

# NOTE:CHILD SUPPORT STATUTES AND THE FATHER'S RIGHT NOT TO PROCREATE

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## Text

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### [\*213]

#### Introduction

Since its legalization in 1973, abortion has been the cause of death for more than forty-two million unborn children. <sup>1</sup> The controversy surrounding *Roe v. Wade* <sup>2</sup> has not abated in the thirty years following the decision. Americans are still no closer to a consensus regarding this volatile and deeply divisive issue, which is central to most current political struggles and frequently informed by moral and religious beliefs. <sup>3</sup> This note, however, will not address the merits, or lack thereof, of the legal underpinnings of *Roe v. Wade* and its progeny. <sup>4</sup> Rather, this note will consider whether or not those who maintain the right to abortion must accept that it takes two to procreate; and that if choice is essential, a man must also have the right to choose. The modern legal culture has failed to acknowledge a man's right to procreate, or more importantly his right not to procreate. <sup>5</sup>

This note posits that child-support laws and welfare regulations creating an automatic obligation to pay child support upon the [\*214] establishment of biological paternity deprive men of their fundamental right to procreation, and violate their rights to due process and equal protection of the laws. Part I develops the discrepancy in the law of procreation as applied to men and women. Part II describes the current state of the law regarding a father's rights and obligations under state laws and the federal aid welfare requirements with respect to paternity. Part III

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<sup>1</sup> David C. Gibbs Jr. & David C. Gibbs III, *The Legacy of Roe v. Wade: 42 Million Dead*, *Nat'l Liberty J.* (Jan. 2003), at <http://www.nljonline.com/jan03/gibbs.htm> (on file with the Ave Maria Law Review).

<sup>2</sup> [410 U.S. 113 \(1973\)](#); [Doe v. Bolton, 410 U.S. 179 \(1973\)](#).

<sup>3</sup> See, e.g., John Harwood & Shailagh Murray, *The Constant Dividers in American Politics? Race and Abortion*, *Wall St. J. Eur.*, Dec. 19, 2002, at A1, 2002 WL-WSJE 103490662 (arguing that the current divide in American politics is cultural rather than economic) (on file with the Ave Maria Law Review). See Gibbs, *supra* note 1.

<sup>4</sup> Lest there be any confusion, this author is opposed, both legally and morally, to the right to privacy cases from which the argument herein is constructed. The argument is presented in part as a *reductio ad absurdum* to highlight the inconsistencies in modern jurisprudence.

<sup>5</sup> For the purposes of this note, the current law with regard to privacy, reproduction, and due process liberties of the Fourteenth Amendment is accepted without challenge.

discusses United States Supreme Court precedent establishing the right to procreate, the right not to procreate, and the right to abortion under the Constitution. Part IV analyzes child-support statutes for their constitutionality.<sup>6</sup> Lastly, Part V suggests a solution to the disparate treatment between men and women with regard to procreation that is consistent with modern legal culture, including a statutory supplement to allow men equal rights in the area of procreation.<sup>7</sup>

### I. Understanding the Problem

In holding that the right of privacy founded in the Fourteenth Amendment was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"<sup>8</sup> the Supreme Court in *Roe* opened the door to a myriad of questions.<sup>9</sup> Among these were questions relating to the rights of the unborn child and the rights of the father of the child. The Court answered the first question by determining that the unborn child was not a person within the meaning of the Fourteenth Amendment, and thus had no rights.<sup>10</sup> The question of the rights of the father was similarly disposed of in [\*215] later Supreme Court cases. While recognizing a man's interest in his offspring,<sup>11</sup> the Court has nonetheless consistently held that a father has no right to interfere with the woman's right to choose.<sup>12</sup> Thus, while recognizing a woman's right to terminate her pregnancy, to be the master (or mistress) of her own procreative capabilities, the courts and the legislatures have simultaneously trampled upon a man's right to be the master of his own procreative capabilities.

Since 1942, the Court has recognized the fundamental right to procreation.<sup>13</sup> Yet, under current law, a man's right concerning procreation begins and ends with the woman's decision. The mere fact that the woman is the carrier of

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<sup>6</sup> This note does not examine a particular statute, but rather child-support statutes in general.

<sup>7</sup> A father who wishes to support his child and wishes for his offspring to see the light of day is also in a quandary. The mother has the ability to abort the child or place the child for adoption, and the State has the ability to terminate his parental rights. This Note leaves that argument for another day.

<sup>8</sup> [Roe, 410 U.S. at 153.](#)

<sup>9</sup> [Roe, 410 U.S. 113.](#) Such questions concern the interests of the State, the unborn child, and the father. The Court attempted to answer the question of the State's interest and the interest of the child in *Roe*, but did not explicitly resolve the question of a father's rights. The question, however, is implicit in the Court's determination that the State's interest in the unborn may become compelling enough to allow intrusion, and also in the Court's recognition of the fact that "the pregnant woman cannot be isolated in her privacy." [Id. at 159.](#)

<sup>10</sup> [Id. at 157-62.](#) Although acknowledging differences in opinion on the question of when life begins, the Court nonetheless punted on the issue and declared that "we need not resolve the difficult question of when life begins." Presumably the status of personhood in the meaning of the Fourteenth Amendment does not depend on human life.

<sup>11</sup> See [Planned Parenthood v. Danforth, 428 U.S. 52, 69 \(1976\)](#) ("We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying.").

<sup>12</sup> See, e.g., [id. at 67-72](#) (striking down a Missouri statute requiring spousal consent as a condition for abortion during the first trimester of pregnancy). Writing for the majority, Justice Blackmun stated that the State could not delegate a power to the husband, namely the power to restrict the right to an abortion, that the State did not have itself. In addition, the Court held that, because the woman bears the child, the balance of the decision whether to terminate the pregnancy weighs in her favor. See also [Planned Parenthood v. Casey, 505 U.S. 833, 887-98 \(1992\)](#) (invalidating a Pennsylvania statute requiring spousal notification as a prerequisite to an abortion).

