, at a glance, less intrusive than the notice requirements. Even, therefore, had the court recognized a legitimate interest in the order of the Circuit Court, the least intrusive means requirement of the *Winfield* case would have invalidated the statute at any rate.[177]

VII. THE LEGISLATURE ACTS: THE SHORT HISTORY OF § 63.088

As early as 2002, according to bill sponsor Senator Wayne Campbell, the Florida legislature had considered repealing the notice provisions of the Adoption Act during its 2003 session.[178] Not only did public scrutiny bring pressure to Senator Campbell, but allegations were made public that the Senator called Judge Peter Blanc and "cast doubt on the truthfulness of the situation surrounding one of [Attorney Charlotte] Danciu's clients, a 12-year-old whom Blanc ruled had conceived after being raped."[179] Danciu accused Campbell of trying to influence the proceedings.[180] Campbell has admitted to both his actions and the faulty nature of the notice requirement. "Unfortunately, like many laws, there were unintended consequences."[181]

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175 *See G.P.*, 842 So. 2d at 1063.

176 *See id.*

177 *See Winfield*, 477 So. 2d at 548 ("Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.").

178 *See* Burstein, *supra* note 29, at B5.

179 Shana Gruskin, *Adoption Attorney Takes Jab at Law: Blames "Scarlet Letter" Regulations For Increase in Abortions*, THE ORLANDO SENTINEL, Nov. 15, 2002, at B5.

180 *Id.*

181 Burstein, *supra* note 29. Of the unintended consequences arising out of passage of the Adoption Act was a rise in abortions over the course of 2002. Florida is an ideologically polarized state unlike most. Its northern areas, much like neighboring southern states, take conservative stances on social issues like abortion, while southern counties, though they harbor many rightist tendencies from religious groups of immigrants, tend to be more liberal. The effects of the Adoption Act on abortion practice has angered all regions. The liberal base seems to consider the notice provisions, along the same line as restrictions on abortions, to be an impingement on a woman's personal autonomy and reproductive freedom. On the other hand, the conservative base, strongly represented in the Florida legislature, has taken notice of the fact that a woman constrained by the state from readily placing her child for adoption is more likely to abort her child rather than publish her sexual history in several newspapers. The oppressive nature of the notice requirements makes the prevalence of abortions in Florida more likely. This alone could serve as motivation for the legislature's conservative base to amend the notice requirements. The second issue is defamation. It is defamatory and libelous to publish truthful, yet malicious information about another without that person's consent. This is one of the

In May 2003, the legislature took action. Recognizing perhaps the legal, political and ethical indefensibility of the notice provisions, the state had first consciously declined to challenge the appeal in the Fourth District Court, and then passed a law doing away with the offending provisions, and implementing a solution advocated by the Florida community of adoption professionals: a voluntary, statewide putative father registry.[182] The state recognized, also, that a father's rights to parenthood, just like a true relationship with his child, cannot be an accident of birth or conception, but is only legitimate when he "demonstrates a timely and full commitment to the responsibilities of parenthood, both during the pregnancy and after the child's birth."[183] Governor Jeb Bush signed the bill into law on May 30, 2003, sealing a resounding victory for single mothers and adoption advocates.[184] While repeal of the notice provision is simple enough to understand, it is helpful to also discuss the specific remedy of the putative father registry and how it purports to protect the rights of a father as well as the notice provisions did.

The Putative Father Registry, created by amendment to §63.054 of Florida Statutes, is a tool for protecting a father's right to raise and have parental contact with his child.[185] Specifically, it exists so that a man who believes that he may have fathered a child in the past may register his name and identity with the state, in recognition of his desire to support a child for whom he might make a paternity claim.[186] It also requires that he identify any Florida woman with whom he might have conceived a child, so that

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exceptions to freedom of speech. Under similar circumstances, were the state to simply publish that a woman named so-and-so with such-and-such description had intercourse with a man of such-and-such description in Gainesville, Florida, then presumably, the woman could sue the state for invading her privacy and defaming her in publication. Unfortunately, those circumstances don't quite exist under the Act. The notice requirements force *the mother* to defame herself and reveal these private events. Presumably, no mother will be permitted to successfully sue the state under its libel laws, but perhaps one will try to do so. Finally, the U.S. Constitution grants immunity from incriminating oneself and the U.S. Supreme Court has placed certain boundaries and protective measures to guarantee such immunity. There are, however, states that still maintain laws banning fornication between unmarried partners. Until recently, in fact, Florida was one of them. Presumably, these laws were difficult to enforce, owning to the sheer impossibility of catching two people in the sexual act in the privacy of their homes. However, when a woman publishes her sexual history in a Georgia newspaper in search of the potential father to her child, she has admitted that she engaged in intercourse with him, and that she doesn't know him well enough to contact him privately. Could Georgia use their own newspaper to enforce an anti-fornication law based on Florida's enforcement of the notice requirements? It is a complicated question. Additionally, the Fifth Amendment protection against self-incrimination has been interpreted only to apply to testimonial statements to police. Whether legal notice publication under the Act would have been held to that standard is a question that we will not address here.

