Journal of Law and Policy

Volume 7 | Issue 1 Article 1

1998

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THE MALE ABORTION: THE PUTATIVE FATHER'S RIGHT TO TERMINATE HIS INTERESTS IN AND OBLIGATIONS TO THE UNBORN CHILD*

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Somehow, somewhere and sometime the rights of the male participant in the activities giving rise to pregnancy must be recognized and protected. Simple justice requires no less.[1]

INTRODUCTION

When an unmarried male and an unmarried female have sexual relations resulting in pregnancy, the female has several options. She may choose to carry the child to term and retain custody of the child. She may carry the child to term and terminate her rights in the child so that the child may be adopted. Finally, she may terminate the pregnancy through an abortion.[2]

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* The author's purpose in writing this article is to demonstrate the inequities involved in the abortion decision and to propose legislation promoting male equality in the procreative decision. This article should not be construed to promote or advocate the woman's right to abortion.

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[1] Shinall v. Pergeorelis, 325 So. 2d 431, 436 (Fla. Dist. Ct. App. 1975) (Boyer, C.J., dissenting).

[2] For an in depth analysis of the male role in the abortion decision, see Andrea M. Sharrin, Note, *Potential Fathers and Abortion: A Woman's Womb is Not a Man's Castle*, 55 BROOK. L. REV. 1359 (1990).

As for the male, his choices are limited. In the first instance, an unmarried father has relatively equal standing in a custody determination.[3] As to adoption, the United States Supreme Court has recognized a father's liberty interest in his children, which entitles the father to notice prior to the termination of his parental rights.[4] However, the unwed father's consent to an adoption is required only when he has established a commitment to the responsibilities of being a parent.[5] If the putative father fails to meet this burden, the child may be adopted without his consent.[6]

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[3] *See, e.g.*, S.C. CODE ANN. § 20-7-100 (Law. Co-op. 1987) (establishing rights and duties of parents in regard to their minor children).

[4] Stanley v. Illinois, 405 U.S. 645 (1972).

[5] Lehr v. Robertson, 463 U.S. 248 (1983). *See also* N.Y. DOM. REL. LAW §§ 111(d), (e) (McKinney 1997) (providing for paternal consent to adoption). Specifically, Domestic Relations Law section 111(d) concerns the father of a child born out of wedlock and placed with adoptive parents more than six months after birth. The father's consent is required for the adoption of this child "only if such father shall have maintained substantial and continuous or repeated contact with the child." *Id.* § 111(d). The statute sets out three ways such contact may be manifested: First, by "the payment by the father toward the support of the child of a fair and reasonable sum." *Id.* § 111(d)(i). Second, by "the father's visiting the child at least monthly when physically and financially able to do so and not prevented from doing so." *Id.* § 111(d)(ii). Third, by "the father's regular communication with the child . . . when physically and financially unable to visit the child or prevented from doing so." *Id.* § 111(d)(iii). Section 111(e) concerns the father of a child born out of wedlock who is under the age of six months at the time of placement for adoption. Section 111(e) requires paternal consent if three conditions are satisfied: First, the father must have "openly lived with the child or the child's mother for a continuous period six months immediately preceding the placement of the child for adoption." *Id.* § 111(e)(i). Second, the father must have "openly held himself out to be the father of such child during such period." *Id.* § 111(e)(ii). Third, the father must have "paid a fair and reasonable sum, in accordance with his means, for medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child." *Id.* § 111(e)(iii).

[6] *In re* Doe, 627 N.E.2d 648 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 807 (Ill.) (sustaining appellate court's determination that the father must take measures to develop a relationship with his child in order to receive full protection of his parental rights, but reversing on the ground that the mother did not demonstrate by clear and convincing evidence that the father was an unfit parent), *cert. denied*, 513 U.S. 994 (1994); Robert O. v. Russell K., 604 N.E.2d 99 (N.Y. 1992); Wade v. Geren, 743 P.2d 1070 (Okla. 1987); *In re* Adoption of

In addition, the putative father cannot force the female to place the child for adoption.[7]

Finally, as to abortion, the unwed father has no rights.[8] Under current United States law, no father can interfere with a woman's choice to abort a child. The United States Supreme Court in *Roe v. Wade*[9] and *Doe v. Bolton*[10] legalized abortion and held that the abortion decision is to be made solely by the woman and her doctor. In legalizing the woman's right to abortion, the Court based its decision on a penumbral right to privacy found in the Constitution.[11] This reasoning lead to the Court's decision in *Planned Parenthood of Central Missouri v. Danforth*,[12] where it held unconstitutional statutes requiring spousal consent for abortion,[13] as well as any absolute veto by the male of a woman's decision to have an abortion. The Court has also struck down statutes requiring the abortion provider to notify the spouse or to conduct at least one mediation session prior to performing a challenged abortion.[14] Thus, the father can neither order, nor prevent or play a supportive

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Baby Boy D, 742 P.2d 1059 (Okla. 1985); *In re* Adoption of Baby Girl M, 942 P.2d 235 (Okla. Ct. App. 1997); GWJ v. MH (*In re* Adoption of BGH), 930 P.2d 371 (Wyo. 1996).

[7] Santosky v. Kramer, 455 U.S. 745, 758-59 (1982).

[8] W.E. Shipley, Annotation, *Woman's Right to Have Abortion Without Consent of, or Against Objections of, Child's Father*, 62 A.L.R.3d 1097 (1975).

[9] 410 U.S. 113 (1973).

[10] 410 U.S. 179 (1973).

[11] *Roe*, 410 U.S. at 152 (noting that the Court has previously held that the Constitution guarantees "certain areas or zones of privacy").

[12] 428 U.S. 52 (1976).

[13] No states have attempted to include the rights of putative fathers when considering the male's role in the abortion decision. *See, e.g.*, *In re* Interest of S.P.B., 651 P.2d 1213 (Colo. 1982); Rothenberger v. Doe, 374 A.2d 57 (N.J. Super. Ct. Ch. Div. 1977).

[14] Arthur B. Shostak, *The Role of Unwed Fathers in the Abortion Decision*, *in* YOUNG UNWED FATHERS, CHANGING ROLES AND EMERGING POLICIES 292 (Robert I. Lerman & Theodora J. Ooms eds., 1993).

role[15] in the abortion decision. In other words, the father has been "relegat[ed] . . . to legal oblivion."[16]

When a female determines she is pregnant, she has the freedom to decide if she has the maturity level to undertake the responsibilities of motherhood, if she is financially able to support a child, if she is at a place in her career to take the time to have a child, or if she has other concerns precluding her from carrying the child to term. After weighing her options, the female may choose abortion. Once she aborts the fetus, the female's interests in and obligations to the child are terminated.

In stark contrast, the unwed father has no options. His responsibilities to the child begin at conception and can only be terminated with the female's decision to abort the fetus or with the mother's decision to give the child up for adoption. Thus, he must rely on the decisions of the female to determine his future. The putative father does not have the luxury, after the fact of conception, to decide that he is not ready for fatherhood. Unlike the female, he has no escape route.

Most states require a proceeding to establish paternity.[17] Once

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[15] In a study of 1,000 men in 30 abortion clinic waiting rooms in 18 states, the majority of the sample were dissatisfied with their rights regarding the abortion decision. Shostak, *supra* note 14, at 288. Of the 820 single respondents, 80 percent felt the husband should have equal say in the decision, and 58 percent felt the putative father should have equal say. Shostak, *supra* note 14, at 292. Additionally, 54 percent felt abortion clinics should be required to notify husbands of impending abortions on their wives. Shostak, *supra* note 14, at 292.

Moreover, this sample was also dissatisfied with abortion clinic procedures and practices. Ninety-three percent wanted to accompany the female during the one-hour post-abortion period; 69 percent wanted counseling and education about abortion and contraception offered to males in the waiting rooms; and 64 percent wanted private counselors in the waiting rooms. Shostak, *supra* note 14, at 292.

[16] Shostak, *supra* note 14, at 293.

[17] *E.g.*, NEW YORK FAMILY COURT ACT § 522 (McKinney 1997) (permitting a "person alleging to be the father" to commence a proceeding to establish the paternity of a child); S.C. CODE ANN. § 20-7-952 (Law. Co-op. 1976) (establishing procedure to aid in determining the paternity of a child). New York courts have recognized that such a proceeding is in the best interests of the child. For example, the court in *Leromain v. Venduro* stated:

> By amending section 522 of the Family Court Act to authorize a person alleging to be the father to commence a paternity proceeding,

the male is adjudged to be the father, the state then requires him to pay child support until the age of majority.[18] The statutory requirement that the male pay for the support of a child born to an unwed mother is not new.[19] However, in recent years, the federal government has stepped in to ensure that fathers are paying child support.[20]

When a putative father fails to meet his support obligation, both federal and state laws offer procedures by which support can be ordered or enforced. Federal provisions enacted since 1975[21] have imposed mandates upon states in order for them to receive funding from Aid to Families with Dependent Children[22] ("AFDC"). These

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> the Legislature has plainly indicated its belief that the best interests of the child will, in fact, be advanced by establishing the alleged father's paternity, irrespective of the mother's wishes.

466 N.Y.S.2d 729, 731 (App. Div. 1983) (citation omitted). One year later, in a case in which an unwed mother sought a declaration of paternity and an order of support, the New York Court of Appeals took the *Leromain* ruling further by holding that "even if petitioner mother had assigned away any right to seek support payments, she and her child still may obtain an order of filiation in the present proceeding." *In re* Cathleen P. v. Gary P., 471 N.E.2d 145, 146 (N.Y. 1984) (citations omitted).

[18] *E.g.*, S.C. CODE ANN. § 20-7-957 (Law. Co-op. 1976).

[19] *See* Maynard v. People, 25 N.E. 740, 742 (Ill. 1890) ("[T]here have been in force in this state, ever since the year 1827, statutes making provision for proceedings against the putative fathers of bastard children for the purpose of compelling them to contribute towards the support, maintenance, and education of such children.").

[20] Because most of the unwed parents are young (under 24) and in need of governmental assistance, the states were becoming overburdened. In an effort to lessen the burden of the state for supporting these children, both state and federal legislators have attempted to require the putative father to support his child(ren). Paula G. Roberts, *Child Support Orders: Problems with Enforcement*, *in* THE FUTURE OF CHILDREN 101, 106-07 (Richard E. Behrman, M.D. ed., 1994). Currently, 30 percent of all births are out of wedlock. *Id.* at 106.

[21] Child Support Enforcement Act, Pub. L. No. 93-647 (1975) (codified as Title IV-D of the Social Security Act, 42 U.S.C. §§ 651-669b (1975).

[22] 42 U.S.C. §§ 601-669b (1998). AFDC is a cooperative federal and state program in which economic support is allocated to poor families. The states decide the appropriate level of benefits, and the federal government provides one-half of this level through monetary grants to the states. 42 U.S.C. § 602. "In order to participate in [the] AFDC program, states must require that [the]

mandates include the requirement that unwed mothers applying for AFDC must name the putative father and cooperate in seeking child support from him. In addition, the mother must assign the support right to the AFDC agency, whereby the putative father must pay the support directly to the state.

In 1988, Congress passed the Family Support Act of 1988.[23] The purpose of the act is to ensure that no one escapes the economic responsibility of parenthood. It requires, *inter alia*, the states to collect the social security numbers from both parents at the time of the birth and to meet tougher standards for improving paternity determinations.

States have followed the federal lead and have enacted statutes requiring enforcement of the putative father's support obligation.[24] Currently states and the federal government are searching for more avenues to enforce support payments by putative fathers.[25] Many

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recipient family assign its right to child support to the state; states are then required to collect any support money and to offset them against amounts paid in AFDC . . . ." 42 U.S.C. § 657.

[23] Pub. L. No. 100-485, 102 Stat. 2344-46, 2349-50 (codified in scattered sections of 42 U.S.C., including 42 U.S.C. §§ 666-667).