<sup>13</sup> [Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 536 \(1942\)](#) (striking down an Oklahoma statute that provided for the sterilization of a person who had been "convicted two or more times for crimes amounting to felonies involving moral turpitude").

the unborn child gives her, in the Court's opinion, the sole ability to make the important decision for both herself and the child's father of whether the two shall be parents.<sup>14</sup>

A pregnant woman has three options under the current regime. Under the shield of privacy, she may carry the child to full term and raise the infant; she may place the child she has carried to term for adoption; or she may terminate her pregnancy through an abortion.<sup>15</sup> Her right to an abortion cannot be restricted until the child reaches viability.<sup>16</sup> Following viability, her right is practically unfettered; the only restriction is a state's ability to proscribe abortions at this point that are not performed for the life or the health of the mother.<sup>17</sup> The [\*216] right to an abortion attaches to a woman regardless of whether she is married.<sup>18</sup> In addition, an unmarried mother may place a child she has carried to term for adoption.<sup>19</sup> In this regard, the law places the question of whether a woman will face the financial responsibilities and other entanglements of child rearing squarely in the woman's own hands.

On the other hand, a man who has impregnated a woman has no rights with regard to the developing child. The laws of this country afford him no recourse. A man may not interfere with the woman's right to terminate her pregnancy;<sup>20</sup> he may not force her to undergo an abortion or to place the child for adoption.<sup>21</sup> Furthermore, the law places no obligation upon the mother to tell the father that he is the father of her child.<sup>22</sup> Neither does the law

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<sup>14</sup> [Danforth, 428 U.S. at 71](#) ("Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.").

<sup>15</sup> [Roe, 410 U.S. 113](#).

<sup>16</sup> [Casey, 505 U.S. at 879](#) ("[A] State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.").

<sup>17</sup> *Id.* The plurality opinion in *Casey* affirmed the essential holding of *Roe*, but rejected the trimester framework, adopting instead an "undue burden" standard prior to the viability of the child. Following viability, the State may restrict access to abortion, but only if the relevant law contains exceptions allowing for abortions in cases in which the pregnancy endangers the life or health of the mother.

<sup>18</sup> E.g., *id.*; [Danforth, 428 U.S. at 71](#).

<sup>19</sup> Married individuals may also place children for adoption but the signatures of both the father and mother are required. See [Santosky v. Kramer, 455 U.S. 745, 758-59 \(1982\)](#); see also [Caban v. Mohammed, 441 U.S. 380, 393 \(1979\)](#) (holding that the Equal Protection Clause of the Fourteenth Amendment requires the consent of an unwed father prior to adoption when the father has demonstrated a full commitment to the responsibilities of parenthood).

<sup>20</sup> E.g., [Casey, 505 U.S. 833](#); [Danforth, 428 U.S. 52](#). But see [Doe v. Smith, 527 N.E.2d 177 \(Ind. 1988\)](#); [Conn v. Conn, 525 N.E.2d 612 \(Ind. Ct. App. 1988\)](#) (involving temporary restraining orders that had been imposed or were requested to enjoin a woman from having an abortion because the father of the child objected). See also Ruth H. Axelrod, *Whose Womb is It Anyway: Are Paternal Rights Alive and Well Despite Danforth?*, 11 *Cardozo L. Rev.* 685 (1990) (discussing the legal rights of fathers to veto an abortion decision and determining that the decision to continue pregnancy should be made only by the woman); Mary A. Tutz, *What's Good for the Goose is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 *N. Ill. U. L. Rev.* 141, 207 n. 387 (1994) (discussing the possibility that strengthened interest in the unborn might allow a state to protect a father's interest in the child prior to viability).

<sup>21</sup> Cf. [Santosky, 455 U.S. at 758-59](#) (arguing that the State cannot terminate a natural parent's interest in his or her child without a finding of neglect greater than fair preponderance of the evidence). It is "'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to 'the companionship, care, custody, and management of his or her children'" is an interest far more precious than any property right." *Id.* (citations omitted).

<sup>22</sup> See [In re Baby Boy K., 546 N.W.2d 86, 99-101 \(S.D. 1996\)](#) (holding that the mother's failure to tell the father of her pregnancy did not excuse his failure to assert his paternity within the statutory limit). Other states have also placed the burden of establishing paternity on the father. See, e.g., [In re Doe, 638 N.E.2d 181 \(Ill. 1994\)](#); [In re Adoption of S.J.B., 745 S.W.2d 606 \(Ark. 1988\)](#); [Robert O. v. Russell K., 604 N.E.2d 99 \(N.Y. 1992\)](#).

permit a man to avoid responsibility for a child whom the mother chooses to raise herself. <sup>23</sup> [\*217] Thus the question of whether a man is to face all the entanglements of fatherhood is also placed squarely in the hands of the mother. At the moment of conception, under the current law, the only decision left to the father's determination is what kind of a father he is going to be.

Child-support statutes that hinge the obligation to pay child support upon the biological relationship between a man and a child legitimize and foster this inequality. The legal relationship and obligations of parenthood are exactly what the right to procreation seeks to control, and thereby accept or avoid. It is because the act of bringing a child into the world has attendant responsibilities and rights and is an intimate, private decision that the Supreme Court has recognized a right to be free from unwarranted governmental intrusion into the decision of whether to bear or beget a child. <sup>24</sup> The right to an abortion is an epigone of this right; the "fruit of its loins," so to speak. Together, the right to bear or beget a child and the right to abortion are the foundation of the right to procreate. Obligatory child support based upon a biological relationship effectively strips a man of his right to procreate, as this right has been constructed by the modern legal culture, while leaving the woman's right intact.

The fundamental injustice in allowing a woman to evade responsibility while requiring a man to pay has not been completely ignored. In the past decade, commentators have acknowledged the discriminatory treatment of men and women in regard to their reproductive rights. Some have attempted to justify the disparate treatment by asserting a woman's superior right because she must bear the burden of pregnancy. <sup>25</sup> Others have argued for equal protection for men, proposing statutes that allow for a man to [\*218] terminate his relationship with the child. <sup>26</sup> Neither the legislatures nor the courts, however, have responded to rectify this inequality.

