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Use of Supervisory Power to Order Counsel for Indigent Paternity Defendants: Hepfel v. Bashaw

Lorna Lee Hepfel and her child who was born out of wedlock were receiving AFDC\(^1\) benefits from Houston County. With the County Attorney acting as her legal representative,\(^2\) Hepfel brought an action in state district court to have Steven Bashaw adjudicated the father of her child. Bashaw denied paternity and moved the court to appoint counsel for him on the ground that he was indigent. The motion was denied, but in a mandamus proceeding the Minnesota Supreme Court ordered counsel appointed.\(^3\) At a rehearing requested by the County Attorney, the court sitting en banc affirmed its earlier decision, holding that as an exercise of its supervisory power a court may order that counsel be appointed for indigent paternity defendants when the state has already supplied counsel for the plaintiff. *Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn. 1979).

The disingenuous manner in which paternity adjudications have traditionally been conducted has long been an embarrassment to the legal community.\(^4\) In 1969, a commission investigating paternity law and practice was led to "the inescapable conclusion that coercion, corruption, perjury and indifference to the rights of the individual defendant pervade in the day to day practice in this area of judicial proceedings."\(^5\) Moreover, a 1963 study indicated that although determinations of paternity are often based on nothing more than the accusation of the mother, 39.6% of the accused fathers in a sample group could

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2. Section 257.254 of Minnesota Statutes provides in part: "When requested to do so by a . . . public welfare or other social service agency, the county attorney may appear on behalf of and represent the complainant in [actions for the determination of paternity] and shall obtain and present such evidence as may be necessary." Minn. Stat. § 257.254 (1978).
not have been the father of the child in question. In recent
years, the problems arising from the unfairness of paternity
hearings have been exacerbated by a dramatic increase in the
number of paternity suits being brought. Although this result
is due in part to a corresponding increase in the rate of illegiti-
mate births, the primary force behind the growing number of
paternity suits is the involvement of county attorneys in bring-
ing suits on behalf of mothers who are receiving AFDC bene-
fits. County attorneys have become increasingly involved in
paternity adjudications, in part as a result of a 1975 amendment
to the Social Security Act permitting federal grants to be
withheld from any state that fails to implement a plan requir-
ing recipients of public aid (1) to assign to the state any right
to support they may have from other persons, and (2) to coop-
erate with the state in establishing the paternity of any of their
children born out of wedlock.

6. See Sussman, Blood Grouping Tests—A Review of 1000 Cases of Dis-
puted Paternity, 40 AM. J. CLINICAL PATHOLOGY 38 (1963), quoted in H. Krause,
supra note 4, at 107-08.
7. For example, in the last seven years the Ramsey County Attorney has
filed the following number of paternity actions in the Family Division of Minne-
sota District Court for the Second District (Ramsey County):

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973</td>
<td>126</td>
</tr>
<tr>
<td>1974</td>
<td>194</td>
</tr>
<tr>
<td>1975</td>
<td>288</td>
</tr>
<tr>
<td>1976</td>
<td>498</td>
</tr>
<tr>
<td>1977</td>
<td>802</td>
</tr>
<tr>
<td>1978</td>
<td>748</td>
</tr>
<tr>
<td>1979 (through Nov. 8)</td>
<td>521</td>
</tr>
</tbody>
</table>

Telephone interview with Pat Kenny, Clerk of Court, Minnesota Second Dis-
trict Court, Family Division, St. Paul, Minnesota (Nov. 13, 1979).
8. The percentage of illegitimate births as a function of all births has
more than doubled since 1965.

<table>
<thead>
<tr>
<th>Date</th>
<th>Percent illegitimate births</th>
</tr>
</thead>
<tbody>
<tr>
<td>1965</td>
<td>7.7</td>
</tr>
<tr>
<td>1970</td>
<td>10.7</td>
</tr>
<tr>
<td>1972</td>
<td>12.4</td>
</tr>
<tr>
<td>1973</td>
<td>13.0</td>
</tr>
<tr>
<td>1974</td>
<td>13.2</td>
</tr>
<tr>
<td>1975</td>
<td>14.2</td>
</tr>
<tr>
<td>1976</td>
<td>14.8</td>
</tr>
<tr>
<td>1977</td>
<td>15.5</td>
</tr>
</tbody>
</table>