[24] *E.g.*, NEW YORK FAMILY COURT ACT §§ 413, 416(a) (McKinney 1997) (outlining the fact that a father may not be released from his parental duties by contractual agreement). *See also In re* Michelle W. v. Forrest James P., 637 N.Y.S.2d 538 (App. Div. 1996). The *Michelle W.* court noted that "Family Court Act 516(a) permits a mother and putative father of a child to enter into a binding agreement for support of their out-of-wedlock child provided that the court determines that adequate provisions have been made for the child." *Id.* (citations omitted). The agreement in that case provided that the putative father support the child for a mere three years. In addition, the agreement severed the putative father's parental rights. Therefore, the court refused to uphold it on the grounds that "[t]he severing or establishing of parental rights can only be accomplished through statutorily governed proceedings, i.e., adoptions or permanent neglect proceedings." *Id.* at 540. The court supported this contention by stating "'[i]t is every child's birthright to be sustained and supported according to the means and station in life of its father.'" *Id.* (quoting Dee v. Dee, 169 N.Y.S.2d 789, 793 (Fam. Ct. 1957)).

[25] *See, e.g.*, Governor Carroll A. Campbell, Jr., South Carolina State of the State Address (Jan. 19, 1994) ("A young man at age 15 or 16 may not be able to support a child today. But, someday, when he's 23 or 24 years old and has a job, that child will be nearly ten and will need his help. That young man should be made to pay support."); N.Y. SOC. SERV. LAW § 352-a (McKinney 1997)

states have recently enacted statutes requiring employers to withhold income from nonpaying fathers.[26] States have also enacted legislation providing for the nonrenewal or revocation of professional,[27] motor vehicle, and hunting and fishing licenses of fathers who fail to pay child support.[28] Some states go so far as to make the failure to pay support punishable through criminal sanctions.[29]

Given the trend in state and federal legislation, the putative father will be less likely to escape the responsibility of supporting his child. This Article proposes that a putative father should have the same right to escape these responsibilities as that of an unwed

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(outlining the procedures social services officials must follow in order to establish paternity and enforcement of support). Under the New York statute, a social services official has the duty and power "to provide pertinent information to such court and law enforcement officials to enable them to assist in locating putative fathers, . . . in establishing paternity and in securing support payments therefrom." *Id.* § 352-a(1)(e).

[26] *See, e.g.*, ME. REV. STAT. ANN. tit. 22, § 3816 (West Supp. 1997); MASS. ANN. LAWS ch. 119A, § 12 (Law Co-op. 1994 & Supp. 1998); N.Y. C.P.L.R. 5241 (McKinney 1997); N.C. GEN. STAT. § 110-136.3 (Michie 1997); S.C. CODE ANN. § 20-7-1315 (West 1997).

[27] *See, e.g.*, CAL. BUS. & PROF. CODE § 6143.5 (West 1992) (establishing penalty for failure of State Bar members to pay child support).

[28] *See, e.g.*, ME. REV. STAT. ANN. tit. 19-A, § 2603-A (West 1998) (authorizing suspension of driver's license and revocation of occupational and recreational licenses); MASS. ANN. LAWS ch. 119A, § 16 (Law Co-op. 1994) (authorizing revocation, suspension, nonissuance or nonrenewal of, *inter alia*, recreational, driver's, and professional licenses); N.Y. DOM. REL. LAW § 244-C (McKinney 1998) (authorizing suspension of professional, occupational, and business licenses); N.C. GEN. STAT. § 50-13.12 (Michie 1997) (authorizing forfeiture of, *inter alia*, recreational, driver's, and professional licenses); S.C. CODE ANN. § 20-7-941 (West 1997) (authorizing revocation of, *inter alia*, recreational, driver's, and professional licenses).

[29] *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-511 (West 1997); CONN. GEN. STAT. ANN. § 53-304 (West 1994 & Supp. 1998); GA. CODE ANN. § 19-10-1 (Michie 1991); IND. CODE § 35-46-1-5 (1978); IOWA CODE ANN. § 726.5 (West 1993); KY. REV. STAT. ANN. § 530.050 (Michie 1990); ME. REV. STAT. ANN. tit. 17-A, § 552 (West 1983); MASS. ANN. LAWS ch. 273, § 1 (Law Co-op. 1992 & Supp. 1998); MICH. COMP. LAWS § 750.165 (Michie 1991); MO. REV. STAT. § 568.040 (West Supp. 1998); NEB. REV. STAT. § 28-706 (1995); N.J. STAT. ANN. § 2C:24-5 (West 1995); N.D. CENT. CODE § 12.1-37-01 (Michie 1997).

mother. This Article will first survey the current abortion law to determine the rights the female has that the putative father does not. Next, the standard of proof, the role of fraud and misrepresentation in paternity proceedings, and the status of contractual agreements relieving the putative father of duty to pay support will be analyzed. The Article will then look to current termination of parental right statutes to determine the options and protections of an unwed parent under the current law and the role played by the best interests of the child. This Article will then set out a model statute for the voluntary termination of the putative father's rights in and obligations to his child. Finally, the constitutionality of the proposed statute will be analyzed.

I. CURRENT ABORTION LAW

In 1973, the United States Supreme Court held that a woman's right to an abortion is constitutionally protected as a privacy right.[30] However, the Court did not qualify abortion as an absolute right. Compelling state interests limit the right to choose abortion.[31] The Court recognized that, unlike other interests such as marital intimacy that are afforded constitutional protection as a privacy right, the abortion decision involves a fetus having the potential to develop into a human being, thereby giving the state compelling interests to protect.[32] Today, *Roe* stands for the recognition of the female's right to choose an abortion prior to viability and for the confirmation of the state's power to enact laws restricting abortions after fetal viability when the life or the health of the female is in danger. *Roe* also stands for the principle that the state has a legitimate interest at conception in protecting the health of the female and the life of the potential child.[33]

Since *Roe*, the Court has continued to shape the extent of the abortion right and issues related to this right.[34] The Court has

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[30] Roe v. Wade, 410 U.S. 113 (1973).

[31] *Id.* at 155.

[32] *Id.* at 154. *See* Sharrin, *supra* note 2, at 1368 n.36.

[33] *In re* Initiative Petition No. 349, 838 P.2d 1, 6 (Okla. 1992).

[34] Madsen v. Women's Health Ctr., 512 U.S. 753 (1994); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993); Planned Parenthood of

upheld state requirements of parental consent if the minor female is insufficiently mature to make the decision herself; however, the state requiring parental consent must provide a procedure for judicial bypass.[35] In contrast, the state cannot require spousal consent during the period when the state itself cannot proscribe abortion.[36]

Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Rust v. Sullivan, 500 U.S. 173 (1991); Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990); Webster v. Reprod. Health Servs., 492 U.S. 490 (1989); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); H.L. v. Matheson, 450 U.S. 398 (1981); Harris v. McRae, 448 U.S. 297 (1980); Bellotti v. Baird, 443 U.S. 622 (1979); Maher v. Roe, 432 U.S. 464 (1977); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

[35] *Bellotti*, 443 U.S. at 643. The Court set out four criteria a bypass procedure must satisfy. First, the procedure must allow the minor to demonstrate that she possesses the requisite maturity and information to make the abortion decision, in consultation with her doctor, without regard to her parents' wishes. *Id.*; *see also Akron Cent. for Reprod. Health*, 497 U.S. at 510. Second, the procedure must allow the minor to demonstrate that the abortion is in her best interests, even if she cannot make the decision by herself. *Bellotti*, 443 U.S. at 644; *see also* 497 U.S. at 511. Third, the procedure must insure the minor's anonymity. *Bellotti*, 443 U.S. at 644; *see also* 497 U.S. at 512. Fourth, the courts must conduct a bypass procedure with expedition to allow the minor an effective opportunity to obtain the abortion. *Bellotti*, 443 U.S. at 644; *see also* 497 U.S. at 513.

[36] *Danforth*, 428 U.S. at 69. The Court stated:

> [T]he State cannot 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy' . . . . Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

Id. (citation omitted).

However, states continue to require spousal consent during the third trimester, a period when the state itself can proscribe abortions. *See e.g.*, S.C. CODE ANN. § 44-41-20(c) (Law. Co-op. 1976) ("Abortion shall be a criminal act except when performed under the following circumstances: . . . (c) During the third trimester of pregnancy, the abortion is performed with the pregnant woman's consent, and if married and living with her husband the consent of her husband . . . .").

The Court has limited the indigent female's access to abortion by upholding statutes prohibiting the use of Medicaid[37] funds to finance abortions, even though Medicaid funds are properly used to finance childbirth.[38] In *Maher v. Roe*,[39] the Court clarified *Roe v. Wade* by declaring:

> *Roe* did not declare an unqualified 'constitutional right to an abortion,' . . . . Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.[40]

The Court explained that a basic difference exists "between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[41] Three years later, in *Harris v. McRae*, the Court upheld the constitutionality of the Hyde Amendment,[42] which places federal restrictions on Medicaid funds for abortions except in

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[37] Medicaid is a joint federal-state entitlement program that provides funding for various medical services to the poor. *See* 42 U.S.C.A. § 1396b (West 1998).

[38] Dalton v. Family Planning Servs., 516 U.S. 474, 476-78 (1996); *Maher*, 432 U.S. 470-71.

[39] 432 U.S. at 464 (holding that states may refuse to provide Medicaid funding for non-therapeutic abortions).

[40] *Id.* at 473-74.

[41] *Id.* at 475.

[42] The Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 923 (1980) states:

> None of the funds provided by this joint resolution [Medicaid funding] shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Harris v. McRae, 448 U.S. 297, 302 (1980). The current version of the Hyde Amendment reads: "None of the funds appropriated by this [Appropriations Act] shall be available to pay for an abortion, except where the life of the mother would be endangered if the fetus were carried to term, or in the case of rape . . . ." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440 (1997).

limited circumstances.[43] Thus, the Due Process Clause of the Fourteenth Amendment does not confer a right to governmental aid, even if failing to provide aid would affect the security of life, liberty, or property interests.[44]

Several states bypassed *Harris* and *Maher*.[45] In 1993, the West Virginia Supreme Court of Appeals struck down a West Virginia statute denying Medicaid funds for therapeutic abortions, because the statute violated the West Virginia Constitutional rights of indigent West Virginian women.[46] The court defined the issue as

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[43] *Harris*, 448 U.S. at 316-26. The Court stated:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in [*Roe v.*] *Wade*.

Id. at 316-17.

[44] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

[45] *See* Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981); Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); Hope v. Perales, 595 N.Y.S.2d 948 (App. Div. 1993); Planned Parenthood Ass'n v. Department of Human Resources, 663 P.2d 1247 (Or. 1983), *aff'd*, 687 P.2d 785 (Or. 1984).

[46] Women's Health Ctr. of W. Va., Inc. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993). The West Virginia statute provided:

> (a) No funds from the medicaid program accounts may be used to pay for the performance of an abortion by surgical or chemical means unless:
>
> (1) On the basis of the physician's best clinical judgment, there is:
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> (i) A medical emergency that so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the

"whether, once the state undertakes funding of medical care for the poor, which includes funding for childbirth, can the state deny funding for medically necessary abortion services?"[47]

In deciding that the statute violated the due process rights of indigent females, the court recognized that the state constitution's due process clause provided more protection than its federal counterpart.[48] Because states are permitted to give greater protection than that accorded by the federal constitution,[49] the court was free to reject the *Harris* precedent.[50] The court stated that it was required to enforce the federally-created right of privacy, which protects the female's right to choose, in a nondiscriminatory manner.[51]

> mother or for which a delay will create grave peril of irreversible loss of major bodily function or an equivalent injury to the mother: Provided, That an independent physician concurs with the physician's clinical judgment; or
> (ii) Clear clinical medical evidence that the fetus has severe congenital defects or terminal disease or is not expected to be delivered; or
> (2) The individual is a victim of incest or the individual is a victim of rape when the rape is reported to a law-enforcement agency.
> (b) The Legislature intends that the state's medicaid program not provide coverage for abortion on demand and that abortion services be provided only as expressly provided for in this section.

Panepinto, 446 S.E.2d at 661 n.1 (citing W. VA. CODE § 9-2-11 (Supp. 1993)).

[47] *Id.* at 662.

[48] *Id.* at 664 (citing State v. Bonham, 317 S.E.2d 501, 503 (W. Va. 1984)). The West Virginia due process clause states:

> All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.

W. VA. CONST. art. III, § 1.

[49] Connecticut v. Johnson, 460 U.S. 73 (1983).

[50] 446 S.E.2d at 664.