## II. State and Federal Law Regarding Parental Obligations

### A. The Uniform Parentage Act

The Uniform Parentage Act (1973), approved by the National Conference of Commissioners on Uniform State Laws, has been adopted in 19 states from Delaware to California, and has been enacted in part by several other states. <sup>27</sup> The revised Uniform Parentage Act (2000) incorporated the Act of 1973, along with provisions covered by the Uniform Putative and Unknown Fathers Act (1988) and the Uniform Status of Children of Assisted Conception Act (1988). One proposed version of the prefatory note to the 2000 Act states that the purpose of the

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<sup>23</sup> Most states have enacted statutes for the determination of paternity. See, e.g., Ala. Code 26-17-14 (1992); see also [Cal. Fam. Code 7558](#) (West Supp. 2003); [Mass. Gen. Laws Ann. ch. 119A, 2](#) (West 2003); [Mich. Comp. Laws Ann. 722.714](#) (West 2002); and N.Y. Jud. Ct. Acts Law 516-a (McKinney 1999). In addition, the federal government requires states to establish procedures for determining paternity and enforcing child-support obligations in order to receive welfare grants. 42 U.S.C. 651-669 (2000). The father's obligation to support a child is only contingent upon his paternity; therefore, knowledge of the child's existence whether constructive or actual is not a prerequisite to child-support responsibility. A mother could keep the child's existence concealed from the father until such time as she needed public support and then file a paternity or child-support action. See Totz, *supra* note 20, at 143 ("Should a mother unilaterally decide to deliver a child, a biological father who had no part in the decision to carry the child to full term nonetheless becomes jointly responsible for its financial support."); see also Kindra L. Gromelski, *You Made Your Bed ... Now You Are Going to Pay for It: An Analysis of the Effects Virginia's Mandatory Paternal Identification in AFDC Cases Will Have on the Rights of Unwed Fathers*, [5 Wm. & Mary J. Women & L. 383, 384 \(1999\)](#).

<sup>24</sup> [Eisenstadt v. Baird, 405 U.S. 438, 453 \(1972\)](#).

<sup>25</sup> See Axelrod, *supra* note 20; Andrea M. Sharrin, *Potential Fathers and Abortion: A Woman's Womb is Not a Man's Castle*, [55 Brook. L. Rev. 1359 \(1990\)](#).

<sup>26</sup> See Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to the Unborn Child*, [7 J.L. & Pol'y 1, 40 \(1998\)](#) (arguing for equal treatment of a man's procreational rights and proposing a statute for the voluntary termination of the parental rights of the putative father); Totz, *supra* note 20.

<sup>27</sup> Unif. Parentage Act prefatory note, 9B U.L.A. 296 (2000).

Act is to "draft workable and sound rules for determining the parentage of a child."<sup>28</sup> The Act does not purport to establish rules regarding the rights of parents or to resolve issues regarding custody, visitation, or support.<sup>29</sup> Nevertheless, the Act and other state acts for establishing parentage are vital to the determination of all other parental rights or obligations. Most particularly, it is axiomatic that if the father of a child is unknown, the state cannot solicit child support from that father. The Act itself states that it "conforms to the mandate of [42 U.S.C. 666\(a\)\(5\)\(A\)](#), which requires States to provide for parentage proceedings at any time before a child attains 18 years of age on penalty of forfeiture of federal funds that subsidize child support enforcement."<sup>30</sup>

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### B. State Parentage Acts

In addition to establishing paternity, state parentage acts provide for determinations of support payments to be ordered by the court upon establishment of paternity. For example, the Alabama Uniform Parentage Act<sup>31</sup> provides that "upon paternity being established, the court shall immediately determine support payments at the conclusion of the paternity hearing and make support payment determination a part of the order establishing paternity."<sup>32</sup> Along with support payments, the father may also be directed to pay reasonable expenses associated with pregnancy and confinement,<sup>33</sup> and in many states, establishment of paternity is the first step to a child-support order.<sup>34</sup>

Child-support obligations typically continue until the child reaches the age of majority.<sup>35</sup> A father's obligation to pay child support then could potentially extend to twenty-one years.<sup>36</sup> Additionally, once a child-support determination has been made, failure to make payments can result in imprisonment and suspension of licenses, including driver's licenses and medical licenses.<sup>37</sup> Furthermore, a father's obligation to pay child support is not dependent on his

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<sup>28</sup> American Academy of Matrimonial Lawyers, Proposed Uniform Parentage Act (2000), at [http://www.aaml.org/Articles/2000-11/UPA\\_FINAL\\_TEXT\\_WITH\\_COMMENTS.htm](http://www.aaml.org/Articles/2000-11/UPA_FINAL_TEXT_WITH_COMMENTS.htm) (on file with the Ave Maria Law Review).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* 103 cmt.

<sup>31</sup> Ala. Code 26-17-1 to -17-21 (1992).

<sup>32</sup> *Id.* 26-17-14.

<sup>33</sup> *Id.*

<sup>34</sup> See [Cal. Fam. Code 7636, 7637](#) (West 1994); [Mass. Gen. Laws Ann. ch. 119A, 3A](#), ch. 209C, 1 (West 1998); [Mass. Gen. Laws Ann. ch. 209C, 1](#) (West 1986); [Mich. Comp. Laws Ann. 722.714, 722.717](#) (West 2002).

<sup>35</sup> The age of majority varies according to jurisdiction from 18 to 21. See, e.g., [Cal. Fam. Code 6502](#) (West 1994) (18 years); [Ala. Code 26-1-1](#) (1996) (19 years); [Miss. Code Ann. 93-5-23](#) (1999) (21 years). In addition, some states provide for child support as long as the child is considered a dependent or is attending school. See [Weber v. Weber, No. 00CA007722, 2001 WL 542319 \(Ohio Ct. App. May 23, 2001\)](#). But see [Anderson v. Loper, 689 So. 2d 118 \(Ala. Civ. App. 1996\)](#).

<sup>36</sup> Child support obligations may continue past the age of majority for children who are disabled. See, e.g., [Cal. Fam. Code 3910](#) (West 1994).

<sup>37</sup> See, e.g., [Crowley v. Crowley, 708 N.E.2d 42 \(Ind. Ct. App. 1999\)](#) (suspending father's license to practice medicine and license to drive for failure to pay child support); [State v. Fritz, 801 A.2d 679 \(R.I. 2002\)](#); see also [Brown v. Taylor, 728 So. 2d 1058 \(La. Ct. App. 1999\)](#).

other parental rights. Therefore, a father who is denied visitation of his child by the mother might not be entitled to refuse to pay child support.<sup>38</sup> Neither can a father voluntarily terminate his parental rights to avoid child support.

