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## PARENTAL AUTONOMY, FAMILY RIGHTS AND THE ILLEGITIMATE: A CONSTITUTIONAL COMMENTARY

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### INTRODUCTION

"[T]hou knowest . . . what are a mother's rights, and how much the stronger they are, when that mother has but her child and the scarlet letter! Look thou to it! I will not lose the child! Look to it!"

Hester Prynne

"[S]till better, it may be, to leave the mystery as we find it, unless Providence reveal it of its own accord. Thereby, every good Christian man hath a title to show a father's kindness towards the poor, deserted babe."

Reverend John Wilson<sup>1</sup>

The presence of illegitimate children has traditionally outraged society.<sup>2</sup> Draconian methods have long been popular to force mothers of illegitimates to identify their "partners in sin." Hester Prynne's New England continued the English practice of using the psychological and

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The author wishes to thank Susan Holahan, B.A., Swarthmore, 1961; M.A., 1962; Ph.D., 1966; J.D., Yale, 1974, for her insights and assistance.

1. N. HAWTHORNE, *THE SCARLET LETTER* 140, 143-44 (1929 ed.).

2. Why bastard? wherefore base?  
When my dimensions are as well compact,  
My mind as generous and my shape as true,  
As honest madam's issue? Why brand they us  
With base? with baseness? bastardy? base, base?  
Who in the lusty stealth of nature take  
More composition and fierce quality  
Than doth, within a dull, stale, tired bed,  
Go to the creating a whole tribe of fops,  
Got 'tween asleep and wake? . . .  
Now, gods, stand up for bastards!  
(Shakespeare, *King Lear*, Act I, scene ii)

See generally H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* (1971).

physical pressures of labor to induce the mother to disclose the father's identity.<sup>3</sup> The punishment inflicted on the mother for her illicit sexual activity was partially justified by the benefits accruing to the child. While the approach has been refined, the moral outrage remains, conveniently disguised by the rationale of fiscal responsibility. In Connecticut, a woman who gives birth to an illegitimate child is required by law to disclose the name of the father. If she is receiving welfare, the caseworker will refer her to a private attorney. The attorney, in order to get paid, must either produce the name of the putative father, or bring the mother before the Circuit Court. Once in court, a woman who refuses to disclose may be cited for contempt, an offense punishable by a fine of \$200, a year in jail, or both.<sup>4</sup> This article focuses upon *Roe v. Norton*,<sup>5</sup> a recent three-judge court decision, currently before the Supreme Court, which upheld such purportedly benevolent in-

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3. E.S. MORGAN, *THE PURITAN FAMILY: RELIGION & DOMESTIC RELATIONS IN SEVENTEENTH-CENTURY NEW ENGLAND* 130-31 (rev. ed. 1966). Standard practice was for Justices of the Peace to wait outside the delivery room for the midwife to obtain a putative father's identity while a woman was in labor. Such identification during the woman's travail was presumptively accurate. This practice was based on the English model, which is discussed by Gail Marcus, Ph.D. candidate, Yale, in an unpublished manuscript available from the author.

4. The statute, CONN. GEN. STAT. REV. § 52-440(b) (1972) reads:

*Compelling disclosure of name of putative father and institution of action.* (a) If the mother of any child born out of wedlock, or the mother of any child born to any married woman during marriage which child shall be found not to be the issue of the marriage terminated by a divorce decree or by decree of any court of competent jurisdiction, fails or refuses to disclose the name of the putative father of such child under oath to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child resides, if such child is a recipient of general assistance, or otherwise to a guardian or a guardian ad litem of such child, such mother may be cited to appear before any judge of the circuit court and compelled to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child. (b) Any woman who, having been cited to appear before a judge of the circuit court pursuant to subsection (a), fails to appear or fails to disclose or fails to prosecute a paternity action may be found to be in contempt of said court and may be fined not more than two hundred dollars or imprisoned not more than one year or both.

While Connecticut mentions a recoupment interest, its emphasis at oral argument below and in its Supreme Court Brief was on the state's benevolent interest. *See, e.g.*, Brief of Appellee at 1:

The statute seeks the disclosure from mothers of the identity of the fathers of their children in an effort to protect the welfare of children. The purpose of the statute is to aid the state in its comprehensive scheme to protect the interest of children, which is of a paramount interest to the State of Connecticut.

5. The case was originally filed as *Doe v. Norton*, 356 F. Supp. 202 (D. Conn. 1973), consolidated with *Roe v. Norton* and decided at 365 F. Supp. 65 (D. Conn. 1973). The Supreme Court noted probable jurisdiction and granted appellants' motion to proceed *in forma pauperis sub nom.* *Roe v. Norton*, 415 U.S. 912 (1974). The children of the appellants, for whom counsel was appointed by the lower court *sua sponte*, were also given

quiry against the constitutional and statutory attack launched by mothers of illegitimates and the illegitimates themselves.

*Roe* raises two basic questions:

- 1) Under what circumstances may the state intervene either to have adjudicated or itself decide that a child's best interests conflict with traditional parental authority?
- 2) Assuming the propriety of state intervention, what procedural protections must be afforded and what are the constitutional limits upon factual or legal presumptions?

Connecticut claims a long-range interest in aiding the illegitimate child financially and psychologically. But the state's pecuniary recoupment rationale and a history of recent attempts to punish nondisclosing mothers and their children undercut this benevolent interest. The disproportionate "civil" sanction authorized by the statute underscores the clumsiness of the 1971 Legislature's response to judicial negation of its prior attempts to obtain the names of fathers of illegitimates. *Roe* emphasizes the importance of judicial scrutiny of the practical effects of claimed benevolence.<sup>6</sup>

Analytically, it is useful to consider the young<sup>7</sup> illegitimate child's interests separately from those of the non-disclosing mother. Indeed, there is an ironic cyclical quality to the state's inquiry: the very process of investigation invades the child's interest in the privacy of the fundamental parent-child relationship.

Mothers, children and the state make competing assertions about the extent to which claimed state beneficence may impinge on traditional parental prerogatives. In resolving the difficult trilemma, the Court could clarify—or further complicate—significant constitutional issues concerning the welfare of children.

Without hazarding predictions, this article will suggest possible utilization of *Roe v. Norton* for further development of such currently fashionable constitutional theories as the wounded but still viable "new" equal protection; the changing judicial perception of minimal procedural due process; the curious admixture of the old bogeyman

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leave to proceed *in forma pauperis*, 417 U.S. 943 (1974), and were granted time for oral arguments, \_\_\_ U.S. \_\_\_, 95 S. Ct. 170 (1974).

6. See, e.g., *In re Winship*, 397 U.S. 358, 365-66 (1970); *In re Gault*, 387 U.S. 1, 15 (1967) (judicial scrutiny piercing the veil of governmental beneficence).

7. The relevant statute of limitations is three years from birth or from cessation of contribution, CONN. GEN. STAT. REV. § 52-435(a) (1972), which may be extended by the putative father's absence from the state for up to seven years, CONN. GEN. STAT. REV. § 52-590 (1972).

substantive due process, irrebuttable presumption *per se* and possible irrebuttable presumption "plus" analysis; the mercurial family privacy and related freedom of association doctrine; and the possibility of a constitutional right to refuse to provide the desired information. The case also involves the difficult issue of properly classifying contempt and poses the question of whether statutory sex discrimination can be so *de minimis* as to escape review.

While categorizing constitutional issues is usually vital in deciding cases, it also may obscure. Indeed, faced with such a plethora of significant doctrinal implications, the Court might well dispose of the *Roe* case without decision on the merits. For example, remand for further development concerning the statute as applied or remand in light of disposition of a related case could be considered "passive virtues" in *Roe*. Or the Court might find the statute's apparent neutrality as to welfare and non-welfare mothers abrogated by actual discrimination between the two groups on the face of the statute.<sup>8</sup> Such a distinction might be held violative of even the old "rational relation" equal protection. But the Court could use this term's tough *Roe* to hew important doctrine from the dense *Roe v. Wade*<sup>9</sup> and *Doe v. Bolton*<sup>10</sup> abortion decisions and the related *In re Gault*<sup>11</sup> and *Wyman v. James*<sup>12</sup> dichotomy concerning state alleged beneficence and child and parental rights.<sup>13</sup>

Whichever theoretical path the Court chooses, it will have difficulty deciding cases like *Roe* so long as the complex mosaic law of welfare<sup>14</sup> and the peculiarities of three-judge court jurisdiction thrust

8. Non-welfare recipient mothers face the same penalties if cited to court. However, at oral argument the state knew of no such citation of a non-welfare mother. Tr. at 40-41. A survey of available court transcripts did not reveal any application of the statute to non-welfare mothers. In vivid contrast, both the parties' stipulation and the lower court's interpretation indicate the Welfare Commissioner's uniform practice of citing all mothers who receive state welfare. See note 60 *infra*. The record reveals no instance of a mother receiving town welfare; analogous town policy is thus unknown.

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

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

11. 387 U.S. 1 (1967).

12. 400 U.S. 309 (1971).

13. See Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259 (1971) for a good description of the dichotomy but a rather ambivalent attempt to accommodate the opposing interests. The Court could also utilize *Roe v. Norton* to elucidate its willingness to defer to data obtained from other disciplines. See, e.g., deference to medical experts in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645-47 & nn. 12 and 14 and throughout *Roe v. Wade*, 410 U.S. 113 (1973) and, particularly, *Doe v. Bolton*, 410 U.S. 179 (1973).

14. Second Circuit Chief Judge Kaufman called the public assistance area "as complex a legislative mosaic as could possibly be conceived by men," *City of New York v. Richardson*, 473 F. 2d 923, 926 (2d Cir.), cert. denied *sub nom. Lavine v. Lindsay*, 412

complicated welfare cases before the Court without benefit of adequate records or intermediate appellate development. The Court must find answers not only to the general riddle of welfare law but also to the question of how far a modern state may go in abrogating parental authority and what, if any, justifications make such governmental intrusion constitutionally palatable.

This article will first analyze the lower court's decision upholding the statute. It will then discuss a more refined statutory analysis and various constitutional theories available to the Supreme Court but ignored or mishandled below. The article suggests possible utilization of *Roe* as a springboard for constitutional development of existing doctrine protecting family self-definition. Whatever the resolution of the *Roe* case, the profound doctrinal problems it poses are sure to recur as society begins to alter its outraged, moralistic response to illegitimates and their parents.

### THE LOWER COURT DECISION

The three-judge court decision, written by District Judge Blumenfeld for himself and Circuit Judge Timbers with a separate concurrence by District Judge Newman, exemplifies the failings of three-judge courts as judicial institutions.<sup>15</sup> Considerations of efficiency precluded taking live testimony. The record is full of factual uncertainties and last minute legal theories unfamiliar even to opposing counsel. Neither the implementation of the challenged statute nor its practical effect was ever clearly articulated. Some questions were not raised; others were entirely muddled both in oral argument and in the court's decision. Such important issues as the position of the Department of Health, Education and Welfare (hereinafter HEW) on the statutory issues and

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U.S. 950 (1973). As long as Congress continues to add pieces to the mosaic, the *Roe* buck will continue to stop before the seers of the Supreme Court.

15. The Supreme Court recently reiterated its dissatisfaction with three-judge court review in *Gonzalez v. Automatic Employees Credit Union*, \_\_\_ U.S. \_\_\_, 95 S. Ct. 289, 294-95 (1974). See generally Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964). The three-judge court institution has long been the subject of vehement criticism and frequent, thus far unsuccessful, attempts at reform or abolition. See, e.g., *Symposium, Should the Appellate Jurisdiction of the United States Supreme Court be Changed: An Evaluation of the Freund Report Proposals*, 27 RUTGERS L. REV. 878, 893-96 (1974); Oakes, *Foreword: The Three-Judge Court and Direct Appeals to the Second Circuit*, 48 ST. JOHN'S L. REV. 205 (1973); "Freund Committee," Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court*, reported at 57 F.R.D. 573, 596 (1972) (advocating abolition of three-judge courts in most cases); Annerman, *Three-Judge Courts: See How They Run*, 52 F.R.D. 293 (1970).

whether there had been any application of the statute to non-welfare mothers were left in limbo. Problems of actual practice under the statute, including such basic issues of due process as availability of counsel and individualized hearings, were not presented to the court.<sup>16</sup> The court never analyzed the possibly punitive aspects of § 52-440(b) of the Connecticut General Statutes, which followed two previous attempts by Connecticut to accomplish the same end, both of which had been judicially invalidated.

Connecticut first attempted to force disclosure by excluding children themselves from Aid to Families with Dependent Children (AFDC) eligibility. That effort was enjoined by a three-judge court on grounds of conflict with the federal statute.<sup>17</sup> Connecticut then tried unsuccessfully to circumvent the injunction by excluding the recalcitrant mothers.<sup>18</sup>

When the plaintiffs in *Roe* sought preliminary relief, Judge Blumenfeld agreed that their constitutional claims were sufficiently substantial to warrant convening a three-judge court.<sup>19</sup> However, he dismissed their "facile" equal protection and due process claims in a single sentence<sup>20</sup> and determined that the balance of hardship would not permit injunctive relief because "these children stand to reap significant benefits if paternity is established."<sup>21</sup> A similar challenge before Judge Newman was consolidated and Judge Newman, *sua sponte*, took the important step of appointing separate counsel for the children. The distinct interest of the illegitimate children themselves was acknowledged in the subsequent designation of separate mothers' and childrens' subclasses for class action purposes.<sup>22</sup>

Addressing the statutory argument, the three-judge court found no direct conflict between Connecticut's statute and the AFDC

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16. See, e.g., Tr. at 36, 40, 52. A copy of the transcript is on file with the Connecticut Law Review.

17. *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488, *rehearing denied*, 397 U.S. 970 (1970). Connecticut's attempt to exclude children from AFDC benefits if their mothers refused to disclose was held to be an additional "condition of eligibility" in violation of 42 U.S.C. § 602(a)(10) (1974).

18. *Doe v. Harder*, 310 F. Supp. 302 (D. Conn.), *appeal dismissed for want of jurisdiction*, 399 U.S. 902 (1970) (the acting welfare commissioner was held in contempt for attempting to circumvent the *Doe v. Shapiro* injunction). See 365 F. Supp. at 72 n. 8 for cases following the rationale of these two earlier Connecticut decisions. Ironically, Judge Blumenfeld participated in both earlier decisions.

19. 356 F. Supp. at 203. See *generally* *Hagans v. Lavine*, 415 U.S. 528 (1974); *Goosby v. Osser*, 409 U.S. 512 (1973).

20. 356 F. Supp. at 204.

21. *Id.* at 207. Judge Blumenfeld never identified these significant benefits.

22. 365 F. Supp. 65, 69.

program's "paramount goal" of protecting dependent children.<sup>23</sup> It was held to comport with a 1967 amendment which required states to establish programs to aid collection of support payments.<sup>24</sup> Further, a recent Supreme Court decision was read to allow all but " 'direct and positive' conflict" between state and federal statutory provisions.<sup>25</sup> The court held § 52-440(b) specifically distinguishable from the previously invalidated Connecticut disclosure attempts because it did not impose an additional condition of welfare eligibility.<sup>26</sup> The court did not discuss possible conflict with the federal statute's basic general purpose of protecting dependent children.

The lower court's general response to plaintiffs' constitutional arguments was to reject "the legal semantics in which they have dressed their particular views about morality, propriety, and psychology."<sup>27</sup> Judge Blumenfeld willingly suspended disbelief as to the accuracy of the state's views on these very issues. Without explanation, the court rejected unrebutted expert testimony emphasizing the harmful effects of the statute.<sup>28</sup> This oversight alone may merit reversal on the basis of Rule 52 of the Federal Rules of Civil Procedure.

23. *Id.* at 71. The "paramount goal" of protecting dependent children was articulated in Chief Justice Warren's important initial AFDC decision, *King v. Smith*, 392 U.S. 309 (1968), striking down Alabama's "substitute father" rule. *See also* *Wyman v. James*, 400 U.S. 309, 318 (1970).

24. 42 U.S.C. §§ 602(a)(17)(A)(i) and (ii) (1974), putting "bite" into the 1950 Notice to Law Enforcement Officials (NOLEO) provision, 42 U.S.C. §602(a)(11) (1974). *See Doe v. Shapiro*, 302 F. Supp. 761, 765-67 (D. Conn. 1970) for the legislative context of the 1967 provisions. The 1967 amendment instructed states to develop programs to ascertain paternity and to secure support for "child[ren] born out of wedlock" as well as deserted or abandoned children. It compelled program development, but did not compel specific program format.

25. 365 F. Supp. at 71, *citing* *Kelly v. Washington*, 302 U.S. 1, 10 (1937) in the context of *New York State Dept. of Social Serv. v. Dublino*, 413 U.S. 405 (1973). The *Dublino* decision dealt with possible conflicts between the New York Work Rules and the Federal Work Incentive Program (WIN). This area of possible state-federal conflict may be distinguishable, *see e.g.*, *Shirley v. Lavine*, 365 F. Supp. 818, 823-24 (N.D.N.Y. 1973), *prob. juris. noted*, 417 U.S. 943 (1974) (Doc. No. 73-1095). Further, there may be significance in the *Dublino* remand to the district court for consideration of specific conflicts notwithstanding the Supreme Court decision. *Id.* at 824.

26. CONN. GEN. STAT. REV. § 52-440(b) (1972) was distinguished on two grounds. First, "it does not deny to either the mother or the child the benefits of food, clothing or shelter in accordance with their needs." 365 F. Supp. at 72. Secondly, it "applies across the board to all mothers of illegitimate children without regard to their or their children's status as AFDC recipients." *Id.* at 73. The inaccuracy of the latter statement is discussed *infra*, text accompanying notes 60-67. The irony of the first statement is apparent—the mother may continue to receive AFDC payments—and prison food, clothes and a cell.

27. 365 F. Supp. at 69.

28. Affidavit of Edward Zigler, Professor of Psychology and Director of the Child Development Program, Dept. of Psychology, Yale University and former Head of the Office of Child Development and Chief of the Children's Bureau, *HEW, Roe v. Norton*.

