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Martin R. Levy

University of the Pacific; McGeorge School of Law

Elaine C. Duncan

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Constitutional Implications of Adoption Revocation Statutes

MARTIN R. LEVY*

ELAINE C. DUNCAN**

Adoption in the United States is a procedure which breaks all ties of a child with its natural family, creates new ties with the adoptive family, results in a new birth certificate being issued naming the adoptive parents, and gives a new right of inheritance from the adoptive parents to the adopted child.¹ Despite the apparent finality of adoption, a large number of states have enacted adoption abrogation or revocation statutes. Under such statutes, an adoption which has been finalized by a court can be set aside under certain circumstances; some states provide for abrogation in certain situations upon the petition of the adoptive parents.²

This article presents a summary of the various abrogation statutes and focuses on those statutes which allow revocation on petition of the adoptive parents. It is the view of the authors that revocation statutes such as California Civil Code Section 227b,³ which allow revocation based upon the adoptive parents' petition, are unconstitutional when measured against equal

* B.S. 1957, Lafayette College; M. Ch. E. 1958, University of Virginia; L.L.B. 1967, University of Maryland; Associate Professor of Law, University of Louisville.

** B.A. 1973, University of Louisville; J.D. 1976, University of Louisville; member of the Kentucky Bar.

1. See REVISED UNIFORM ADOPTION ACT 14. Adoption records are generally confidential and include the names of the petitioner and the proposed name of the child. The child's former name and the names of the natural parents are not referred to in the judgment. In Kentucky, it is the duty of the clerk of the Circuit Court to report the name change to the Division of Vital Statistics. Thereafter, the original birth certificate is subject to inspection only upon order of the court. R. PETRILLI, KENTUCKY FAMILY LAW 542-43 (1969).

2. For a compilation of adoption revocation statutes by jurisdiction, see TABLE I, APPENDIX A.

3. CAL. CIV. CODE §227b.

protection standards. This article will examine the basis for adoption legislation, survey the adoption revocation statutes that are in effect throughout the United States, and subject these statutes to equal protection analysis under the fourteenth amendment to the United States Constitution to point out the discriminatory classification which exists in such laws. In this regard, the California⁴ and Kentucky⁵ revocation statutes will be examined in detail.

The authors believe that all laws affecting adoptions must be premised upon the state's interest in protecting the child's best interests. To develop this concept, it is necessary at the outset to take a cursory look at past and present authority for the basis of adoptions. No more than an overview of the subject matter is presented herein and an in depth analysis, if desired, may be obtained from sources footnoted in the following section.

THE BASIS FOR ADOPTION STATUTES

As adoption was unknown under the English common law,⁶ it gained a foothold in the United States from the Spanish and French law traditions which were modeled after Roman civil law. Louisiana and Texas readily accepted the law of adoption⁷ because of these traditions. In all other parts of the United States, adoption is purely a creature of statute.⁸ Such statutes first became popular in the 1840's due in part to the increasing concern for the welfare of neglected and dependent children.⁹ This same concern caused the purpose of the statutes to be primarily the welfare of the child¹⁰, and even today the "best interests" test is used by the courts in deciding whether to finalize an adoption.¹¹ In the words of one commentator:

[A]doption legislation has as its aim the protection of children by enunciating a policy of promoting their physical and emotional well-being. Also, it strives to be fair to his natural and adoptive

4. CAL. CIV. CODE §227b.

5. KY. REV. STAT. ANN. §199.540 (Baldwin).

6. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 746 (1956). Adoption in the Roman sense of the term was not legally possible in England until the Adoption of Children Act of 1926. *Id.*

7. *Id.* at 747.

8. *Id.* at 748.

9. Conflicting reports indicate that the earliest adoption statute may be either that of Mississippi in 1846 or Massachusetts in 1851. *Id.*

10. *Id.* at 749; e.g., *In re Buss*, 234 App. Div. 299, 299, 254 N.Y.S. 852, 853 (1932). "[A]doption legislation in the United States has been based primarily on the welfare of the child." Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 J. FAM. L. 7, 8 (1964).