**[\*220]** Most courts apply the "best interests of the child" standard to the question of termination of parental rights. Therefore, a father who wishes to terminate his parental rights may not be allowed to do so unless a court determines that it would be in the child's best interests.<sup>39</sup> Voluntary termination would not usually be in the child's best interests when the father is attempting to avoid child support.<sup>40</sup> Moreover, although a majority of courts hold that the responsibility to pay child support terminates with the termination of parental rights, a minority continue to hold a father whose parental rights have been terminated liable for child support.<sup>41</sup>

### C. Federal Regulations Governing Paternity Determinations and Child Support

In addition to state laws assigning parental responsibilities, including child support, federal law encourages state paternity and child-support laws. In fact, federal law requires states to adopt programs to establish the paternity of a child and enforce child-support obligations as a condition to the receipt of federal public assistance funds.<sup>42</sup> Subchapter IV of Chapter 7 of Title 42 on Public Health and Welfare provides for "Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare **[\*221]** Services."<sup>43</sup> Part D of that subchapter requires states to "provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, as appropriate, under the plan with respect to - (i) each child for whom (I) assistance is provided under the State program funded under part A of this subchapter."<sup>44</sup> Part A in turn provides that states be granted funds for temporary assistance for needy families.<sup>45</sup> Thus, a state's grant of welfare money

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<sup>38</sup> See, e.g., [Appert v. Appert, 341 S.E.2d 342, 350 \(N.C. Ct. App. 1986\)](#) (holding that "visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and that one is not, and may not be made, contingent upon the other"); see also [Truax v. Truax, 522 N.E.2d 402, 406 \(Ind. Ct. App. 1988\)](#); [Pellar v. Pellar, 443 N.W.2d 427, 430 \(Mich. Ct. App. 1989\)](#). But see [Richardson v. Richardson, 332 N.W.2d 524, 525 \(Mich. Ct. App. 1983\)](#) (recognizing a general rule in Michigan that "support payments may be suspended when the noncustodial parent is wrongfully denied visitation rights unless suspension of those payments would adversely affect the children"); [Giacopelli v. Giacopelli, 439 N.Y.S.2d 211, 212 \(N.Y. App. Div. 1981\)](#); [Strahl v. Strahl, 414 N.Y.S.2d 184 \(N.Y. App. Div. 1979\)](#), aff'd, [407 N.E.2d 479 \(N.Y. 1980\)](#).

<sup>39</sup> See, e.g., [Brian M. v. State, 52 P.3d 934 \(Nev. 2002\)](#) (holding that a father could not voluntarily terminate his parental rights and obligations unless the termination would be in the best interests of the child); see [C.J.H. v. A.K.G., No. M2001-01234-COA-R3-JV, 2002 WL 1827660 \(Tenn. Ct. App. Aug. 9, 2002\)](#); see also [DiPaolo v. Cugini, 811 A.2d 1053 \(Pa. Super. Ct. 2002\)](#).

<sup>40</sup> See, e.g., [Brian M., 52 P.3d at 936](#).

<sup>41</sup> [Fritz, 801 A.2d at 683-87](#) (distinguishing between parental rights and parental responsibilities and finding that, according to [R.I. Gen. Laws 15-7-7](#) (2000), parental responsibilities including support continued after termination of parental rights); see also [Evink v. Evink, 542 N.W.2d 328, 330 \(Mich. Ct. App. 1995\)](#) (holding that, absent adoption or emancipation of the child, parental obligations to pay child support continue despite termination of parental rights). But see [Rebecca Lynn C. v. Michael Joseph B., 580 S.E.2d 854, 858 \(W. Va. 2002\)](#) (joining the majority of courts in finding that "'an order terminating parental rights completely severs the parent-child relationship and deprives the court of the authority to make an award of child support'" (quoting [County of Ventura v. Gonzalez, 106 Cal. Rptr. 2d 461, 462 \(2001\)](#)) and citing a number of cases following the majority rule).

<sup>42</sup> [42 U.S.C. 654, 666](#) (2000).

<sup>43</sup> [Id. 601-79](#).

<sup>44</sup> [Id. 654](#). The statute is gender-neutral insofar as it requires the state to enforce all support obligations. Mothers, as well as fathers, may be compelled to pay child support. When a mother is ordered to pay child support, however, the mother would have made the choice to bear the child.

<sup>45</sup> [Id. 601-609](#).

from the federal government is contingent upon a state's willingness to cooperate in compelling parents to provide child support.

Child-support enforcement procedures with which a state must comply include establishing procedures by which a

State has ... authority to withhold or suspend, or to restrict the use of driver's licenses, professional and occupational licenses, and recreational and sporting licenses of individuals owing overdue support or failing, after receiving appropriate notice, to comply with subpoenas or warrants relating to paternity or child support proceedings<sup>46</sup>

and

procedures under which all child support orders ... will include provision for withholding from income, in order to assure that withholding as a means of collecting child support is available if arrearages occur without the necessity of filing application for services under this part.<sup>47</sup>

These mandatory procedures ensure that the parent who has been ordered to pay child support will be penalized for his or her failure to pay and tracked for the money owed. In these cases, the state itself would seek payment from the recalcitrant parent.<sup>48</sup> Moreover, [\*222] compulsory interstate assistance increases the difficulty of a parent evading child-support obligations by leaving the jurisdiction.<sup>49</sup>

Federal law also provides for criminal prosecution of parents owing child-support payments. Section 228 of Title 18 reads:

Failure to pay legal child support obligations (a) Offense. - Any person who - (1) willfully fails to pay a support obligation with respect to a child who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than \$ 5,000; ... shall be punished as provided in subsection (c)... . (c) Punishment. - The punishment for an offense under this section is - (1) in the case of a first offense under subsection (a)(1), a fine under this title, imprisonment for not more than 6 months, or both; and (2) in the case of an offense under paragraph (2) or (3) of subsection (a), or a second or subsequent offense under subsection (a)(1), a fine under this title, imprisonment for not more than 2 years, or both.<sup>50</sup>

Parents owing child support can therefore be subject to both state and federal prosecution with penalties including fines and imprisonment.

### III. Constitutional Guarantees: Due Process and Liberty

The United States Constitution does not specifically recognize a right to procreate or a right to privacy. Nevertheless, the Supreme Court has found these rights to be inherent in the Constitution, particularly the right to

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<sup>46</sup> [Id. 666\(a\)\(16\)](#).

<sup>47</sup> [Id. 666\(a\)\(8\)\(A\)](#).

<sup>48</sup> See [id. 657](#).

<sup>49</sup> [Id. 666\(a\)\(11\), \(a\)\(14\)](#).