U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF
9. See note 7 supra.
11. 42 U.S.C. §§ 602(a)(26), 604(a)(2) (1976). Moreover, the plan must pro-
vide that the state will in fact undertake to establish paternity in such cases.
See id. § 654(4).
An aspect of paternity adjudications often labelled unfair is the states' practice of representing indigent plaintiffs without making any similar provision for appointing counsel for indigent defendants. Since 1976, the highest courts of five states have considered the issue of whether indigent defendants in paternity suits have a constitutional right to counsel, and three of them—Alaska, California, and Michigan—have recognized the right.12 Each of these courts based its decision on the due process clause of its state constitution, holding that the provision of counsel is required because the possibility of incarceration for failure to support the child threatens a liberty interest of the father;13 the California court's holding was based on the due process clause of the fourteenth amendment of the federal constitution as well.14 Both the California and Alaska courts also reasoned that the paternity defendant's interest in avoiding the wrongful imposition of a parent-child relationship is as compelling as a parent's interest in maintaining the parent-child relationship, an interest that has been deemed important enough to mandate the provision of counsel in child neglect and dependency hearings.15 In addition, the California and

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15. Reynolds v. Kimmons, 569 P.2d 799, 801 (Alaska 1977); Salas v. Cortez, 154 Cal. Rptr. 529, 533, 593 P.2d 226, 230, cert. denied, 100 S. Ct. 209 (1979). The fundamental nature of the right of parents to raise children was recognized more than fifty years ago. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("liberty" in due process clause "denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children"). In declaring unconstitutional an Illinois statute that presumed the father of an illegitimate child unfit for custody and denied him a hearing before placing his children up for adoption, the Supreme Court stated: "The rights to conceive and to raise one's children have been deemed 'essential basic civil rights of man.'" Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citation omitted). See also Moore v. City of E. Cleveland, 431 U.S. 494, 505-06 (1977) (right of blood relatives to live together in same home); Roe v. Wade, 410 U.S. 113, 152-54 (1973) (right of woman to decide whether to terminate her pregnancy); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (right to use contraceptives); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry person of another race); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (right of parents to send their children to private schools). Extending this line of reasoning, several state courts have held that there is a constitutional right to counsel in child dependency and neglect hearings. For a listing of authorities, see Davis v. Page, 442 F. Supp. 258, 263 n.13
Alaska courts agreed that a constitutional right to counsel must exist because of the complexity of the issues involved in paternity suits and the relative powerlessness of unrepresented defendants who face, in effect, prosecution by the state. The two state courts that have refused to recognize the right of indigent paternity defendants to counsel—New York and Washington—emphasized the civil nature of paternity hearings and reasoned that the threatened loss of liberty that these hearings present is too remote to mandate a constitutional right to counsel.

In *Hepfel v. Bashaw*, the Minnesota Supreme Court termed "dubious" the claim that indigent defendants in paternity suits have a constitutional right to counsel. The court did recog-

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(S.D. Fla. 1977). Minnesota has recognized the importance of the family relationship, although not on constitutional grounds. See *McDonald v. Copperud*, 295 Minn. 440, 444, 266 N.W.2d 551, 553 (1978).


18. In a series of decisions, the Supreme Court has made clear that when life and liberty are at stake, due process requires the right to counsel. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (right to counsel for any offense including petty misdemeanors if imprisonment follows conviction); *In re Gault*, 387 U.S. 1, 36-37 (1967) (right to counsel in juvenile commitment proceedings); *Specht v. Patterson*, 386 U.S. 605, 607-10 (1967) (right to counsel at psychiatric determination that might lead to commitment for indeterminate length of time); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (right to counsel for defendants charged with felony); *Powell v. Alabama*, 287 U.S. 45, 68-71 (1932) (right to counsel for defendant charged with murder). Reacting to this gradual expansion of the due process right to counsel, many commentators have expressed the belief that the Court is moving toward a general requirement that counsel be provided for indigents in civil cases as well. See, e.g., *Botein, Appointed Counsel for the Indigent Civil Defendant: A Constitutional Right Without a Judicial Remedy?*, 36 BROOKLYN L. REV. 368 (1970); Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 FORDHAM L. REV. 989 (1975); Note, *Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967); Comment, *The Continuing Expansion of the Right to Counsel*, 41 U. COLO. L. REV. 473 (1969). See also *Johnson & Schwartz, Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants Part One: The Legal Arguments*, 11 LOY. L.A. L. REV. 249 (1978). In the most recent decision of this series, however, the Court stated that *Argersinger* delimits the due process right to counsel. See *Scott v. Illinois*, 440 U.S. 367, 373 (1979).