11. See *In re St. John*, 51 Misc. 2d 96, 272 N.Y.S.2d 817 (1966); cf. *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1975). Ideally, the child's interests rather than the interests of the other parties should be the court's primary concern. In the California case, *Adoption of McDonald*, 43 Cal. 2d 447, 461, 274 P.2d 860, 868 (1954), the court points out that it is the child who is the real party in interest in an adoption proceeding, and the validity of any agreements made by others should be based on the court's judgment as to the best interests of the child. See also Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10 (1975).

parents by including provisions designed to protect their rights and interests.¹²

Under the doctrine of *parens patriae*, states have a duty to protect those children within their borders. As stated by Goldstein, Freud and Solnit in their book, *Beyond the Best Interests of the Child*:

Children are presumed by law to be incomplete beings during the whole period of their development. Their inability to provide for their own basic needs, or even to maintain life without extraneous help, justifies their being automatically assigned by birth certificate to their biological parents, or, where this natural relationship fails to function, by later court proceeding to parent substitutes.¹³

Accordingly, it is the duty of the courts to carefully weigh the child's interests in any decision regarding the child's future.

This approach has been adopted in respect to the court's discretion in finalizing adoptions. For example, in *Adoption of McDonald*,¹⁴ Chief Justice Traynor speaking for the California Supreme Court stated:

It is the welfare of the child that controls, and any agreement others may have made for its custody is made subject to the court's independent judgment as to what is for the best interests of the child.¹⁵

In a more recent pronouncement concerning the basis for adoption and revocation statutes in general, the California Supreme Court stated:

The main purpose of such statutes is the promotion of the welfare of children "by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child."¹⁶

Without doubt, then, the state's legitimate interest in adoption statutes must lie with the promotion of the child's best interests.

Court action is also necessary to revoke an adoption¹⁷ and it is generally agreed that there must be statutory authority for such an act,¹⁸ except in unusual circumstances. It may be argued that, "[u]nder the principle that

12. Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 J. FAM. L. 7, 9 (1964). "Since the law of adoption is statutory, the major influence on a judge's decision is the adoption legislation itself. It is his guide, and it reflects much of the prevalent adoption practice." *Id.*

13. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 9 (1973).

14. 43 Cal. 2d 447, 274 P.2d 860 (1954).

15. *Id.* at 461, 274 P.2d at 868.

16. Department of Social Welfare v. Superior Court, 1 Cal. 3d 1, 6, 459 P.2d 897, 899, 81 Cal. Rptr. 345, 347 (1969).

17. "Some form of judicial proceeding is required for the abrogation or annulment of the adoptive status. It cannot be accomplished by an act of the parties, even a notarized act." Note, *Adoption: Annulment of Status*, 29 NOTRE DAME LAW. 68, 77 (1954).

18. *Coonrad v. Sailors*, 186 Tenn. 294, 299, 209 S.W.2d 859, 861 (1948):

By the great weight of authority, the adoption of a child is governed by statute and to effect a legal adoption it must be complied with. If there is no provision made for the annulment of a valid decree of adoption, the right does not exist.

what the court has created through its order, it can also put asunder," a court may order an adoption set aside.¹⁹ However, the court's original order finalizing the adoption was based on statutory authority, and similar authority is usually required for the revocation of that order.²⁰

ADOPTION REVOCATION STATUTES

There are three basic types of revocation statutes currently in force in the United States: (1) revocation based on mistake of fact or fraud in the inducement; (2) revocation based on petition of the child; and (3) revocation based on procedural defects. A tabulation of adoption revocation statutes is given in Table I.²¹ In the view of the authors, type (1) statutes are contrary to the principle that finality of adoptions must be based on the best interests of the child. These statutes will be discussed at length. California Civil Code Section 227b falls into this group and provides that:

If any child heretofore or hereafter adopted under the foregoing provisions of this code shows evidence of a mental deficiency or mental illness as a result of conditions prior to the adoption to such an extent that the child cannot be relinquished to an adoption agency on the grounds that the child is considered unadoptable, and of which conditions the adopting parents or parent had no knowledge or notice prior to the entry of the decree of adoption, a petition setting forth such facts may be filed by the adopting parents or parent with the court which granted the petition for adoption. If such facts are proved to the satisfaction of the court, it may make an order setting aside the decree of adoption. . . .²²

Type (2) statutes are, in the view of the authors, not contrary to the law of adoption since the purpose of adoption is to provide for the best interests of the child. We assume here that a child's petition is in its best interests. Type (3) statutes are compatible with the law of adoption since in those situations

19. Note, *Adoption: Annulment of Status*, 29 NOTRE DAME LAW. 68, 69 (1954).

20. See *Coonradt v. Sailors*, 186 Tenn. 294, 299, 209 S.W.2d 859, 861 (1948):

Where one voluntarily assumes the relationship of parent to a child by formal adoption, it cannot be lightly cast aside Society has an interest in this relationship, and we think the Legislature alone should supply the procedure to be followed, as well as define the cause, if any, whereby the relationship may be dissolved. In the absence of such a statute the courts will not assume jurisdiction to annul a decree of adoption at the instance of the adopting parent

21. *Appendix A infra*. No cases have been found to explain the Hawaii and Maine statutes which provide for revocation for good cause. Since this terminology seems to be most closely associated with the "best interests" of the child, these statutes have been grouped under type (2) statutes.