[51] *Id.*

By exercising her constitutional right to an abortion, an indigent female and her family are penalized.[52] The female receiving AFDC benefits, who either receives a gift or donation, earns additional income, or borrows funds to pay for an abortion, must report this extra money to the Department of Human Resources.[53] Receiving the additional funds may render the female ineligible for further AFDC benefits; thus, she is penalized through the loss of funds she would have received but for the exercise of her constitutional right to abortion.[54]

The court concluded that the statute denied the indigent female due process protection. "[W]hen state government seeks to act 'for the common benefit, protection and security of the people' in providing medical care for the poor, it has an obligation to do so in a neutral manner so as not to infringe upon the constitutional rights of [its] citizens."[55] According to this court, the real issue was protecting the individual from undue governmental interference.[56] Therefore, the court held:

> the provisions of [the statute] constitute[d] undue government interference with the exercise of the federally-protected right to terminate a pregnancy . . . . [W]ere it not for this state's undertaking to provide medically necessary care to the poor through entitlement programming such as Medicaid, it would not be operating in violation of its obligation to act neutrally for the common benefit of its citizens by enacting legislation such as West Virginia Code § 9-2-11, the effect of which is forced compliance with legislated reproductive policy.[57]

The question of payment for abortions with Medicaid funds remains unanswered in many states.

In 1989, the United States Supreme Court decided *Webster v. Reproductive Health Services*.[58] Although the Court did not

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[52] *Id.* at 665.
[53] *Id.* at 664-65.
[54] *Id.*
[55] *Id.* at 667.
[56] *Id.*
[57] *Id.*
[58] 492 U.S. 490 (1989).

directly address the validity of *Roe*, it did reject *Roe*'s strict trimester approach.[59] The Court held that a state's interest in protecting human life did not attach until viability of the fetus.[60] In this case, the Court accepted the Missouri legislation, which established viability at twenty weeks.[61]

After *Webster*, the fate of *Roe* appeared uncertain. Five of the justices in *Webster* joined in criticizing *Roe*.[62] In addition, legal commentators anticipated the Court's overruling *Roe* or substantially undercutting its principals.[63] However, the Court did not live up to these expectations when it decided *Planned Parenthood v. Casey* in 1992.[64]

Casey reaffirmed *Roe*'s central premise that "the right of privacy founded in the Fourteenth Amendment's concept of personal liberty includes a woman's right to have an abortion."[65] The Court stated the issue as:

> [W]hether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.[66]

After balancing the woman's liberty interest against the state's interest in fetal life, the Court held that prior to viability the

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[59] *Id.* at 518-19.

[60] *Id.* at 519-21.

[61] *Id.* at 519-20.

[62] *Id.* at 518-19.

[63] *See* Erich Brueschke & Jason Brueschke, *Constitutional Law: The Future of the Abortion Controversy and the Role of the Supreme Court After* Webster v. Reproductive Health Services, 43 OKLA. L. REV. 481, 513 (1990); Clarke D. Forsythe, *A Legal Strategy to Overturn* Roe v. Wade *After* Webster: *Some Lessons from Lincoln*, 1991 BYU L. REV. 519, 520-21 (1991); Selina K. Hewitt, Hodgson v. Minnesota: *Chipping Away at* Roe v. Wade *in the Aftermath of* Webster, 18 PEPP. L. REV. 955, 995 (1991); Colloquy, Webster v. Reproductive Health Services, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 89 (1989).

[64] 505 U.S. 833 (1992).

[65] *In re* Initiative Petition No. 349, 838 P.2d 1, 5 (Okla. 1992) (citing *Casey*, 505 U.S. at 857-862).

[66] 505 U.S. at 850-51.

woman has a right to choose abortion and that the state may not deprive the woman of that right.[67]

Five Justices agreed in reaffirming three parts of the *Roe* decision. These Justices first recognized the woman's right to choose abortion prior to viability and to obtain it without undue interference from the state.[68] The Justices then confirmed the state's power to "restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health."[69] Finally, the Justices held that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[70]

Thus, the woman has the freedom to choose abortion prior to viability of the fetus. At viability, the state may step in to prevent the abortion; however, the state is not obligated to prevent the abortion of a viable fetus. If the female does not have the funds for an abortion, she may not be able to use federal funds to pay for the abortion unless the state in which she resides has circumvented *Harris*. However, the lack of funding is not a direct denial of the woman's decision to have an abortion because, should the female obtain the funds, she will not be prevented from having the abortion. The female's procreative freedom has consistently been protected at both the federal and state levels.

Although the woman's choice to abort the fetus she is carrying continues to be protected under the law, the father's role in the abortion decision is contrastingly restrained.[71] At common law the father, during his lifetime, had exclusive rights in his child, and the mother was entitled only to "reverence and respect."[72] Today, parental rights are joint and equal between husband and wife.[73]

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[67] *Id.* at 846.

[68] *Id.* (O'Connor, Kennedy, Souter, J.J., joined in pertinent part by Stevens and Blackmun, J.J., plurality opinion).

[69] *Id.*

[70] *Id.*

[71] Shipley, *supra* note 8, at 1098.

[72] Shipley, *supra* note 8, at 1097.

[73] Shipley, *supra* note 8, at 1097.

However, after *Roe*, the mother was given the right to choose to abort while the father's role remained unclear.

The 1970's saw the bulk of litigation regarding the father's abortion rights. The married father has been held to be without standing to enjoin his wife and her doctor from proceeding with an abortion of children of the marriage.[74] Putative fathers have also been held to be without standing to interfere with the mother's decision to abort.[75] Given the Court's decision regarding spousal consent in *Danforth*, the requirement of the putative father's consent prior to viability would most likely be held unconstitutional.[76]

Potential fathers continue to seek injunctions to prevent abortions.[77] Some have been successful in attaining lower court restraining orders.[78] However, the appellate courts reverse the lower court decisions,[79] or the putative father reaches an agreement with the female,[80] thus making the injunctions or temporary

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[74] Doe v. Doe, 314 N.E.2d 128, 130 (Mass. 1974). In rejecting the husband's constitutional argument that his right to decide whether to bear children was violated, the court found that "cases involving the right to procreate and the right to privacy were protections against government intrusion, not vehicles to control decisions of other private citizens." Sharrin, *supra* note 2, at 1381 (citing *Doe*, 314 N.E.2d at 130).

[75] Jones v. Smith, 278 So. 2d 339 (Fla. Dist. Ct. App. 1973). The court rejected the father's argument that "by consenting to sexual intercourse the woman had waived her right to an abortion, and that by seeking an abortion the woman had 'abandoned' the child and was, therefore, unfit." Sharrin, *supra* note 2, at 1380.

[76] *See* Rothenberger v. Doe, 374 A.2d 57, 59 (N.J. Super. Ct., Ch. Div. 1977) ("[W]here there is no marital relation involved, the natural father has even less equity in compelling the mother to suffer an unwanted pregnancy.").

[77] Sharrin, *supra* note 2, at 1359 n.4 (citing cases in which the putative fathers sought injunctions to prevent the pregnant female from having, and the doctor from performing the abortion).

[78] *See* Doe v. Smith, 527 N.E.2d 177 (Ind. 1988); Doe v. Smith, 530 N.E.2d 331 (Ind. Ct. App. 1988), *cert. denied*, 492 U.S. 919 (1989). *See also* Sharrin, *supra* note 2, at 1359-60 n.4.

[79] *See* Sharrin, *supra* note 2, at 1359 n.4 (citing Doe v. Smith, 527 N.E.2d at 177).

[80] Sharrin, *supra* note 2, at 1359 n.4 (citing Williams v. Miller, No. EQ 12396 (Iowa Dist. Ct. Sept. 14, 1988) (granting the putative father a TRO with the mother's consent after both parties reached an agreement)).

restraining orders moot. Therefore, the putative father has little or no voice in the abortion decision.

II. PATERNITY ANALYSIS

A. Standard of Proof

Given the ramifications of a determination that the putative father is the biological father, what should the evidentiary standard be to prove paternity of the child? Keep in mind that paternity tests only determine that the putative father is not in the class of possible fathers or that the putative father falls within the small percentage of males who could be the father.[81] If the putative father is determined to be within the group of possible fathers, he must then come forward with proof that he is not the father, such as evidence of lack of access to the mother, his own testimony, or the testimony of others.[82] Because such high stakes are involved in a paternity determination, the standard of proof should be high because of the devastating effect of a wrongful finding of paternity. However, the United States Supreme Court has failed to recognize the seriousness of paternity proceedings and has failed to protect the father's constitutionally recognized liberty interests.

In 1987, the United States Supreme Court decided *Rivera v. Minnich*, which answered the question of what evidentiary standard should control in a paternity proceeding.[83] The issue in this case was whether a preponderance of the evidence standard for determining paternity violated the putative father's Fourteenth Amendment due process rights.[84]

Justice Stevens delivered the opinion of the Court, holding the preponderance of the evidence standard in paternity proceedings constitutional. Stevens first recognized that the preponderance of the evidence standard is the most frequently applied standard in

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[81] Mills v. Habluetzel, 456 U.S. 91, 98 n.4 (1982).

[82] *Id.*

[83] 483 U.S. 574 (1987) (Rehnquist, C.J., White, Marshall, Blackmun, Powell, and Scalia, J.J., joining) (O'Connor, J., concurring) (Brennan, J., dissenting).

[84] *Id.* at 575.

civil litigation and, for the majority of American jurisdictions, in paternity litigation.[85] Because this standard is the "'dominant opinion' . . . in accord with 'the traditions of our people and our law,'"[86] it is "entitled to a powerful presumption of validity when it is challenged under the Due Process Clause of the Fourteenth Amendment."[87]

Stevens then justified the distinction between the constitutionally required clear and convincing evidence standard to terminate parental rights[88] and the proof required to establish the parental relationship.[89] First, in a termination proceeding, the putative father is seeking to protect his recognized liberty interest of "companionship, care, and custody of his children."[90] The state is "seeking to destroy permanently all legal recognition of the parental relationship,"[91] which is a recognized liberty interest.[92] Therefore, clear and convincing evidence is required to terminate a putative father's parental rights because "'rights once confirmed should not be lightly revoked.'"[93]

In contrast, in a paternity proceeding the putative father is attempting to avoid the "serious economic consequences that flow from a court order . . . establish[ing] paternity and its correlative obligation to provide support for the child."[94] Unlike a termination hearing, where the protected interest is an existing parental relationship, the paternity proceeding does not violate an existing constitutionally protected interest.[95] "[T]he putative father has no

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[85] *Id.* at 577-78.

[86] *Id.* at 578 (citing Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

[87] *Id.*

[88] *See* Santosky v. Kramer, 455 U.S. 745, 748 (1982).

[89] *Rivera*, 438 U.S. at 579.

[90] *Id.* at 580 (citing *Santosky*, 455 U.S. at 758-59).

[91] *Id.*

[92] *Santosky*, 455 U.S. at 758-59 (citing Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981) (quoting Stanley v. Illinois, 465 U.S. 645, 651 (1972))).

[93] *Rivera*, 483 U.S. at 580 (citing Schneiderman v. United States, 320 U.S. 118, 125 (1943)).

[94] *Id.* at 580.

[95] *Id.* at 579-80.

legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law."[96] Thus, the potential effect on the putative father in a paternity proceeding is not as great as that in a termination proceeding, and the preponderance of the evidence standard is sufficient.[97]

Second, Stevens observed that the relationship between the parties involved in a termination proceeding differs from the relationship of the parties in a paternity proceeding. In a termination proceeding, the State and the parent are the contestants. When the State is a party, the Constitution demands that the state bear the burden of a higher standard of proof than preponderance of the evidence.[98] This enhanced standard is necessary because the State has greater resources and because an adverse ruling has "especially severe consequences for the individuals affected."[99]

However, in a paternity proceeding, the parties are the putative father and the mother, both of whom have a "relatively equal[] interest in the outcome."[100] Because an adverse ruling would cause both parties to suffer similar consequences, the parties should share the risk of an inaccurate factual determination.[101] In addition, the child's interest in the paternity proceeding could be negatively affected by either standard of proof. Using a preponderance of the evidence standard increases the risk that the putative father will erroneously be determined to be the biological father.[102] On the other hand, a clear and convincing evidentiary standard may result in the erroneous determination that the putative father is not the biological father and not responsible for the child's support.[103] Thus, "[t]he equipoise of the private interests that are at stake in a paternity proceeding supports the conclusion that the

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[96] *Id.* at 580.
[97] *Id.* at 580-81.
[98] *Rivera*, 483 U.S. at 581.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Rivera*, 483 U.S. at 581.