20. 279 N.W.2d at 544.
nize, however, that several important interests of a putative father are at stake in a paternity hearing: remaining free from financial obligations, from incarceration, and from injury to reputation. The court also noted that the illegitimate child has a substantial interest in an accurate determination. Because paternity hearings threaten these important though not constitutionally protected interests, the Hepfel court based its ruling that the state must provide counsel for indigent defendants on the court's "supervisory power to ensure the fair administration of justice."

According to the court, the best way to protect the interests threatened by paternity actions is to ensure that determinations of paternity are accurate. The court observed, however, that "in the trial of a contested paternity action, appallingly little attention is given to the accuracy of the determination," and that the predominant interest represented by the county attorney is that of the welfare board in escaping AFDC payments. Thus, from the county attorney's standpoint, any adjudication of paternity, whether accurate or not, is in the state's financial interest. The Hepfel court therefore concluded that ordering the provision of counsel was necessary to enhance the accuracy of paternity proceedings.

Although the court in Hepfel did not articulate its reasons for rejecting Bashaw's constitutional claim to counsel, its decision appears correct. It is true that an adjudication of paternity will have a significant adverse financial impact on the defendant: he must provide financial support for the child until it

21. Id. at 345.
22. Id. at 346-47.
23. See text accompanying notes 29-50, 64 infra.
24. 279 N.W.2d at 348.
25. Id. at 347-48.
26. Id. at 345. The court observed that determinations of paternity are often made upon the mere accusation of the mother without corroborating evidence. Id. It also cited a study, based on blood tests, which revealed that in a group of 1000 cases of disputed paternity, 39.6 percent of the accused fathers could not possibly have been the fathers of the children in question, and that 18 percent of the group of men who had voluntarily admitted paternity were not in fact the fathers of the children in question. Id. (citing Sussman, supra note 6, at 38).
27. [P]resently the welfare department, not the child or the mother, can potentially become the aggressive and predominant party in interest, emphasizing primarily its concern to find the man it can legally hold financially liable to reimburse it for the support expenses it incurs and, without the aid of blood tests, accepting, as current law allows, the uncorroborated testimony of the mother as sufficient proof of paternity. 279 N.W.2d at 346.
28. Id. at 346.
reaches majority, and his estate, his insurance, even his workmen's compensation benefits can be burdened by the child.29 These interests, however, are property interests, and they neither distinguish paternity suits from most other civil proceedings nor do they provide an adequate basis for a constitutional right to counsel.30 Compelling the state to provide counsel to indigent defendants whose financial interests are threatened by civil paternity actions logically should lead to the provision of counsel for indigent defendants in virtually all types of civil actions where substantial financial interests are at stake. But courts have been unwilling to so extend the right to counsel.31

An adjudication of paternity may also indirectly threaten the father's liberty interest: he can be imprisoned for criminal nonsupport if without excuse he knowingly fails to support any of his children under the age of sixteen,32 or for civil contempt if after the paternity finding the court demands a bond or other security for the payment of support and the father refuses to give it.33 The possibility of prosecution for civil contempt for nonpayment of support continues until the child reaches the age of majority.34 An adjudged father would have a right to

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29. Id. at 345 (citing Unborn Child v. Evans, 310 Minn. 197, 245 N.W.2d 600 (1976); Minn. Stat. § 525.172 (1978)).


32. Section 609.375 of Minnesota Statutes provides that one who knowingly fails to support his minor child without a lawful excuse may be fined, imprisoned, or both. "As used in section 609.375, 'child' means a child under the age of 16 years who is in necessitous circumstances and includes such child born out of wedlock whose paternity has been duly established." Minn. Stat. § 609.37 (1978). If the nonsupport lasts for ninety days or less the crime is a misdemeanor; if it lasts for longer than ninety days the crime is a felony with a maximum penalty of five years' imprisonment. See id. § 609.375.