22. This statute goes on to provide as follows:

The petition must be filed within whichever is the later of the following time limits:

(a) within five years after the entering of the decree of adoption, or (b) within one year after the effective date hereof, if such a condition were manifest in the child within five years after the entering of the decree of adoption.

In every action brought under this section it shall be the duty of the clerk of the superior court of the county wherein the action is brought to immediately notify the State Department of Health of such action. Within 60 days after such notice the State Department of Health shall file a full report with the court and shall appear before the court for the purpose of representing the adopted child.

where revocation is based on procedural defects, the adoption was never “final” and therefore the best interests test is not controlling.

A. Adoption Viewed as a Contract

Adoption proceedings may be viewed by some as an implementation of a type of contractual relationship between the natural parent or agency and the adoptive parents. Consideration may be seen as the transfer of custody (“title”) to the adoptive child on the one hand and the relinquishment of duty to the child on the other. Revocation based on the contract theory of rescission seems to be the basis for type (1) revocation statutes. However, it is the view of the authors that the status of adoption puts the child on equal footing with children naturally born into the family, except that the status is grounded on the best interests test implicit in the adoption statute. Therefore, a contract theory has no place in the law of adoption and revocations justified by analogy to contract law are inappropriate. This should not be taken as an indication that the status of all relationships must remain irrevocably final. Obviously, marriages may end in divorce or annulment and many annulments are based on contractual principles such as mutual mistake of fact or fraud in the inducement; however, termination of the marital status based on contract analogies works well because the parties to any mistake or fraud are the parties directly concerned and the equities run between them. Adoption, on the contrary, involves a child who is not the moving party to the creation of the adopted status. Although it is true that the child is conceptually the real party in interest to the creation of the new status,²³ and a fortiori is the real party in interest to later changes in that status, this should not make the child a party to mistake or fraud perpetrated by the natural parents, the state agency, or the adoptive parents. Nor should the effects of mistake or fraud in these circumstances be visited upon the child to terminate its status.²⁴ Error between other parties should not result in hardship to the child such as removal from a home, denial of inheritance from adoptive parents and denial of the right to support. If the adoptive parents are dissatisfied, they could put the child up for adoption or place the child with foster parents. But unless it would serve the best interests of the child, the adoption itself should not be revoked.

B. Contract Law: Mistake of Fact

Arkansas, California, Iowa and Missouri²⁵ have statutes setting forth certain illnesses arising from conditions which existed prior to the adop-

23. *Adoption of McDonald*, 43 Cal. 2d 447, 461, 274 P.2d 860, 868 (1954).

24. Mutual mistake of fact arises when both the agency and adoptive parents have honestly erred in the evaluation of the child. Fraud occurs when the agency intentionally misleads the parents as to the condition of the child. Mistake of fact is used herein as the prototype to show that revocation not in the child’s best interests is unconstitutional. The basis of the argument, however, includes those statutes where revocation is based on fraud.

25. See TABLE I, *Appendix A infra*.

tion, of which the adoptive parents were unaware when they agreed to take the child. Such illnesses are grounds for revocation based upon the premise that the child for whom the parents bargained is not the child received. Such a premise presents a clear analogy to the contract theory of mutual mistake of fact or alternatively fraud in the inducement.