[preponderance of the evidence standard] is also appropriate for [paternity proceedings]."[104]

Finally, Stevens noted that the finality of judgment in favor of the putative father in a termination proceeding differs from that in a paternity proceeding. A state may repeatedly attempt to terminate parental rights without triggering double jeopardy; thus, the higher standard of proof for termination proceedings protects the parent from continued efforts to sever the parent-child relationship.[105] In contrast, the paternity proceeding "terminates with the entry of a final judgment that bars repeated litigation of the same issue."[106]

Justice Brennan was the lone dissenter in *Rivera*. Brennan reasoned that the imposition of the parental relationship and its consequences demanded the higher standard of proof.[107] Unlike Stevens, who equivocated the paternity proceeding to a monetary dispute,[108] Brennan recognized the effect of a positive paternity determination on the putative father, which imposes "a lifelong relationship with significant financial, legal, and moral dimensions."[109]

The financial implications of paternity are ongoing and open-ended.[110] The adjudicated father's financial responsibility extends until at least the child's eighteenth birthday and the amount of support varies according to the needs of the child.[111] In addition, "[i]f a child receives any form of public assistance, all the father's real and personal property are deemed available to the State for reimbursement."[112] Thus, the financial responsibilities of an adjudicated father are "far more onerous and unpredictable than the liability borne by the loser in a typical civil suit."[113]

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[104] *Id.*
[105] *Id.* at 582.
[106] *Id.*
[107] *Id.* at 586 (Brennan, J., dissenting).
[108] *Rivera*, 483 U.S. at 578 n.5.
[109] *Id.* at 583 (Brennan, J., dissenting).
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Rivera*, 483 U.S. at 584.

The paternity determination also entails significant legal ramifications. If the adjudicated father fails to comply with a support obligation, he may be subject to the attachment of income, the confiscation of income tax refunds, the imposition of contempt sanctions, or incarceration.[114] Therefore, the paternity determination "establishes a legal duty whose assumption exposes the father to the potential loss of both property and liberty."[115]

Along with the financial and legal implications involved, the paternity determination creates a parent-child relationship, which is a pronouncement of far more than a financial responsibility.[116] As a result, the adjudicated father "assumes a cultural role with distinct moral expectations."[117] The parental relationship a paternity determination creates has the "potential to set in motion a process of engagement that is powerful and cumulative, and whose duration spans a lifetime."[118] Thus, because fatherhood involves an emotional bond and ongoing moral responsibilities, the paternity proceeding is "more akin to [a termination proceeding], than to a suit for breach of contract."[119]

Brennan further distinguished the paternity proceeding from the common civil suit by recognizing the difference in social consequences. The putative father, as the defendant in the paternity action, may be characterized as "shirk[ing] responsibility for his actions."[120] He will be viewed by society as "a parent apparently impervious to the moral demands of that role, who must instead be coerced by law to fulfill his obligation."[121] In his role as parent, the adjudicated father will always be seen as having accepted the

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[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Rivera*, 483 U.S. at 585.

[119] *Id.* Brennan also noted that Pennsylvania required clear and convincing evidence for such proceedings as change of domicile, reformation of contract on grounds of mistake, proof of adverse possession, and claims for wages for personal services rendered to a decedent. *Id.* at 585 n.l.

[120] *Id.* at 585.

[121] *Id.*

role involuntarily, regardless of the quality of the parent-child relationship.[122]

Thus, considering the financial, legal, and moral implications as well as the social consequences, "a paternity proceeding . . . implicates significant property and liberty interests of the [putative father]."[123] Modern blood-grouping tests are extremely reliable, so the difference in proof standards would not make a practical difference where the mother introduces blood test results.[124] However, when the mother relies on other evidence, which is not scientific, the possibility for error is much greater because "'the truth [in a contested paternity action] is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity.'"[125] In an effort to protect the putative father's property and liberty interests and in recognition of the gravity of imposing a parental relationship, courts should require the more demanding clear and convincing evidence standard of proof rather than a mere preponderance of the evidence.[126]

Along with providing for a lower standard of proof, states have enacted legislation making proof of paternity easier. For example, in 1994, the South Carolina General Assembly enacted legislation creating presumptions of paternity[127] providing for the

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[122] *Id.*

[123] *Rivera*, 483 U.S. at 586.

[124] *Id.*

[125] *Id.* (quoting Cortese v. Cortese, 76 A.2d 717, 719 (N.J. Sup. Ct. 1950)).

[126] *Id.*

[127] S.C. CODE ANN. § 20-7-956 (Law. Co-op. 1994). The following evidence will be admissible at a hearing to prove paternity: 1) results of genetic tests admitted without foundation testimony or other proof of authenticity or accuracy unless the putative father challenges the tests at least twenty days prior to trial; 2) the refusal of a party to submit to genetic or other tests as to the credibility of the party; 3) test results showing a statistical probability of paternity (a statistical probability of 95 percent or higher creates a rebuttable presumption of the putative father's paternity); 4) a verified voluntary acknowledgment of paternity, which creates a rebuttable presumption of paternity; 5) a foreign paternity determination creating a conclusive presumption of paternity; 6) a birth certificate containing the signature of the mother and the putative father, which creates a rebuttable presumption of paternity; 7) expert testimony concerning the time of conception; 8) the testimony of a husband and wife as to any relevant matter; and 9) any other relevant and competent evidence deemed admissible in

implementation of programs to promote voluntary acknowledgments of paternity before a newborn is released from the hospital[128] and requiring that the social security numbers of the mother and putative father be included in the forms prescribed by the state registrar for birth certificates.[129] Thus, states are creating an atmosphere in which the mother feels pressure to name a father of the child, who may or may not be the putative father. In turn, by having a lower standard of proof the danger of an erroneous paternity determination becomes even greater, and the risk of depriving the putative father of his protected liberty interests increases as well.

B. Fraud and Misrepresentation

In addition to challenging the constitutionality of the paternity standard of proof, putative fathers also have employed the claim or defense of fraud and misrepresentation in paternity proceedings to avoid their duty to pay support or to recover from the female damages for the amount of the support awarded. The putative father argues that the mother lied to him regarding her ability to conceive or her use of contraceptives. Thus, the putative father could not have agreed to become a father and should not be made to pay support or should be allowed to recover damages because his right to procreative choice or his right to privacy has been violated.[130]

Courts unanimously have held that such claims or defenses are against public policy.[131] In *Stephen K. v. Roni L.*, a putative

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the discretion of the court. § 20-7-956(A). *See also* N.Y. PUB. HEALTH LAW § 4135-b (McKinney 1997) (outlining the standard of proof in a voluntary acknowledgement of paternity proceeding); N.Y. SOC. SERV. LAW § 111-k(2)(a) (McKinney 1997) (describing the standard of proof when the paternity of a child is contested).

[128] S.C. CODE ANN. § 44-7-77 (Law. Co-op. 1994).

[129] S.C. CODE ANN. § 44-63-75 (Law. Co-op. 1994).

[130] Anne M. Payne, Annotation, *Parent's Child Support Liability as Affected by Other Parent's Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control, or Refusal to Abort Pregnancy*, 2 A.L.R.5th 337, 350 (1992).

[131] *See* Erwin L.D. v. Myla Jean L., 847 S.W.2d 45 (Ark. Ct. App. 1993) (refusing to endorse the putative father's proposition that birth control fraud can act as a bar to a claim of paternity); Stephen K. v. Roni L., 164 Cal. Rptr. 618

father who admitted paternity cross-claimed against the mother for fraud, negligent misrepresentation, and negligence based on the mother's alleged false representation of her use of birth control.[132] The father claimed he relied upon the mother's representations in deciding to have sexual intercourse, which eventually resulted in the birth of his child.[133] The father sought damages in amounts representing his future child support obligations and mental agony he had suffered; he also sought punitive damages.[134]

The court refused to recognize the claim of fraud and misrepresentation in paternity actions as an actionable tort. The court noted that many wrongs exist in society, which correcting through the judiciary "'may do more social damage than if the law leaves them

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(Ct. App. 1980) (holding that as a matter of public policy the practice of birth control, if any, engaged in by two consenting partners must be free of governmental interference); Beard v. Skipper, 451 N.W.2d 614 (Mich. Ct. App. 1990) (ruling that the mother's intentional misrepresentation that she was practicing birth control did not deprive the putative father of his constitutional right to decide whether to father a child); Faske v. Bonanno, 357 N.W.2d 860 (Mich. Ct. App. 1984) (deciding that parents have obligations to support their children regardless of the circumstances of a child's conception); Murphy v. Myers, 560 N.W.2d 752 (Minn. Ct. App. 1997) (finding that the mother's alleged fraud and misrepresentation were not available to the putative father as affirmative defenses in a paternity proceeding); Welzenbach v. Powers, 660 A.2d 1133 (N.H. 1995) (holding that public policy barred actions by the putative father based on assertions that he relied on the mother's assurances that she had taken contraceptive measures); L. Pamela P. v. Frank S., 449 N.E.2d 713 (N.Y. 1983) (holding that defenses of fraud and deceit may be used in paternity proceedings only if such defenses are able to overcome the best interest of the child standard); Douglas R. v. Suzanne M., 487 N.Y.S.2d 244 (Sup. Ct. 1985) (holding that public policy precludes a putative father from bringing a tort claim against the child's mother for fraud and misrepresentation regarding her deliberate misstatement with respect to the use of birth control); Hughes v. Hutt, 455 A.2d 623 (Pa. 1983); Linda D. v. Fritz C., 687 P.2d 223 (Wash. Ct. App. 1984). Claims raised by females against putative fathers for compensatory or punitive damages resulting from claims of false representation by the father that he had a vasectomy have also been rejected. C.A.M. v. R.A.W., 568 A.2d 556 (N.J. Super. Ct. App. Div. 1990).

[132] 164 Cal. Rptr. 618, 619 (Ct. App. 1980).

[133] *Id.*

[134] *Id.*

alone.'"[135] In this case the issue was whether tortious liability should attach "to the natural results of consensual sexual intercourse."[136] The court held that the state has minimal if any interest in "this otherwise entirely private matter."[137] In essence, the court did not want to create a standard for private sexual behavior because such a standard would "encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy."[138]

The court's reasoning is flawed. First, the government interferes with many private sexual decisions, and this interference has been upheld under scrutiny.[139] Second, the court averred that it did not

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[135] *Id.* (citing Morris Ploscowe, *An Action for "Wrongful Life,"* 38 N.Y.U. L. REV. 1078, 1080 (1963).

[136] *Id.*

[137] *Id.*

[138] *Id.* at 620.

[139] *See* S.C. CODE ANN. § 16-15-90 (Law. Co-op. 1976) (proscribing prostitution); S.C. CODE ANN. § 20-1-10 (Law. Co-op. 1976) (defining who may contract to marry); Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia law prohibiting sodomy). Three years after *Stephen K.* the Court of Appeals of California, First Appellate District, decided *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Ct. App. 1983). In this case, an unwed female relied on the fraudulent misrepresentations of sterility made by the putative father and became pregnant in reliance on these misrepresentations. Due to complications arising from the pregnancy, the female was rendered sterile. The female sued the putative father on the theory of fraudulent misrepresentation. The court of appeals held the putative father's misrepresentations actionable. *Id.* at 433. The court distinguished this case from *Stephen K.* (which was heard by the second appellate district court) by analyzing the damages involved. *Id.* at 428-31. According to this court, in *Stephen K.* the damage was for wrongful birth whereas in *Barbara A.* the damage was for severe bodily injury to the female. *Id.* at 429. The court addressed the right to privacy issue by stating: "The right to privacy . . . is not absolute, and governmental intervention in matters affecting an individual's right to privacy in sexual matters has been sanctioned in both criminal and civil law." *Id.* at 430. The court cited to laws preventing sexual intercourse between unmarried persons, marital rape cases, and evidentiary rules creating a presumption that a child of a wife cohabitating with her husband, who is not impotent or sterile, is a child of the marriage. *Id.*

The court concluded:

> Although the right to privacy is a freedom to be carefully guarded, it is evident that it does not insulate a person from all judicial inquiry

want to create standards for sexual relationships; however, the court, in fact, created a strict liability standard for any unmarried male engaging in sex with a female. The male is not free to trust the female; instead, he must assume she is lying and take extra precautionary measures.[140] If the putative father relies on the female's assurances of birth control or sterility, he has no recourse should the female be lying. This strict liability standard places an unrealistic burden of ensuring birth control on the putative father, the parent who has the least procreative freedom.