Plaintiffs' claim that the government had to show a "compelling state interest" was rejected on the grounds that illegitimacy *per se* was not a "suspect classification" under the statute, and because no "fundamental" interest was affected.<sup>29</sup> The court's presumption, never detailed, was that the statute substantially benefits illegitimates. The court announced that it would apply the then current, "new" equal protection test. In fact, the court recast the test into a reiteration of the newer "rational relation" test, requiring a showing of "some legitimate, articulated state purpose."<sup>30</sup>

In balancing the state's interest against the plaintiffs' claims, the lower court indicated two distinct state concerns which were commingled throughout its opinion. These were the state's financial recoupment interest and the state's claimed concern for the illegitimates' well-being. Judge Blumenfeld combined the two without explanation, perhaps because of an overriding moralistic attitude that a father's support duty "belongs to a man as a man, and not simply as a member of civil society."<sup>31</sup> He rejected without discussion the argument that the statute distinguished between welfare and non-welfare illegitimates. The court asserted, however, that even if the statute were so construed, "it is 'rational' that [the state] should take steps to enforce the prior obligations of [the] father to provide that support" because the state furnishes public assistance to illegitimates.<sup>32</sup> Plaintiffs' constitutional privacy argument was characterized as "whether an unwed mother's desire to keep secret the name of her child's father is so 'fundamental' or 'implicit in the concept of ordered liberty' as to require constitutional protection."<sup>33</sup> Having placed the burden of justification on the recalcitrant mother, the court limited its discussion to the broad scope of governmental power to compel testimony in criminal investigations<sup>34</sup> and the asserted absence of an important 'zone of pri-

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Supreme Court Appendix, Doc. No. 73-6033 [hereinafter Rec.] at 125. Deposition of Albert J. Solnit, M.D., Professor of Pediatrics and Psychiatry, Director of Child Study Center and Chairman, Center for the Study of Education, Yale University. Rec. at 62. The Brief of the Children's Defense Fund as *amicus curiae* emphatically supports the experts' arguments and is joined by an impressive list of 27 organizations ranging from the American Academy of Child Psychiatry to the Salvation Army.

29. Familiarity with equal protection doctrine is hereinafter assumed. If the assumption is faulty, see Equal Protection Section and specifically sources cited at note 58 *infra*.

30. 365 F. Supp. at 78 n. 22. See Equal Protection Section, *infra*, particularly notes 71-72.

31. *Id.* at 79 n. 25. See also Judge Blumenfeld's colloquy with Attorney Rosen, counsel for the children, Tr. at 55-59.

32. 365 F. Supp. at 82.

33. *Id.* at 74 (footnote omitted), citing *Roe v. Wade*, 410 U.S. 113, 152 (1973).

34. This power was said to be limited only by relevant immunity considerations and a quickly-rejected evidentiary privilege claim. *Id.* at 76.

vacy' interest. Though Judge Newman questioned the state's rationale for compelling the mother to prosecute a paternity action as well as to disclose,<sup>35</sup> Judge Blumenfeld's majority opinion made no mention of the paternity prosecution requirement in § 52-440(b). Curiously, the irrebuttable presumption-due process challenge was relegated to a footnote, where Judge Blumenfeld, after analyzing leading Supreme Court decisions involving irrebuttable presumptions of fact, declared they had nothing to do with Connecticut's statute.<sup>36</sup> The same lengthy footnote contained the assertion that the statute was "unlikely" to be woodenly imposed without regard for impact upon the family. This unsupported supposition ignored the state's assertion at oral argument that the statute would be imposed upon all welfare mothers without any opportunity to litigate its impact.<sup>37</sup>

Having rejected both statutory and constitutional arguments, the court denied the permanent injunction and dismissed the case. Judge Newman filed a separate concurring opinion in which he acknowledged the important privacy right necessarily "implicated"<sup>38</sup> in the statute's compelled disclosure. While stressing that the state's competing interest "might well be insufficient,"<sup>39</sup> Judge Newman was able to concur by assuming that critical constitutional balancing would be done by

35. Judge Newman regarded the mother's obligation to prosecute as redundant "[s]ince the welfare commissioner has authority to prosecute the paternity suit." *Id.* at 86. Therefore, he thought the state's interest "might well be insufficient to justify impairment of the constitutionally protected interest she has in making decisions to maintain the harmony of her family unit." *Id.* citing *Haley v. Troy*, 338 F. Supp. 794, 804 (D. Mass. 1972).

36. 365 F. Supp. at 79 n.14. If the intended distinction was between presumptions of fact and presumptions of law, the lack of further elaboration leaves the distinction puzzling. Recently invalidated irrebuttable presumptions were presumptions of fact with direct and conclusive legal effect. The irrebuttable presumption claimed to be imposed by §52-440(b) similarly presumes facts (that disclosure is always in the child's best interest) and resolves legal questions accordingly. See Irrebuttable Presumption Section, text accompanying notes 145-74 *infra*.

37. Tr. at 43-44. The following colloquy occurred between Judge Newman and the attorney representing the State:

JUDGE NEWMAN: Do you take the position that in a contempt proceeding the woman has the right to present facts bearing on whether disclosure is in the child's interest?

MR. HIGGINS: Where the disclosure is in the child's interest?

JUDGE NEWMAN: Can she litigate that issue in the contempt hearing?

MR. HIGGINS: No, I don't believe that she can, under the statute.

JUDGE NEWMAN: Well, when you say the Circuit Court judge will exercise his discretion, what will he exercise it on if she can't litigate that issue?

MR. HIGGINS: He would litigate it on whether or not she would be held liable to the imposition of one of the penalties provided.

38. 365 F. Supp. at 84.

39. *Id.* Judge Newman concurred as to the statute's facial validity "in the precise sense that not every application of the statute would achieve an unconstitutional result."

state judges on an *ad hoc* basis. Presuming that the statute would be applied with discretion, Judge Newman concluded that the statute was not facially invalid.

### *Statutory Arguments*

The lower court's statutory analysis was twofold: prior decisions invalidating earlier Connecticut attempts to compel disclosure were distinguished because they had imposed additional conditions of welfare eligibility; and *New York State Department of Social Services v. Dublino*<sup>40</sup> was interpreted to allow flexibility in state programs absent, clearcut, direct conflict with the federal statute.

A more fundamental conflict with federal statutory intent was overlooked by the lower court. The deleterious effect of imposed separation from the mother upon the very child the AFDC program is designed to protect was acknowledged. With marked understatement, the court conceded the "undesirable effect of diminishing the amount of time that a recalcitrant mother will be able to spend with her child" and admitted that "the incarceration of a contemptuous mother may not always be in the child's best interest."<sup>41</sup> However, Judge Blumenfeld held that "this does not establish any irreconcilable conflict between the two acts."<sup>42</sup> This permissive approach to a clearcut conflict with the "paramount goal of AFDC" was not explained; the court totally ignored the statement of AFDC purpose contained in the Act's introduction.<sup>43</sup> Since

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40. *New York State Dept. of Social Serv. v. Dublino*, 413 U.S. 405 (1973).

41. 365 F. Supp. at 72-73.

42. *Id.* However, Judge Blumenfeld did not offer guidance in reconciling the Connecticut statute and the AFDC federal statutory purpose. Further, his reliance on Justice Powell's opinion in *Dublino* alone was overly facile. The New York work rules were challenged on a claim of federal preemption in the work incentive program area, and it was this preemption attack which the Court rejected because it found no unambiguous congressional intent to preempt, 413 U.S. 405, 417 (1973). Such decisions as *Carleson v. Remillard*, 406 U.S. 598 (1972) and *Townsend v. Swank*, 404 U.S. 282 (1971) indicate that the Court continues to scrutinize state welfare schemes with care and, in some contexts, places the burden of justifying discrepancies squarely on the states. *Dublino* does not represent Supreme Court abdication of its function of comparing federal welfare provisions with conflicting state language typified by *King v. Smith*, 392 U.S. 309 (1968).

For example, Justice Powell's opinion for a unanimous Court in *Shea v. Vialpando*, 416 U.S. 251 (1974) (striking down Colorado's standardized work expense allowance) demonstrated that the Court continues to demand flexibility in state programs and individualized determinations in accord with federal statutory purpose. *Dublino* may be limited to its rejection of the preemption argument. See note 25 *supra*.

43. The statement of purpose emphasizes the program's primary concern with assisting children in their own homes in the company of their parents. It states:

For the purpose of encouraging the care of dependent children *in their own homes* or in the homes of relatives by enabling each State to furnish financial

*King v. Smith*,<sup>44</sup> the Supreme Court has repeatedly stressed the importance of home and parent to the development and protection of the dependent child. The Court recently stated, "The presence of the parent in the home who has the legal obligation to support is the key to the AFDC program."<sup>45</sup> Nonetheless, the court below assumed away the inevitable conflict of § 52-440(b) with the federal statute's primary purpose of aiding families with dependent children and not separating family units without good cause.<sup>46</sup>

The court accepted Connecticut's claimed authority for its statutory scheme in the 1967 amendment to the NOLEO provisions of the AFDC statutory scheme, 42 U.S.C. § 602(a) (17) (A) (i) and (ii).<sup>47</sup> There is no indication, however, in the almost nonexistent statutory history of that amendment that it was meant either to alter the AFDC program's focus on the home and parental care or that anything approaching Connecticut's harsh enforcement mechanism was foreseen.<sup>48</sup> Further, the 1967 amendment also contained a specific method to bring "unsuitable homes" to the attention of the appropriate authorities.<sup>49</sup> Congress thereby continued to indicate that parental child-rearing deci-

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assistance and rehabilitation and other services . . . to needy children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection (emphasis added). 42 U.S.C. § 601 (1974).

44. 392 U.S. 309 (1968).

45. *Carleson v. Remillard*, 406 U.S. 598, 603 (1972).

46. *Supra* note 23. The term "dependent child" is defined as a needy child "deprived of parental support" by the absence of one parent. 42 U.S.C. § 606(a) (1974). Connecticut's scheme, purportedly to further assist that child, threatens to absent the remaining parent.

47. *Supra* note 24.

48. Even the ambiguous bit of statutory history quoted by the lower court, 365 F. Supp. at 71 n.7, was out of context. If any intent at all can be discerned in the sketchy legislative discussion prior to passage, it is that the thrust of the Senate Finance Committee Report was aiding collection of extant support obligations. Overall, there was remarkably little attention paid to the section in question. *See, e.g.*, S. REP. No. 744, 90th Cong. 1st Sess. 1967 U.S. CODE CONG. & AD. NEWS at 2837, 2982, 2997-98. *Cf. Taylor v. Martin*, 330 F. Supp. 85, 89 n.5-6 (N.D. Cal.), *aff'd sub nom. Carleson v. Taylor*, 404 U.S. 980 (1971) (terming 42 U.S.C. §§ 602(a)(17)(A)(i) and (ii)'s purpose "subservient" to other AFDC purposes). Once again, the AFDC program is an area in which Congress "has voiced its wishes in muted strains and left it to courts to discover the theme in the cacophony of political understanding." *Rosado v. Wyman*, 397 U.S. 397, 412 (1970), *quoted with approval in Shea v. Vialpando*, 416 U.S. 251, 266 (1974).

49. 42 U.S.C. §602(a) 16 (1974). *See also King v. Smith*, 392 U.S. 309, 321-24 (1968), stressing the abuses of past state "suitable home" programs which emphasized parental morality and Congress' response, 42 U.S.C. §608(a)(i), which permitted alteration of the parent-child home arrangement only if the home were "judicially determined to be so unsuitable as to 'be contrary to the welfare of such child.'" *Id.* at 324.

sions, even when considered detrimental by the state, could not produce the automatic governmental overriding of parental authority which Connecticut's statute compels.

After three-judge court decisions following *Doe v. Shapiro* were summarily affirmed by the Supreme Court,<sup>50</sup> Connecticut alone responded with yet another, more drastic means to compel disclosure and paternity suit prosecution. Other states apparently decided they could devise programs required by the 1967 NOLEO amendment without threatening mothers with jail and children with lengthy separations. There is no indication that HEW ever disapproved or even questioned any of these less restrictive state programs for failure to conform to the 1967 amendment's prescription. Ironically, Connecticut submitted its plan to HEW but the record does not reveal HEW approval, though it is apparently required.<sup>51</sup> Further, though the Supreme Court has repeatedly emphasized the desirability of HEW position statements in welfare cases,<sup>52</sup> *Roe* has been thus far decided without the benefit of this administrative expertise.

Finally, both implementation of § 52-440(b) and past Connecticut practice indicate the danger of violation of the federal statutory command that a welfare recipient's privacy be protected.<sup>53</sup> The almost leering judicial attitude prevalent while enforcing § 52-440(b)<sup>54</sup> em-

50. Cited at 365 F. Supp. at 72 n. 8, including, *e.g.*, *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill.), *aff'd summarily sub nom.* *Weaver v. Doe*, 404 U.S. 987 (1971); *Meyers v. Juras*, 327 F. Supp. 579 (D. Ore.), *aff'd summarily*, 404 U.S. 803, *rehearing denied*, 404 U.S. 961 (1971).

51. Rec. at 77-78. (Packard Deposition) indicating that Connecticut submitted the plan embodied in §52-440(b) to HEW but received no reply; the AFDC "scheme of cooperative federalism," *King v. Smith*, 392 U.S. 309, 316 (1968), requires such submittal. *See generally* *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 728 (D.C. Cir. 1970).

52. *See, e.g.*, *Rosado v. Wyman*, 397 U.S. 397, 406-07 (1970).

53. 42 U.S.C. §602(a)(9) (1974) compels states to "provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of aid to families with dependent children." *See also* 45 C.F.R. §205.50 (1973):

*Safeguarding information . . . .* A State plan . . . must provide that: . . . (i) The use or disclosure of information concerning applicants and recipients will be limited to purposes directly connected with the administration of the program. Such purposes include establishing eligibility, determining amount of assistance, and providing services for applicants and recipients.

54. Judicial colloquy with recalcitrant mothers included, *e.g.*:

THE COURT: Well, when you became pregnant with child. . . .

THE WITNESS: Mmm Hmm.

THE COURT: . . . didn't it occur to you that somebody was responsible for that condition?

THE WITNESS: Oh yes.

THE COURT: And you were concerned, weren't you?

phasizes the statute's inherent threat to a recipient's privacy and the difficulty of restricting inquiries even to the broad purposes of the statute. Past cooperation of Connecticut welfare employees with 3 a.m. apartment-window searches by police,<sup>55</sup> and other abuses underscore the danger.

In summary, there are at least two statutory conflicts not addressed by the lower court, coupled with a questionable resolution of the conflict it recognized but minimized by simply citing *Dublino*. The failure to obtain a statement of HEW's position regarding Connecticut's statute and the disposition of cases currently before the Supreme Court concerning HEW's promulgation of a regulation overruling the *Doe v. Shapiro* line of cases<sup>56</sup> could be invoked as grounds for remand by a Supreme Court anxious to avoid the difficult constitutional problems posed by *Roe*.<sup>57</sup>

THE WITNESS: Yes.

THE COURT: Were you?

THE WITNESS: Mmm Hmm.

THE COURT: And did you look for that individual?

THE WITNESS: No.

THE COURT: You didn't know who it was?

THE WITNESS: No. You can't look for somebody that I don't know who it is.

THE COURT: And you want the Court to understand that these "several guys" as you called them, you had relations with and you don't know who they are?

THE WITNESS: No.

THE COURT: She was promiscuous to say the least.

Brief of Children of Appellants App. at 36a-38a. *See also, e.g., id.* at 28a-30a; 22a-24a; 11a-17a; Brief of Children's Legal Defense Fund, App. at 19a-21a.

55. *State v. Plummer*, 5 Conn. Cir. Ct. 35 (1967) upheld a lascivious carriage conviction based on such a warrantless search, which entailed climbing a fire escape and shining a flashlight into the defendant's bedroom and was based on a complaint from a "representative of the state welfare department," *id.* at 36, that the welfare recipient was sleeping with a man to whom she was not married. The Appellate Division of the Circuit Court refused to certify the case for Superior Court review. *Id.* at 42.

56. *Shirley v. Lavine*, 365 F. Supp. 818 (N.D.N.Y. 1973), *prob. juris. noted*, 417 U.S. 943 (1974) (Doc. No. 73-1095).

57. Recent passage of a new federal child support collection mechanism, H. R. 17045, reported at 120 CONG. REC. 12522-12530, may affect the outcome in *Roe*. While the statute renders *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969), *appeal dismissed*, 396 U.S. 488 (1970) and its progeny inapplicable (Congress specifically made parental cooperation a condition of eligibility), its impact on *Roe v. Norton* is far from certain and may require a remand. Part of the uncertainty stems from the lack of clarity in the congressional action itself. The Social Service Amendments of 1974 (H.R. 17045) were adopted on the last day of the 93d Congress amid complaints on the House floor that the Representatives had not seen what they were voting on and did not understand the bill's implications. *See, e.g.,* comments by Reps. Abzug and J.L. Burton at 120 CONG. REC. 12585 and 12588-89 (daily ed., Dec. 20, 1974). The bill offers no guidelines as to what parental cooperation must entail, and its supporters at times contradicted the language of the bill. *See, e.g.,* the statement by Rep. Pettis, a member of the conference committee, that "this bill will do more for mothers than is being done now, because the mothers are

## EQUAL PROTECTION

An arbitrary distinction on the face of the statute between illegitimates born to mothers receiving welfare and those born to non-welfare mothers, virtually undiscussed by the lower court, is the statute's clearest traditional equal protection problem. This facial distinction based on welfare status is underscored by clear discrimination in benefits (or burdens) as the statute is applied to the illegitimate infant. The Court might decide *Roe* using either traditional "minimal" equal protection scrutiny<sup>58</sup> or an evolving alternative applied in recent equal protection decisions involving the definition of households. These decisions require something more than mere rational scrutiny of governmental purpose when individuals are excluded by statutory definition from their chosen families or households.

I. *Discrimination on the Statute's Face*

The lower court should be reversed on equal protection grounds because of an arbitrary, facially discriminatory classification. *Roe* involves differing statutory impact, be it burden or benefit, on two classes of illegitimates distinguished solely by the welfare status of their mothers.