The classic case of mutual mistake of fact in contract law is *Sherwood v. Walker*,²⁶ wherein a prospective purchaser made an executory contract to buy an allegedly barren cow named "Rose of Aberlone." At the time the transfer was to take place, the owner refused to make delivery because the cow was with calf and thus of greatly increased value. The prospective buyer sued for breach of contract and the owner defended on grounds of mutual mistake of fact. A barren cow and one capable of conceiving, it was argued, are two different beasts. The "Rose of Aberlone" for which the buyer had bargained and the "Rose" ready to be delivered were different in kind. In this respect, the court agreed with the owner.²⁷

Similarly, an adopted child who has one of the illnesses which is grounds for revocation, where the illness is unknown to the adoptive parents prior to the adoption, may well be considered a very different child from one which is "healthy" enough to meet the parents' expectations. The expenses of raising the child will be greater and the nature and quality of family life will differ in the two instances. The child "bargained for" provides an entirely different situation than the sick child the adoptive parents may find in their home and consequently, the gratification of raising the child is much different. The question then becomes whether such an illness should be grounds for revocation just as the unknown physical condition in the "Rose of Aberlone" was a valid ground for revocation of the contract for the sale of the cow. As we have previously stated, it is our view that contract law analogies are inapplicable to adoption revocation. As so aptly put by one court, "Courts should not allow abrogation of an adoption if it is premised on the desire of adoptive parents to rid themselves of a bad bargain"²⁸

California Civil Code Section 227b has received appellate court consideration in only one reported opinion. In *Department of Social Welfare v. Superior Court*,²⁹ the state supreme court showed no signs of concern over the "bad bargain" theory underlying the petition for revocation. Although the principal issue in the case was whether one adoptive parent could seek judicial termination of the child's status vis a vis the petitioner and thus

26. 66 Mich. 568, 33 N.W. 919 (1887).

27. *Id.* at 571, 33 N.W. at 923:

If there is a difference or misapprehension as to the substance of the thing bargained for; if the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold, then there is no contract. . . .

28. *Pierce v. Pierce*, 522 S.W.2d 435, 436 (Ky. Ct. App. 1975).

29. 1 Cal. 3d 1, 459 P.2d 897, 81 Cal. Rptr. 345 (1969).

leave the status vis a vis the other parent unchanged, the court did provide commentary on the interests being served by the statute. On the one hand, the court quoted with favor the opinion of the respondent court that if the adopted child were mentally deficient,

one could very well feel that they are not in a position to continue with taking the burden of support and care for such a child—and that they would proceed, under the law, to have an adoption set aside.³⁰

This statement supports the idea that a contract exists between the adoptive parents and the agency and that if the child is found to be “defective” by virtue of one of the illnesses enumerated in the statute, the parents have no obligation to fulfill their contract obligation to provide support.

On the other hand, the court in *Department of Social Welfare v. Superior Court* also stated that adoption statutes must be liberally construed with a view to effecting their objects and promoting justice. The main purpose of such statutes, according to the court, is the promotion of the welfare of children by obtaining through legal means, “the consummation of the closest conceivable counterpart of the relationship of parent and child.”³¹ In this respect, the court appears to be saying that the primary focus of adoption legislation should be the interests of the child and that the goal is properly the duplication, in as many ways as possible, of a natural parent-child relationship.

In justifying revocation of adoption, however, the court shifted its concern from the individual child to the class of potential adoptees. The court stated that:

[T]he remedial provisions of section 227b were enacted as a step in the regulatory process, to apply in the described situations in which the child proves unable to take part in a normal parent and child relationship, and that a liberal construction of the section to make its benefits available to the petitioning adoptive father in the present case will tend to encourage adoptions in the first instance and thus will promote the welfare of children available for adoption.³²

Apparently, the court reasoned that more children will be adopted if potential parents know that either of them can discontinue the relationship under the statutory circumstances. Whatever the validity of such reasoning, it interjects into the adoptive relationship a consideration unknown to the natural parent-child relationship and one which may ignore the best interests of the child affected thereby.

30. *Id.* at 6, 459 P.2d at 899, 81 Cal. Rptr. at 347.

31. *Id.*

32. *Id.* at 6, 459 P.2d at 900, 81 Cal. Rptr. at 348.

Notwithstanding the foregoing analysis and comment, there remains for consideration the true interests being served by revocations under type (1) statutes. To satisfy this inquiry, it is necessary to examine the historical and modern trends in adoption revocation policies.

C. Policy Arguments: Parents' Best Interests and Child's Best Interests

In considering the validity of adoption revocation statutes, the question arises as to what interests, if any, these statutes serve. From the standpoint of the adoptive parent, these statutes provide an escape valve; a child taken into the home who results in too great a burden may be returned. However, this escape valve may not serve the best interests of the child.