Finally, the issue of consent is questionable. The putative father decides to have sex based on assurances by the female that she will not become pregnant. But for these assurances, the putative father maintains that he would not have engaged in sexual intercourse with the female. Thus, the consent is based upon a set of circumstances the female knows are false and is invalid because the putative father is consenting to sexual relations that will not result in pregnancy, but not to sexual relations based on misrepresentations by the female regarding birth control or sterility.[141]

> into his or her sexual relations. We do not think it should insulate from liability one sexual partner who by intentionally tortious conduct causes physical injury to the other. Public policy does not demand such protection for the right of privacy.

Id. at 431.

[140] *Stephen K.*, 164 Cal. Rptr. at 620.

[141] A related consent issue occurs when the putative father is required to pay support for a child whose conception was the result of statutory rape in which the putative father was the victim. The Wisconsin Court of Appeals addressed this issue in *In Re Paternity of J.L.H.*, 441 N.W.2d 273 (Wis. Ct. App. 1989). The court held that the putative father failed to prove that the sexual intercourse was nonconsensual despite the fact that the statutory rape statute provided that a person fifteen years of age could not consent as a matter of law. *Id.* at 275. The court determined that the statutory rape definition of consent did not apply to paternity proceedings because statutory rape is criminal and paternity proceedings are civil. *Id.* The court, espousing a blatant double standard, found the sexual intercourse consensual because the "hugging, kissing, petting and other acts leading to intercourse . . . can only be read as evidence of [the putative father's] willing and voluntary participation." *Id.* at 276. Thus, despite the fact that the putative father was fifteen at the time of conception and had a history of psychiatric problems, the court unbelievably stated that if "voluntary intercourse results in parenthood, then for purposes of child support, the

Putative fathers have also used fraud and misrepresentation as a defense in paternity proceedings rather than as a claim against the mother.[142] In *Inez M. v. Nathan G.*,[143] the mother established the putative father's paternity clearly and convincingly; however, the putative father defended his non-payment of support by claiming the mother used fraud and deceit in the conception of the child.[144]

While holding that the putative father failed to prove the defense, the court recognized that to allow the defense would exceed the scope of the putative father's protected procreative choice as set out by the United States Supreme Court.[145] The *Inez M.* court determined that the "gravamen of [the] defense so profoundly affects the very status, nature and quality of the parent-child relationship as to require classification with those actions deemed, at best, better reserved for legislative, rather than judicial, attention."[146] Therefore, the court opened the door for legislative action to provide more procreative choice for the putative father when he is deceived into engaging in sexual intercourse that results in the birth of his child.

Finally, putative fathers have claimed that the female's misrepresentation as to birth control or sterility violated their right to procreative choice, thereby suspending their duty to support the resulting children. In *L. Pamela P. v. Frank S.*,[147] the court

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parenthood is voluntary. This is true even if a fifteen-year old boy's parenthood resulted from a sexual assault upon him within the meaning of criminal law." *Id.* at 277. *Cf.* Doe v. Brown, 489 S.E.2d 917 (S.C. 1997) (holding that a putative father who is the victim of statutory rape has the same paternity rights as any other putative father). *See also* Jevning v. Cichos, 499 N.W.2d 515 (Minn. Ct. App. 1993) (holding a male victim of statutory rape responsible civilly for child support payments even though the child was conceived as a result of the statutory rape).

[142] *See* Murphy v. Myers, 560 N.W.2d 752 (Minn. Ct. App. 1997) (holding that a putative father cannot raise the defense of fraud and misrepresentation in a paternity action).

[143] 451 N.Y.S.2d 607 (Fam. Ct. 1982).

[144] *Id.* at 608.

[145] *Id.* at 610 (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

[146] *Id.*

[147] 449 N.E.2d 713 (N.Y. 1983).

determined that the protected procreative rights of individuals were related to the freedom to decide for oneself, without unreasonable governmental interference, whether to avoid procreation through the use of contraception.[148] The court stated that the right of procreative choice had never extended to the regulation of private actors as between themselves because of the danger of excessive governmental interference.[149] Again, the putative father was not hindered from using contraceptives, so his right to procreative choice was not violated. Although the court noted that the mother did indeed treat the putative father unfairly, it rejected the father's argument that he be relieved of his support obligation of a child he did not choose to have. The wrong of the mother did not rise to the level of a constitutional violation.

The Washington Court of Appeals also held that the father's right to privacy did not extend to the right of one parent to avoid the duty of support where the other parent's choice regarding procreation was not fully respected.[150] The court reasoned that the protected right of privacy did not extend to the avoidance of child support obligations where a child resulted from the private decision to use contraceptives.[151]

Thus, the putative father who does not want the child born as a result of the mother's deceit cannot use that deceit as a sword or a shield in a paternity proceeding. Courts act to protect the mother's ability to freely exercise her sexual freedom regardless of whether she chooses to act responsibly or honestly. Unfortunately, by cloaking the mother in protective armor, the court's recognition of the mother's rights once again impinges on the sexual and procreative freedoms of the putative father.

C. Contractual Agreements

In some instances the mother has acted to protect the putative father's right to procreative choice. In these cases, the mother has entered into a contractual agreement with the putative father

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[148] *Id.* at 715-16.

[149] *Id.* at 716.

[150] Linda D. v. Fritz C., 687 P.2d 223 (Wash. Ct. App. 1984).

[151] *Id.* at 228.

relieving him of support obligations.[152] However, these agreements have not withstood judicial scrutiny.

Because the right to support is exclusive to the child, neither parent has the right to contract the right away.[153] The courts have interpreted these contracts as being violative of public policy because they "place[] [the child] in economic jeopardy, depriving [the child] of a substantial source of financial support"[154] and "narrow[] the basis of support to one parent."[155] Thus, the putative father cannot protect his rights via contract.

III. CURRENT TERMINATION OF PARENTAL RIGHTS PROVISIONS

If the putative father cannot procure an abortion, claim fraud and misrepresentation in the conception of the child, nor contract with the mother to relieve himself of his duty of support, in what situations can he be relieved of parental duties under current law? At common law, proceedings to terminate parental rights did not exist.[156] Thus, termination proceedings are purely statutory[157] and cannot exist without enactment of legislation.[158] Most jurisdictions hold that "absent statutory authority, private individuals have no standing to initiate and prosecute proceedings to terminate parental rights."[159]

Termination of parental rights (TPR) proceedings are either voluntary or involuntary. In either case, the purpose of the proceeding is to "provide stability to the life of a child who must be

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[152] Peregood v. Cosmides, 663 So. 2d 665 (Fla. Dist. Ct. App. 1995); K.S. v. R.S., 657 N.E.2d 157 (Ind. Ct. App. 1995), *vacated*, 669 N.E.2d 399 (Ind. 1996) (vacating opinion of the lower appellate court that district court did not have jurisdiction "when a third person attempts to establish paternity of a child born during the marriage of the mother and her husband while their marriage remains intact," 657 N.E.2d at 159); State *ex rel.* T.R.L. v. R.L.P., 772 P.2d 1054 (Wyo. 1989).

[153] *K.S.*, 657 N.E.2d at 165.

[154] *Peregood*, 663 So. 2d at 670.

[155] *K.S.*, 657 N.E.2d at 165.

[156] *In re* Parental Rights of P.A.M., 505 N.W.2d 395, 397 (S.C. 1993).

[157] *Id.*

[158] *In re* Edmunds, 560 P.2d 243 (Okla. Ct. App. 1977).

[159] *P.A.M.*, 505 N.W.2d at 397.

removed from the home of a parent."[160] Thus, in both voluntary and involuntary TPR proceedings, the paramount concern is the best interests of the child.[161]

The effect of a TPR order is the severance of the child's ties with the natural parent.[162] As for the parent, a TPR order relieves the parent of "all duties and obligations to support the child and the burden is placed on the State until the State is legally relieved of the obligation."[163] A parent who relinquishes his or her parental rights through a voluntary or involuntary TPR proceeding "is no longer a parent."[164] The Missouri Voluntary Termination statute and the South Carolina Involuntary Termination statute are representative of termination statutes found in most states.

A. Voluntary Termination—Missouri

States may provide for direct or indirect voluntary TPR proceedings. Missouri's statute provides for indirect proceedings because a juvenile officer acts as a liaison between the person initiating the termination of parental rights and the court.[165] Other states, such as South Dakota, provide for direct proceedings. South

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[160] Kansas *ex rel.* Secretary of SRS v. Clear, 804 P.2d 961, 966 (Kan. 1991).

[161] *See, e.g.*, MO. ANN. STAT. § 211.447 (West 1997); N.Y. SOC. SERV. LAW § 384-b (McKinney 1997); S.C. CODE ANN. § 20-7-1578 (Law. Co-op. 1985).

[162] *Clear*, 804 P.2d at 966.

[163] *Id.*

[164] *Id.* at 967.

[165] Missouri's TPR statute provides in part:

> 1. Any information that could justify the filing of a petition to terminate parental rights may be referred to the juvenile officer by any person. The juvenile officer shall make a preliminary inquiry and may file a petition to terminate parental rights. If it does not appear to the juvenile officer that a petition should be filed, such officer shall so notify the informant . . . . Thereupon, the informant may bring the matter directly to the attention of the judge of the juvenile court by presenting the information in writing, and if it appears to the judge that the information could justify the filing of a petition, the judge may order the juvenile officer to take further action, including making a further preliminary inquiry or filing a petition.

MO. REV. STAT. § 211.447(1) (West Supp. 1998).

Dakota provides for the direct petition to the court by the parent seeking to terminate his or her rights.[166] In either case, the purpose of the voluntary TPR is to place the child in a stable home environment. The issue then becomes whether the putative father may use the voluntary termination provisions to relieve himself of the duty of support.

The Missouri Court of Appeals directly answered this question in 1992 when it decided *In re R.A.S.*,[167] which epitomizes the putative father's lack of choice. Here, the putative father was sixteen at the time of the child's birth; the mother was eighteen.[168] The putative father averred that he was intoxicated at the time of conception.[169] The mother filed a paternity action, and the child was adjudicated to be his. The putative father, through a juvenile officer, then sought to voluntarily terminate his parental rights in R.A.S.

At the trial level, the putative father testified that he "[was] unwilling to be a father to R.A.S. He does not intend to visit him or establish any relationship. [He was] reluctant to support R.A.S., acknowledging that he would not do so unless forced to by the court."[170] In fact, although the mother had not prevented the putative father from visiting, the putative father had not had contact with the child and had done nothing toward developing a relationship with R.A.S.[171] At the time of the trial, the child was an eight year-old, who had emotional ties to the putative father resulting from the child's awareness of his parentage.[172] The trial court denied the TPR petition based on a finding that the TPR was not in the best interests of the child; the putative father appealed.

On appeal, the putative father argued that the court erred in its best interests determination. He believed the court did not give sufficient weight to the lack of emotional bonding with the child

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[166] S.D. CODIFIED LAWS. § 25-5A-3 (Michie 1992 & Supp. 1998).
[167] D.S. v. D.A. (*In re* R.A.S.), 826 S.W.2d 397 (Mo. Ct. App. 1992).
[168] *Id.* at 398.
[169] *Id.*
[170] *Id.*
[171] *Id.* at 398-99.
[172] *Id.* at 399.

and gave too much weight to the issue of child support.[173] The putative father reasoned that "his rejection of R.A.S. was beginning to adversely affect the child and conclude[d] that the child would be best served by a legal severance of the parental tie."[174]

The court rejected these arguments. Although the mother testified that the child was upset by the court proceedings,[175] the court found that "[t]here [was] no evidentiary basis to support [the putative father's] contention."[176] In addition, the court found that the father's concern for the child's interests lacked credibility and was therefore "a transparent attempt to avoid support."[177]

Missouri law does not allow the parent to file the petition for voluntary termination of parental rights because consent of the parent is not sufficient.[178] The juvenile officer must file the petition, and "the evidence must support a finding that termination is in the best interests of the child."[179] The filing of the petition must be based on a reasonable amount of investigation by the juvenile officer, who "must act in a role beyond that of a mere tool of a parent whose primary motivation is that of avoiding parental responsibilities."[180] The juvenile officer bears the burden of showing that termination is in the best interests of the child.[181] A voluntary TPR proceeding initiated and orchestrated by the parent, through his counsel, "for the paramount purpose of relieving him of the financial obligations" is not in the best interests of the child.[182]

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[173] *Id.*

[174] *Id.*

[175] *Id.* at 400.