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not going to be denied under this legislation anything to which they have been entitled up to now." *Id.* at 12589. While parents will be denied initial eligibility for refusal to cooperate (§ 402(a)(26)(B)) the bill provides a further incentive of 40 percent of the first \$50 of child support collected monthly during the first 15 months payable to the cooperating parent (§ 457(a)(1)) as well as federally-funded bonuses to states which aid other states in enforcing child support orders (§ 458(a)).

The new amendments institute elaborate mechanisms for locating missing parents and for enforcing state child support orders. The House managers insisted that it would yield "at least \$1 billion." *E.g.*, Rep. Ullman, acting chairman of the House Ways and Means Committee, at 120 CONG. REC. 12585 (daily ed. Dec. 20, 1974). Nonetheless, the new statutory language does not allow measures as harsh as Connecticut's threat of incarceration to compel cooperation. Accordingly, Connecticut's § 52-440(b) is seemingly in conflict with a relatively clear congressional indication of what form compelling cooperation from a remaining parent to locate a missing parent should take.

By injecting the federal government into the delicate state-dominated child support area, including utilization of the Internal Revenue Service and the federal district courts for enforcement, the bill produced opposition from President Ford who, though he signed the bill, was reported to wish to propose legislation to alter it. The *Wall Street Journal*, Jan. 6, 1975, at 14, col. 1 (a story which described the child-support section as something "slipped into the bill" by the Senate Finance Committee).

58. See generally Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) and *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) for comprehensive analysis of equal protection theories and the development of newer criteria for judicial measurement. Cf. Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

The discrimination is best illustrated by assuming *arguendo* the reasonableness of the state's benevolent justification that disclosure is in the best interest of all children. Under Connecticut law, the mother of an illegitimate child under 18 years old is the sole guardian.<sup>59</sup> If the mother is receiving welfare, the state need not remove her guardianship to compel disclosure since the Welfare Commissioner is authorized to require revelation. In fact, the parties stipulated that it is the statute's intent and the welfare agency's uniform practice to compel disclosure "in each and every case."<sup>60</sup> However, to gain the statute's claimed benefits, the child of a non-welfare mother must overcome procedural barriers and the further hurdle of merely discretionary access. Only a guardian or guardian *ad litem* may compel a non-welfare mother to disclose. The non-welfare child's statutory benefits thus depend on having someone meet the weighty burden of convincing a court to remove the mother's guardianship in a judicial hearing replete with procedural protections for the mother.<sup>61</sup> Even were such a burden met, the newly appointed guardian or guardian *ad litem* still would have discretion to refuse to compel disclosure.

This double discretionary barrier sharply contrasts with the state's position vis-à-vis welfare children, for whom Connecticut uniformly seeks the statute's alleged benefits. If the state's primary justification for the statute—the child's best interest—is believed, it affords an almost unprecedented example of statutory discrimination against the non-welfare group.

Of course, if one assumes the far more plausible contrary hypothesis—i.e., that the statute often burdens those children it purports to benefit—then the classification of illegitimates wholly according to their mothers' welfare status is even more striking. The twofold discretionary shield testing the best interests of the particular non-welfare child contrasts with the uniform treatment the welfare depart-

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59. CONN. GEN. STAT. REV. § 45-43 (1972). *But see Doe v. Doe*, 163 Conn. 340, 307 A.2d 166 (1972) (invoking *Stanley v. Illinois*, 405 U.S. 645 (1972) to question the statute's exclusive grant of guardianship to mothers of illegitimates).

60. The stipulation stated:

It is the intent of §52-440(b) and the practice of the Connecticut State Welfare Department in each and every case in which the mother of an illegitimate child fails or refuses to name the putative father of the child to retain an attorney for the purpose of citing the mother court [sic] if she persists in refusing to name the putative father. (Rec. at 56.)

It is unclear how the parties could discern the statute's intent, since there is no available legislative history, and they cite no supplementary sources. Nevertheless, their perception was shared by the lower court which stated, "The defendant public official . . . is not only authorized, but required, to proceed under the statute. . . ." 365 F. Supp. at 80.

61. CONN. GEN. STAT. REV. § 45-43 (1972).

ment affords welfare children. This distinction is a paradigmatic example of the dual family law system identified by the late Professor tenBroek.<sup>62</sup>

The irrationality of the distinction is underscored by the state's ironic argument that the private attorneys to whom recalcitrant welfare mothers are referred may exercise discretion not to cite them before a court.<sup>63</sup> But the attorneys are paid by the welfare department *only* if they obtain the putative father's name or if they go to court.<sup>64</sup> Nevertheless, the court below stressed, "This statute which imposes a duty upon an unwed mother to disclose the name of the putative father of her child does *not* distinguish between unwed mothers who receive public assistance and those who do not."<sup>65</sup> From the child's perspective however, this is a vital distinguishing characteristic.

Just last term, the Court struck down a similar statutory distinction among illegitimates in *Jiminez v. Weinberger*.<sup>66</sup> In Chief Justice Burger's 8-1 majority opinion, the Court emphasized the constitutional infirmity of the combined under-inclusive and over-inclusive categori-

62. Jacobus tenBroek's seminal study was first published as *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 900, and 17 STAN. L. REV. 612 (1964-65). The entire study was reissued, with minor changes, as *FAMILY LAW AND THE POOR* (1971). In language directly relevant, Professor tenBroek summarized the dual system:

One is public, the other private. One deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.

16 STAN. L. REV. at 257-58. Lewis & Levy, *Family Law and Welfare Policies—The Case for "Dual Systems"*, 54 CALIF. L. REV. 751 (1966). See also Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694 (1966); Foster & Freed, *Unequal Protection: Poverty and Family Law*, 42 IND. L.J. 192 (1967).

63. See note 60 *supra* for the referral procedure. Assistant Attorney General Higgins argued before the lower court that the attorneys had such discretion. Tr. at 43. Immediately thereafter, however, he conceded that the mother could not litigate whether disclosure would be in her child's interest at the contempt hearing. Tr. at 44; see note 37 *supra*.

64. The private attorneys to whom the Welfare Department makes referrals are paid "\$75—if the mother names the father prior to a court hearing" and "\$150—if the mother goes to a full hearing before the court." Rec. at 124. The private attorney is paid *only* if he forces the mother to disclose and thus has a direct financial stake. Rec. at 122. This economic self-interest directly undercuts his function as a disinterested party or one concerned solely with the child's best interest. Cf. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (trial of traffic violations before mayor whose town was financed from traffic court proceeds denied due process requirement of disinterested magistrate).

65. 365 F. Supp. at 81. Judge Newman disagreed. *Id.* at 85-86 n. 2. The state conceded at oral argument that it knew of no attempted enforcement concerning a non-welfare mother.

66. 417 U.S. 628 (1974).

zation of illegitimates, as in the Connecticut statute. The lower court in *Roe* conceded that welfare children might have their statutory benefits sought more "assiduously," but regarded this as a permissible remedial distinction.<sup>67</sup> Connecticut's gross exclusion of non-welfare illegitimates from its questionable benefits—or protection from its burdens—stretches the equal protection notion of remedial classification beyond the breaking point. Even to categorize the statute's effect as remedial is, of course, to accept its asserted beneficent basis. But the lower court recognized the much more mundane state fiscal interest in additionally burdening welfare mothers. This inherently contradictory state rationale invalidates the assumption that "[t]his statute . . . does not distinguish between unwed mothers who receive public assistance and those who do not."

## II. *How Reasonable is Rational These Days?*

Judge Blumenfeld inconsistently asserted "[e]ven if . . . the statute ought logically to be construed to create a separate classification affecting only unwed mothers of illegitimate children who receive some form of public assistance, that particular classification is directly linked to the public interest the statute is designed to secure."<sup>68</sup> That "public interest" is defined as the state's claimed financial interest.

This assertion underscores the inconsistency of the state's benevolent rationale, and recalls the questionably benevolent origins of the *parens patriae* doctrine.<sup>69</sup> Even minimal equal protection scrutiny might regard such a claimed state interest as so wholly without factual

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67. 365 F. Supp. at 81 n. 29. Judge Blumenfeld compared *Roe*'s alleged benefits to those discussed in *Katzenbach v. Morgan*, 384 U.S. 641, 656-57 (1966), in which the granting of benefits to a limited class was permitted. *Katzenbach*, however, involved a distinctly different, ameliorative attempt by Congress to increase Puerto Rican voting by waiving an English literacy requirement for Puerto Ricans educated in Puerto Rico. See Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966). Mere invocation of "remedial" purpose, however, cannot answer any and all equal protection questions. Further, there may be a subtle form of racial discrimination in outraged paternalistic responses to the plight of illegitimates. As Professor Krause argued in his *amicus curiae* brief in *Levy v. Louisiana*, 391 U.S. 68 (1968) and in ed. WILKERSON, *THE RIGHTS OF CHILDREN: EMERGING CONCEPTS IN LAW AND SOCIETY* 147 & n. 22 (1973), discrimination against illegitimates often masks discrimination against blacks.

68. 365 F. Supp. at 82 (footnote omitted).

69. The beneficence of the original *parens patriae* assumption of decision-making competence and the less-than-benevolent continuing effects of the rationale have been critically analyzed extensively in recent years. See, e.g., In re Gault, 387 U.S. 1, 16-17 (1967); *Winters v. Miller*, 446 F. 2d 65, 70-71 (2d Cir.), cert. denied, 404 U.S. 985 (1971); *State ex rel. Hawks v. Lazaro*, 202 S.E. 2d 109, 117-22 (W. Va. 1974). See generally Cogan, *Juvenile Law Before and After the Entrance of 'Parens Patriae'*, 22 S. CAROLINA L. REV. 147 (1970); FOOTE, LEVY & SANDER, *CASES AND MATERIALS ON FAMILY LAW* 394 (1966).

basis as to be irrational. Connecticut concedes that it has never considered whether the cost of administering the disclosure requirement exceeds its potential returns.<sup>70</sup> The total absence of legislative history, combined with past attempts to penalize the classes challenging the statute and the state's emphasis on conflicting altruistic and self-interested justifications, compel scrutiny of the statute's rational relation to either asserted purpose.

The rational relation test set forth by Justice Powell in the equal protection paroxysm, *San Antonio School District v. Rodriguez*,<sup>71</sup> examined a state purpose "to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination."<sup>72</sup> Although Justice Powell also indicated during the same term that a legislative purpose need not be primary to serve as a valid equal protection defense, it must be "clear and legitimate."<sup>73</sup>

The success of a defense asserting the saving of money as in itself a legitimate legislative purpose is currently much in doubt, particularly given the patina of punitiveness present in *Roe*.<sup>74</sup> Further, while the acceptable legislative purpose need not be primary, in *Roe* the economic rationale may actually conflict with the asserted primary benevolent purpose. Finally, the state must make some showing that its purpose, even assuming its "legitimacy," is being "rationally furthered" by the classificatory scheme.<sup>75</sup> *Roe* presents no record regard-

70. Rec. at 75-76. A 1971 Department of Health, Education and Welfare AFDC Study found that even among non-institutionalized fathers whose whereabouts were known to be within the state, approximately two-thirds paid no support whatsoever. HANDBOOK OF HEALTH, EDUCATION & WELFARE, FINDINGS OF THE 1971 AFDC STUDY, Part III (Department of Health, Education & Welfare, Pub. No. (SRS) 73-03759, 1973). A more recent study, with questionable methodology, showed return exceeding expenditures and was relied on during debates on the Social Security Amendments of 1974. See 120 CONG. REC. 11291-92 (daily ed. Dec. 4, 1974) (remarks of Rep. Griffiths).

71. 411 U.S. 1 (1973).

72. *Id.* at 17.

73. *McGinnis v. Royster*, 410 U.S. 263, 277 (1973). *McGinnis* also included the "articulated" element of the test. *Id.* at 270.

74. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("the Constitution recognizes higher values than speed and efficiency"); *Reed v. Reed*, 404 U.S. 71, 76 (1972); *City of New York v. Richardson*, 473 F. 2d 923, 132 (2d Cir.) cert. denied sub nom. *Lavine v. Lindsay*, 412 U.S. 950 (1973). Cf. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). See also *James v. Strange*, 407 U.S. 128 (1972) discussed note 77 *infra*.

75. *San Antonio School District v. Rodriguez*, 415 U.S. 1 (1973). Justice Powell reiterated the importance of some governmental showing of rationally furthering its purposes in his concurrence in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 653 n. 2 (1974) (Powell, J., concurring). See note 156 *infra*. See also *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 170 (1972) (requiring showing of "substantial" interest being fur-

ing such concerns. The total absence of legislative history undercuts the "articulated" element of the *Rodriguez* test. Many unexamined questions should be considered by a court scrutinizing the rationality of the statute.<sup>76</sup> Even if Connecticut's fiscal rationale were convincing, however, the statute should be overturned because its blight on the search for "self-sufficiency and self-respect" of welfare mothers and their infants contains "elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law."<sup>77</sup>

Further, Professor Gunther's suggestion of a "newer" equal protection with intermediate legislative ends-means scrutiny originated primarily in decisions protecting family interests and, specifically, the interests of illegitimates.<sup>78</sup> Although development of Gunther's approach has been slowed,<sup>79</sup> the Court has not explicitly rejected the

thered). *Cf. Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972). For a provocative critique of scrutiny of the rationality of state purposes, see Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972). See also cases discussed in text accompanying notes 80-96 *infra*.

76. Such questions might include:

- 1) Does HEW reimburse Connecticut for its enforcement costs or for the salary of the temporary housekeeper Connecticut claims it will supply if a mother actually goes to jail?
- 2) How much would jail costs be?
- 3) Does Connecticut insist on pursuing all mothers even when there is no potential recoupment possibility, as when the statute of limitations has run?
- 4) How much does it cost to administer the program? What are the projected financial returns?

A remand to explore such issues could be in order.

77. *James v. Strange*, 407 U.S. 128, 142-43 (1972) (invalidating a Kansas statute allowing recoupment for indigents' legal defense fees without protective exemptions provided other civil judgment debtors). In *James*, Justice Powell stated that the state's recoupment interest might be legitimate, *id.* at 141, and that even if "misguided" the statute could be constitutional, because the statute's effectiveness was a legislative matter, *id.* at 133-34. However, the statute violated equal protection because the state's financial interest did not justify the harsh practical effect of its enforcement which undermined other state goals, and which unconstitutionally separated indigent defendant debtors from all others. The welfare mothers and their illegitimate children are similarly singled out in *Roe* and treated in a way which undercuts the benevolent goals the state claims to wish for them. Even a legitimate state fiscal interest "does not mean, however, that a state may impose unduly harsh or discriminatory terms merely because the obligation is to the public treasurer rather than to a private creditor." *Id.* at 138.

78. Gunther, *supra* note 58, at 17, 31-33.

79. The Second Circuit opinion in *Boraas v. Village of Belle Terre*, 476 F.2d 806 (2d Cir. 1973) represented the highwater mark of the new equal protection. The Supreme Court's refusal to follow the Gunther-Second Circuit analysis, reversing in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), may indicate that many an equal protection tier has to fall before lower courts and commentators understand the equal protection emanations from the current Court. See, e.g., *Citizens Committee for Faraday Wood v. Lindsay*, \_\_\_ F.2d \_\_\_ n.5, Doc. No. 73-2590 (2d Cir. Dec. 5, 1974).

doctrine. The cause of illegitimates with mothers on welfare burdened and stigmatized by Connecticut's disclosure statute could help revive a theory floundering in search of a context.

### III. *Family Self-Definition v. Protecting the Fisc*

In a series of directly relevant equal protection decisions, the Court recently struck down statutes which presumptively excluded individuals or groups from the family or household units with which they chose to identify. The decisions all acknowledge or assume *arguendo* the rationality and legitimacy of governmental attempts to protect the fisc. Nevertheless, in *Stanley v. Illinois*,<sup>80</sup> *United States Department of Agriculture v. Moreno*<sup>81</sup> and *Jiminez v. Weinberger*,<sup>82</sup> the Court required far more than minimal scrutiny<sup>83</sup> of attempts to ignore familial or household bonds by mere definitional exclusion. In all three cases, the governmental defendant lost because the Court would not accept thrift as a sufficient justification.<sup>84</sup>

*Stanley* represents the clearest judicial articulation of the importance of the family unit to an individual. Illinois attempted to exclude

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80. 405 U.S. 465 (1972) (striking down an Illinois statute removing the putative father of illegitimates from the family unit in a dependency hearing less expensive than the otherwise required neglect hearing).

81. 413 U.S. 528 (1973) (invalidating a statute denying food stamps to households of unrelated persons despite claimed governmental purpose of reducing fraud).

82. 417 U.S. 628 (1974) (invalidating a statute which excluded after-born, unacknowledged illegitimates from Social Security insurance payments).

83. The most minimal scrutiny is best represented by *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Pennsylvania's Sunday Closing Laws by "conceiving" a secular motive) and *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding a Maryland statutory ceiling on AFDC grants to families regardless of the number of children). In *McGowan*, late Chief Justice Warren stated that "a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426. The *Dandridge* majority opinion by Justice Stewart stressed the institutional concern that federal courts not "impose upon the States their views of what constitutes wise economic or social policy." *Id.* at 486 (footnote omitted). In the area of economics and social welfare, the Court stated that it would allow imperfection in "allocating limited public welfare funds among the myriad of potential recipients." *Id.* at 487. This policy basis for the Court's reluctance to intervene in the *Dandridge* allocation decisions was emphasized by the *Jiminez* Court in distinguishing *Dandridge*. See text accompanying note 91 *infra*.

84. *Reed v. Reed*, 404 U.S. 71 (1971) also fits the general category of judicial scrutiny of family definition as it conflicts with governmental attempts to save money by utilizing administrative short cuts via generalization. Because Idaho's probate code automatically preferred males to females in the same entitlement class, the sex discrimination element in the case renders *Reed* explainable on other grounds. See Gunther, *supra* note 58, at 33-34. Nevertheless, Chief Justice Burger's opinion for the unanimous Court stressed the legitimacy of the workload reduction rationale, but found it an insufficient constitutional justification. *Reed*, *supra* at 76. See also *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), discussed at note 92 *infra*.