In early times, the revocation of an adoption gave the adopted child an advantage over the natural child. The Code of Hammurabi stated:

If a man adopt a child as his son, and after he has taken him, he transgresses against his foster-father; that adopted son shall return to the house of his own father.³³

As transgression against a parent, foster or otherwise, was a serious offense in that society, this rule actually gave the adopted child an escape from potentially severe punishment by merely returning him to his original family.

Later, revocation became a means of protecting the public, as is shown in the writings of one author in the 1870's when adoption was considered irrevocable:

Considering the fact that the subjects of adoption are so largely taken from the waifs of society, foundlings or children whose parents are depraved and worthless; considering also the growing belief that many traits of mind are hereditary and almost irradicable; it may be questioned whether the great laxity of the American rule [of irrevocability] is for the public benefit.³⁴

Presently, the policy behind many of the adoption revocation statutes seems unclear. Provision for revocation in type (1) situations may be viewed as a remnant of an earlier era, as a means of promoting adoptions in general, as a way of protecting the interests and expectations of the adoptive parents, or as a measure intended to benefit the adopted child. However, the adoptive parent has voluntarily entered into the parent-child relationship, and once formalized, that relationship should not be lightly cast aside. "The relationship involves duties of care, maintenance and education with rights of custody, control and service of the child. Society has an interest in this relationship"³⁵ Such a relationship should not be abrogated solely on

33. I A. KOCOUREK & J. WIGMORE, *EVOLUTION OF LAW, SOURCES OF ANCIENT AND PRIMITIVE LAW* 426 (1915).

34. W. WHITMORE, *THE LAW OF ADOPTION* 73-74 (1876), *quoted in* Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 467 (1967).

35. *Coonradt v. Sailors*, 186 Tenn. 294, 300, 209 S.W.2d 859, 861 (1948).

motion of the parents based upon pecuniary grounds.³⁶

Certainly, there may be times when an adopted child and the parents find themselves in a relationship which is detrimental to one or both parties. Each relationship must be viewed on its own merits, and if the situation is such that the parent would actually seek revocation of the adoption, it is possible that all love and affection has been lost. "Children with special needs (e.g., the physically handicapped, minority-group children, older children) demand special parents. . . ."³⁷ Furthermore, the adopted child may require greater attention and money, which can strain other family relations. In the words of one court:

To continue the relationship would only strain it; affection is already lost; it will not return, but rather in its place will come dislike, repugnance, and ultimate hatred, all of which is against the interests of the child and the foster parents.³⁸

In regard to the family who adopts a child who later develops different ethnological traits (a possibility contemplated by the Kentucky legislature),³⁹ it must be noted that the family has not prepared itself for the resulting pressures, as would a family who knowingly entered into such a relationship. Problems are inevitable for the child, particularly in the adolescent years when the parents of its peers show disapproval of interracial dating.⁴⁰ Adoptive parents who are not prepared to cope with the resulting pressures may well increase the child's chances of experiencing a severe identity crisis.⁴¹ In some situations, foster parentage or readoption may be in the best interests of the child. Revocation and return to an institutional setting would not seem to be the answer, although where the best interests of the child demand it, the option should be available.

This brings us to the question of how to deal with situations now provided for in adoption revocation statutes. The argument can be made that a child in an unloving home is not benefitting and should be removed from that environment. This determination should be made on a case by case basis, using the child's best interests as a guide. By upsetting the child's status and returning it to an institution, the state may be depriving the child of the love and personal attention necessary to help the child over an illness or mental defect. Even if the home life is deemed unsuitable for the child and the child is removed to an institution, the responsibilities of parenthood need not be lifted where they would not be lifted in a natural parent-child relationship.

36. See generally Note, *Adoption: Annulment of Status*, 29 NOTRE DAME LAW. 68, 80 (1953).

37. Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 J. FAM. L. 7, 22 (1964).

38. *In re Anonymous*, 157 Misc. 951, 952-53, 285 N.Y.S. 827, 829 (Sur. Ct. 1936).

39. See text accompanying notes 60-63 *infra*.

40. See Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFFALO L. REV. 303, 330 (1968).

41. *Id.* at 330-31.

For example, the duty of support owed to the adopted child has significant value to a sick child and should not be taken away. Further, the child should not be denied its inheritance rights nor forced to have its name changed simply because the parents do not like the "bargain" they have struck. In some situations where revocation could apply, it may be concluded that the relationship is best terminated; however, in this extreme case it should be a decision in the best interests of the child. Short of such a finding, the relationship should continue just as the natural parent-child relationship would continue.