<sup>50</sup> [18 U.S.C. 228](#) (2000). (This act is commonly known as the "Deadbeat Parents Punishment Act," Deadbeat Parents Punishment Act of 1998, **Pub. L. No. 105-187, 112 Stat. 618**, or the "deadbeat dads" law, Rebecca A. Wistner, *Abusing the Power to Regulate: The Child Support Recovery Act of 1992*, [46 Case W. Res. L. Rev. 935, 936 \(1996\)](#)).

be free.<sup>51</sup> As applied to the states, the [\*223] Supreme Court has found such rights implicit in the liberty guaranteed by the Fourteenth Amendment.<sup>52</sup>

The Fourteenth Amendment provides that

no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>53</sup>

Efforts by the Supreme Court to interpret this clause have resulted in the recognition of numerous rights that are claimed to reside within the shelter of the amendment and specifically within the term "liberty." "Liberty" is not easily defined, but

without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>54</sup>

In addition, the Court has held that "this liberty may not be interfered with ... by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."<sup>55</sup>

Perhaps the most important right found within the contours of the Fourteenth Amendment's term "liberty" is the right of [\*224] privacy.<sup>56</sup> Although not specifically recognized in the Constitution, the right of privacy has become the source for various other liberties.<sup>57</sup> This right encompasses only those personal rights that are "'fundamental' or 'implicit in the concept of ordered liberty.'"<sup>58</sup> Personal rights that have fallen within the guarantee of personal

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<sup>51</sup> See [Slaughter-House Cases, 83 U.S. 36, 76 \(1872\)](#).

"The inquiry ... is, what are the privileges and immunities of the citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

... They are ... those rights which are fundamental.

*Id.* (quoting [Ward v. Maryland, 79 U.S. 418, 430 \(1870\)](#)). See also [Griswold v. Connecticut, 381 U.S. 479 \(1965\)](#); [Eisenstadt v. Baird, 405 U.S. 438 \(1972\)](#); [Roe v. Wade, 410 U.S. 113 \(1973\)](#). Recently, the Court has affirmed its jurisprudence regarding the right to be free, finding that "freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." [Lawrence v. Texas, 123 S.Ct. 2472, 2475 \(2003\)](#).

<sup>52</sup> See, e.g., [Meyer v. Nebraska, 262 U.S. 390 \(1923\)](#) (finding Nebraska's prohibitions and restrictions on foreign languages in schools to be a deprivation of liberty without due process of law in violation of the Fourteenth Amendment).

<sup>53</sup> [U.S. Const. amend. XIV, 1](#).

<sup>54</sup> [Meyer, 262 U.S. at 399](#).

<sup>55</sup> [Id. at 399-400](#).

<sup>56</sup> [Id. at 399](#).

<sup>57</sup> See, e.g., [Roe v. Wade, 410 U.S. 113, 152-53 \(1973\)](#).



privacy are all an extension of or have some relation to marriage,<sup>59</sup> procreation,<sup>60</sup> contraception,<sup>61</sup> family relationships,<sup>62</sup> child rearing and education,<sup>63</sup> and abortion.<sup>64</sup> These rights are all fundamental rights. The State may not interfere with fundamental rights without a compelling state interest.<sup>65</sup> Even when permitted to interfere with a fundamental right the "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."<sup>66</sup>

#### A. The Right to Procreate

In 1927, in an opinion now famous, or infamous, for its language, Justice Holmes declared that "three generations of imbeciles are enough."<sup>67</sup> Justice Holmes and seven of his colleagues on the Supreme Court in that year affirmed Virginia's right to sterilize Carrie Buck, a "feebleminded" woman.<sup>68</sup> Fifteen years later, faced with **[\*225]** another sterilization case, the Supreme Court declared Oklahoma's statute for the sterilization of criminals unconstitutional.<sup>69</sup> Although the actual holding in *Skinner v. Oklahoma ex rel. Williamson* was predicated on equal protection grounds, the Court described the right to procreate at issue as "one of the basic civil rights of man" and a "basic liberty."<sup>70</sup> *Skinner* has since been interpreted as establishing an affirmative right to procreate. Procreation is a right consistently recognized among the litany of personal decisions protected by the right of privacy.<sup>71</sup>

#### B. The Right Not to Procreate

<sup>58</sup> *Id.* at 152 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>59</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967) (holding Virginia's miscegenation statute a violation of the Equal Protection Clause).

<sup>60</sup> See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (invalidating on equal protection grounds an Oklahoma statute that provided for the sterilization of a person who had been convicted two or more times for crimes "amounting to felonies involving moral turpitude").

<sup>61</sup> See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down a Massachusetts statute that prohibited the sale of contraceptives to single persons for the prevention of pregnancy as a violation of the Equal Protection Clause); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a Connecticut statute that prohibited the use of contraceptives).

<sup>62</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (reaffirming 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. And it is in recognition of this that [this Court has] respected the private realm of family life which the state cannot enter.") (citation omitted).

<sup>63</sup> See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (holding an Oregon statute mandating compulsory public education a violation of the Fourteenth Amendment); *Meyer*, 262 U.S. 390.

<sup>64</sup> See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding the right to privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

<sup>65</sup> See, e.g., *id.* at 155.

<sup>66</sup> *Id.*

<sup>67</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>68</sup> See *id.* Justice Butler was the sole dissenting justice. *Id.* at 208.

<sup>69</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

<sup>70</sup> *Id.* at 541.

<sup>71</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992); *Zablocki v. Redhail*, 434 U.S. 374, 384-85 (1978).

The right to procreate has also spawned a related right, the right not to procreate. In 1965, the Court first recognized a right to contraception as an element of marital privacy.<sup>72</sup> In 1972, the right to contraception was extended to all persons, married and single alike.<sup>73</sup> The right to contraception is generally characterized as the right to decide "whether to bear or beget a child."<sup>74</sup> This right differs from the right to procreation because procreation is exactly what contraception aims to avoid. Although related to procreation, a right to contraception does nothing to enhance the right to procreate; it rather enhances non-procreation. In addition, since 1973, the Court has recognized a right to an abortion.<sup>75</sup> Similar to contraception, the right to an abortion is more properly characterized as an exercise of the right not to procreate, in light of the manner in which this right has been characterized by the Court. Abortion enhances and enables the individual's choice not to procreate.

Although the U.S. Supreme Court has never characterized the rights of contraception and abortion as rights stemming from or establishing a right not to procreate, the reality of the situation was fully recognized by the Supreme Court of Tennessee in *Davis v. [\*\*226] Davis*.<sup>76</sup> *Davis* involved the disposition of embryos that had been frozen following an in vitro fertilization procedure. Before the embryos could be implanted, the parents divorced, and could not reach an amicable resolution regarding the disposition of the five remaining embryos. The mother wanted to donate the embryos to potential parents while the father was vehemently opposed to any use, claiming that he did not want to become a parent.<sup>77</sup> Citing *Griswold* and *Roe*, the Tennessee Supreme Court stated that "a right to procreational autonomy is inherent in our most basic concepts of liberty."<sup>78</sup> The Court further stated that "whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance - the right to procreate and the right to avoid procreation."<sup>79</sup>

The Court ultimately determined that "ordinarily, the party wishing to avoid procreation should prevail."<sup>80</sup> So holding, the Court recognized that "any disposition which results in the gestation of the preembryos would impose unwanted parenthood on [the father], with all of its possible financial and psychological consequences."<sup>81</sup> With regard to the frozen embryos the Court regarded both parents as equal "gamete-providers."<sup>82</sup> Therefore, neither party was entitled to control the decision.