Peter Stanley, the natural father of illegitimate children, from its statutory definition of parents when adoption was being considered. Justice White stated for the Court:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.<sup>85</sup>

Illinois could not exclude Peter Stanley from his parental prerogatives and obligations by definitional fiat. Nor could the child's interest be so easily overcome. Significantly, the Court recognized both interests and rejected a statute which foreclosed individualized weighing of "the determinative issues of competence and care" when family dissolution was at stake.<sup>86</sup>

In *Moreno*, remarkably analagous to *Roe* in its lack of articulated basis for legislation and in its transparently punitive motivation, the Court emphasized that a legislative desire to harm an unpopular group could not constitute an adequate governmental interest. Justice Brennan's majority opinion questioned the federal government's assertion that denying food stamps to households of unrelated persons would minimize fraud. But even if the Court "accept[ed] as rational the Government's wholly unsubstantiated assumptions concerning the differences between 'related' and 'unrelated' households," it was held necessary to scrutinize the statute's "practical effect."<sup>87</sup> Forcefully applying the *Rodriguez* test, albeit without citation, the Court required a showing by the defendant that the statute operated "so as rationally to further the prevention of fraud."<sup>88</sup> Because of the importance of household self-definition, the aura of punitiveness and the lack of satisfactory legislative articulation of goals, the *Moreno* Court rejected the money-saving rationale. Remarkably similar elements appear in *Roe*, and Connecticut has likewise failed to show or even to consider the "practical effect" of its differential classification of welfare families.

Last term's delphic decision in *Jiminez* further indicates that mere minimal rationality is insufficient for governmental classifications uni-

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85. 405 U.S. 645, 656-57 (1972) (footnote omitted).

86. *Id.* at 657-58.

87. 413 U.S. 528, 535-37 (1973).

88. *Id.* at 537.

laterally excluding individuals from their family units. *Jiminez* involved a claim to Social Security payments by unacknowledged illegitimates born after the onset of parental disability. Chief Justice Burger tiptoed almost imperceptibly between what he recognized as a legitimate governmental interest—saving money—and what was held to be a fatal failure in the “tightness of fit” of the governmental family definition because of its discrimination among classes of illegitimates.

*Jiminez*' very ambiguity makes it an attractive precedent for the Court in *Roe*. The Court offered neither further equal protection citation nor analysis beyond quoting extensively from two equal protection polarities and regarding neither as determinative.<sup>89</sup> Employing recent irrebuttable presumption language,<sup>90</sup> the Court rejected the rationale of avoiding spurious claims because, distinguishing *Dandridge*, the statutory scheme was not meant “to achieve necessary allocation of finite resources.”<sup>91</sup> *Jiminez* forbade discrimination in classification between classes of illegitimates which was both over-inclusive and under-inclusive. The *Roe* statute is grossly over-inclusive of welfare children and arguably under-inclusive for non-welfare children. More specifically, Connecticut attempts to insulate the welfare child from his or her mother's discretionary decision to exclude the putative father from the family. In questioning the mother's competence to make such a decision, the state should be required, at a minimum, to afford the welfare child the procedural protections and individualized determination of best interests it affords other illegitimates. *Jiminez*' holding reiterated recent Supreme Court indications that the government has the burden of justifying lines drawn between classes of children which significantly harm one class by denying it governmental largesse.<sup>92</sup>

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89. 417 U.S. 628 (1974). The ambiguity of the decision is described by Justice Rehnquist as “a perplexing three-legged stool,” *id.* at 638 (dissenting). Chief Justice Burger quoted at length from *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 167, 175-76 (1972) (discussing special judicial concern with the plight of illegitimates), *id.* at 632, and *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (discussing the inevitability of imperfect accommodation of state social and economic welfare policies to the particular needs of a given family), *id.* at 632-33.

90. Supreme Court scrutiny to determine if “it is necessarily or universally true” that the discrimination between classes of illegitimates comported with what would be revealed if they were afforded individual hearings, *id.* at 636, was taken directly, albeit without citation, from *Vlandis v. Kline*, 412 U.S. 441, 451-52 (1973) in which Chief Justice Burger vigorously dissented.

91. 417 U.S. 628, 634 (1974).

92. The revolution in the rights of illegitimates had its Supreme Court beginnings in *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimates constitutionally enabled to collect for the wrongful death of their mother) and *Glon v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968) (the converse). Its development seemed to be interrupted by *Labine v. Vincent*, 401 U.S. 532 (1971), which upheld intestate succession provisions

Of course, a private decision to be part of a family does not preclude state imposition of legal duties such as child care and support and the requirement of divorce before remarriage. Indeed, in *Gomez v. Perez*,<sup>93</sup> the Court held it unconstitutional for a state to deny some family members the right to enforce the legal support duties of others. No analogy to *Roe* can be drawn, however, because a *Gomez* right to the putative father's assistance does not imply a duty to seek it.<sup>94</sup> Further, under § 52-440(b) only welfare mothers are forced to seek the father's assistance.

The *Stanley* and *Jiminez* decisions, complementing recognition of the "illogical and unjust"<sup>95</sup> traditional condemnation of illegitimate infants, illustrate increasing judicial solicitude for self-defining family situations and extensive inquiry prior to allowing governmental intervention.<sup>96</sup> Deference to family autonomy may help explain the otherwise confusing series of cases generally concerning the rights of illegitimates.<sup>97</sup> Statutory presumption and definitional exclusion in pursuit of efficiency cannot meet even the low-level test of "rationally

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denying acknowledged illegitimates equal inheritance rights. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) followed *Levy* and distinguished *Labine*. Justice Powell's majority opinion invalidated a workmen's compensation law which disadvantaged illegitimates. In *Gomez v. Perez*, 409 U.S. 535 (1973), the *per curiam* opinion found a paternal support duty for illegitimates constitutionally required because "a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Id.* at 538. The *per curiam* opinion in *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), continued the trend by invalidating a New Jersey assistance program for the working poor which "in practical effect . . . operates almost invariably to deny benefits to illegitimate children while granting benefits to those children who are legitimate." *Id.* at 619-20. Connecticut's statute seems to include just such a "practical effect" if a child's interest in parental autonomy is considered a "benefit."

93. 409 U.S. 535 (1973).

94. In *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), the Court rejected a claim that the state had an obligation to enforce a child support duty by invoking available criminal sanctions. The mother of an illegitimate was denied standing in her attempt to influence prosecutorial discretion. This result, coupled with *Gomez*, should delight Hohfeldian scholars.

95. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972).

96. Arguably, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), which upheld a zoning ordinance forbidding households of three or more unrelated persons, conflicts with developing judicial solicitude for family or household self-definition. But lack of discussion of equal protection or freedom of association issues indicates that *Boraas* is explainable as a modern example of traditional deference to local zoning police power with environmental overtones. See note 79 *supra*.

97. Among the decisions discussed *supra* note 92, only in *Labine v. Vincent*, 401 U.S. 532 (1971) had a parent done something which could be interpreted to reflect choice of exclusion of an illegitimate from the category of "family". Of course, reliance on intestate succession as an index of conscious choice is distressingly unrealistic; nevertheless, the assumption of positive parental decision may differentiate *Labine* from the other recent Supreme Court decisions concerning illegitimates.

furthering a legitimate articulated state interest." Surely, scrutiny of the "practical effect" of Connecticut's statute condemns its blunderbuss approach.

#### IV. *Facial Sex Discrimination and the De Minimis Defense*

The Connecticut statute on its face applies only to mothers who refuse to reveal the names of putative fathers, and not vice versa. It is not inconceivable that a mother might give birth and falsify her name on a birth certificate or deliver at home and desert father and child.<sup>98</sup> Accepting the state's justification for forcing disclosure of the father's identity, it could be in the child's or the state's interest to obtain the name of the deserting mother. However, the statute does not aid in obtaining such "benefits." Deserting mother scenarios echoing Victorian fiction may be rare, but they raise the question of how *de minimis* a sex-based discrimination must be to survive judicial scrutiny. In *Frontiero v. Richardson*,<sup>99</sup> the discriminatory classification affected fewer than one percent of the relevant population,<sup>100</sup> yet was found to be unconstitutional. What percentage of deserting parents of illegitimates must be mothers for *Frontiero* to require reversal in *Roe*? When sex discrimination is apparent on the face of a statute, the Court appears unwilling to ignore even minimal effects absent remedial justification. It would be wonderfully ironic if § 52-440(b) were constitutionally invalid because it did not allow illegitimates sufficient leverage to learn their deserting mothers' identities. Yet, to the extent that sex classification approaches racial classification in "suspectness,"<sup>101</sup> such a possibility must not be overlooked. The Court faces a sex-classification on the face of § 52-440(b); it must either ignore it or clarify the permissible range of statutory sex discrimination.

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98. In *Jimenez v. Weinberger*, 417 U.S. 628, 630 (1974), for example, the mother had deserted her family, leaving the father to care for the illegitimate children. It is perhaps significant that the recent amendments to the Social Security Act, H.R. 10745, discussed *supra* at note 57, use the sex-neutral term "parent" throughout.

99. 411 U.S. 677 (1973).

100. Servicewomen affected by the discriminatory method of granting military benefits to dependents constituted fewer than 1 percent of the relevant group. *Id.* at 681.

101. Only four Justices joined in Justice Brennan's plurality opinion that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688. Justice Brennan also stressed the comparable discrimination suffered by 19th century women and pre-Civil War blacks under slave codes. *Id.* at 685. In *Kahn v. Shevin*, 416 U.S. 351 (1974), however, another largely unexplained decision authored by Justice Douglas cast doubt on the analogy of sex to race in terms of suspect classification for equal protection purposes. The overt statutory sex classification in *Roe* would not survive were it a racial classification, even with minimal practical application. *See also Schlesinger v. Ballard*, 43 U.S.L.W. 4158 (U.S. Jan. 15, 1975).

## DUE PROCESS

Any of four possible due process analyses could be determinative in this case. The challenged statute is appallingly cavalier in failing to afford traditional procedural protections. The stipulation that the contempt is civil might be questioned and the lack of protections afforded the mother found wanting; the traditional procedural due process model standing alone—or as a vital element in developing irrebuttable presumption analysis—might condemn the statute; finally, the “new” substantive due process protection of privacy interests might afford a basis for decision.

I. *Due Process Aspects of Contempt*

In a curious stipulation,<sup>102</sup> the parties agreed that § 52-440(b) provides a *civil* contempt sanction. The plaintiffs’ desire to avoid *Younger v. Harris*<sup>103</sup> restrictions on their access to the federal courts explains their agreement to the stipulation. The state probably agreed because by doing so it thought to avoid difficult due process issues. However, the parties themselves may not have authority to determine whether a contempt is civil or criminal.<sup>104</sup> Several elements of the statute might lead the Court to construe it as criminal according to past contempt categorization. The fixed maximum penalties, the presence

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102. The stipulation (merely noted and accepted by the three-judge court, 365 F. Supp. at 82 n.31) stated inelegantly, “[Sec.]52-440b in the opinion of counsel for all the parties is a civil statute. A contempt committed under this section can be purged at any time, i.e. by naming the putative father, in the opinion of counsel of record herein.” Rec. at 56.

103. 401 U.S. 37 (1971).

The Supreme Court could use *Roe* to extend *Younger*, by terming proceedings against the mothers “quasi-criminal” or extending *Younger* to civil cases. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 556 (1972) (dissenting opinion). Further extension of *Younger* is ill-advised. Since the essence of the children’s constitutional claim is the state court’s refusal to consider their interests, remand is pointless. Because the Connecticut statute threatens the equivalent of arrest, in disregard of the mothers’ first amendment interests, *Dombrowski v. Pfister*, 380 U.S. 479 (1965) and *Steffel v. Thompson*, 415 U.S. 452 (1974) preclude invocation of *Younger*. *Younger’s* policy of avoiding state-federal friction would be disserved by compelling state courts to resolve issues the state wishes the federal courts to decide and which the state may have waived.

104. See, e.g., *Shillitani v. United States*, 384 U.S. 364 (1966) (the case cited by the court below which supports the characterization of a §52-440(b) proceeding as civil). In *Shillitani*, the Supreme Court construed the contempt as civil, though the courts below and the parties had consistently construed it as criminal. Such a uniform mistake among parties and lower courts underscores the difficulty of any contempt characterization. See also *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 285 (1966) (stringent standard of proof prior to deportation though denominated “civil”); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (fifth and sixth amendment procedural protections prior to loss of citizenship because of “punitive nature” of sanction).

of the state as one of the parties and the punitive underpinning of the statute are all traditional indicators of criminal contempt. But resolution of the categorization riddle could require a remand because of its complexity and its due process ramifications.

Scholarly condemnation of *sui generis* judicial attempts to distinguish civil and criminal contempt is all but universal.<sup>105</sup> A single contempt sentence often contains a punitive component (defining criminal contempt) and conduct-coercing elements (defining the civil contempt).<sup>106</sup> Supreme Court decisions enhancing the procedural protections accompanying criminal contempt have heightened the practical importance of correctly isolating the two elements. But this is a nearly impossible task. Further, the Court has condemned such a "jurisprudence of labels" repeatedly in other contexts.<sup>107</sup> The right to appointed

105. Perhaps the most outspoken critic of attempts to distinguish civil and criminal contempts is R. GOLDFARB, *THE CONTEMPT POWER* (1963), particularly at 46-67. For a more moderate, but still despairing critique of civil-criminal linedrawings updating Goldfarb see Dobbs, *Contempt of Court: A Survey*, 56 *CORNELL L. REV.* 183 (1971). Professor Dobbs noted, "[T]he classification scheme breaks down in confusions, and courts are apt to talk of contempts themselves (rather than the hearings) as criminal or civil . . . In short, the abstract distinctions between civil and criminal contempt have not worked very well." *Id.* at 246. See also Brautigam, *Constitutional Challenges to the Contempt Power*, 60 *GEO. L.J.* 1513 (1972); Note, *Summary Punishment for Contempt: A Suggestion that Due Process Requires Notice and Hearing Before an Independent Tribunal*, 39 *S. CAL. L. REV.* 463 (1966).

106. *Shillitani v. United States*, 384 U.S. 364, 383 (1966) (Harlan, J., dissenting). "[O]bviously, a fixed sentence with a purge clause can be said to embody elements of both criminal and civil contempt." *Id.* Justice Harlan was, in effect, restating the Supreme Court's recognition of the mixed contempt difficulty articulated in its leading civil-cum-criminal decisions, *United States v. United Mine Workers*, 330 U.S. 258, 298-302 (1947); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441-48 (1911); and *Besette v. W.B. Corkey Co.*, 194 U.S. 324, 329 (1904). Courts have generally held that even when a contempt sanction is imposed to coerce action, it is properly classified as criminal contempt if the state rather than a third party benefits directly from the subsequent fine or action. See, e.g., *Parker v. United States*, 153 F.2d 66, 70-71 (1st Cir. 1946) (cited by the Supreme Court in *Shillitani*, *supra*, at 371 n.7, regarding the distinction between criminal and civil contempts and the need for procedural protections even in the civil context); *In re Merchants Stock & Grain Co.*, 223 U.S. 639, 642 (1912). Ironically, the Connecticut Supreme Court recently discussed the civil/criminal distinction at length and found that a definite fine imposed upon striking teachers made the contempt criminal and therefore compelled reversal since the hearing accorded them lacked adequate procedural safeguards. *McTigue v. New London Educ. Assoc.*, 164 Conn. 348 (1973). Justice Bogdanski, for a unanimous court, found it determinative that the fines "were punitive, designed to uphold the dignity and authority of the court: they cannot be classified as remedial or coercive. They were payable to the state of Connecticut and not to the plaintiffs." *Id.* at 355.

107. Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 *MICH. L. REV.* 1259, 1302 (1971). In *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963), the Court noted, "a State cannot foreclose the exercise of constitutional rights by mere labels." Cf. *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (upholding a murder conviction after jury visit to crime scene unaccompanied by accused), in which Justice

counsel and the less clear-cut right to a jury trial recently have been decisive factors in a variety of technically civil cases.<sup>108</sup>

Affixing the civil label in *Roe* without consideration emphasizes the arbitrariness of this "Proteus of the legal world."<sup>109</sup> Even if the parties correctly stipulated that the contempt was civil, however, the statute might violate fundamental fairness by permitting incarceration for up to a year without appointed counsel or jury trial.<sup>110</sup> Recent decisions support the mother's right to appointed counsel no matter what the designation of the contempt.

Just last term the Court noted in *Taylor v. Hayes* the "heightened potential of abuse posed by the contempt power," commenting,

[t]he provision of fundamental due process protections for contemnors accords with our historic notions of elementary fairness . . . . Due process cannot be measured in minutes and hours or dollars and cents. For the accused contemnor facing a jail sentence, his "liberty is valuable and must be

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Cardozo decried "the tyranny of labels" as "a fertile source of perversion in constitutional theory."

108. The right to counsel was sustained in *In re Gault*, 387 U.S. 1 (1967). While jury trials were not required in juvenile delinquency hearings, *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), Justice Blackmun's plurality opinion relied on the "idealistic prospect" of the benevolent proceeding regarding the one facing loss of liberty. In a more recent decision, *Humphrey v. Cady*, 405 U.S. 504, 509 (1972), a unanimous Court emphasized the importance of the impact of community standards through the jury and took a more jaundiced look at another purportedly benevolent incarceration. From the mother's perspective, of course, incarceration under § 52-440(b) is not even arguably benevolently motivated.

109. Moskowitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780 (1943). Justice Black's dissenting opinion in *Frank v. United States*, 345 U.S. 147, 159 (1969), merits attention. He stated, "Those who commit offenses against courts should be no less entitled to the Bill of Rights than those who commit offenses against the public in general." *Id.* at 160.