The unavoidable conclusion to the foregoing analysis is that adoption revocation statutes of the type (1) variety permit courts to terminate the adopted status for reasons other than the best interests of the child concerned. The inevitable result is a situation wherein adopted children are treated differently than natural children simply because they are adopted. Thus, a classification is made by statute and such a classification may be subject to attack on constitutional grounds.

CONSTITUTIONAL ARGUMENTS AGAINST REVOCATION

Adoption revocation statutes based on mistake of fact or fraud in representation of the child (type (1) statutes) may be constitutionally attacked as being contrary to the equal protection clause of the fourteenth amendment. If adoption law is taken at face value, the argument can be made that "in all aspects an adopted child stands in the same relationship to a foster parent as a natural child stands in relation to a natural parent."⁴² Thus, adopted and natural children are supposed to be identically situated, but natural children are subject to no law which is comparable to adoption revocation statutes. It is the view of the authors that the state must have a rational basis to justify disparity of treatment between natural and adopted children. As demonstrated previously, only grounds based on the best interests of the child provide such a rational basis, since the child's best interests is the underlying rationale for adoption in this country. Other grounds of statutory revocation are in derogation of the right of equality and should not pass constitutional muster; thus, type (1) statutes should be unconstitutional under the equal protection clause.

Although the Supreme Court has not yet ruled on the constitutionality of the natural versus adopted child distinction, an analogy may be drawn between that classification and the legitimate versus illegitimate distinction, which has previously been considered by the Supreme Court. In legitimate-illegitimate cases, the Court has held that, absent a rational basis, state statutes cannot make classifications based on legitimacy where the result is to deprive a parent or child of a right.

42. *In re Abrogation of Adoption of Anonymity*, 8 Misc. 2d 155, 156, 167 N.Y.S.2d 472, 473 (Sur. Ct. 1957).

The Court first considered the legitimacy-illegitimacy distinction in *Levy v. Louisiana*,⁴³ wherein a statute⁴⁴ which prevented illegitimate children from recovering for the wrongful death of their mother was held unconstitutional. The Court found that since the mother had cared for and nurtured the children, "they were indeed hers in the biological and in the spiritual sense,"⁴⁵ and therefore, they should not be denied the right to recover simply because they were born out of wedlock.⁴⁶

Similarly, in *Weber v. Aetna Casualty and Surety Co.*,⁴⁷ the Supreme Court struck down a workman's compensation statute⁴⁸ which gave legitimate children a preference over illegitimate children in recovery for the death of a parent. The Court held that the classification had no significant relationship to the purpose of the statute.⁴⁹

Further, in *Glonn v. American Guarantee Co.*,⁵⁰ the Court held that the parents of an illegitimate child have a cause of action for the child's wrongful death although the state statute provided for recovery only in the case of legitimate children. The Court found the classification to be lacking in a rational basis and held that the prevention of illegitimacy, which was the purpose of the statute, was not advanced by the classification.⁵¹

Finally, in *Gomez v. Perez*,⁵² the Court declared unconstitutional a Texas scheme⁵³ whereby fathers of illegitimate children had no duty of support, whereas fathers of children born into a marriage had such a duty. The Court held this statutory scheme to be discriminatory on its face.⁵⁴

Of significance, between the *Glonn* and *Weber* decisions, the Court in *Labine v. Vincent*⁵⁵ sustained a state statute⁵⁶ which prevented illegitimate children from taking intestate shares in their father's estate. The Court reasoned that the child was not insurmountably barred from inheritance since the father could provide for them by will or could legitimize them.⁵⁷ In addition, the Court held that the question of intestate succession was a matter traditionally left to the states.⁵⁸

Labine may be distinguished from *Levy*, *Weber*, *Glonn* and *Gomez* in that the latter involved rights which were assigned by statute whereas

43. 391 U.S. 68 (1968).

44. LA. CIV. CODE ANN. art. 2315 (West).

45. 391 U.S. at 72.

46. *Id.*

47. 406 U.S. 164 (1972).

48. LA. REV. STAT. ANN. §23:1232 (West).

49. 406 U.S. at 175.

50. 391 U.S. 73 (1968).

51. *Id.* at 75.

52. 409 U.S. 535 (1973).

53. TEX. FAM. CODE ANN. §4.02 (Vernon).

54. 409 U.S. at 538.