33. The court may require an adjudicated father to give a bond or other security for the payment of the support judgment immediately following a finding of paternity. Minn. Stat. § 257.263 (1978). If the father refuses to pay at that time, the court may find him in contempt. Id. § 257.262.

34. Section 588.02 of Minnesota Statutes provides:

   Every court of justice and every judicial officer may punish a contempt by fine or imprisonment, or both; and in addition thereto, when the contempt involves the willful disobedience of an order of the court requiring the payment of money for the support of maintenance of a minor child, the court may require the payment of the costs and a reasonable attorney's fee, incurred in the prosecution of such contempt, to be paid by the guilty party. . . .

Minn. Stat. § 588.02 (1978).
counsel at a trial for criminal nonsupport,\textsuperscript{35} but the utility of that right is diminished by the fact that he was not represented by counsel at the earlier paternity hearing.\textsuperscript{36} Admissions made at that hearing without the advice of counsel might preclude the adjudged father's most effective defense in a subsequent criminal nonsupport hearing. Thus, the civil determination of paternity is arguably a "critical stage" in the criminal nonsupport proceeding that necessitates the provision of counsel.\textsuperscript{37} Moreover, an adjudged father would be in contempt of court if he refused to deposit the security for support that a court may demand immediately following a finding of paternity, and the prior finding of paternity would be res judicata at any subsequent contempt hearing.\textsuperscript{38} Thus, even if counsel were provided

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{35} See State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967) (counsel must be provided in any case, whether it be a misdemeanor or felony prosecution, when conviction can result in incarceration). See also Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); note 18 supra.
\item \textsuperscript{37} In criminal proceedings, the right to counsel begins when there exists a possibility that the defendant could become prejudiced in the defense of his case. More specifically, a critical stage in a criminal proceeding can be one in which the defendant's rights might be lost, his defenses waived, or any other stage at which the outcome of his case might be substantially affected. See, e.g., Mempa v. Rhay, 389 U.S. 128, 137 (1967) (designating time of sentencing a critical stage); United States v. Wade, 388 U.S. 218, 237-39 (1967) (designating lineup after formal charges a critical stage); Hamilton v. Alabama, 368 U.S. 52, 53 (1961) (designating arraignment a critical stage).

It is unclear under what circumstances a civil proceeding might be considered a critical stage in criminal proceedings. One court has held that a juvenile has a right to counsel at a civil hearing to determine whether he should be transferred from juvenile court to district court for prosecution as an adult, since the transfer hearing is a "critical stage of proceedings 'criminal in nature,' . . . at which time the 'defense' of juvenile status may be lost." In re Lewis, 98 Wash. 2d 556, 561, 564 P.2d 328, 331 (1977) (citation omitted). See also Prideaux v. State Dep't of Pub. Safety, 310 Minn. 405, 411, 247 N.W.2d 385, 389-91 (1976) (dictum) (the decision whether to take or refuse chemical testing is arguably a "critical stage" in criminal proceeding for driving under the influence). It should be noted that in Lewis and Prideaux the defendants had already been charged with a crime at the time of the civil proceeding; the same result might not occur if the civil proceeding took place prior to the initiation of the criminal proceeding. See State v. Durnell, 16 Wash. App. 500, 502, 558 P.2d 252, 254 (1976) (court was "unaware of any case which places the critical stage of a criminal proceeding at a point before the criminal proceedings actually begin—indeed, before the crime is even committed") (emphasis in original).

\item \textsuperscript{38} Although this issue has not yet been decided in Minnesota, it has in other jurisdictions. See Reynolds v. Kimmons, 559 P.2d 799, 802 (Alaska 1977); Salas v. Cortez, 24 Cal. 3d 22, 28, 593 P.2d 226, 230, 154 Cal. Rptr. 529, 533, cert. denied, 100 S. Ct. 209 (1979); Artibee v. Cheboygan Circuit Judge, 397 Mich. 54, 57-58, 243 N.W.2d 248, 250 (1976).
\end{enumerate}
\end{footnotesize}
at the contempt hearing, the father would be unable to raise the defense of nonpaternity.