110. The Supreme Court has repeatedly wrestled with the procedural protections which must accompany criminal contempt since *Shillitani* and a companion case, *Cheff v. Schnakenberg*, 384 U.S. 373 (1966). See *Codispoti v. Pennsylvania* \_\_\_ U.S. \_\_\_, 94 S. Ct. 2687 (1974) and *Taylor v. Hayes*, \_\_\_ U.S. \_\_\_, 94 S. Ct. 2697 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (for an earlier chapter in the *Codispoti* litigation whose history Justice Rehnquist found "worthy of a chapter in Charles Dickens' *Bleak House*," in his dissent to *Codispoti* and *Taylor*, \_\_\_ U.S. \_\_\_, \_\_\_, 94 S. Ct. 2687, 2710); *Baldwin v. New York*, 399 U.S. 66 (1970); *Frank v. United States*, 395 U.S. 147 (1969). Cf. *Groppi v. Leslie*, 404 U.S. 496 (1972). The difficulties have been compounded by the Court's changing perception of right to counsel and jury trial issues in the "regular" criminal context. In *Codispoti* and *Taylor*, the Court evolved a doctrine which focuses on the actual sentence imposed and the time of imposition to determine whether the offense is "serious," in which case a jury trial is constitutionally required or "petty," in which case it is not. However, in *Frank v. United States*, *supra*, Justice Marshall's majority opinion stated, "If the statute creating the offense specifies a maximum penalty, then of course that penalty is the relevant criterion." *Id.* at 149 n.2. While the *Codispoti* majority

seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal."<sup>111</sup>

The *Morrissey* decision left unanswered the extent to which informal orderly process must include counsel when conditional liberty is at stake. The Court's partial answer in *Gagnon v. Scarpelli*<sup>112</sup> is particularly relevant to the mothers accused of contempt in *Roe*. The guidelines in *Scarpelli* emphasize the importance of case-by-case determination of the need for counsel. The *Scarpelli* court instructed that counsel should be afforded "presumptively" when "there are substantial reasons which justified or mitigated the violations . . . and . . . the reasons are complex or otherwise difficult to develop or present."<sup>113</sup> Counsel is thus presumptively mandated for a parolee facing revocation whose interest in liberty is merely conditional. The *Roe* mother faces loss of her unconditional liberty. Further, even if her offense is clear, mitigating or justifying reasons clearly merit provision of counsel under the *Scarpelli* guidelines. If a *Roe* mother's contempt were properly construed as criminal, she would be entitled to counsel. Since her sentence could exceed six months, the demarcation line of "serious" contempt sentences, she also would be entitled to a jury trial. The all or nothing consequences flowing from the decision to affix a civil rather than criminal label emphasize the need for increased procedural protections.

The potentially devastating psychological damage of the enforced separation of mother and child should constitute the "sufficient consequences" of loss of liberty suggested by Justices Powell and Rehnquist as the basis for determining when counsel should be provided.<sup>114</sup>

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may have implicitly limited *Frank's* total deference to the statutory maximum by regarding "the judgment about the seriousness of the crime" to be "normally heavily influenced by the penalty authorized by the legislature," \_\_\_ U.S. \_\_\_, 94 S. Ct. at 2691, the issue was not directly involved in the decision and the dissenting opinion of Justice Rehnquist, joined by Chief Justice Burger, reiterated the total deference to the legislative maximum to define seriousness and thereby afford a jury trial. *Id.* at 2712.

111. *Taylor v. Hayes*, \_\_\_ U.S. \_\_\_, 94 S. Ct. 2697, 2704, quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1973).

112. 411 U.S. 778 (1973).

113. *Id.* at 790. The Court's concern with disposition is emphasized by its reliance on the requirement of counsel at the variously construed sentencing or probation revocation stages in *Mempa v. Rhay*, 389 U.S. 128, 134 (1967).

114. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Objecting to the provision of counsel whenever an accused faces possible incarceration, Justice Powell's concurrence argued that the majority's rule was too narrow as well as too broad. His example was, "When the deprivation of property rights and interests is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a

Categorization of a contempt citation as civil does not diminish the necessity for counsel to develop mitigating or justifying evidence. The recalcitrant mother is in a "Russian Roulette"<sup>115</sup> situation if she dares resist disclosure. Fundamental fairness demands at least orderly process, individualized inquiry and appointed counsel. A right to trial by jury might also be required. Thus, there is much at stake in properly categorizing the contempt under § 52-440(b); even if it is correctly denominated civil, however, Connecticut's failure to provide procedural safeguards violates due process.<sup>116</sup>

## II. "Pure" Due Process

The Connecticut statute lacks the minimal procedural protections recently afforded a broad spectrum of individual interests.<sup>117</sup> Rights as basic as the preservation of the bond between mother and child are overridden without counsel or counsel-substitute and without any consideration of the wisdom of the mother's decision concerning her child's best interest. Neither mother nor child has an opportunity to confront the faceless state opponent. The failure to provide counsel to the mother raises obvious due process problems.<sup>118</sup> Less obvious but more important for *Roe's* doctrinal potential is the failure to provide representation for the infant.

Unlike non-welfare illegitimates, the plaintiff children in *Roe* are deprived of their mothers' authority to decide for them, but provided

denial of due process." *Id.* at 48 (footnote omitted). The footnote catalogued such deprivations of sufficient consequence as loss of opportunity to hold a licensed position and loss of civil service pension benefits. *Id.* n.11.

115. GOLDFARB, *supra* note 105, at 48.

116. The transcripts of proceedings under §52-440(b) reprinted in appendices to the Brief for the Children of Appellants and to Brief for the Children's Legal Defense Fund demonstrate no suggestion of providing counsel (with a single exception), Brief for Children's Defense Fund, App. A., at 38a, no offer of a jury trial and an incredible array of judicial badgering techniques which fall far short of providing fair hearings. Rather, the women were subjected to "assembly-line justice," condemned in *Argersinger v. Hamlin*, 407 U.S. 25, 34-36. Their treatment should compel scrutiny of § 52-440(b) with the standard suggested by Justice Harlan's concurring opinion in *Williams v. Illinois*, 399 U.S. 235 (1970): "unquestionably this Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free." 399 U.S. at 263.

117. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972) (personal property); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (retention of welfare benefits); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (wages). But see *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972) (more than unilateral job expectations). See also *Arnett v. Kennedy*, 416 U.S. 134 (1974) (particularly separate opinions by Powell and White, J.J. concurring in part at 164 and 174 respectively); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) ("conditional liberty"); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (freedom from stigma).

118. See text accompanying notes 108-14 *supra*.

no surrogate. They have no voice in the critical determination of whether the state, acting as *parens patriae*, exercises its power as a "wise, affectionate and careful parent."<sup>119</sup> No judge determines whether the mere threat, to say nothing of the reality, of enforced separation from the mother is worth the speculative psychological and economic benefits claimed by the state. The infant is left in a no-man's-land without any adult functioning as parent.

The vital importance of representation for young children has been widely acknowledged.<sup>120</sup> At a minimum, the child should be represented by counsel or an adequate substitute who would present evidence concerning the effects on the child of the enforced disclosure and potential incarceration of the mother. The child is threatened with loss of his or her natural protector without any due process safeguards whatsoever. What for an adult would be basic liberty and property rights clearly warranting due process protection are for an infant contained within the parental prerogative. The importance to the child of parental custody and care is emphasized by the procedural protections afforded in dependency and neglect proceedings.<sup>121</sup> The *Roe* situation demands at least the judicial weighing of competing interests which is

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119. Judge Cardozo's definition of the *parens patriae* power in *Finlay v. Finlay*, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

120. See, e.g., J. GOLDSTEIN, A. FREUD, A. J. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* at 65-67 (1973); [hereinafter cited as GOLDSTEIN, FREUD & SOLNIT]; essays by Forer, Coyne, Weissman, and Hansen in *THE RIGHTS OF CHILDREN: EMERGENT CONCEPTS IN LAW AND SOCIETY* (Wilkerson ed. 1973). The child's right to counsel in a variety of long-range placement contexts has been a recurring theme in the *Family Law Quarterly*. See, e.g., Kleinfeld, *The Balance of Power Among Infants, Their Parents and The State*, 4 FAM. L.Q. 319-50 (1970) (other related aspects of Attorney Kleinfeld's thesis appear under the same title at 4 FAM. L.Q. 410 (1970) and 5 FAM. L.Q. 63 (1971); Inker & Peretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM L.Q. 108 (1971); Inker, *Expanding the Rights of Children in Custody and Adoption Cases*, 5 FAM. L.Q. 417, 422-23 (1971). Connecticut statutes make the appointment of counsel to represent the child's interest discretionary in custody, dependency and neglect contexts, CONN. GEN. STAT. REV. §17-66c (1972) as amended by 1973 P.A.188; 1973 P.A.373, §13, as amended by 1974 P.A. 169, §9. For an interesting discussion of competing claims upon an attorney in juvenile court, see Kay & Segal, *The Role of the Attorney in Juvenile Court Proceedings, A Non-Polar Approach*, 61 GEO. L.J. 1401 (1973).

121. Statutory language compels judicial scrutiny of the child's best interests and elaborates procedural protections for the adult parties. See, e.g., CONN. GEN. STAT. REV. § 17-389(f) (1972), as amended by 1973 P.A.205, 1974 P.A.293; § 17-62 (1972), as amended by 1973 P.A.205, 546, 625; § 43-45 (1972), as amended by 1973 P.A.156; § 45-54 (1972). Connecticut provides a procedural means for the Welfare Commissioner to terminate parental rights when "it would be in the best interest of any child committed to him." CONN. GEN. STAT. REV. § 17-43(a) (1972). By statute, the Commissioner has "general supervision over the welfare of children who require the care and protection of the state." CONN. GEN. STAT. REV. § 17-32 (1972), but his or her efforts to assist are limited to protective services or monetary assistance unless a juvenile court orders more intervention after an appropriate individualized hearing.

afforded when the state seeks to separate parent from child in other contexts. Such balancing can be achieved only if the child's interest, perhaps at times conflicting with the mother's, is presented by independent counsel or counsel substitute.

The speculative nature of the claimed benefits to the child under § 52-440(b) emphasizes the arbitrariness of the lack of procedural protections. The state claims to serve the child's economic and psychological needs.<sup>122</sup> However, even if the state succeeded in obtaining support payments, the child would not benefit directly. The state would apply such funds to reduce its current payments to the child or to recoup past expenses.<sup>123</sup> The *res judicata* effect of an unsuccessful early effort to establish paternity may render such attempts more harmful than helpful.<sup>124</sup> Significantly, Connecticut's highest court emphasized that enhancement of a child's financial position does not itself warrant a change in custody.<sup>125</sup>

The state's excessive emphasis on paternity suits for the child's long-term economic benefit is undercut by recent decisions which grant even unacknowledged illegitimates such benefits as workmen's

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122. A health interest could conceivably be at issue, though the Welfare Commissioner seems the wrong state official in such a case. The state did not argue any health justification for the statute, which does not provide any mechanism for the Welfare Commissioner to disseminate any health information to the Commissioner of Health or other appropriate officials.

123. CONNECTICUT STATE WELFARE DEPARTMENT, SOCIAL SERVICES POLICIES—PUBLIC ASSISTANCE ELIGIBILITY PROVISIONS § 3460.22 (August 1, 1972). See *Norton v. Larrucuento*, (2d Cir. Ct. Bridgeport, Nov. 23, 1973) reprinted in Brief for Children of Appellants, App. at 39a. Further, the deserting father may well be judgment-proof or impossible to locate. Recent federally-funded studies indicate some success in obtaining payments which exceed costs of administering such programs. However, the data may be skewed by many factors, including preliminary success which may later fall off drastically. Also, additional transaction costs not calculated in the equations may exist.

124. *Ruocco v. Logiocco*, 104 Conn. 585, 595, 134 A.173, 178 (1926) (holding a failure to prove paternity to be *res judicata*). There is some evidence that important information about blood types might not be available until after the three-year statutory period provided by Connecticut. CONN. GEN. STAT. REV. § 52-435(a) (1972). See ROCE & SANGER, BLOOD GROUPS IN MAN (1968). H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY, Ch. 4 (1971). The three-year period also may harm the illegitimate because it may take longer to establish the kind of amicable informal arrangement defined by statute as "living with or contributing to the support of the illegitimate" which has been interpreted with increasing liberality to provide benefits to illegitimates. See, e.g., *Wagner v. Finch*, 413 F.2d 267 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970); *Madison v. Richardson*, 354 F. Supp. 383 (M.D. La. 1973).

125. *Antedomenico v. Antedomenico*, 142 Conn. 558, 563, 115 A.2d 659, 662 (1955):

The rule [allowing the upsetting of a parent's natural right to custody] does not go so far as to require that faithful and devoted parents should be deprived of their children because some wealthy relative or stranger who may have their temporary custody for some good reason is apparently able to provide a higher standard of living than the parents can.

compensation and social security survivor's insurance without paternity adjudication.<sup>126</sup> The very pattern of paternal relationship held determinative in those cases may be destroyed by forcing an unwilling mother to help prosecute a paternity suit.

The lower court argued that "history and literature are replete with examples of the anguish suffered by illegitimate children denied the satisfaction of knowing their paternity."<sup>127</sup> Unequal treatment by the law and by society explain much of the anguish. The psychological need to search for identity of the "real" parent, emphasized by Judge Blumenfeld, has been termed a typical adolescent preliminary step "to achieving independence from any parental authority and reaching maturity."<sup>128</sup> Several of the plaintiff's affidavits indicate the possibly devastating psychological effects of such disclosure to the illegitimate child.<sup>129</sup>

Two nationally-known experts on child psychological development agreed that Connecticut's method of "benefiting" illegitimates will often produce hostility between mother and father and between mother and child.<sup>130</sup> Further, the effect of enforced separation of mother and child is usually an unmitigated psychological disaster.<sup>131</sup> An additional psychological burden on the child is the shame implicit

126. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D.Conn.) *aff'd*, 409 U.S. 1069 (1972). Similarly, allowing benefits under federal programs for unacknowledged illegitimates, see *Middletown v. Luckenback SS Co.*, 70 F.2d 326 (2d Cir.), *cert. denied*, 293 U.S. 577 (1934) (Death on the High Seas Act); *Metropolitan Life Ins. Co. v. Thompson*, 368 F.2d 791 (3d Cir. 1966) (Federal Employees Group Life Insurance, 5 U.S.C. §§2091 *et seq.*); *Hammond v. Pennsylvania R.R.*, 31 N.J. 244, 156 A. 2d 689 (1959) (F.E.L.A.). Actually, Connecticut decisions anticipated recent protection of illegitimates. *Piccinim v. Connecticut Light & Power Co.*, 93 Conn. 423, 106 A.330 (1919). See also *Wheat v. Red Star Express Lines*, 156 Conn. 245, 240 A.2d 859 (1968).

127. 356 F. Supp. at 206 n.6.

128. GOLDSTEIN, FREUD & SOLNIT at 23.

129. One mother's affidavit asserted that her child was the product of either an incestuous union or a union with an emotionally unstable person who had since disappeared, Rec. at 45; two mothers feared physical retaliation, Rec. at 34, 41; two intended to marry the putative fathers and feared disclosure would jeopardize the marriages, Rec. at 39, 42-43; one feared excommunication from her Seventh Day Adventist Church, Rec. at 44-45; two stated the three year paternity suit statute of limitations had already run. See also *Welfare Comm. v. Stone* (1st Cir. Ct. Norwalk, Jan. 28, 1974) reprinted in Brief for Children's Defense Fund, App. at 1a-3a (presumed judicial inability under the statute to make exception for a mother's realistic fear of direct physical retaliation).

130. Deposition of Albert J. Solnit, M.D., Rec. at 62-71; affidavit of Edward Zigler, Ph.D., Rec. at 125-28. See note 28 *supra*. The state offered no contrary evidence whatsoever.

131. *Id.* at 65, terming the effect "catastrophic." The psychological literature concerning separation of parent and very young child is replete with similar descriptions of the effects. See, e.g., GOLDSTEIN, FREUD & SOLNIT at 31-34; BOWLBY, CHILD CARE

in the inquiry. The Supreme Court recently noted that "Courts are powerless to prevent the social opprobrium suffered by these hapless children. . ." <sup>132</sup> Ironically, Connecticut's courts heighten the opprobrium. <sup>133</sup>

The state made no showing of legislative fact-finding or other evidence to counteract the plaintiffs' evidence of vast psychological harm. The claimed benefits cannot be assumed applicable to all illegitimate children of welfare mothers without consideration of individual situations. Of course, individualized inquiry encroaches upon the family unit even when procedural protections are afforded. But without minimal due process, the government simply runs roughshod over rights "to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness of free men." <sup>134</sup>

In *Kent v. United States* <sup>135</sup> and again in *In re Gault*, <sup>136</sup> the Court noted that the child "may get the worst of both worlds" in a system where the government's "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . Failure to observe the fundamental requirements of due process has resulted in instances . . . of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy." <sup>137</sup> The Connecticut legislative scheme provides no fact-finding inquiry and prescribes inherently unfortunate remedies. *Gault's* due process analysis arguably applies only to "civil" proceedings analagous to adult criminal proceedings. Decisions since *Gault* indicate its direct application to other contexts and underscore recogni-

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AND THE GROWTH OF LOVE at 13, 219 (2d ed. 1965); BOWLBY, ATTACHMENT (1968); M. A. AINSWORTH ET AL., DEPRIVATION OF MATERNAL CARE: A REASSESSMENT OF ITS EFFECTS (1962); A. FREUD & D. BURLINGHAM, INFANTS WITHOUT FAMILIES: REPORTS ON THE HAMPSTEAD NURSERIES (1944).

132. *Weber v. Aetna Life & Casualty Co.*, 406 U.S. 164, 176 (1972).

133. Connecticut has not followed Judge Newman's suggestion, concurring, that *in camera* proceedings might be in order. 365 F. Supp. at 86 n.4. See transcripts reprinted in Brief for Children of Appellants, Appendix; and Brief for Children's Defense Fund, Appendix. There is no mention made of an *in camera* option. This is in ironic contrast to the statutory provision compelling secrecy of adoption records. CONN. GEN. STAT. REV. § 45-66 (1972). It also ignores the oft-quoted recognition that "The statutory provisions that a child's illegitimacy must be suppressed, in certain public records, is (sic) an admission of the hardship that can be caused by disclosure." *Zepeda v. Zepeda*, 4 Ill. App. 2d. 328, 335; 190 N.E.2d 849, 859 (1963).

134. *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974), quoting *Meyer v. Nebraska*, 262 U.S. 390, 393 (1923) (plurality opinion per Rehnquist, J.). One may safely assume that recent judicial scrutiny of sex-based classification, whatever its categorization, would not permit limitation of such rights to "free men." See note 100 *supra*.