182 H.B. 835, 2003 Leg., 105th Reg. Sess. (Fla. 2003).

183 § 63.062(2)(A)(1) (2003).

184 *See* Editorial, *Restoring Sense And Sympathy To Florida's Adoption Laws*, TAMPA TRIBUNE, June 4, 2003, at 18 [hereinafter *Restoring Sense & Sympathy*].

185 § 63.054(1)-(14).

186 *See id.* at § 63.054(1); *see also Restoring Sense & Sympathy, supra* note 184, at 18.

notice may immediately be given to the mother that he wishes to fulfill his parental responsibilities.[187] This measure puts the burden on the putative father to take the initiative in registering should his biological child be put up for adoption, and requires that he update his contact information with any relevant change. The only action required of the mother is that, should she decide to place her child for adoption, she must submit a request to the state's Office of Vital Statistics—which maintains the registry—that it search for the name of the putative father, or his description. If the mother does not know his name, the request may be to search for her name, in case a father might have included it in his registration.[188] The amendment also provides that the Office of Vital Statistics is required to alert the public to the existence and purpose of the registry, lest women still fear the implications of adoption for their children that existed under the notice requirements.[189]

A development in the amended law just as significant, perhaps, as the creation of the putative father registry, is the change in overall attitude towards women caught in similar circumstances to those described by the notice requirements. A good example of this change is in subsection (1) of the amended § 63.088:

> An unmarried biological father, by virtue of the fact that he has engaged in a sexual relationship with a woman, is deemed to be on notice that a pregnancy and an adoption proceeding regarding that child may occur, and that he has a duty to protect his own rights and interest.[190]

The notice provisions took a very different stance, protecting the father's right to care about the consequences of his sexual activities or not. Clearly, the legislature's changes reflect not only the legal implications of the old view, but also the public backlash against it, and the prevailing understanding that in order to foster parental responsibilities among such putative fathers, they must be assigned some responsibility from the beginning.[191] Thus, the creation of the putative father registry, and the repeal of the constructive notice provision.

CONCLUSION: QUESTIONS & ANSWERS

The constitutional right to privacy was first notably recognized within the context of the Fourth Amendment. Justice Louis Brandeis stated that the framers of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as

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187 *See* § 63.054(4).

188 *See id.* at § 63.054(7).

189 *See id.* at § 63.054(12).

190 § 63.054(1).

191 *See, e.g.*, Burstein, *supra* note 29, at B5.

against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[192] He truly pressed against government interference in those activities that are inherently private. So why was that right not solidified at that time as more fundamental? It appeared in a dissent.

Federal constitutional law provides a newer right to privacy in certain circles, applied through the doctrine of substantive due process, first espoused in *Griswold.* As the line of such cases expanded to include abortion rights, the lines of familial privacy became sharper. Added to the rule of *Moore,* broadly defining the family unit, the *Griswold* doctrine might assist opponents of the notice provision but for the fact that the putative fathers whose rights the provision seeks to protect would be, under federal constitutional law, within the familial "zones of privacy" that now stand. Since the state could argue in defense of the notice provision that a compliant newspaper advertisement is addressed to the father whose rights are protected and not to the peripheral public that might also read it, the familial privacy of substantive due process cannot defeat it.

In Florida, however, there is a presumption that the right to privacy would supersede the picayune restrictions that prevent due process from invalidating the notice provision. After all, privacy is specifically guaranteed in the Florida constitution. However, Florida courts have made the amendment's application less certain. The rule espoused by *In re T.W.*, for example, favors opponents of the notice provisions in providing the child with a measure of privacy from government interference, and specifically, parental guidance.[193] The extension of such a rule in the *G.P v. Florida* case might also have been well placed, given that the petitioners sought, essentially, to dismiss the importance somewhat of the approval of one natural parent due to the hardship incurred in gaining such approval. Such an extension, however, would have addressed only the privacy rights of the child, and not of the mother herself, who presents a more compelling reason for keeping her private life private.[194]

The Florida Adoption Act's notice requirement was an invasion of protected privacy and parental autonomy. It was invalidated by both the courts and the Florida legislature because of this intrusiveness, an overwhelming public opposition and the fact that it resulted in not one putative father coming forward to claim a child or to voluntarily terminate

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[192] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[193] *See T.W.*, 551 So. 2d at 1186.

[194] *See Roe,* 410 U.S. at 113; *see also* Edith L. Pacillo, *Expanding the Feminist Imagination: An Analysis of Reproductive Rights,* 6 AM. U. J. GENDER SOC. POL'Y & L. 113, 135 ("Fathers' rights must not be broadened because to do so would justify the imposition of fathers' judgment on women's pregnancy-related decisions, thereby threatening women's reproductive autonomy.").

his parental rights.[195] Privacy cannot only be the right of the nuclear family, but must also be a strong shield against reckless legislation for the natural mother who must make the most difficult of decisions, of giving up her child.

[195] *See* Interview w/ Charlotte Danciu, *supra* note 52; *see also* Burstein, *supra* note 29, at B5.