These indirect threats to liberty, however, do not seem sufficient to support a fourteenth amendment due process right to counsel, and Minnesota courts read the state constitution's due process clause no more broadly than federal courts interpret the fourteenth amendment's due process clause. In *Scott v. Illinois*, the United States Supreme Court held that due process does not require the state to provide counsel when a defendant "is charged with a statutory offense for which imprisonment upon conviction is authorized but not actually imposed." Since there is no statutory authorization for imprisonment upon an adjudication of paternity, the rationale of *Scott* would appear a fortiori to rule out any right to counsel in paternity proceedings. In addition, it seems unlikely that an adjudication of paternity would be deemed the "critical stage"
of a prosecution for criminal nonsupport, since in *Kirby v. Illinois* the Supreme Court held that the right to counsel attaches only at or after the initiation of adversary judicial criminal proceedings. Finally, there is nothing about the prospect of incarceration for civil contempt in paternity proceedings that distinguishes it from the prospect of incarceration for civil contempt in any other adjudicative setting. Since the Minnesota court has eschewed the notion that the state must provide indigent defendants with counsel in any civil action that may eventually culminate in the defendant’s imprisonment for contempt, it seems clear that the deprivation of liberty that might result if an adjudged father refused to pay court-ordered child support is too remote from the paternity adjudication to require the provision of counsel at the adjudicative stage.

The *Hepfel* court also recognized that some form of social stigma or injury to reputation may result from an adjudication of paternity. Nonetheless, it is well settled that the imposition of social stigma is not per se a sufficient deprivation of liberty to warrant due process protection. Therefore, its imposition should not constitute sufficient grounds for deriving a constitutional right to counsel. This point is demonstrated by the fact that no constitutional right to counsel inheres in adjudications of gross negligence, libel, or slander, or those resulting in punitive damages, even though those determinations

45. *Id.* at 689-90. The highest courts of several states have rejected *Kirby* and have instead relied on their state constitutions to find a right to counsel at pre-charge lineup identifications. *See, e.g.*, Blue v. State, 558 P.2d 636, 641 (Alaska 1977); People v. Jackson, 391 Mich. 323, 337-38, 217 N.W.2d 22, 27-28 (1974).
46. The Minnesota Supreme Court has upheld the constitutionality of imprisonment for civil contempt in a variety of situations. *See, e.g.*, Johnson v. Froelich, 196 Minn. 81, 264 N.W. 232 (1936) (failure to remove wall that encroached on neighbor’s property); State v. Wiebke, 154 Minn. 61, 191 N.W. 249 (1923) (nonpayment of support following adjudication of paternity); Campbell v. Motion Picture Mach. Operators, 151 Minn. 238, 186 N.W. 787 (1922) (failure to obey an injunction). A court may resort to imprisonment for civil contempt only when a defendant is able to obey but refuses to do so. *See State v. Strong*, 192 Minn. 420, 256 N.W. 900 (1934).
47. *See, e.g.*, State v. Durnell, 16 Wash. App. 500, 501, 558 P.2d 252, 254 (1976) (driver’s license revocation hearing too remote from subsequent convictions to be a “critical stage”). *See also note 37 supra.*
48. 279 N.W.2d at 345.
50. *See note 18 supra* and accompanying text. For a discussion of whether the procedural safeguards afforded defendants in civil actions in which punitive damages are awarded should be the same as those afforded defendants in crim-
The court, in failing to find the existence of a constitutional right to counsel in paternity actions, did not consider the putative father's interest in freedom from the imposition of the parent-child relationship. Some courts regard this interest as a fundamental liberty, since it involves the same basic issues as the preservation of a family relationship—an interest long recognized as fundamental. But while this right to have and raise one's offspring is undoubtedly a fundamental liberty, it is not clear that freedom from the imposition of a parent-child relationship should be accorded this specially protected status. When a court establishes a parent-child relationship by finding paternity and ordering support, it has merely imposed a financial obligation on the adjudged father. To equate this imposition of financial obligation with the deprivation of care and custody of a child distorts the nature of the family-related interest that courts have found protected by the Constitution. It is doubtful that the right to remain free from this type of financial burden could ever serve as the basis for a constitutional right to counsel.

The court in *Hepfel* may have been reluctant to find a constitutional right to counsel in civil paternity actions out of fear that such a right would logically be extended to other civil actions in which financial, liberty, or family interests are at stake. Such reluctance may serve to explain the court's use of punitive damages, see *Note, The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U. L. REV. 1158, 1180-81 (1966).