[176] *Id.* at 399.

[177] *Id.*

[178] Allstun v. C.J.G.H. (*In re* B.L.G.), 731 S.W.2d 492, 499 (Mo. Ct. App. 1987).

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.* The Missouri Court of Appeals readdressed the issue of voluntary termination in 1998 when it held that a father's "disinterest [and] lack of commitment to [a] child, including his lack of financial support, his failure to visit" and physical unavailability are not effective under the statute as a voluntary termination of his parental rights. Washington *ex rel.* Lewis v. Collis, 963

The court determined that the financial interests of the child trump the emotional interests of the child when determining what is in the child's best interests. Instead of focusing on the motivation behind the putative father's arguments, the court should have given more weight to the fact that an eight year-old boy continues to be affected by the repeated rejection of his father in determining the child's best interests.

The court's decision in *R.A.S.* prevents the putative father from actively using the voluntary statutes to avoid his support obligation. His only option under the TPR statute is to prompt the state to seek termination of his parental rights under the involuntary procedure. This means the putative father must engineer his actions to qualify as a ground for involuntary termination. By not allowing the putative father to voluntarily terminate his parental rights, the state wastes time and money utilizing the involuntary statute to achieve the same ends and the state fails to serve the best interests of the child.

B. Involuntary Termination—South Carolina

Ironically, although the putative father cannot voluntarily terminate his parental rights and obligations to protect his procreative freedom, a court may terminate them without the putative father's consent if the court finds that the state has sufficient grounds to terminate and that termination is in the best interests of

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S.W.2d 700, 704 (Mo. Ct. App. 1998). *See also Ex parte* Brooks, 513 So. 2d 614, 617 (Ala. 1987) (holding convenience is not a sufficient reason for termination of parental rights), *overruled in part by Ex Parte* Beasley, 564 So. 2d 950, 950-51 (Ala. 1990) (overruling possible interpretation of *Brooks* language requiring a determination of the dependency of the child where one parent seeks to terminate the parental rights of another person); *In re* Interest of D.W.K., 365 N.W.2d 32, 35 (Iowa 1985) (holding acceptance of the putative father's argument that his behavior justified termination of his parental rights "ultimately would open a hatch for a parent to escape his or her duty to support a child"); *In re* Interest of A.B., 444 N.W.2d 415, 419 (Wisc. Ct. App. 1989) (stating that "no parent may blithely walk away from his or her parental responsibilities"). *See infra* Part V.A.3, discussing the relationship between the putative father's ability to escape the duty of support and the best interests of the child.

the child.[183] Given the nature of the involuntary termination of parental rights proceeding, the cases arising from this proceeding involve parents, including putative fathers, who are seeking to maintain their parental rights.

The South Carolina involuntary TPR statute and the cases it involves are typical of most involuntary TPR statutes. The purpose of the involuntary TPR statute is to ensure the termination of parental rights in abuse, neglect, or abandonment cases so that children can be adopted into more loving and safe homes.[184]

The statute sets out seven grounds for termination; a finding of at least one suffices for termination.[185] However, the state cannot terminate parental rights without establishing the ground for termination by clear and convincing evidence[186] and without finding that termination is in the best interests of the child.[187] The grounds for termination are as follows:

1. Due to the "severity or repetition of the abuse[188] the home can[not] be made safe within twelve months";

2. Department of Social Services (DSS) has removed the child from the home and has offered appropriate rehabilitative services, and the parent has failed to remedy the conditions causing the removal;

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[183] S.C. CODE ANN. § 20-7-1572 (Law. Co-op. 1976 & Supp. 1996).

[184] S.C. CODE ANN. § 20-7-1560 (Law. Co-op. 1976 & Supp. 1993).

[185] S.C. CODE ANN. § 20-7-1572(1)-(3), (5)-(6) (Law. Co-op. 1976), § 20-7-1572(4) (Law. Co-op. 1976 & Supp. 1996), § 20-7-1572(7) (Law. Co-op. 1997).

[186] Santosky v. Kramer, 455 U.S. 745, 746 (1982).

[187] S.C. CODE ANN. § 20-7-1572.

[188] S.C. CODE ANN. § 20-7-490(C)-(D) (Law. Co-op. 1976 & Supp. 1996) (defining "'harm' to a child's health or welfare" resulting in an "abused or neglected child").

3. The child has lived outside of the home for six months prior to the TPR proceeding, and the parent has willfully[189] failed to visit the child;

4. The child has lived outside of the home for six months prior to the TPR proceeding and "the parent has failed to make a material contribution to the child's care";[190]

5. The "presumptive legal father is not the biological father . . . and the best interests of the child will be best served by terminating the presumptive father's parental rights";[191]

6. "The parent has a diagnosable condition unlikely to change within a reasonable time . . . and the condition makes the parent unlikely to provide minimally acceptable care of the child";[192] and

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[189] *See* South Carolina Dep't of Soc. Servs. v. Broome, 413 S.E.2d 835 (S.C. 1992) (upholding the trial court's termination of parental rights under S.C. Code Ann. § 20-7-1572(4)). Willfulness, whether to visit or support, is a question of intent to be determined in each case from all the facts and circumstances, and the trial judge is given wide discretion. *Id.* at 838. A parent's conduct that "evinces a settled purpose to forego parental duties may be fairly characterized as 'willful' because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent." *Id.* at 839.

[190] *See* Dorn v. Criddle, 410 S.E.2d 590 (S.C. Ct. App. 1991) (addressing the issue of alcohol or drug abuse and its role in failure to support). The court refused to recognize a per se rule that abuse of drugs and alcohol negates willfulness in TPR cases, finding that "[t]he father's substance abuses may explain his failures as a parent, but they do not excuse them." *Id.* at 592. The court remanded for a trial de novo because three years had passed since the family court issued the order. *Id. See* South Carolina Dep't of Soc. Servs. v. Phillips, 391 S.E.2d 584, 585 (S.C. Ct. App. 1990) (holding that limited income available during incarceration does not relieve a father of his duty to support his child and that such wages could not have been significantly depleted by the occasional purchase of soap and personal grooming supplies); Boyer v. Boyer, 352 S.E.2d 514 (S.C. Ct. App. 1987) (upholding TPR order under the clear and convincing evidence standard after finding that although the husband did not receive a copy of the support order, he was personally served with the petition submitted to the court by the mother requesting support, lived in the same county as the children and was gainfully employed, and admitted that he had not paid any support).

[191] S.C. CODE ANN. § 20-7-1572(5). No South Carolina case law exists regarding this ground.

[192] S.C. CODE ANN. § 20-7-1572(6) (Law. Co-op. 1976).

7. The child has been abandoned.[193]

The statute provides for liberal construction to ensure prompt proceedings to free minor children from abusive homes.[194] In addition, the best interests of the child should prevail when in conflict with the parent's rights in the child.[195] Therefore, all the grounds sufficient to terminate a parent's parental rights are based on a theory of the best interests of the child.

The conflict between the parent's interest in his child and the best interests of the child has come to the forefront in two South Carolina Supreme Court decisions. In these cases, the court suggests a broadening of the definition of the child's best interests.

In *Greenville County Department of Social Services v. Bowes*, the court's majority held that the Department of Social Services (DSS) had not met its burden of proof by clear and convincing evidence of severe and repetitive abuse where no finding of abuse or neglect was made at the trial level.[196] Additionally, DSS failed to meet this burden as to the failure to visit because the state had played a pivotal role in the mother's failure to visit the child.[197] The majority cited to *Santosky* in holding the best interest of the child includes the child's interest in preventing erroneous termination of the familial bond with the natural parent.[198] The court recognized that, although the paramount concern "is to ensure the child's welfare, we must in the process afford [the m]other the constitutional protection to which she is entitled."[199] The court felt the procedures in this case were fundamentally unfair because the child was taken from the mother at a very young age; the mother was prevented from spending the substantial amount of time with the child required to form a parent-child bond; and the mother

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[193] S.C. CODE ANN. § 20-7-1572(7) (Law. Co-op. 1997). No South Carolina case law exists regarding this ground.

[194] S.C. CODE ANN. § 20-7-1578 (Law. Co-op. 1976) (providing statutory construction guidelines to interpret the TPR statute).

[195] *Id.*

[196] 437 S.E.2d 107, 110 (S.C. 1993).

[197] *Id.* at 111 (finding that the State contributed to the lack of bonding between the child and the mother because the DSS had custody for the child's entire lifetime).

[198] *Id.* at 110-11 (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

[199] *Id.* at 111.

had been in compliance with the treatment plan at the time of the termination hearing. The court also noted that the mother had provided a good home for her other two children.

In her dissent, Justice Toal appeared to be outraged at the majority's opinion. She stated that the majority focused solely on the interests of the mother, ignoring the interests of the child and ignoring the requirement of section 20-7-1576, to liberally construe the TPR statute so that the interests of the child prevail over the interests of the parent, if the two are in dispute.[200] Instead of focusing on why a bond was not formed, although she discussed the mother's failures to remedy the situation causing the removal, Justice Toal focused on the fact that no bond existed between the mother and the child. Thus, the child's best interest was to be with the foster parents where a bond had been formed.[201]

The second case is *Hopkins v. South Carolina Department of Social Services*.[202] Here, the father appealed the TPR order against him. According to the court, the father's situation was "a tragic case."[203] After the couple separated, the mother told the father that she had given birth to a child but that he was not the father. She then intermittently appeared to tell him he was or was not the father. When the child was just over a year old, the mother disappeared with the child before blood tests could be taken to determine paternity. For two-and-a-half years following the disappearance, the father did not know the location of the child. The child and his half-sister were then taken into protective custody in South Carolina. Three months later, the father of the second child informed the father of the first that DSS had custody of the child. The father contacted DSS, who refused him visitation until paternity was established. DSS allowed only phone or mail contact between the father and the child. Almost a year later, DSS obtained the results of the blood tests but refused to release them until the father paid his share of the test's costs. The father then came to South Carolina twice to visit the child and had some phone contact. The guardian ad litem filed for TPR for failure to visit. The family

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[200] *Id.* at 116.
[201] *Id.*
[202] 437 S.E.2d 542 (S.C. 1993).
[203] *Id.* at 543.

court refused to terminate his parental rights, finding that the father had "done everything within his means not to abandon [the child] but rather to establish a parent-child bond."[204] The family court ordered DSS to establish a treatment plan, and once completed successfully, to award custody to the father permanently.[205]

The South Carolina Supreme Court affirmed the family court order. The court held that DSS had chilled the father's efforts to visit and to establish a bond between himself and the child.[206] The court recognized that the public policy of South Carolina is to reunite parents and children.[207] The court found the father to be a fit parent; thus, the rebuttable presumption that a fit natural parent should have custody, as opposed to a third party, dictates custody with the father. The court recognized the bond between the child and the foster parents but agreed with the family court's order to allow the child to continue to reside with the foster parents until a bond was formed between the father and the child.

Justice Toal dissented and would have terminated the father's parental rights. She opined that the father shirked his responsibility and ignored the child during the time they were apart.[208] She also stated that a strong bond had formed between the child and the foster parents and between the child and his half-sister.[209] To remove the child from this home would be too damaging, and this harm should outweigh the interest of the father in the child. Justice Toal ignored DSS's role in preventing the father from visiting the child.[210] In addition, she addressed the ground of nonsupport, which was not before the court. Justice Toal considered failure to support a factor in finding the child's best interest would be met by leaving him in the foster family's custody.[211] Acting Chief Justice Chandler filed a concurring opinion addressing Justice Toal's dissent. He stated:

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[204] *Id.* at 544.
[205] *Id.*
[206] *Id.* at 543.
[207] *Id.* at 544.
[208] *Id.* at 547.
[209] *Id.* at 549.
[210] *Id.*
[211] *Id.*

> The dissent . . . misinterprets [section] 20-7-1578 which provides that the child's interests prevail if there is a conflict between the child's interests and the parental rights. This statute is an admonition to consider whether, *after* finding a legal basis upon which to terminate parental rights, such termination is in the child's best interests, not a *separate* basis upon which to terminate those rights.[212]

These two decisions exemplify the conflict between the rights of the parent and the interests of the child. However, the court, both majority and dissent, seem willing to expand the definition of the best interests of the child. Rather than looking at the interests of the child from the narrow view of a strict statutory reading, the justices seem to be willing to look at the total circumstances surrounding the termination decision. Thus, these opinions leave open the door for recognizing that voluntary termination may serve both to protect the procreative freedom of the putative father and to promote the best interests of the child.