135. 383 U.S. 541 (1966).

136. 387 U.S. 1 (1967).

137. *Kent v. United States*, 383 U.S. 541, 556 (1966).

tion that a less restrictive label may not vitiate important individual interests.<sup>138</sup> In *Stanley* the Court emphasized the importance of the interests involved:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangement."<sup>139</sup>

The family rights stressed in *Stanley* assume even greater significance when considered from the young child's perspective. Even if the state is right that in some cases this "integrity of the family unit" should include an unwilling father, it cannot assume that this is always so or threaten the remaining family unit to achieve such "integrity."

The extent of the threat is illustrated by Connecticut's failure to consider the consequences should a mother choose jail. Actual practice and the absence of any statutory provision for providing adequate substitute housekeepers undercut the state's benevolent claims. Could the state institute neglect proceedings against the mother while she is forcibly absent or upon her release? If one assumes an adequate parent substitute, the young child's important interest in psychological con-

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138. See, e.g., *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972). These decisions, and the plethora of lower court decisions concerning the right to treatment and civil commitment, form the basis of the notable Fifth Circuit decision, *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974) *cert. granted*, \_\_\_\_\_ U.S. \_\_\_\_\_, 95 S. Ct. 171 (1974). Judge Wisdom summarized decisions involving deprivation of liberty with civil labels as "a near unanimous recognition that governments must afford a *quid pro quo* when they confine citizens in circumstances where the conventional limitations of the criminal process are inapplicable." *Id.* at 524. The breakdown of such compartmentalizing as the right versus privilege distinction, *Graham v. Richardson*, 403 U.S. 365, 374 (1971), and the liberty versus property distinction, see note 185 *infra*, highlights the importance of an individualized evaluation of the *quid* the state offers for the *quo* it extracts. Cf. *In re Gault*, 387 U.S. at 22 n.30. The *Jackson v. Indiana* test ("whether the nature and duration of commitment bears some reasonable relation to the purpose for which the individual is committed," 406 U.S. at 738) arguably applies only to confinement and therefore, perhaps, solely to the *Roe* mother's plight. But it represents an important updating of the least drastic alternative approach. See also *Boddie v. Connecticut*, 401 U.S. 371, 378-80 (1971). Cf. the five opinions in *Arnett v. Kennedy*, 416 U.S. 977 for the current Court's difficulty applying traditional due process balancing exemplified by *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

139. 405 U.S. 645, 651 (1972), quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949).

tinuity will be upset again upon the mother's return.<sup>140</sup> Further, the cost of a mother's stay in jail plus the pay of a fulltime substitute housekeeper make ludicrous the state's claims of protecting the fisc by obtaining support contributions from absent fathers.<sup>141</sup>

The state's belated attempt to ascribe discretion to a judge enforcing § 52-440(b) is painfully empty. First, the transcripts reveal the enforcing judges' perception that they have no option but to find mothers in contempt and to threaten jail.<sup>142</sup> Second, the state's argument that the women may hire counsel is clearly a makeweight. Under Connecticut's meager flat grant system<sup>143</sup> welfare recipient mothers are living at a subsistence level, with no extra funds for attorneys' fees.

Even if the mother were given the chance to explain her decision not to disclose, a radical shifting of the burden of persuasion all but resolves the issue.<sup>144</sup> To contest the state's assumption concerning

140. United Nations Declaration of the Rights of the Child (1959), Principle 6:

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents. . . . A child of tender years shall not, save in exceptional circumstances, be separated from his mother.

In *THE RIGHTS OF CHILDREN*, *supra* note 120, at 222, Professor Keith-Lucas argued: "Anyone who has ever worked with dependent children knows, one of the primary rights or needs of most of these children is to belong to and be under the guidance of their natural parents despite inadequacies, even mistreatment in the home." Keith-Lucas provided a valuable discussion of the distinction between a dependent child's needs, as defined by well-meaning "interveners" and the child's rights, including "the right to his own parent whenever possible." *Id.* at 218-31. See also GOLDSTEIN, FREUD & SOLNIT at 17-21, 31-34, 105-11.

141. While the state might argue that it does not actually intend to enforce the incarceration threat, this very defense highlights the potential abuse of discretion the statute provides and the sheer irrational punitiveness of the statute. Such opportunity for abuse has frequently been condemned by the Court. See, e.g., *Humphrey v. Cady*, 405 U.S. 504, 512 (1972) (equal protection violation if discretion prior to commitment could avoid procedural protections). Such discretion has also formed the basis of decisions striking down statutes on first amendment grounds. E.g., *Smith v. Goguen*, 415 U.S. 566 (1974); *Papachristou v. Jacksonville*, 405 U.S. 156 (1972). It also could conceivably rise to the level of a violation of the eighth amendment, see *Furman v. Georgia*, 408 U.S. 238 (1972), particularly separate "majority" opinions by Justices Douglas, Stewart and White at 240, 306 and 310 respectively, and Justice Powell's dissenting opinion at 414.

142. Brief for Appellees, 29, 32. For example, one circuit judge told a cited mother: "Well, I don't make the law. The legislature makes the law. That is what they say, that you divulge knowledge under oath or else you spend a year in jail. It isn't the thing I want to do anymore than you want to do it." *Welfare Comm. v. A. Ar.* (10th Cir. Ct., New London, Feb. 1, 1973) reprinted in Brief for Children of Appellants, App. A at 25a-26a. See also transcript reprinted in Brief for Children's Defense Fund, App. at 4a, 5a, 8a. *But cf.* *Norton v. Larracuento*, (2d Cir. Ct. Bridgeport, Nov. 23, 1973).

143. See *Johnson v. White*, 353 F. Supp. 69 (D. Conn. 1972).

144. *Armstrong v. Manzo*, 380 U.S. 545, 551-52 (1965) constitutionally condemned such burden-shifting in a case involving a natural father's parental interest:

[t]here was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial

what is best for her child, a mother would have to prove, without assistance of appointed counsel or access to experts, that her own childrearing decision was correct. What kind of proof might she offer? What standard would she have to meet? Shifting the burden determines the outcome.

Under § 52-440(b) a mother faces all but insurmountable obstacles in protecting her family unit. Both mother and child are threatened with "grievous loss."<sup>145</sup> Without providing a hearing concerning the individual interests of the mother and child, Big Brother quietly replaces mother.

### III. Irrebuttable Presumption "Plus"

Connecticut's statutory scheme presumes that it is always in the best interests of an illegitimate child to force a mother on welfare to disclose the putative father's identity. The state conceded in oral argument that under the Connecticut statute such a presumption cannot be questioned.<sup>146</sup> The sole issue a judge must consider is whether the mother will disclose the father's identity if she knows it. This procedure involves issues considered in the recent irrebuttable presumption decisions of the Supreme Court. These decisions, however, leave the appropriate standard and correct application of the irrebuttable presumption doctrine unresolved.

*Vlandis v. Kline*<sup>147</sup> first articulated a new irrebuttable presumption approach. In striking down a statute denying students defined as non-residents the tuition advantage afforded to residents, the Court declared that the statute violated due process because of its "conclusive and unchangeable presumption of non-resident status" which was "not necessarily or universally true in fact."<sup>148</sup> The *Vlandis* approach has produced outraged dissents and stinging academic criticism.<sup>149</sup>

ability over the period involved. The burdens thus placed upon the petitioner were real, not purely theoretical. For "it is plain that where the burden of proof lies may be decisive of the outcome." *Speiser v. Randall*, 357 U.S. 513, 525.

145. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring):

The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society.

See generally *Boddie v. Connecticut*, 401 U.S. 371 (1971).

146. *Supra* note 37.

147. 412 U.S. 441 (1973).

148. 412 U.S. at 452, emphasizing reasonable fact-finding alternatives.

149. See, e.g., *id.* at 459 (Burger, C.J., dissenting, joined by Rehnquist, J.) and at 463 (Rehnquist, J., dissenting, joined by Burger, C.J., and Douglas, J.); Note, *The Irrebuttable*

The revival of the irrebuttable presumption doctrine<sup>150</sup> has its origins in a procedural due process decision and several equal protection decisions during the last decade.<sup>151</sup> Its application has been inconsistent and its standard protean. Irrebuttable presumption decisions thus far offer neither predictability nor cogent standards and appear an easy target for "slippery slope" attacks.<sup>152</sup>

The *Roe* case allows the Court to apply this doctrine while evolving a new, more sophisticated theoretical basis which may answer charges that irrebuttable presumption analysis inevitably threatens "[c]ountless state and federal statutes"<sup>153</sup> and that "the Court seems to misunderstand the nature of an irrebuttable presumption."<sup>154</sup> Judicial scrutiny of irrebuttable presumptions is clearly less deferential to legislatures than traditional rational relation review. Indeed, irrebuttable presumption review has been criticized as "a hybrid, if not simply a confusion" of equal protection and traditional due process review with closest resemblance to equal protection's "strict scrutiny" of the "tightness of fit" of means adopted to further legislative ends.<sup>155</sup>

*Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974). For a good try at a defense see Comment, *The Right to Rebut: Conclusive Presumptions in Civil Cases*, 6 CONN. L. REV. 725 (1974).

150. The interchangeable terms defining the new test, "irrebuttable" and "conclusive" presumption, are traceable to the pre-Roosevelt Court era when state taxes as well as regulatory legislation frequently fell before judicial due process assaults. See *Heiner v. Donnan*, 285 U.S. 312 (1932); *Hooper v. Tax Comm.*, 284 U.S. 206 (1931); *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926).

151. Justice Stewart's *Vlandis* opinion reinterpreted several decisions as sources for modern irrebuttable presumption doctrine, including *Stanley v. Illinois*, 405 U.S. 645 (1972) (finding denial of a hearing to a natural father of illegitimates afforded other parents violative of equal protection); *Bell v. Burson*, 402 U.S. 535 (1971) (forbidding forfeiture of a driver's license by an uninsured motorist involved in an accident absent minimal due process procedures); and *Carrington v. Rash*, 380 U.S. 89 (1965) (invalidating Texas' denial of resident status to servicemen for purposes of voting, based on equal protection).

152. Chief Justice Burger charged that "literally thousands of state statutes" would be susceptible to irrebuttable presumption attack, 412 U.S. at 462.

153. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 657 (1974) (Rehnquist, J., dissenting joined by Burger, C.J.).

154. Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, *supra* note 149, at 1544.

155. *Id.* at 1547. See generally Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, *supra* note 149. Justice Marshall's rather lonely attempt to adopt a "sliding-scale" standard for equal protection review in such dissents as *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 97-100 (1973) (Marshall, J., dissenting, joined by Douglas, J.) and *Dandridge v. Williams*, 397 U.S. 471, 519-30 (1970) (Marshall, J., dissenting, joined by Brennan, J.) seems to have attracted a new supporter when cloaked in irrebuttable presumption garb, *Vlandis v. Kline*, 412 U.S. 441, 458-59 (1973) (White, J., concurring).

Dissenting Justices have characterized the new doctrine as the much-feared return of substantive due process.<sup>156</sup> Although the emerging theory has already produced one renunciation,<sup>157</sup> only one of its original Supreme Court detractors has remained consistently opposed.<sup>158</sup> Nevertheless, even the doctrine's advocates do little more than cite it and assert its relevance to cases before them. The confusion and criticism surrounding irrebuttable presumption analysis makes it easy for lower courts to dismiss it summarily, as the lower court did in *Roe*.

No convincing explication of the hybrid doctrine has yet provided it with a solid theoretical underpinning. Nevertheless in some cases the doctrine is both explainable and justifiable. It is properly invoked in situations such as *Roe*, in which the legislative body:

- 1) classifies with broad generality by "legislative notice" which affects constitutionally significant interests;
- 2) denies, by its presumptive classification, direct governmental benefits or directly burdens a class which lacks

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156. See, e.g., Justice Rehnquist's dissenting opinions in *Vlandis v. Kline*, 412 U.S. at 467-68 and *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 524 (1973) (discussed at note 161 *infra*). Justice Rehnquist is himself willing to invoke substantive due process shadows to help decide contemporary cases. *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974). While the initial irrebuttable presumption decisions were very much a part of the heyday of substantive due process, see note 150 *supra*, the modern doctrine differs significantly. The Court has not simply been rejecting legislative ends based on its own "unyielding negativism," McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 40. See also Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). Nor has the Court been imposing the drastic all-or-nothing remedies substantive due process analysis recalls. See generally, Substantive Due Process Section *infra*.

157. Justice Powell concurring in the result in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 651, preferred equal protection analysis to a doctrine which, he argued, even used selectively, "at root often will be something else masquerading as a due process doctrine. That something else, of course, is the Equal Protection Clause." *Id.* at 652. Significantly, Justice Powell reiterated his *Rodriguez* equal protection test, *supra* note 72, and applied it stringently. He acknowledged that there were "indeed some legitimate state interests at stake," but regarded the mandatory leave for pregnant teachers as an equal protection violation because "it has not been shown that they are rationally furthered by the challenged portions of these regulations." *Id.* at 653 n.2 (emphasis added). Accordingly, "rational basis" equal protection review mandated striking down the regulations because the defendant school board had not met its burden of showing a sufficient nexus between regulation and rationale.

158. Chief Justice Burger utilized the *Vlandis* standard directly, albeit without citation, as a basis for his *Jiminez v. Weinberger* majority opinion, 417 U.S. 628, 636 (1974); Justice Douglas authored the majority opinion striking down an irrebuttable presumption in *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973). Justice Rehnquist alone remained consistent in his opposition. He again dissented in *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 657 and in *Jiminez v. Weinberger*, 417 U.S. 628, 638.

access to the classifier and is without significant political influence; and

3) affords no opportunity to cross the classifying line—even when such an opportunity could be easily afforded.

If governmental classification fits all three criteria, then what might be termed an irrebuttable-presumption-plus test should apply. The burden of justification then shifts to the state and requires more than the “mere rationality” of administrative convenience.<sup>159</sup> If the state fails to justify the challenged classification, the remedy need not be its elimination. Rather, the appropriate remedy will usually be the institution of corrective procedures to bring about individualized treatment in the application of the legislative categories.

Several of the recent “irrebuttable presumption” decisions do not fully meet the above test and the doctrine was too readily invoked. *Bell v. Burson*<sup>160</sup> should be relegated to its procedural due process origins. *Cleveland Board of Education v. LaFleur*<sup>161</sup> did not involve close-to-permanent exclusion from direct governmental benefits and the plaintiffs arguably were not excluded from the decision-making process. *LaFleur* and *United States Department of Agriculture v. Murry*<sup>162</sup> most nearly resemble traditional minimal equal protection review, at least as such analysis scrutinizes legislative findings or presumptions of facts and considers whether actual implementation supports initial legislative assumptions.<sup>163</sup>

The most difficult irrebuttable presumption decision is probably *Vlandis*, which is complicated by the fact that a portion of the majority voiced approval of a one-year waiting period before achievement of

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159. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. at 646, citing *Stanley v. Illinois*, 405 U.S. 645, 656 (1973).

160. 402 U.S. 535 (1971). *Bell* did involve a personal hardship in that the uninsured motorist who lost his license without a hearing apparently depended upon his car for transportation vital to his job as a traveling clergyman. *Id.* at 537. Such an interest should have been balanced via procedural due process analysis following *Goldberg v. Kelly*, 397 U.S. 254 (1970) because other aspects of irrebuttable presumption plus were absent.

161. 414 U.S. 632 (1974). *LaFleur* held mandatory pregnancy leave for teachers violative of due process because of “unwarranted conclusive presumptions that seriously burden the exercise of protected constitutional liberty.” *Id.* at 651. The Court thereby avoided the sex discrimination claim which had been the gravamen of the complaint.

162. 413 U.S. 508 (1973). *Murry* held that needy households could not be denied foodstamps by a 1970 amendment aimed at college students which excluded households from eligibility which contained anyone over 18 years old claimed as a dependent for federal income tax purposes by a taxpayer not a member of the household during the prior tax period.

163. See generally Equal Protection Section, *supra* notes 71-75, 83.

resident status.<sup>164</sup> Increasing judicial reluctance to identify interests as singularly important<sup>165</sup> may explain why the Court did not fit *Vlandis* into the equal protection model of such cases as *Shapiro v. Thompson*.<sup>166</sup> The combination of non-access to the classifier and permanent denial of an obvious government benefit supported irrebuttable-presumption-plus analysis in *Vlandis*—although the benefit itself (less expensive college tuition) would not ordinarily be significant enough to merit such scrutiny and the Court was unwilling to regard the challenged regulation as itself a constitutionally invalid restriction on interstate travel.

The *Carrington v. Rash*<sup>167</sup> and *Stanley* decisions represent irrebuttable-presumption-plus in its clearest form. All the other irrebuttable presumption decisions, with the possible exception of *Bell*, concerned recognized, constitutionally significant interests.<sup>168</sup> But *Carrington* dealt with exclusion from the right to vote of persons who were thereby permanently deprived of access to the local Texas classifier. Similarly, in *Stanley*, Illinois simply “non-parented” Peter Stanley and offered him no forum to assert or prove parental rights held to be “far more precious . . . than property rights.”<sup>169</sup>

Irrebuttable-presumption-plus analysis does contain elements of “legitimate articulated state interest” equal protection review and classic procedural due process balancing. But it also involves constitutionally significant individual interests which would trigger a more scrupulous equal protection scrutiny than either the oft-invoked “merely conceivable” justification or judicial deference to economic or

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164. 412 U.S. at 452 & n.9. Previously the Court had summarily affirmed a three-judge court decision, *Starns v. Mallerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.* 401 U.S. 985 (1971), upholding a one-year nonresident presumption.

165. *Bell v. Burson*, 402 U.S. 535, 537 (1971) stressed that the petitioner was a clergyman who would be “severely handicapped in the performance of his duties by a suspension of his licenses.” Other recent decisions emphasized more important personal interests. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 341-42 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969). *Compare* *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); and *Lindsey v. Normet*, 405 U.S. 56, 64 (1972). *But see* note 183 *infra*, concerning the difficulty in ascertaining the importance of any personal interest.

166. 394 U.S. 618 (1969). *Shapiro* recognized a pre-constitutional basic right to travel interstate and vividly illustrates two-tier equal protection scrutiny.