51. Fundamental liberties are those that receive an extraordinarily high degree of judicial solicitude. These liberties are usually explicit or implicit in the Bill of Rights, but some—such as the right to privacy that characterizes many family decisions—are "penumbral" to it. See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (plurality). See generally *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

52. See note 15 *supra* and accompanying text.

53. For a discussion of the nature of the family relationship interest protected by the fourteenth amendment, see note 15 *supra*.

54. Courts generally have been unwilling to extend the right to counsel to indigents involved in civil cases because of the great financial cost it would entail. See *Scott v. Illinois*, 440 U.S. 367, 384 (1979) (Brennan, J., dissenting). See generally sources cited in note 18 *supra*.

In Minnesota, however, the extension of counsel to indigent paternity defendants has not yet proven to be a significant economic burden. The Hennepin County Public Defender's Office has been defending indigent paternity defendants since 1976, yet no new staff members have been needed. In 1978, of the 725 paternity cases filed in Hennepin County, only 38 were referred to the public defender's office because the defendant was indigent. Telephone interview with Mike Richardson, Assistant County Attorney in charge of paternity, Minneapolis, Minn. (Nov. 8, 1979). In Ramsey County, about two-thirds of the 783 paternity suits filed for the fiscal year 1978-1979 were against indigent de-
of its supervisory power to create a "right" with such obvious due process overtones.

The supervisory power of courts is often invoked to provide greater procedural protection than does the Constitution. Traditionally, courts have asserted their supervisory power for two purposes: to correct a particular injustice in an isolated case and to establish a general standard of procedural fairness for situations in which constitutional safeguards have proved inadequate. Hepfel is an example of the latter case. Implicit in the court's creation of a general standard requiring counsel for indigent defendants in paternity suits brought by county attorneys is the perception of the injury that such proceedings inflict on "the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts." Undoubtedly the primary factor behind the Hepfel court's decision to invoke its supervisory powers was the cumulative effect of the damage that paternity hearings inflict upon the various interests of the putative father, even though none of defendants. Under procedures in Ramsey County, defendants who contest the accusation of paternity are given blood tests. If the test does not exclude a particular defendant, he is referred to the public defender. But see note 69 infra. While the Ramsey County Board did appropriate $70,000 for blood testing, there has been no need to increase the size of the Ramsey County Public Defender's staff to represent indigent defendants. Telephone interview with Harry Peak, Assistant County Attorney for Ramsey County, St. Paul, Minn. (Nov. 8, 1979).


those interests, standing alone, require constitutional protection. Another reason for the Hepfel court's reliance on its supervisory power may have been the court's recognition that unrepresented indigent defendants are at a peculiar disadvantage when they must face plaintiffs whose counsel has been provided by the state. Unlike the situation in which the state is a real party in interest and the county attorney merely a spokesman on its behalf, the involvement of the county attorney in the adjudicative stage of a paternity proceeding is on behalf of one private litigant against another. The state's decision to confer the benefit of counsel on indigent paternity plaintiffs but not on indigent defendants thus suggests an equal protection issue quite apart from the due process problem of the state's bringing its full prosecutorial powers to bear against a presumably ill-prepared defendant. While courts have generally addressed the due process issue, it seems clear that the equal protection argument bolsters concern over the potential unfairness of paternity hearings.

The Hepfel court also believed that the use of its supervisory power was appropriate because an adjudication of paternity affects interests other than those of the putative father; it affects interests of the illegitimate child as well. Granted,

59. The California and Alaska courts found this mismatch to be particularly unfair and limited their provision of appointed counsel to those cases in which the complainant is represented by the state. See Reynolds v. Kimmons, 569 P.2d 799, 803 (Alaska 1977); Salas v. Cortez, 24 Cal. 3d 22, 28, 593 P.2d 226, 230, 154 Cal. Rptr. 529, 537, cert. denied, 100 S. Ct. 209 (1979).