IV. MODEL STATUTE

Given the courts' unwillingness to recognize and protect the putative father's procreative choice, the legislature must act to protect the rights of the putative father. The following model statute is applicable where the unmarried female has made the decision to forego adoption or abortion and wishes to maintain custody of the child. As a direct result of the female's decision, the putative father no longer has a choice in his financial responsibilities to the child. This statute recognizes the inequity existing between the female's ability to choose whether she will be responsible for her child, without interference from the putative father, and the putative father's inability to make the same choice.

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[212] *Id.* at 546 (emphasis in original).

§ 101. Purpose

The legislature recognizes the best interests of the child are not always met by requiring a putative father to pay child support against his will because the putative father's intentional failure to pay support leads to deep emotional scars in the child. In order to provide the most nurturing atmosphere for the child, free from the constant rejection by the putative father through his nonpayment, the legislature enacts the following termination of putative paternal parental rights statute.

§ 102. Definitions

(A) "Putative Father" means the alleged or reputed father of a child born out of wedlock.

(B) "Parental Rights" include the putative father's right to custody of the child, to companionship with the child, to discipline of the child, to indoctrination of moral and ethical standards of the child, to control and management of the child's earnings, to have the child bear the putative father's name, to prevent adoption of the child without the putative father's consent, to visit the child, and to inform the child that the putative father is the child's biological father. Parental Rights also include the child's right to inheritance or right to collect wrongful death or damages awards resulting from the death of the putative father.

(C) "Obligations" include the duty to maintain regular visits with the child, to maintain consistent contact or communication with the child, to meet the needs of the child, and to provide financial support for the child.

§ 103. Termination of Paternal Parental Rights and Obligations

(A) A putative father, at any time between conception and the date of the child's birth, may file a petition with the Family Court in the county where the mother resides, if known, to terminate his paternal rights and obligations. If the mother's

residence is unknown, the father must file in the county of the mother's last known address.

(1) In his petition, the putative father shall include:

(a) Name and place of the residence of the putative father and of the mother,

(b) Certification that the mother was served with notice of the petition. If the mother's whereabouts are known to the putative father, notice means the mother was served by personal service or by certified mail, return receipt requested. If the mother's whereabouts are unknown to the putative father, notice means service by publication in the newspaper in the county of the mother's last known address. If notice is by publication, the putative father must file with the Family Court an affidavit of due diligence setting forth his efforts to locate the mother.

(c) The grounds for termination of his parental rights and obligations.

(2) Grounds for termination of parental rights and obligations include:

(a) The putative father informed the mother prior to conception that the putative father would not take on the responsibilities of fatherhood;

(b) Upon notification by the mother of the pregnancy, the putative father offered to pay the expenses related to an abortion;

(c) The putative father guaranteed his consent to adoption;

(d) The mother used fraud or misrepresentation to induce sexual relations with the putative father, which resulted in the pregnancy at issue;

(e) The putative father was the victim of statutory rape; and

(f) The mother and putative father entered into a binding contract terminating the putative fathers' obligations to and interest in the child, to the extent that both parties agreed in writing.

(3) The putative father must prove the grounds for termination by clear and convincing evidence.

(B) If the mother notifies the putative father of the child's birth between the date of the child's birth and the last day of the fifth month following the child's birth, the father must file the petition to terminate his parental rights and obligations within 15 calendar days after notification of the birth. The putative father's petition shall include grounds for termination of parental rights and obligations as provided in Subsection (A) of this section.

(C) Petition to Terminate Parental Rights and Obligations Filed Six Month or More after the Child's Birth.

(1) The mother of the child at issue must notify the putative father that he is the biological father of the child within six (6) months of the date of the child's birth. If the mother fails to notify the putative father prior to the date marking the child's sixth-month birthday:

(a) the putative father may file a petition to terminate his parental rights and obligations in the child, which shall include his grounds for termination of parental rights and obligations as provided in Subsection (A) of this section, and

(b) the Family Court shall grant the petition unless the mother can show by a preponderance of the evidence good cause for failing to notify the putative father. Good Cause includes prolonged illness resulting in incapacitation of the child's mother or failure to locate the putative father after exercising due diligence in her search for the putative father.

(2) If the mother meets her burden of showing good cause, the burden shifts to the putative father to show grounds for the termination of parental rights and obligations as provided in Subsection (A) of this section.

(3) The putative father must file the petition within 15 calendar days of notification by the mother of the child's existence.

§ 104. Hearings and Court Determinations

(A) A hearing shall be held in the Family Court where the petition is filed within 30 calendar days of the date of the filing of the petition to determine if, after the evidence of the mother and the putative father is presented, the putative father's rights in and obligations to his child may be terminated.

(B) The Family Court where the petition is filed shall grant or deny the petition no later than 30 calendar days after the hearing on the petition is completed.

§ 105. Appointment of Guardian Ad Litem

The Family Court shall appoint a guardian ad litem to represent the child's interests. The guardian ad litem shall use due diligence to represent the child's best interest; however, the guardian ad litem shall not hinder or prolong the termination proceedings if the father has met his burden of proof for termination.

§ 106. Withdrawal of Termination of Parental Rights and Obligations

Once the Family Court grants the motion to terminate the parental rights and obligations of the putative father, the putative father shall not at any time attempt to withdraw termination, whether through the courts or through direct contact with the child or the child's mother.

V. CONSTITUTIONAL ANALYSIS OF THE MODEL STATUTE

A. Equal Protection

1. Putative Father v. Putative Mother

Both men and women have a protected privacy interest under the Fourteenth Amendment in procreative decisions. This right to privacy, which is recognized as a fundamental right, 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."[213] However, the United States Supreme Court has only recognized that the female has the right to procreative choice upon conception.[214] The only criterion a woman must meet in order to obtain full privacy rights is pregnancy. At that point, no questions are asked as to her use of birth control, her commitment to the child, or her fitness as a parent.[215] Upon conception, the female can

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[213] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[214] *See* Doe v. Smith, 486 U.S. 1308 (1988) (recognizing that the mother's constitutionally protected right to choose whether to terminate the pregnancy outweighs the natural unmarried father's interest in the pregnancy); *See* Roe v. Wade, 410 U.S. 113 (1973) (referring to the choice of whether to terminate the pregnancy as strictly a woman's decision without regard for the putative father's interest).

[215] Of course, these factors will be considered if the mother's parenting abilities come into question after the birth of the child because the child then has rights that the state is obligated to protect.

choose whether to give birth to the child and whether to maintain custody of the child.

The putative father, however, does not have full privacy procreative rights upon conception. He cannot force the mother to have an abortion. He cannot force the mother to give the child up for adoption. He cannot walk away from the child without significant legal and financial ramifications. He has no protected rights other than the freedom to engage in sexual conduct. Thus, as current law exists, the male is given disparate treatment in the childbearing decision based upon his sex.

The Court articulated the standard for analyzing gender-based classifications in *Craig v. Boren*.[216] Gender-based distinctions are to be given intermediate scrutiny, meaning that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[217] However, a state cannot make "overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class."[218]

On its face, this model statute is not gender-neutral because it allows the putative father to disclaim responsibility for the child without giving the mother the same option. However, the state need only provide an important government objective in order to uphold the statute's constitutionality. That objective is the state's recognition of the putative father's lack of choice in the procreation decision and its desire to put the putative father on equal footing with the mother.

Once the state has shown it has an important government objective, it must then show the gender-based classification is

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[216] 429 U.S. 190 (1976).

[217] *Id.* at 197. *See also* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980); Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979); Califano v. Webster, 430 U.S. 313, 316-17 (1977).

[218] Parham v. Hughes, 441 U.S. 347, 354 (1979).

substantially related to the achievement of that objective.[219] Here, the objective is to equalize the putative father's level of procreative choice as compared with the mother's. The mother has a constitutionally protected right to privacy in the abortion decision;[220] thus, the state cannot meet this objective by giving the putative father veto power over the mother's decision to abort the child. In addition, states cannot require a mother to terminate her parental rights in the child in order for the child to be adopted.[221] Therefore, the only means available to the state to meet its objectives is to allow the putative father to petition the court for termination of his parental rights and obligations.

Although this statute creates a gender-based classification, it meets the important government objective of giving the putative father the same procreative choice as the mother while at the same time protecting the mother's constitutionally protected parental rights as well as her right to choose. Thus, this statute is substantially related to the state's objective.

2. *Putative Father v. Married Father*

This statute also discriminates between putative fathers and married fathers. The statute provides only for the voluntary termination of paternal rights and obligations of the putative father. Thus, the married father would not have the option to terminate his duty to support his child, whereas, the putative father could.

In analyzing the equal protection claim of the married father, a court must determine if the classification is rationally related to

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[219] *Craig*, 429 U.S. at 197. *See also Mississippi Univ. for Women*, 458 U.S. at 723-24; *Kirchberg*, 450 U.S. at 461; *Wengler*, 446 U.S. at 150; *Feeney*, 442 U.S. at 273; *Caban*, 441 U.S. at 388; *Orr*, 440 U.S. at 279; *Webster*, 430 U.S. at 316-317.

[220] *See supra* Part I.

[221] *See supra* Part I. *See also* Santosky v. Kramer, 455 U.S. 745, 758-59 (1982) (citing Stanley v. Illinois, 452 U.S. 645, 651 (1972)) (stating the natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children is an interest far more precious than any property right'"). This interest is protected for married as well as unmarried parents. Lehr v. Robertson, 463 U.S. 248, 260-61 (1983); *Caban*, 441 U.S. at 391; Stanley v. Illinois, 405 U.S. 645, 649 (1972).

a legitimate state interest.[222] The classification between married and putative fathers receives minimum equal protection scrutiny because classifications based on marital status have not been raised to a stricter level of scrutiny by the United States Supreme Court.[223]

The state has an interest in protecting the constitutionally recognized rights of its citizens. The right the model statute protects is the procreative choice and freedom[224] of the individual, in particular the putative father's right to procreative choice. The model statute seeks to protect the putative father's procreative freedom by allowing him to terminate his parental rights and obligations.

The married father assumes the potential duties and obligations inherent in the parent-child relationship when he enters into the marriage contract.[225] Upon the birth of the child, the married father attains complete constitutional protection in his status as a parent.[226] His consent is required to place the child for adoption,[227] and any child conceived during the marriage is presumed to be his.[228] In addition, the married father may have the

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[222] Eisenstadt v. Baird, 405 U.S. 438, 457 (1972).

[223] *Id.* The Court has recognized race and national origin as suspect classes entitled to strict scrutiny. Loving v. Virginia, 388 U.S. 1, 11 (1967). In addition, classifications affecting fundamental rights receive strict scrutiny. Harper v. Virginia Bd. of Elections 388 U.S. 663, 672 (1966). Intermediate scrutiny, which involves a determination as to whether the statutory classification is substantially related to an important governmental objective, has been applied to discriminatory classifications based on sex or illegitimacy. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (citing *Mississippi Univ. for Women*, 458 U.S. at 723-24, 724 n.9; Mills v. Habluetzel, 456 U.S. 91, 99 (1982); *Craig*, 429 U.S. at 197; Mathews v. Lucas, 427 U.S. 495, 505-506 (1976)). *See supra* Part V.A.1 and *infra* Part V.A.3.

[224] *See Eisenstadt*, 405 U.S. at 453.

[225] *Stanley*, 405 U.S. at 663 (Burger, C.J., dissenting).

[226] *Id.*

[227] S.C. CODE ANN. § 20-7-1690 (Law. Co-op. 1976).

[228] Michael H. v. Gerald D., 491 U.S. 110 (1989); Humphrey v. Pannell, 710 So. 2d 392 (Miss. 1998); Gregory v. McLemore, 899 P.2d 1189 (Okla. Ct. App. 1995).

authority, depending on the state, to veto an abortion if the state also has the authority to veto.[229]

The putative father, however, does not enjoy equivalent legal status with respect to his children to that of a married father. By engaging in sexual intercourse, the unmarried putative father and the unmarried mother do not enter into a relationship in which both parties have legally enforceable rights and duties with respect to any children born to them.[230] In fact, the putative father's only recognized connection with the child is his duty to support the child.[231] This duty attaches upon the birth of the child, regardless of the desires of the putative father.[232] In order to receive full protection of his parental rights, the putative father must take active steps to develop a relationship with the child.[233] Unless the putative father takes these steps, his consent is not required for adoption.[234] In addition, if the mother is married to another man at the time of the child's birth, the state may presume the child is a child of the marriage,[235] and the putative father may be denied all rights in his child except the duty of support.