### C. The Right to Abortion

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<sup>72</sup> See [Griswold v. Connecticut, 381 U.S. 479 \(1965\)](#).

<sup>73</sup> See [Eisenstadt v. Baird, 405 U.S. 438 \(1972\)](#).

<sup>74</sup> [Id. at 453](#) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

<sup>75</sup> [Roe v. Wade, 410 U.S. 113 \(1973\)](#).

<sup>76</sup> [842 S.W.2d 588 \(Tenn. 1992\)](#) (finding that the desire not to procreate trumps the desire to procreate in a case involving disposition of "frozen embryos").

<sup>77</sup> [Id. at 590](#).

<sup>78</sup> [Id. at 601](#).

<sup>79</sup> *Id.*

<sup>80</sup> [Id. at 604](#).

<sup>81</sup> [Id. at 603](#).

<sup>82</sup> [Id. at 601](#).

The result in *Davis* would have been radically different if the mother had been pregnant at the time of her divorce. <sup>83</sup> Although both [\*227] parties would still have been equal "gamete-providers," the mother would have been the sole arbiter of whether she and her husband would "procreate." In the abortion context, the question of control regarding procreation has consistently been decided in the woman's favor. Women alone have the capacity to carry a child; therefore, the Supreme Court has favored them with the sole authority to terminate pregnancies. <sup>84</sup> Conversely, and necessarily, women also have the sole authority to decide to continue pregnancies. <sup>85</sup>

Under current law, the right to an abortion is a woman's right alone. This may seem obvious insofar as it is only a woman who has the ability to become pregnant. Depriving a man of an equal right to terminate a pregnancy, however, ignores the biological fact that a woman and a man have contributed equally to the pregnancy. Viewed as an element of procreational autonomy, which includes the right not to procreate as well as the right to procreate, the right to abortion is more than just the right to terminate a pregnancy. It is the right to terminate procreation. The right to an abortion critically alters the relationship between pregnancy and procreation.

Pregnancy is no longer synonymous with procreation. Instead, abortion destroys the union between conception and procreation. For the sake of procreational autonomy, the crucial question after the legalization of abortion becomes "when does procreation happen?" While the recognition of a woman's right to terminate a pregnancy is itself appalling because of the termination of an unborn child, the failure of the law to recognize the right of a man to terminate a pregnancy leads to a disturbing dichotomy in how procreation is defined. For a woman, procreation is not actually recognized until [\*228] she has given birth to a baby or, during pregnancy, at the point of viability when the state's interest in the unborn child may be recognized. For the man, procreation occurs at the moment of conception because his active role ends and his duties and obligations are fixed at that moment. This inequality seriously burdens a man's right to procreational autonomy. Due to the fundamental nature of the right of procreational autonomy, the state may not burden it without a compelling state interest. <sup>86</sup>

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<sup>83</sup> For an interesting article arguing that the reasoning of *Davis v. Davis* should be applied in the abortion context to allow women the same right as a man to refrain from procreation, see Christina L. Misner, *What if Mary Sue Wanted an Abortion Instead? The Effect of Davis v. Davis on Abortion Rights*, [3 Am. U. J. Gender & L. 265, 267-68 \(1995\)](#):

Why would the law be so quick to recognize a man's right to refrain from procreation, but be so reluctant to recognize the same right for a woman contemplating abortion? This article explores the discrepancy, which becomes apparent when one reads *Davis v. Davis* together with the current leading abortion case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*... . After analyzing the fundamental right to procreational autonomy, the freedom of bodily integrity, and a woman's right to abortion, this article calls upon the U.S. Supreme Court to apply the reasoning adopted by the Tennessee Supreme Court in *Davis v. Davis* to future abortion cases.

<sup>84</sup> See, e.g., [Planned Parenthood v. Casey, 505 U.S. 833, 852-53 \(1992\)](#):

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear... . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.

<sup>85</sup> Although the State may restrict access to abortion after viability of the unborn child, such restrictions are severely limited; the relevant law must contain exceptions allowing for abortions in cases in which the pregnancy endangers the life or health of the mother. See [id. at 879](#). Even in such cases, however, the man has no say in deciding whether to terminate the pregnancy. See [id. at 897](#).

<sup>86</sup> See [id. at 848](#) ("The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" ... is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.") (quoting [Poe v. Ullman, 367 U.S. 497, 543 \(1961\)](#) (Harlan, J., dissenting from dismissal on jurisdictional grounds)).

#### IV. Fourteenth Amendment Protections

Statutes mandating that child-support payments be made by all parents regardless of whether they exercised their right of procreational autonomy in the birth of the child could be challenged on the constitutional grounds of equal protection and substantive due process.

##### A. Equal Protection

The Fourteenth Amendment forbids any state from denying to any person the equal protection of the laws.<sup>87</sup> The Supreme Court has realized, in interpreting the amendment, the difficulty inherent in attempting to legislate without creating classifications. The practical necessity is

that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.<sup>88</sup>

**[\*229]** A law that targets a suspect class or burdens a fundamental right requires more than a rational relation to a legitimate end to withstand constitutional scrutiny.

Classifications based on gender are among those subject to a stricter standard of scrutiny than a rational relation,<sup>89</sup> because "the sex characteristic frequently bears no relation to ability to perform or contribute to society."<sup>90</sup> Since gender generally provides no reasonable basis for differential treatment, "government action based on sex must establish an "exceedingly persuasive justification" for the classification."<sup>91</sup> In other words, the gender-based classification must serve important government objectives and must be substantially related to the achievement of those objectives.<sup>92</sup> On the other hand, the Court has "consistently upheld statutes where the gender classification [was] not invidious, but rather realistically reflected the fact that the sexes are not similarly situated in certain circumstances."<sup>93</sup>

Equal protection jurisprudence also recognizes the inescapable fact that there are differences among people. Therefore, the directive of the Equal Protection Clause is that "all persons similarly situated should be treated alike."<sup>94</sup> The law does not require that "a statute necessarily apply equally to all persons or require things which are different in fact ... to be treated in law as though they were the same."<sup>95</sup> Gender classifications will be upheld if they reflect the fact that the sexes are not always similarly situated.<sup>96</sup>

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<sup>87</sup> [U.S. Const. amend. XIV, 1.](#)

<sup>88</sup> [Romer v. Evans, 517 U.S. 620, 631 \(1996\)](#) (citations omitted).