55. 401 U.S. 532 (1971).

56. LA. CIV. CODE ANN. art. 206 (West).

57. 401 U.S. at 539.

58. *Id.* at 538. See also *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 170 (1972).

Labine did not concern any rights assigned to either legitimate or illegitimate children. Rather, *Labine* concerned the right of the father to dispose of his property at death. The Louisiana statute gives the father complete freedom to exercise that right, and merely provides a scheme of descent and distribution should the father fail to do so.

From the foregoing cases, it must be concluded that there can be no constitutionally permissible distinction between legitimate and illegitimate children without a rational basis unless (1) there is no right bestowed upon one group by statute; (2) the classification may be refuted by the positive action of the parent; and (3) the matter in issue is one traditionally left to state law. Similarly, it would seem that there can be no distinction between adopted and natural children. When an adoption is finalized, certain rights are bestowed upon the adopted child by statute. This factor alone is sufficient to take the issue beyond the confines of the *Labine* case, and to trigger the requirement for a rational basis for such a classification.

At least one federal court has accepted this argument. In 1973, the United States District Court for the Western District of Missouri was confronted with the natural-adopted child distinction. The issue in *Stanley v. Secretary of Health, Education and Welfare*⁵⁹ was whether the plaintiff's grandson, who had been adopted by the grandparents, was entitled to receive child's insurance benefits when the grandfather became eligible for old age benefits. After reviewing the facts of the case so as to insure there was no fraud intended by the adoption, the court held that,

[T]here is no permissible rational distinction between a natural son who may be illegitimate and a stepson who may not even be a blood relation on one hand and an adopted grandchild on the other hand. This is an arbitrary classification inconsistent with the purpose of the Social Security Act and a violation of the equal protection standards of the due process clause of the Fifth Amendment.⁶⁰

Thus, at least one court considers the natural-adopted child distinction insufficient to pass constitutional muster. Under this analysis, type (1) revocation statutes must also be held unconstitutional because they discriminate between adopted and natural children without a rational basis.

Aside from the rational basis analysis, some type (1) adoption revocation statutes may also be subject to attack under the strict scrutiny test. An example of such a statute is found in the Kentucky provision which permits revocation based upon racial characteristics. While the theory of the Kentucky statute seems similar to other type (1) statutes which deal with mental or physical illness, the focus of the Kentucky statute presents additional constitutional considerations.

59. 356 F. Supp. 793 (N.D.Mo. 1973).

60. *Id.* at 805.

A. *The Kentucky Statute*

Kentucky Revised Statutes Chapter 199.540 provides for revocation of adoptions where the child has definite traits of ethnological ancestry different from those of the adoptive parents and where this fact was not known at the time the adoption was finalized.⁶¹ Clearly the statute is vague in that the term different ethnological ancestry is ambiguous. It is unclear as to whether the statute applies to racial characteristics alone or to different cultural backgrounds as well. The statute itself is unclear, and there is no legislative history to provide an interpretation.

Protecting the statute from an attack based on vagueness requires that it be limited to racial differences. Such a construction makes the statute subject to equal protection standards. Although the burden of revocation falls equally on children of Caucasian, Negro, Oriental or Indian ancestry, this fact affords no real defense in light of the Supreme Court's holding in *Loving v. Virginia*.⁶² In *Loving*, an anti-miscegenation statute was defended on the grounds that it made criminal the marriage of any black to any white and the consequences fell equally on both parties. The Supreme Court refused to accept that argument, and held that a distinction based on race requires strict scrutiny.⁶³ In the opinion of the authors, the Kentucky revocation statute could not withstand strict scrutiny.

In the Kentucky revocation scheme, children are deprived of the rights bestowed upon them by the adoption process solely due to a classification based upon race. The fact that the statute struck down in *Loving* was a mandatory criminal sanction as opposed to the permissive nature of the Kentucky statute is immaterial because court action which is necessary to revoke an adoption, is state action within the meaning of *Shelley v. Kramer*.⁶⁴ *Shelley* held that judicial action is not immunized from the operation of the fourteenth amendment.