167. *See* note 151 *supra*.

168. The interest protected in *Stanley* is discussed *infra*, text accompanying note

169. The other decisions involved three constitutional rights: the *Vlandis* majority only implied the right to travel but it was the basis for Justice Marshall's concurrence, 412 U.S. at 455; *Murry* was based on the right of association plus basic survival necessities; and *LaFleur* involved the right to a personalized decision regarding child-bearing.

169. *May v. Anderson*, 345 U.S. 528, 533 (1953).

social regulation.<sup>170</sup> Classificatory exclusion and a direct relationship between individual and government further differentiate irrebuttable presumption decisions from the third-party classificatory schemes unsuccessfully challenged in traditional equal protection cases.<sup>171</sup>

Careful application of the irrebuttable-presumption-plus criteria would concentrate on the importance of the interests, access to the classifier and the feasibility of alternative means of classification. Such an approach should allay fears that, for example, all age distinctions might be held unconstitutional.<sup>172</sup> A minor is not permanently denied access to such relatively insignificant interests as drinking or driving below the statutory age. The minor seeks something he or she does not yet have. By contrast, the mandatory retirement of a 70-year-old civil servant is more difficult to justify. Though the older citizen does enjoy access to the classifier, his case is distinguishable because he can claim a vested "expectancy."<sup>173</sup> All the modern irrebuttable presumption decisions except *Vlandis* and *Carrington* contain elements of already-granted entitlements.<sup>174</sup> In *Vlandis* and *Carrington* perma-

170. *Supra* note 83.

171. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n. 4 (1938). See also Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933 n.85 (1973) (regarding the important distinction between "we-they" classifications and "they-they" classifications); *Hobson v. Hansen*, 269 F. Supp. 501, 507-08 (D.D.C. 1967), *aff'd and modified sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). This distinction helps explain why neither *Ferguson v. Skrupa*, 372 U.S. 726 (1963), nor *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) warranted irrebuttable presumption review and why an irrebuttable presumption claim failed in *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 376-77 (1973). In *Mourning*, for example, the corporate plaintiff attempted to void a Federal Reserve Board regulation compelling finance charge disclosure for all consumer sales payable in more than four installments. The burden was too tenuous and the complainant not sufficiently isolated to warrant application of the doctrine. Corporate efforts to save money or to make more apparently do not successfully invoke modern irrebuttable presumption protection, in sharp contrast to the period of the doctrine's origin.

172. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. at 658 (Rehnquist, J., dissenting).

173. Young and old are distinguishable on a *Roth-Sindermann* basis which affords procedural protection when taking away "entitlements" but not when granting new interests or protecting unilateral expectancies. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972) ("more than a unilateral expectation . . . a legitimate claim of entitlement"). The old person has something important the state wishes to take away; the youth merely seeks to gain something initially. See generally *Arnett v. Kennedy*, 416 U.S. 134 (1974); Reich, *The New Property*, 73 YALE L. J. 733 (1964). But see *McIlvaine v. Pennsylvania*, 416 U.S. 986 (1974) *dismissing*, 454 Pa. 129, 309 A.2d 801 (1973) for want of substantial federal question (state policemen mandatorily retired at age 60 after 39 years service). Cf. *Weisbred v. Lynn*, 43 U.S.L.W. 2181 (D.D.C. 1974).

174. *Bell* involved potential serious occupational hardship to the petitioner in taking away his driver's license; *Stanley* took away parental rights to custody of children; *Murry* took away necessary food stamps; *LaFleur* took away the right to continued employment.

ment exclusion is the most important element, but both contain notions that citizens are "entitled" to the perquisites denied them.

The expectancy distinction between the driving youth and the aging worker helps explain the puzzling irrebuttable presumption decision in *Murry* in contrast to the more traditional equal protection analysis in *Moreno*, its companion food stamp case.<sup>175</sup> The *Murry* statute took away foodstamps; the statute challenged in *Moreno* established initial eligibility. Such a dubious distinction underscores the technical nature of "vested" interest analysis. Irrebuttable presumption analysis is most appropriately invoked when government directly burdens an existing interest.

*Roe* involves a statutory classification which the state argues presumptively benefits illegitimates and their mothers. The parties stigmatized by the classification, however, perceive the statutory scheme as imposing a permanent, onerous burden. Welfare mothers of illegitimates and the illegitimates themselves lack access to the classifier and do not have political clout. The classification affects constitutionally protected rights of both child and mother, yet neither is afforded an opportunity to cross the presumptive line drawn by the legislature. Accordingly, *Roe* presents an opportunity for the Court to make important refinements in the irrebuttable presumption doctrine. Although the Court's destination in its march "under the banner of irrebuttable presumptions"<sup>176</sup> is still uncertain, the irrebuttable-presumption-plus analysis provides a rough map.

#### IV. *Substantive Due Process.*

*Roe v. Wade*<sup>177</sup> and *Doe v. Bolton*<sup>178</sup> make use of the feared substantive due process, although with more deference than in its heyday.<sup>179</sup> The doctrine's recent manifestation indicates that some personal interests are so important that the state may not intrude absent compelling countervailing reasons which may require reference to data

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175. 413 U.S. 528 (1973).

176. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. at 652 (Powell, J. concurring).

177. 410 U.S. 113 (1973).

178. 410 U.S. 179 (1973).

179. For a quick introduction to substantive due process, a phrase nearly as pejorative in legal discourse as conflict of interest, see McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. For background about the initial utilization of the substantive due process doctrine to protect capital, see A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF THE BAR AND BENCH, 1887-1895* (1960). The doctrine's heyday is generally considered the 1920's and 1930's, although *Lochner v. New York*, 198 U.S. 45 (1905), which has come to symbolize

from other disciplines. Even those sympathetic with the outcome in the abortion decisions, however, find the doctrine open-ended and difficult to justify.<sup>180</sup>

Nonetheless, the role-allocation aspect of substantive due process identified by Professor Tribe in his apologia for the abortion decisions is applicable to Connecticut's assumed role as protector of illegitimate children. Tribe argued that scientific uncertainty and an atmosphere of clashing religious beliefs undercut legislative competence to decide the difficult abortion issue and thereby compelled judicial intervention to protect private autonomy. *Roe v. Norton* does not involve the religious entanglements crucial to Tribe's argument, but his suggestion of a "personal question"<sup>181</sup> buffer restricting legislative meddling with the indispensable "right to family self-definition"<sup>182</sup> is important. Clearly, a mother's autonomy concerning her child's interest is the norm. The government should be required to justify any alteration of this basic "allocation of competence."<sup>183</sup> The level of justification required varies with the significance of the private interest involved and the rationale for the legislative action. The very lack of legislative fact-finding coupled with previous judicially forbidden attempts to penalize those whose judgment is being superseded by the statute renders the state's motivation highly suspect.

The Court need not undercut post-*West Coast Hotel Co. v. Parrish*<sup>184</sup> deference to legislative judgment to disavow Connecticut's overriding of a normally private prerogative. The challenged legislation

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an entire judicial approach, was earlier, and inroads were made in the Court's harsh regulating of regulators via substantive due process in decisions such as *Nebbia v. New York*, 291 U.S. 502 (1934) before the famous 1937 line of demarcation symbolized by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

180. The most perceptive critiques include Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) and Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). See also Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765 (1973); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

181. Tribe, *supra* note 180, at 32. It is described as "a doctrine embodying the concept that some types of choices ought to be remanded, on principle, to private decision-makers unchecked by substantive governmental control."

182. *Id.* at 36.

183. *Id.* at 13, quoting A. BICKEL, *THE LEAST DANGEROUS BRANCH* 104 (1962).

184. 300 U.S. 379 (1937). For evidence of the profound effect of pre-*West Coast Hotel* judicial "usurpation" on New Dealers, see, e.g., Justice Douglas' decision decreeing deference to legislatures in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); his anxious distinguishing of the Warren Court from the pre-Roosevelt Court in *Flast v. Cohen*, 392 U.S. 83, 107 (1968) (concurring), and his fear of the monster's return in *Kahn v. Shevin*, 416 U.S. 351, 356 & n.10 (1974) and *Boddie v. Connecticut*, 401 U.S. 371, 384 (concurring).

unquestionably affects important personal rights.<sup>185</sup> The state lacks factual basis for its assumption that forced disclosure either will be in the child's best interest or will actually benefit the state. The total absence of factual support and the failure to provide an individualized enforcement mechanism demands judicial review. The "new" substantive due process scrutiny need not characterize legislative goals as inherently improper, but it should require evidence supporting legislative assumptions which abrogate individual choice when basic interests are affected. For example, in *Roe v. Wade* and *Doe v. Bolton* the Court rejected legislative assumptions of fact concerning the first trimester of pregnancy, required reference to expert decision-makers during the next trimester, and accepted the legislative judgment during the final trimester (because of sufficient factual basis).

The *Roe v. Wade* opinion "fails to justify any of the lines actually drawn."<sup>186</sup> But the Court's willingness to draw lines and its rejection of an all-or-nothing approach to legislation affecting important personal rights is applicable to *Roe v. Norton*. Mother and child have defined themselves as a family; the legislative wish to intervene must be halted absent a sufficiently convincing, adequately supported rationale. Otherwise, a political arm, incapable of the sensitive individual treatment the issues demand, hacks through the "personal question" thicket to trespass upon the mother's zone of competence. A parent's autonomy and a child's best interests are too complex to be abandoned to Connecticut's simple solution.

#### PRIVACY

*Roe v. Norton* involves consideration of two distinct levels of privacy and suggests a possible reconciliation of the two. The first concerns the parent's right to autonomy in child rearing absent some

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185. A clearcut property rights-personal rights dichotomy is both analytically impossible, (see, e.g., *McCloskey*, *supra* note 79, at 54-59) and constitutionally unsupported, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Nonetheless, Justice Brandeis' almost self-evident statement during the height of substantive due process merits attention. He maintained that "the reasonableness of every regulation is dependent on the relevant facts," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 301-02 (1932). Inevitably, the importance of the interest being overridden creeps back into any equation guiding judicial review of a challenged legislative scheme. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). The very intangibility of parental authority and the child's interest in the private decision defining his or her family make Brandeis' balancing test difficult. Nevertheless, such an approach compels reversal in *Roe v. Norton* because obviously important interests of the mother and child are being vitiated by a regulation whose benefit is purely hypothetical. The proper allocation of competences requires a state's showing of an overriding interest prior to running roughshod over parental competence generally presumed primary. *Id.* at 377.

186. *Tribe*, *supra* note 180, at 5.

compelling reason for the state to interfere. The second involves the right to secrecy surrounding sexual conduct and childbearing. The Connecticut statute impinges upon both parental autonomy and sexual privacy. It directly affects the right of parent and child to define their own family unit. Neither privacy interest is absolute. The two concerns combine in a new private associational right: *Roe* is an ideal vehicle for development of that right. It also may be a means toward further elaboration of a constitutionally-protected right to resist disclosure absent compelling state justifications and adequate safeguards.

### I. Parental Autonomy

The older cases contain pious proclamations concerning "the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>187</sup> Modern cases continue to emphasize the "enduring American tradition" of treating the parental role in a child's upbringing as "primary . . . beyond debate."<sup>188</sup> Indeed, such interests are entitled to "special safeguards"<sup>189</sup> and may be so entwined in "[t]he entire fabric of the Constitution"<sup>190</sup> as to warrant ninth amendment protection. The parent even has a right to be wrong concerning the child's best interests. As a constituent of the family, the child shares an interest in preservation of that right, even if the parent is sometimes mistaken about optimal choices.<sup>191</sup> Indeed, the explanation for the parental right is largely the intimacy of the family unit and the beneficial effects of the family on the child's development.<sup>192</sup> This

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187. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). Such "liberty" was expressed in the recognition that "the child is no mere creature of the state" and of the concomitant "right coupled with . . . high duty" of the parent or guardian to guide the child's destiny. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Because of the substantive due process context of *Meyer* and *Pierce* and specifically Justice McReynold's authorship, their holdings have been too readily dismissed by critics of the judicial period which, it has been aptly said, "threatens to give freedom a bad name." Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108, 1167 (1972).

188. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

189. *United States v. Orito*, 413 U.S. 139, 142 (1973). "The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education."

190. *Griswold v. Connecticut*, 381 U.S. 479, 495-96 (1965) (Goldberg, J., concurring). See generally Rhoads & Patula, *The Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since Griswold v. Connecticut*, 50 DENVER L. J. 153 (1973).

191. Judicial declarations have concentrated on the parent's interest, overlooking the interest a young child shares in parental autonomy. See note 217 *infra*.

192. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944): "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

judicial respect for parental discretion is exemplified by the line drawn in *Ginsberg v. New York*,<sup>193</sup> forbidding sales of " 'girlie' magazines" to children but tolerating sales to parents who buy the same materials for their children.<sup>194</sup>

However, parental autonomy is not unlimited.<sup>195</sup> A graphic example in the welfare context was *Wyman v. James*,<sup>196</sup> which sustained a regulation conditioning AFDC payments upon consent to a caseworker's visit to the recipient's home. The 5-4 majority unquestioningly assumed that the caseworker forced upon the welfare mother was "a friend to one in need" and that the child's interest warranted the compulsory visit.<sup>197</sup> The Court's presumption of benevolence was not explained, despite compelling contrary arguments offered by the dissenters.<sup>198</sup> *Wyman* was essentially a fourth amendment decision

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... And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." The *Prince* Court recognized that the case involved "two claimed liberties" and explicitly distinguished the adult's (actually the guardian's) and the child's interests. *Id.* at 164. Of course, the *Prince* holding, narrowed considerably in *Wisconsin v. Yoder*, 406 U.S. 205, 229-30 (1972), allowed states "a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." 321 U.S. at 167. Significantly, however, the emphasis in *Prince* was on perceived "severe" dangers to the child rather than claimed governmental amelioration of the child's situation. See *Wisconsin v. Yoder*, *supra* at 230. Justice Murphy, dissenting, emphasized the questionable factual assumption regarding the potential threat to the child's well-being and the drastic burden shifting countenanced by the Court. 321 U.S. at 173-75 (Murphy, J., dissenting). Prevention of harm to children is surely a more appealing basis for state intervention than affirmative state action assertedly to improve the child's situation. This distinction is helpful in delimiting the holding in *Prince*. See *Wisconsin v. Yoder*, *supra*; cf. *Merriken v. Cressman*, 364 F. Supp. 913, 917-20 (E.D. Pa. 1973); GOLDSTEIN, FREUD, & SOLNIT 7-8 (1973).

193. 390 U.S. 629 (1968).

194. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). Speaking for the Court, Justice Brennan said: "[C]onstitutional interpretation has consistently recognized that the parents claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* Accordingly, though the Court asserted that "the state has an independent interest in the well-being of its youth," *id.* at 640, it defended the challenged statute on the grounds that it "does not bar parents who so desire from purchasing the magazines for their children." *Id.* at 639. Thus, the *Ginsberg* Court reiterated the *Prince* articulation of the state's interest in "its youth" but nonetheless respected parental authority. Cf. Justice Fortas's claim that the 16-year-old actually "was enlisted by his mother to go to the luncheonette and buy some 'girlie' magazines so that *Ginsberg* could be prosecuted." *Id.* at 671-72 (Fortas, J., dissenting).

195. E.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1970); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

196. 400 U.S. 309 (1971).

197. *Id.* at 309, 318-19, 323 (1971).

198. *Id.* at 326 (Douglas, J., dissenting); *id.* at 338 (Marshall and Brennan, JJ., dissenting). Justice Douglas stated the case's central question to be "whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution." *Id.* at 328. Justice Marshall noted that the majority alternated benevolent and self-interested rationales, *id.* at 344, and invoked past precedent invalidating the coerced consent relied on by the majority. See note 200 *infra*.

asserting the reasonableness of the investigation; the privacy issue *per se* was not addressed. Justice Blackmun's opinion purported to involve individualized determination of the need for home visits. He indicated that the outcome would have been different if the sanctions imposed were criminal and argued that Mrs. James' privacy was accorded due respect.<sup>199</sup> Finally, the majority insisted that Mrs. James had consented to the visit because she had always had the option of withdrawing her request for needed assistance.<sup>200</sup>

*Wyman* is distinguishable from *Roe*. The Connecticut statute imposes a sanction and does not provide the individualized determination which apparently satisfied the *Wyman* majority. Connecticut baldly eliminates the parental prerogative altogether. Even the "choice" afforded Mrs. Wyman is denied mothers under § 52-440(b).

Connecticut's assault on parental autonomy is akin to the "public school only" rule struck down in *Pierce* and the ban on foreign languages overturned in *Meyer*. Those legislative schemes, like Connecticut's, made no concession to the wishes of parents concerning child raising. In both cases, the state arrogated to itself sole authority to determine the interests of children. That arrogation was the essential constitutional infirmity and it infects Connecticut's statute as well.

Despite his willingness to allow inquiry which itself encroached upon parental authority, Judge Newman acknowledged in his concurrence that:

In its application, this statute will involve privacy rights concerning both procreation and child rearing. . . . It is certainly an important aspect of child rearing for a mother to decide whether to secure legally some actual or potential financial benefit for her child at the expense of harming the child by inflicting upon *it* distressing knowledge such as incestuous parentage. Decisions on such matters would plainly seem to

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199. *Id.* at 321, 323 (1971).

200. *Id.* at 324. "Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid . . . flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved." *Id.* This rather incredible "choice" was somehow regarded as consistent with the state's beneficent concerns which the decision constantly emphasized.