<sup>89</sup> See [Miss. Univ. for Women v. Hogan, 458 U.S. 718 \(1982\)](#).

<sup>90</sup> [City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 \(1985\)](#).

<sup>91</sup> [United States v. Virginia, 518 U.S. 515, 524 \(1996\)](#) (quoting [Miss. Univ. for Women, 458 U.S. at 724](#)).

<sup>92</sup> *Id.*

<sup>93</sup> [Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464, 469 \(1981\)](#).

<sup>94</sup> [Cleburne Living Ctr., Inc., 473 U.S. at 439](#) ("Where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.").

<sup>95</sup> [Michael M., 450 U.S. at 469](#) (citations omitted).

To challenge child-support laws using an equal protection claim, a man would have to make several allegations. To be actionable, a gender-based classification must either appear on the face of the statute or be apparent from the discriminatory impact of the statute.<sup>97</sup> **[\*230]** Since child-support statutes are gender neutral, an equal-protection claim resting on an alleged gender-based classification must assert that the statute has a discriminatory impact.

Discriminatory-impact claims have generally been dismissed unless the plaintiff could prove that the discriminatory impact or purpose was a motivating factor in the enactment of the statute.<sup>98</sup> In determining "whether invidious discriminatory purpose was a motivating factor in a government body's decisionmaking,"<sup>99</sup> courts have evaluated several considerations, including whether the official action bears more heavily on one class than another, the historical background of the decision, the events leading to the decision, departures from normal procedures, and legislative history.<sup>100</sup>

Child-support statutes clearly have a discriminatory impact on men. According to a 1999 report of the United States Census Bureau, approximately 85 percent of all custodial parents in the United States are women.<sup>101</sup> In addition, 61 percent of all child-support awards are granted to mothers.<sup>102</sup> Any law, therefore, enforcing child-support obligations necessarily has a greater impact on men than on women. Discriminatory impact alone, however, is insufficient to prove an equal-protection violation. Any challenge to a child-support statute must also prove that such discrimination was a motivating factor of the statute.

Although drawn generally, the federal statutes relating to enforcement of child support appear to be particularly aimed at fathers.<sup>103</sup> The evidence, however, is minimal at best. Indeed, a federal district court reviewing the Child Support Recovery Act for an equal-protection violation found that "there is not one scintilla of evidence that the CSRA reflects invidious discrimination on the part of its framers."<sup>104</sup>

**[\*231]** Equal-protection challenges may also be brought if a statute burdens a fundamental right.<sup>105</sup> Under such an analysis, the question becomes whether the government's discrimination as to who can exercise a given right is justified by a sufficient purpose.<sup>106</sup> The analysis of a claimed equal-protection violation of a fundamental right requires strict scrutiny of the legislative purpose behind the enactment.<sup>107</sup> Strict scrutiny evaluates whether the

<sup>96</sup> *Id.*

<sup>97</sup> See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 9.4.2, at 728-29 (2d ed. 2002).

<sup>98</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>99</sup> *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 488 (1997) (citation omitted).

<sup>100</sup> *Id.* at 489.

<sup>101</sup> Lydia Scoon-Rogers, *Child Support for Custodial Mothers and Fathers: 1995*, Current Population Rep. (Mar. 1999), at <http://landview.census.gov/prod/99pubs/p60-196.pdf> (on file with the Ave Maria Law Review). Information in the report was taken from the 1994 and 1996 supplements to the Current Population Surveys.

<sup>102</sup> *Id.*

<sup>103</sup> Statement by President William J. Clinton upon signing H.J.Res. 136, *Pub. L. No. 104-69*, 1995 U.S.C.C.A.N. 748-1 ("Today I have signed into law House Joint Resolution 136, which ... continues funding for State child support enforcement agencies to ensure that "deadbeat dads" do not get a reprieve from supporting their children.").

<sup>104</sup> *United States v. Nichols*, 928 F. Supp. 302, 318 (S.D.N.Y. 1996).

<sup>105</sup> *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

<sup>106</sup> See Chemerinsky, *supra* note 97, at 764-68.

relevant statute serves a compelling governmental interest and is narrowly tailored to serve that interest.<sup>108</sup> Such an analysis is effectively the same as a substantive-due-process analysis for purposes of scrutinizing governmental interests.<sup>109</sup> Therefore, this analysis will focus on substantive due process.

## B. Substantive Due Process

The "Due Process Clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.' ... The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."<sup>110</sup> Among the fundamental [\*232] rights entitled to heightened protection under the Due Process Clause are the rights to marry, to have children, to use contraception, and to abortion.<sup>111</sup> Substantive due process ""forbids the government to infringe ... "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."<sup>112</sup> Therefore, any government action infringing on the procreational autonomy of an individual must be narrowly tailored to serve a compelling state interest. Substantive due process, in effect, requires four inquiries. "First, is there a fundamental right? Second, is the right infringed? Third, is the government's action justified by a sufficient purpose? And fourth, are the means sufficiently related to the goal sought?"<sup>113</sup>

Using this framework, child-support statutes violate substantive due process. Child-support statutes unquestionably involve a fundamental right. Implicated in a child-support statute is the fundamental right to make decisions concerning the care and custody of children.<sup>114</sup> In addition, because child-support statutes force recognition of parental relationships and responsibilities, such statutes also implicate the right of procreational autonomy.

<sup>107</sup> [Kadmas v. Dickinson Pub. Sch., 487 U.S. 450, 457-58 \(1988\)](#).

<sup>108</sup> [Plyler v. Doe, 457 U.S. 202, 217 \(1982\)](#).

<sup>109</sup> [Zablocki v. Redhail, 434 U.S. 374, 394 \(1978\)](#) (Stewart, J., concurring in the judgment. The majority held that a Wisconsin statute requiring judicial approval for certain marriage candidates was a violation of equal protection). Justice Stewart stated:

Today equal protection doctrine has become the Court's chief instrument for invalidating state laws. Yet, in a case like this one, the doctrine is no more than substantive due process by another name... .