CONCLUSION

Whether type (1) revocation statutes violate equal protection because there is no rational basis for them or because they classify on the basis of race and will not withstand strict scrutiny, the fact remains that they ignore

61. The Kentucky statute reads in part:

(1) Whenever a child adopted under KRS 199.470 to 199.520 reveals definite traits of ethnological ancestry different from those of the adoptive parents, and of which the adoptive parents had no knowledge or information prior to the adoption, a petition setting forth such facts may be filed by the original petitioner of the department at any time within five years after such adoption with the court which decreed the adoption, and if upon hearing the facts set forth in such petition they are established, the said court may enter a decree of annulment of the adoption and setting aside any or all rights or obligations which may have accrued by reason of such adoption.

62. 388 U.S. 1 (1967).

63. *Id.* at 11.

64. 334 U.S. 1 (1948).

the best interests of the child. Alabama,⁶⁵ Louisiana,⁶⁶ Minnesota,⁶⁷ New York,⁶⁸ and Utah⁶⁹ have recently amended their laws to remove type (1) statutes from their books. It is hoped that this article will give legislatures in other states the incentive to repeal constitutionally defective revocation statutes. Adopted children should not be denied their rights merely because of a classification based on status; rather, the parents should seek the alternatives that they would be forced to seek if they were the natural parents of the child. The best interests of the child should always be the sole consideration and guide in determining what these alternatives may entail.

65. ALA. CODE tit. 27 §5 (as amended by 19 Ala. Acts, c. , §).

66. LA. REV. STAT. ANN. §9.422 (West) (as amended by 1975 La. Acts, No. 421, §1).

67. MINN. STAT. ANN. §259.30 (West) (repealed by 1975 Minn. Laws, c. 216, §1).

68. N.Y. DOM. REL. LAW §§118-118c (McKinney) (repealed by 1974 N.Y. Laws, c. 1035, §1). The New York statute was most unusual. New York Domestic Relations Law §118-b stated that a foster parent who adopted a foster child could apply to abrogate the adoption, "because of the willful desertions of such foster child or because of any misdemeanor or ill behavior of such child."

69. UTAH CODE ANN. §78-30-13 (repealed by 1975 Utah Laws, c. 67, §23).

Appendix A
TABLE I

State	Yrs. of Limitation	Type	Grounds	Statute No.
Alabama	5 years	3	procedural defects	Title 27 §5
Alaska	1 year	2 (?)	for an adult who is adopted and has no notice thereof; or, where petitioner has not taken custody of an adopted minor	Title 20 §20.15.140(b)
Arizona	1 year	3	procedural irregularities	§8-123
Arkansas	5 years	1	feble-mindedness, epilepsy, insanity, psychosomatic or mental disturbance, venereal disease, incurable disease as a result of conditions existing before adoption of which adoptive parents were unaware	§56-110 §56-112
California	2 years	3	procedural defects; divorce or separation of adoptive parents of minor children; failure to perform obligation to adopted person	
	5 years	1	mental deficiency or mental illness arising from condition existing prior to adoption of which adoptive parents were unaware	§227b, Civil Code
Colorado	2 years	3	jurisdictional or procedural defects	§19-4-116
Delaware	2 years	3	procedural defects	§918
D.C.	1 year	3	procedural defects	§16-310
Florida	2 years	3	procedural defects	§63.211
Hawaii	1 year (no limitation)	(?)	good cause, fraud	§578-12

State	Yrs. of Limitation	Type	Grounds	Statute No.
Iowa	5 years	1	mental retardedness, epilepsy, mental illness, venereal disease or otherwise serious and permanent disability resulting from condition existing before adoption of which adoptive parents were unaware	Vol. 39 §600.7
Kentucky	2 years 5 years	3 1	—for procedural irregularity —child of different ethnic background than parent and parent unaware at time of adoption	199.540
Maine	no limitation	2 (?)—may be in child's best interests	good cause	Title 19 §538
Maryland	1 year	3	jurisdictional or procedural defects	Title 16, §79
Mississippi	6 months	3	jurisdictional or procedural defects	§93-17-15, 17
Missouri	5 years	1	feeble-mindedness, venereal disease epilepsy arising from condition existing before adoption of which adoptive parents were unaware and child and adoptive parents of a race prohibited by law of marrying.	§453.130
North Carolina		3	procedural grounds by natural parent	§48:28
Tennessee		3	no attack by anyone, no procedural attack except by one injured by defective procedure	§36.127
Vermont	1 year	2	minor within 1 year after attaining majority dissents from adoption	§15-454
Washington	6 months	2	best interest of the child	26.32.130
West Virginia	1 year	3	improper notice	48-4-6(a)
		2	minor may file dissent within one year after attaining majority	48-4-6(b)