How the mother's choice of refusal and forfeiture of aid could be reconciled with her child's interest was not explained. This anomaly underscores the conflicting governmental economic and benevolent rationales which are even more overt in *Roe v. Norton*. In enforcing CONN. GEN. STAT. REV. § 52-440(b) (1972), the mother is afforded no option to leave assistance and be left alone—at least if one credits the assertion that the statute is applicable to all mothers of illegitimates, even those not on welfare.

enjoy no less constitutional protection than the decision whether to educate the child at a public or private school.<sup>201</sup>

Even if the state's questionable rationale of protecting the child's interest justifies some encroachment, Connecticut may not proceed by simply sweeping away individual interests. Such a conflict between state and parent, bearing directly on the child's psychological interests, should at the least require the type of expert evaluation of individual circumstances suggested by *Roe v. Wade* and *LaFleur*.<sup>202</sup>

Last term, the Court insisted that it "has long recognized that freedom of personal choice in matters of marriage and family choice is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment,"<sup>203</sup> and applied a least-restrictive-alternative approach to an impingement of that right.<sup>204</sup> In contrast, Connecticut "insists on presuming rather than proving"<sup>205</sup> the character of a vital family interest, making no allowances for the different circumstances of different families. This abrogation of the parent's rights effected by the Connecticut statute is greater than that permitted in *Wyman*. The benefit to the child, questionably assumed by the *Wyman* Court, is considerably more doubtful in *Roe*. The interest of the parent is more directly burdened, and that of the child is even less obviously advanced. The Court should accord parental interests proper weight, while assessing the state's claim of beneficence. Intensive scrutiny of the sort applied by the Court in *Gault* is more appropriate than the unquestioning review by the *Wyman* Court. Lax as the *Wyman* standards were, the Connecticut statute could not survive them.

## II. *Secrecy*

Since *Griswold*, the constitutional right to privacy concerning sexual activities has been expanded to protect unmarried individuals<sup>206</sup> and to shield mothers' abortion decisions.<sup>207</sup> The limitations on the

201. 365 F. Supp. 65, 84-85 (D. Conn. 1973) (Newman, J., concurring).

202. See note 13 *supra*.

203. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974). The opinion continued with citation to a host of privacy decisions, old and new. The Court rather inexplicably viewed the *LaFleur* maternity leave regulations as a "heavy burden" penalizing particular childbearing protected freedoms. *Id.* at 640. The Connecticut statute could be viewed as a similarly attenuated, but nonetheless constitutionally invalid, penalty on childbearing.

204. *Id.* at 647. Cf. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); Chambers, *supra* note 187.

205. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

206. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

207. *Doe v. Bolton*, 410 U.S. 179 (1973); *Roe v. Wade*, 410 U.S. 113 (1973).

latter are instructive. Justice Blackmun, writing for the Court in *Roe v. Wade*, distinguished some rights such as the childrearing interests protected by *Pierce* and *Meyer*, because the pregnant mother "cannot be isolated in her privacy" and because the competing interest of a "potential human life" necessarily limits the woman's privacy which is "no longer sole."<sup>208</sup>

A visibly pregnant woman has already disclosed something about her sexual conduct.<sup>209</sup> Even if the Connecticut statute might provide some long-term economic or psychological benefits to children, such competing interests are not so compelling as potential life. Further, the mother's secrecy concerns are poignantly supported by transcripts of actual utilization of the statutes.<sup>210</sup> The broad scope of judicial inquiry into sexual activity and the prurient attitude with which Connecticut judges pursue it exceeds even the broad claimed interest of the state.

Such individual interest should compel the state to justify its inquiry, and to establish procedures to contain its investigation narrowly. Connecticut has met no such burden, nor does it afford procedural protections. Though the secrecy element of privacy is not absolute, it demands that "a neutral magistrate" undertake "the important responsibility for balancing societal and individual interest."<sup>211</sup> Procedure under § 52-440(b), however, is grossly overreaching and wholly insensitive to the delicate concerns upon which it intrudes.

### III. Associational Interests

The associational interest of mother and child provides the Court with its most interesting opportunity to develop ideas merely hinted at

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208. *Roe v. Wade*, 410 U.S. at 159 (1973).

209. The lower court concluded, a bit too readily, that "the 'embarrassing' information has in large part been disclosed before any inquiries are made." 365 F. Supp. at 77. Judge Blumenfeld took Justice Blackmun's reference to the pregnant woman's lack of isolation to be a recognition of the usually obvious physical nature of pregnancy. *Id.* n. 19. A more plausible reading connects Justice Blackmun's reference to the need to balance the pregnant woman's interests against those of her child-to-be. There are, of course, well-known if not time-honored ways to give birth to illegitimates away from the perception of the local community.

210. Revelations sought by the Connecticut judges applying §52-440(b) concerning who the father was and the circumstances of conception, e.g., *supra* note 54, certainly illustrate the possibility of additional embarrassment from disclosure of intimate details. See, e.g., *Roe v. Norton*, Rec. at 45 (possibility of incestuous union); Brief for Children's Defense Fund, App. 22a-25a (fear of physical harm and of interference with planned marriage to another man).

211. *California Bankers Assoc. v. Shultz*, 416 U.S. 21, 79 (1974) (Powell, J., concurring, joined by Blackmun, J.). Justice Powell worried that the bank record-keeping

heretofore. As Justice Marshall stated last term, "The freedom of association is often inextricably entwined with the constitutionally guaranteed right of privacy."<sup>212</sup> In the case of an inarticulate infant, the familial definition provided by the parent represents the child's basic interests combined in one package of rights.<sup>213</sup> Application of first amendment protections to a two year old is implausible. But protection of the familial closure and its associational interests is the infant's fundamental right—equivalent to the more traditional civil rights and civil liberties of adults. Indeed, the family is the basic protective institution of the child's "very special place in life which law should reflect."<sup>214</sup> In *Stanley* the Court stressed the familial "private interest . . . that . . . undeniably warrants deference" and reiterated the principles requiring governmental respect for the "integrity of the family unit."<sup>215</sup> The Court has emphasized the importance to the child of even informal family units in several equal protection decisions upholding claims of illegitimates.<sup>216</sup>

The child's perception of his own best interests has seldom been considered by the Court, even when the child is old enough to be questioned.<sup>217</sup> Certainly government must recognize that "[O]ne of the most basic forms of human association in our society is the family, and the idea of 'family' as the most powerful and intimate center of human feeling and trust runs through a long series of familiar constitu-

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scheme at issue "would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process."

212. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 15 (1974) (Marshall, J., dissenting). See note 79 *supra*.

213. *Cf. Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) for Judge J. Skelly Wright's development of the jurisprudence of "package[d]" interests in another context.

214. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Justice Frankfurter continued, "Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." An apt warning in the *Roe* context.

215. 405 U.S. 645, 651 (1972). Some jurisdictions even recognize a compensable interest in an "undisturbed family life," W. PROSSER, *LAW OF TORTS* 887 (4th ed. 1971).

216. See note 93 *supra*.

217. Thus in *Wisconsin v. Yoder*, 406 U.S. 205, 230-31 (1972), the majority did not believe it important to find out what the Amish children who had eighth-grade educations desired. *But see* Justice Douglas' dissent, *id.* at 241, 243-46. Compare *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (acknowledging the first amendment rights of children 13, 15, and 16 years old) with *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding a restriction on a 16-year-old "child's" access to magazines not claimed to be obscene for adults). See also Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 *STAN. L. REV.* 1383, 1396 n.68 (1974).

tional decisions."<sup>218</sup> As the *Stanley* Court noted, even if parent and child are eventually reunited, the parent "suffers from the deprivation of his children and the children from uncertainty and dislocation."<sup>219</sup> Without adequate procedures which reveal powerful countervailing state interests, "the State spites its own articulated goals when it needlessly separates [a parent] from his family."<sup>220</sup> There must be some compelling governmental rationale for invading a young child's associational nexus because the infant's equivalent of "fundamental interests" is the "right to be let alone,"<sup>221</sup> with his parent guiding the familial closure's destiny.

#### IV. *Governmental Interests in Information and Individual Rights*

Connecticut affords a mother cited under § 52-440(b) full fifth amendment transactional immunity.<sup>222</sup> The lower court assumed that this immunity answers all constitutional claims to a right to resist disclosure.<sup>223</sup> Recent Supreme Court decisions, however, indicate that while the state has a right to every man's testimony,<sup>224</sup> that right is not limitless. The mothers in *Roe* may have first amendment rights not to disclose. The Supreme Court has implied that there may be other justifications for resisting disclosure.

The majority opinion in *Branzburg v. Hayes*<sup>225</sup> emphasized the importance of the governmental interest in law enforcement and the unique powers and protections of the grand jury. Justice White stressed the secrecy of grand jury proceedings and noted, "[n]othing in the record indicates that these grand juries were 'probing at will and without relation to existing need.'"<sup>226</sup> Implicitly, the outcome

218. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Rules in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 34 (1973).

219. 405 U.S. 645, 647 (1972) (emphasis added).

220. *Id.* at 653.

221. This is Justice Brandeis' classic statement of the privacy interest. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

222. The immunity is granted by incorporation of CONN. GEN. STAT. REV. § 52-435(b) (1972).

223. The only limitation on that power [to compel testimony] found in the Constitution is the fifth amendment's privilege against self-incrimination. . . . With the privilege not to be compelled to incriminate themselves completely safeguarded, all that could arguably support the plaintiffs' unwillingness to answer the particular inquiry authorized by the state would be simply a rule of evidence classified as an evidentiary privilege. (footnote omitted)

365 F. Supp. at 76.

224. *Kastigar v. United States*, 406 U.S. 441, 443 (1972). *See also* *Hurtado v. United States*, 410 U.S. 578, 589 (1973).

225. 408 U.S. 665 (1972).

226. *Id.* at 694.

would have been different without such a relation to existing need. Such a relation is not demonstrated in investigations under § 52-440(b), and the mothers being questioned may well have a significant, constitutionally-protected right to refuse to answer. Justice White reiterated both the *Bates v. Little Rock*<sup>227</sup> test which requires a "reasonable relationship to the achievement of the governmental purpose asserted as its justification" and the *Gibson v. Florida Investigation Committee*<sup>228</sup> test, under which the government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." Both tests were met in *Branzburg* because of the investigator's good faith, the importance of the criminal inquiry and the "pragmatic view" that the press "is far from helpless to protect itself from harassment or substantial harm."<sup>229</sup> The *Roe* opinion does not exhibit *Branzburg's* scrutiny of the legitimacy of the investigation combined with sensitivity to first as well as fifth amendment rights.<sup>230</sup> The good faith of Connecticut's investigations is doubtful and the governmental objectives are clearly less compelling than those of a criminal investigation. The self-protective capabilities of the target mothers are comparatively negligible. Unlike the press, they lack access to attorneys or means to combat overzealous investigation by appeal to public sympathy.

The importance of case-by-case scrutiny of investigations was emphasized in Justice Powell's swing-vote concurring opinion in *Branzburg*.<sup>231</sup> He went further than Justice White in stressing the "tried and traditional" need to balance "vital constitutional and societal interests on a case-by-case basis" and concurred because the courts would be available to protect "legitimate first amendment interests."<sup>232</sup> No such protection is available to the *Roe* mothers.

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227. *Id.* at 700, quoting 361 U.S. 516, 525 (1960).

228. *Id.* at 700-01, quoting 372 U.S. 539, 546 (1963).

229. *Id.* at 706.

230. The court recognized that "grand juries must operate within the limits of the First Amendment as well as the Fifth." *Id.* at 708.

231. *Id.* at 709-10. With tongue in cheek, Justice Stewart recently stated that Justice Powell's concurring opinion, which he had termed "enigmatic" in his *Branzburg* dissent, *id.* at 725, actually made *Branzburg* a 4½-4½ decision. Sesquicentennial Keynote Address, Yale Law School, November 2, 1974.

232. *Id.* at 710. Developing a theme he has stressed before, Justice Powell reiterated the constitutional requirement of individualized inquiry. *See, e.g.,* *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (dissenting) (rejecting an absolute ban on prisoner interviews, but also rejecting *ad hoc* balancing as an alternative); *California Bankers Association v. Shultz*, 416 U.S. 21, 78 (1974) (concurring) (discussing potential constitutional failings of Bank Secrecy Act of 1970 if extended to its limit because of the necessity

Justice Stewart dissented in *Branzburg* because of failure to consider the " 'delicate and vulnerable' nature" of first amendment rights for which "[t]his Court has erected . . . safeguards when government, by legislative investigation or other investigative means, has attempted to pierce the shield of privacy inherent in freedom of association."<sup>233</sup>

Lower courts consistently have narrowed *Branzburg's* language and distinguished its holding.<sup>234</sup> Adopting any of the *Branzburg* statements of proper deference to first amendment interests, it must be conceded that some burden shifts to the investigators if the investigated have some first amendment claim. The *Roe* decision avoids this burden-shifting by refusing to recognize the first amendment claim, leaving the Connecticut mothers with no way to avoid the inquiry into their private lives.

*Roe* thereby affords the Court the opportunity to develop the scope of first amendment associational interests. Such interests should not be limited to political or otherwise public concerns.<sup>235</sup> The privacy element of family unit integrity compels a convincing showing by the government to justify its investigation. The Court must determine

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of having a neutral magistrate balance competing individual and societal interests); *United States v. United States District Court*, 407 U.S. 297, 316-17 (1971) (majority opinion requiring neutral magistrate's approval of domestic wiretap of alleged subversives).

233. 408 U.S. at 725, 738. Justice Stewart would require that "the government must not only show that the inquiry is of 'compelling and overriding importance' but it must also 'convincingly' demonstrate that the investigation is 'substantially related' to the information sought." *Id.* at 740. Justice Douglas' dissent was not even willing to weigh the governmental interest. He argued that "all of the 'balancing' was done by those who wrote the Bill of Rights," *id.* at 713, and reprimanded *The New York Times* for conceding such a balancing approach, *id.*, as he had at oral argument in *New York Times Co. v. United States*, 403 U.S. 713 (1971), reported at 39 U.S.L.W. 3562 (U.S. June 22, 1971).

234. *See, e.g., Baker v. F & F Investment Corp.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Burse v. United States*, 466 F.2d 1959 (9th Cir. 1972); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). In *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir.), *cert. petition dismissed*, 417 U.S. 936 (1974) inquiry of a journalist-defendant concerning eyewitnesses was allowed because it went to the heart of the civil libel suit. In so holding, however, Judge McGowan emphasized a case-by-case approach and stated that the "central thrust" of Justice White's *Branzburg* opinion was "the traditional importance of grand juries and the strong public interest in effective enforcement of the criminal law." *Id.* at n. 6. He also noted that Justice White relied on the protections available in the *Branzburg* context. *Id. See generally, Murasky, The Journalist's Privilege: Branzburg and its Aftermath*, 52 TEXAS L. REV. 829 (1974).

235. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 15 (1974) (Marshall, J. dissenting). Justice Marshall noted that "[t]he right to establish a home is an essential part of the liberty guaranteed by the Fourteenth Amendment." *See note 79 supra. See also United States Dept. of Agriculture v. Moreno*, 413 U.S. 528, 538-45 (1973) (Douglas, J., concurring); *Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) and, particularly, Justice Douglas' dissent at 179-80; *NAACP v. Button*, 371 U.S. 415, 430-31 (1963). *See Privacy Sections I and III supra.*

whether, in the *Roe* context, the investigation is required by "the course of justice."<sup>236</sup>

### CONCLUSION

Connecticut has a history of unsuccessful attempts to intervene in private family decisions. The state fought determinedly to prevent birth control.<sup>237</sup> It went to the Supreme Court to keep indigent married couples from divorce.<sup>238</sup> It sought to assure that a pregnant mother would not have the option to have an abortion.<sup>239</sup> The common thread in all these efforts was a purported benevolent motivation: to protect individuals from themselves and to enhance family life.

Again claiming a benevolent purpose, Connecticut substitutes a legislative generalization for a private, parental decision in § 52-440(b). The state presumes a mother does not know what is best for her illegitimate child if she receives welfare. She faces a year in jail if she refuses the state's advice that she publicly include the reluctant father in her child's family identity. Connecticut's forced disclosure statute provides no individualized inquiry as to the child's best interest.

The state impinges directly upon the interests of a family, parent and child, in determining their own destiny. Because the child is illegitimate and the mother unwed, the state's paternalistic power, cloaked in a *parens patriae* rationale, can separate them and jail one for the other's own good. Alongside this "benevolent" policy is a more mundane fiscal justification. There is appalling insensitivity to the delicacy of the impoverished illegitimate's situation and the family's privacy interests. Illegitimate children are once again victimized by "a

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236. 365 F. Supp. at 75, quoting WIGMORE, EVIDENCE §2192 at 72 (McNaughton rev. 1961). The justification for compelling testimony is couched in terms of duty to society, which may vitiate privacy rights when the course of justice so requires. However, the course of justice is not implicated in *Roe*. As Justice Douglas recently noted, "A witness is often permitted to retain exclusive custody of information where a contrary course would jeopardize important liberties such as First Amendment guarantees." *Gelbard v. United States*, 408 U.S. 41, 65 (1972) (concurring) (recalcitrant witnesses could inquire regarding wiretaps prior to answering questions before grand jury) citing *In re Stolav*, 401 U.S. 23 (1971); *Baird v. State Bar*, 401 U.S. 1, 6-7 (1971); *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958); *Watkins v. United States*, 354 U.S. 178 (1957).

237. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ullman*, 367 U.S. 497 (1961); *Tileston v. Ullman*, 318 U.S. 44 (1943).

238. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

239. *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972), on remand from 452 F.2d 1121 and *Abele v. Markle*, 351 F. Supp. 224 (D. Conn. 1972), vacated, 410 U.S. 951 (1973), rehearings denied, 411 U.S. 940, conformed to 369 F. Supp. 807 (D. Conn. 1973).

moral prejudice.”<sup>240</sup> Those whose mothers are welfare recipients are cursed by the burdens of inadequate funds, the stigma of welfare, and the inevitable application of § 52-440(b). The Supreme Court could use any of several constitutional doctrines to decide *Roe*. The Court may further develop nascent doubts about *parens patriae* rationales permitting deprivations of liberty and privacy. Moral outrage at the illegitimate children of welfare recipients must not mask equal protection, due process and privacy violations precipitated by heavy-handed intrusion into family life. The illegitimate child and unwed mother have enough trouble; the state should wait to be asked to intervene. It may be difficult to affix the proper constitutional labels, but the spirit of the Constitution denies governmental authority in matters of family definition, absent compelling reasons.

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240. *Labine v. Vincent*, 401 U.S. 532, 558 (Brennan, J. dissenting with Douglas, White and Marshall, JJ.). In *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972), Justice Powell argued for the 8-1 majority, “The status of illegitimacy has expressed through the ages society’s condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.”