60. Since plaintiffs in paternity actions are exclusively female, and defendants are exclusively male, it could be argued that the legislative decision to provide counsel for plaintiffs but not for defendants is an example of gender-based discrimination. Gender-based discrimination is scrutinized at an intermediate level of review, which requires more than a mere rational basis for the legislation, but falls short of strict scrutiny review. See Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). See also id. at 210 n.* (Powell, J., concurring). In paternity actions in which the state is a co-plaintiff, there would be no issue of gender-based discrimination since the implicit classifications would be state versus private party. But when paternity suits are civil actions between private individuals, and the state provides only plaintiffs with counsel, the implicit classification is inescapably female versus male.

The Florida Supreme Court in Florida Dep't of Health & Rehabilitative Servs. v. Hefiler, 48 Law Week 2684 (Apr. 22, 1980), held that the equal protection guarantee of its constitution is not violated by the provision of free counsel to mothers but not to putative fathers in paternity actions.

61. 279 N.W.2d at 346.

62. First, the child has an obvious "identity" interest in an accurate determination of paternity. See Minn. Stat. § 257.29 (1978) (requiring that name of adjudged father be placed on illegitimate child's birth certificate). Second, since the determination can affect the child's inheritance rights, workers' com-
there is no reason to believe that the interests of the child should accrue to the putative father, creating for the father a constitutional right to counsel. That an incorrect finding of paternity might permanently bias the child's interests emphasizes the necessity of ensuring the accuracy of paternity determinations. In this respect the supervisory power is a tool not only for enhancing the procedural rights of parties to litigation in which unfairness is probable, but also for safeguarding the interests of nonparties who are unable to gain access to the forum in which their fate is being decided.

The Hepfel decision also illustrates the advantage of a court's using its supervisory powers rather than straining constitutional doctrine to establish new rights. The Hepfel court succeeded in extending to indigent paternity defendants the benefits of a due process right to counsel without actually finding that, as a constitutional matter, the right itself exists. Thus, the provision of counsel in Hepfel serves as a temporary judicial remedy to address the unfair manner in which paternity proceedings are currently administered. The clear implication of the court's opinion is that its holding can be vitiated by legislative action designed to make paternity adjudications more fair. The use of the supervisory power allows courts

63. For a discussion of how some states employ their constitutions to provide protection beyond that provided by the federal constitution, see Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977).

64. In this respect, the Hepfel court seems to have promulgated what Professor Henry Monaghan has called "constitutional common law." See Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 24-25 (1975). Professor Monaghan argues that the federal courts' use of the supervisory power in fashioning exclusionary rules is an example of a "substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions." Id. at 2-3, 26-27. Another commentator has argued that while the right to a fair hearing is shielded from political influences by judicial interpretations of due process requirements, many of the specific components of a fair hearing may not reach the level at which constitutional protection is mandated. See Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1278-1304 (1975). See generally Note, Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510 (1975).

65. The Hepfel court suggested to the legislature "that the correct adjudi-
temporarily to fill voids left by legislative inaction when constitutional rights are only indirectly implicated. Unlike a constitutional ruling, however, a decision based on supervisory power does not foreclose the legislature from eventually deciding the same issue. Indeed, it seems apparent that the court in *Hepfel* used its supervisory power specifically to spur the legislature to action.66

The supervisory power helps courts reconcile their desire to exercise reasoned self-restraint in constitutional interpretation with the need to correct serious flaws in the fair administration of justice. Courts "may exert a supervisory power with greater freedom to reflect [their] notions of good policy . . . [even when] these expressions of policy are not necessarily embodied in the concept of due process." But the supervisory power can also be used to invigorate the political climate—to open "a dialogue with [the legislature] . . . in which the factor of inertia is now on the side of individual liberty." The legislature, at the least, becomes sensitive to those areas in which its own remedial scheme is lacking and can use the court's determination as a focal point for the reexamination of the policy questions involved.68 Now that the Minnesota Supreme Court, through its *Hepfel* decision, has opened the dialogue, the Min-
Minnesota Legislature should respond by seeking a complete and permanent solution to the unfairness that pervades paternity proceedings.\textsuperscript{69}

\textsuperscript{69} The Minnesota Supreme Court recently held that the right of an indigent paternity defendant to counsel, extended in \textit{Hepfel}, attaches before the requirement to admit or deny paternity. Ramsey County Pub. Defender's Office v. Fleming, Finance and Commerce, p. 8, at col. 2 (Minn. Apr. 18, 1980).