Thus, the married father enjoys the protection of his parental rights, which attaches automatically upon the birth of the child, that the putative father does not share. The putative father stands in

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[229] *See supra* Part I.

[230] *Stanley*, 405 U.S. at 663.

[231] *See id.* at 664.

[232] *Id.*

[233] "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting); *see also* Lehr v. Robertson, 463 U.S. 248, 261 (1983) (stating that "the mere existence of a biological link does not merit equivalent constitutional protection").

[234] *In re* Doe, 627 N.E.2d 648 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 181 (Ill.) (sustaining appellate court's determination that the father must take measures to develop a relationship with his child in order to receive full protection of his parental rights, but reversing on the ground that the mother did not demonstrate by clear and convincing evidence that the father was an unfit parent), *cert. denied*, 513 U.S. 994 (1994); Robert O. v. Russell K., 604 N.E.2d 99 (N.Y. 1992); Wade v. Geren, 743 P.2d 1070 (Okla. 1987); *In re* Adoption of Baby Boy D., 742 P.2d 1059 (Okla. 1985); *In re* Adoption of Baby Girl M., 942 P.2d 235 (Okla. Ct. App. 1997); GWJ v. MH, 930 P.2d 371 (Wyo. 1996).

[235] Michael H. v. Gerald D., 491 U.S. 110 (1989).

limbo regarding his legal parental status. He automatically has a duty to support the child, but his complete parental rights do not become fully recognized until he takes further actions to develop a relationship with the child. Thus, current law discriminates between the putative and married father regarding the extent of protection afforded the father's parental rights.

By allowing the putative father to terminate his parental rights and obligations, the model statute is rationally related to the state's interest in protecting the procreative rights of the individual. Unlike the married father, the putative father has not accepted the responsibilities of fatherhood merely by engaging in sexual intercourse, and the putative father does not automatically attain complete parental rights. Therefore, although the statute differentiates as to the marital status of the father, it is justified in doing so because of the current status of the law regarding putative fathers.

3. *Legitimate Child v. Illegitimate Child*

The model statute causes the greatest conflict between the legitimate child and the illegitimate child. It allows the legitimate child to enforce child support obligations from the married father, while denying the illegitimate child the same right to support from the putative father. Thus, on its face, the statute discriminates between children based upon the marital status of the parents.

The United States Supreme Court has addressed discrimination based on legitimacy in the context of the putative father's duty of support to his illegitimate child. Although the Court has refused to recognize illegitimate children as a suspect class,[236] it has treated the issue of legitimacy with a greater level of scrutiny than a rationally-related level.[237]

In *Gomez v. Perez*, the Court addressed the issue of whether a Texas law denying the right of paternal support to illegitimate children, while granting it to legitimate children, violated the Equal Protection Clause.[238] In striking the Texas law, the Court held

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[236] Trimble v. Gordon, 430 U.S. 762, 767 (1977).

[237] *See* Clark v. Jeter, 486 U.S. 456, 464-65 (1988); Mathews v. Lucas, 427 U.S. 495, 510 (1976).

[238] 409 U.S. 535, 535 (1973).

that "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."[239] The Court noted, however, that while problems exist regarding proof of paternity that cannot be ignored, "neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination."[240]

In 1982, the Court revisited *Gomez* in *Mills v. Habluetzel*.[241] The Texas legislature, in response to *Gomez*, enacted legislation allowing illegitimate children the opportunity to obtain support by establishing paternity.[242] Although the illegitimate child now had a cause of action, the statute required that suit be filed prior to the child's first birthday or be barred.[243] The statute was challenged on Equal Protection and Due Process grounds.[244]

In striking the statute, the Court conceded that Texas was not required to adopt procedures for attaining support coterminous with those of a legitimate child because the illegitimate must prove paternity.[245] The state was only required to "provide the illegitimate child with a bona fide opportunity to obtain paternal support."[246] Because paternity tests prove nonpaternity, "excluding

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[239] *Id.* at 538.

[240] *Id.*

[241] 456 U.S. 91, 92 (1982).

[242] *Id.* at 94.

[243] TEX. FAM. CODE ANN. § 13.01 (West 1975) (*repealed and amended as* TEX. FAM. CODE ANN. § 160.002 (West 1995)) (stating at the time of the case: "A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.").

[244] The Court did not consider the Due Process argument because it invalidated the statute on Equal Protection grounds. *Mills*, 456 U.S. at 97. The Texas Court of Appeals held that the statute did not violate equal protection. *Id.* at 96. The Texas court relied on *Texas Department of Human Resources v. Chapman*, which held that "'the legitimate state interest in precluding the litigation of stale or fraudulent claims' was rationally related to the one-year bar and therefore did not deny illegitimate children equal protection of the law." *Id.* at 96 (citing *Chapman*, 570 S.W.2d 46, 49 (Tex. App. 1978).

[245] *Id.* at 97.

[246] *Id.*

from the class of possible fathers a high percentage of the general male population,"[247] the putative father must come forward with more conventional forms of proof that he is not the natural father in order to rebut the paternity test results.

Thus, the Court concluded that in support suits by illegitimate children "the [s]tate has an interest in preventing the prosecution of stale or fraudulent claims, and may impose greater restrictions" than those imposed in support suits by legitimate children.[248] However, the restrictions imposed on illegitimate children in support suits must be substantially related to a legitimate state interest.[249] Although preventing prosecution of stale or fraudulent claims was a legitimate state interest, the one-year statute of limitations was not "sufficiently long to present a real threat of loss or diminution of evidence, or an increased vulnerability to fraudulent claims."[250]

Therefore, in order to survive equal protection scrutiny, the model statute's legitimacy classification must be substantially

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[247] *Id.* at 98 n.4 (citing HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 123-136 (1971)).

[248] *Id.* at 98-99.

[249] *Id.* at 98. *See also* Lalli v. Lalli, 439 U.S. 259 (1987) (upholding New York statutory scheme allowing an illegitimate child to inherit under intestate succession if a court had made a finding of paternity during the father's lifetime). *Cf.* Trimble v. Gordon, 430 U.S. 762 (1977) (invalidating a portion of the Illinois intestacy plan which prevented all illegitimate children from inheriting). The *Lalli* Court distinguished the New York plan from the Illinois plan by stating:

> The Illinois statute in *Trimble* was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of the parents. The reach of the statute was far in excess of its justifiable purposes. [The New York statute] does not share this defect. Inheritance is barred only where there has been a failure to secure evidence of paternity during the father's lifetime in the manner prescribed by the State. This is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock.

439 U.S. at 273.

[250] *Mills*, 456 U.S. at 99. *See* Pickett v. Brown, 462 U.S. 1 (1983) (holding two-year statute of limitations for paternity suits violative of equal protection).

related to permissible state interests.[251] The state interests involved in the model statute are protecting and promoting the best interests of the child, while recognizing the interests of the child are separate from the interests of the parent.[252]

Traditionally, courts and legislatures have defined the best interests of the child in terms of financial support.[253] However, this definition actually serves the best interests of the state. The state's interest in ensuring that courts order putative fathers to pay child support is to keep the illegitimate child and his mother free from relying on public assistance for support, thereby saving the state and taxpayer the costs involved with supporting the dependent child of a nonpaying putative father. The Washington Supreme Court said it best when it held that the state's interest is "assuring that the primary obligation for support of illegitimate children falls on both natural parents rather than on the taxpayers of this state."[254]

Rather than defining the best interests of the child in financial terms, this statute defines the best interests of the child in terms of the whole child. The model statute recognizes that pursuing the putative father of an illegitimate child who refuses to pay child support does not serve the child's best interests. Instead this statute takes into consideration the emotional interests of a child whom the putative father refuses to support financially and emotionally. The statute seeks to save the child the emotional scars accompanying the blatant and selfish neglect of the putative father who would seek to terminate under the statute, the same father who will risk criminal contempt for refusing to pay support. The statute recognizes that the child will not understand the psyche of the putative father but will blame himself for the putative father's neglect, while searching to understand why he is not important enough to deserve the putative father's support.[255]

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[251] *Mills*, 456 U.S. at 99; *Lalli*, 439 U.S. at 265; *Trimble*, 430 U.S. at 767; Mathews v. Lucas, 427 U.S. 495, 506 (1976).

[252] A.B. v. C.D., 690 N.E.2d 839, 842 (Mass. App. Ct. 1998).

[253] *See supra* Part III.

[254] State v. Wood, 569 P.2d 1148, 1151 (Wash. 1977).

[255] *In re R.A.S.* exemplifies the situation that this statute seeks to serve. 826 S.W.2d 397 (Mo. Ct. App. 1992). *See supra* Part II. In *R.A.S.*, the putative father

The model statute is substantially related to serving the best interests of the child. Under the current application of the child's best interests standard, the statute will save the state money. The putative father this statute serves will not pay child support regardless of the consequences the state imposes. Thus, the state must pay any necessary welfare payments to the mother and child. In addition, the state must expend funds in a futile effort to collect child support payments from the putative father. This statute may result in cases where the mother and child are being supported by public assistance; however, they would be receiving such payments regardless of the putative father's ability to terminate his rights and obligations. Therefore, this statute would alleviate the fiscal burden of pursuing a "deadbeat" putative father, who will never pay child support.

The model statute is also substantially related to the whole child's best interests. The statute seeks to prevent unnecessary emotional scarring by allowing the putative father to terminate his connection with the child at the earliest date possible.[256] The goal of the statute is to prevent the child from knowing the putative father who will neglect the child financially and emotionally, as

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testified that:

> [H]e [was] unwilling to be a father to R.A.S. He [did] not intend to visit him or establish any relationship. [He was] reluctant to support R.A.S., acknowledging that he would not do so unless forced to by the court. Despite a court order for support, [he] has paid only a nominal amount . . . . [He] has not availed himself of the opportunity to have contact with the child. He has never done anything toward developing a relationship with R.A.S.; he has not sent him presents and has never visited with him. Despite this, eight-year-old R.A.S. has emotional ties to Father as a result of his awareness of his parentage.

826 S.W.2d at 398-99. Thus, for eight years a little boy had been repeatedly rejected by his father. The emotional scars he shares with many other children in the same situation more than justify a statute allowing the father to remove himself from the child's life before the child has an opportunity to be rejected.

[256] Of course, the assumption is that the mother will not use the child as a pawn against the putative father and will handle the father's decision to terminate in a manner that will best serve the emotional needs of the child. The mother will have the burden of deciding how and what to tell the child regarding the absence of the father. However, this should be no more difficult than the same decision made by adoptive parents.

well as from knowing that the putative father is intentionally withholding child support and that the child's mother or caretaker is constantly seeking enforcement of child support orders because of the putative father's refusal to pay according to his obligations. By allowing the father to terminate no later than six months after the birth of the child, the matter is settled early in the child's life, and the child will not be burdened with the emotional questions that accompany his father's adamant decision not to pay. Because the state can only seek to enforce child support payments but cannot actually make the putative father pay,[257] no other means are available to prevent the emotional scars to the child. In addition, as in *Lalli*,[258] this statute does not exclude all illegitimate children from receiving child support. It allows only those putative fathers who choose to terminate under this statute to avoid their child support obligations, thereby only affecting a small portion of illegitimate children. Accordingly, this statute is substantially related to a legitimate state interest, which, if the courts are willing to look to more than the financial interests of the child, should survive constitutional scrutiny.

CONCLUSION

Recent jurisprudence ensures the protection of the female's right to procreative choice and freedom. However, the putative father does not receive the same protection. The courts have erred in systematically denying the putative father's rights and in focusing their analysis on the financial best interests of the child. Until the legal system begins to give more weight to the emotional interests of the child, the best interests of the child will continue to be ignored by the courts and by the putative fathers who will neglect their children emotionally and financially. The courts have opened the door for state legislatures to recognize the effect of the harm on both the putative father and the child and to pass legislation

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[257] A father who is adamant in refusing to pay child support will circumvent the best laid plans.

[258] Lalli v. Lalli, 439 U.S. 259 (1987).

protecting both the procreative freedom of the father and the emotional well-being of the child.