... The effect of the Court's decision in this case is not to require Wisconsin to draw its legislative classifications with greater precision or to afford similar treatment to similarly situated persons. Rather, the message of the Court's opinion is that Wisconsin may not use its control over marriage to achieve the objectives of the state statute. Such restrictions on basic governmental power are at the heart of substantive due process.

[Id. at 395](#) (Stewart, J., concurring in the judgment).

<sup>110</sup> [Washington v. Glucksberg, 521 U.S. 702, 719-20 \(1997\)](#) (quoting [Daniels v. Williams, 474 U.S. 327, 331 \(1986\)](#), quoted in [Collins v. Harker Heights, 503 U.S. 115, 125 \(1992\)](#)). Governmental interference with liberty apart from unfair procedures has been designated "substantive due process." *Id.* Violations of liberty that arise out of procedural unfairness are violations of "procedural due process." *Id.*

<sup>111</sup> [Id. at 720](#).

<sup>112</sup> [Id. at 721](#) (alteration in original) (quoting [Reno v. Flores, 507 U.S. 292, 302 \(1993\)](#)).

<sup>113</sup> Chemerinsky, *supra* note 97, at 764.

<sup>114</sup> See [Troxel v. Granville, 530 U.S. 57, 66 \(2000\)](#) (plurality opinion) (arguing "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children").

As explained in Part III, the recognition of a right to abortion confuses the act and the moment of procreation. Procreation is the action of begetting a child.<sup>115</sup> Ordinarily, this would mean that procreation has occurred at conception. A fundamental right to abortion exists, however, such that neither the state nor any other party may interfere with a woman's decision to abort prior to the viability of the child.<sup>116</sup> The law, therefore, does not recognize the existence of a person at conception.<sup>117</sup> Indeed the law does not [\*233] recognize a valid or substantial interest in the life of the unborn child until viability.<sup>118</sup> Consequently, the law does not recognize procreation as an event until birth or, at the very earliest, viability.

The law may not treat similarly situated individuals differently.<sup>119</sup> Failure to allow a man the option of terminating his "procreative act" treats similarly situated men and women differently. Both stand in the same position concerning potential to be parents to the unborn child. Yet, the law allows a woman to terminate that potential while not affording a similar right to the man. Instead, the law recognizes the parental relationship of the man at the point of conception.<sup>120</sup>

While child-support statutes do not per se infringe upon the right to procreate, that right is implicated because the statutes usually assign a parental obligation based upon a genetic relationship.<sup>121</sup> In other words, child-support laws enable or legitimize different treatment of men with regard to the exercise of procreational autonomy. All that is required to enforce a child-support obligation against a man is the mere fact of his genetic relationship to the child.<sup>122</sup> On the other hand, because a woman has the right to terminate her pregnancy, child-support obligations can never be enforced against her without her consent to the existence of a parental obligation. Although the very existence of the child might be deemed procreation, it is not until the law recognizes or enforces parental rights or obligations that procreation is realized.<sup>123</sup> Therefore, when the law recognizes a parental obligation against the will of the "parent," it forces procreation on that individual and infringes on the fundamental right of procreational autonomy. In the same way that forcing a woman to bear a child, and therefore parental responsibility, against her will burdens her procreational autonomy, forcing a man [\*234] to bear parental responsibility against his will burdens his right of procreational autonomy.

If then, as this note contends, the fundamental right to procreation is implicated and burdened by a child-support statute, the next question is whether the statute serves a compelling governmental interest. There are two main justifications generally set forth for the enforcement of child support obligations against parents. Primarily, the state

<sup>115</sup> See The American Heritage Dictionary of the English Language 1399 (4th ed. 2000); Oxford English Dictionary, available at <http://dictionary.oed.com/cgi/entry/00189239> (on file with the Ave Maria Law Review).

<sup>116</sup> See supra notes 84-85.

<sup>117</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 157 (1973) ("The Constitution does not define 'person' in so many words... . But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.").

<sup>118</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992).

<sup>119</sup> *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

<sup>120</sup> Some states even allow paternity suits to be filed during the mother's pregnancy. See, e.g., *Mich. Comp. Laws Ann. 722.714* (West 2002).

<sup>121</sup> Child support can also be ordered against an individual who acknowledges paternity even if there is no genetic relationship. See, e.g., *Mich. Comp. Laws Ann. 722.717* (West 2002).

<sup>122</sup> See, e.g., *Cal. Fam. Code 7641* (West 1994); *Mich. Comp. Laws Ann. 722.717* (West 2002); N.Y. Jud. Ct. Acts Law 513 (McKinney 1999).

<sup>123</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that there is no due process right to establish paternity of a child born to the wife of another man).

argues that a child has a right to support from both parents.<sup>124</sup> Therefore, it is claimed that the child support is for the benefit of the child.<sup>125</sup> Parents may not contract around the obligation to pay child support or otherwise agree on the division of support<sup>126</sup> because the parents may not contract away the rights of the child. In addition, the State has an interest in avoiding responsibility for support by means of public assistance.<sup>127</sup> Effectively, both justifications can be reduced to financial considerations. The law imposes no obligation other than financial upon parents.

While there may be many reasons to encourage parental responsibility toward children, including the advantages to the child of having role models and the emotional support of two parents, none of these reasons are implicated by child-support requirements. Although it might seem in the best interests of a child to live with both parents, or at least to have visitation with his non-custodial parent, there is no legal requirement that a parent either live with children or visit them. The only "parental responsibility" enforced is one of financial support. Thus, the question, for purposes of substantive due process, becomes whether the government's interest in securing financial support for children from both biological parents is compelling enough to allow the state to infringe upon a man's procreational autonomy.

**[\*235]** There are several problems with finding the governmental interest in securing financial support from both biological parents to be compelling. First, many states allow single-parent adoptions.<sup>128</sup> The governmental interest in securing support from two parents is significantly weakened because the state does not require two parents for support in adoption cases. Even if financial stability is a prerequisite to a single-parent adoption, it does not lessen the fact that such support can come from one parent alone. Similarly, no one could suppose that one spouse's inability to continue providing support would enable the state to remove the children from the home of the remaining parent.

Secondly, the state need not recognize the parental rights or duties of the biological father at all. For instance, many states provide for the donation of sperm without parental obligations.<sup>129</sup> In such instances, the sperm is donated for the exclusive purpose of procreation, with no parental rights attaching. In addition, many states provide for a presumption of paternity on the part of the husband of a married woman.<sup>130</sup> In some cases, this presumption is irrebuttable if the husband does not deny paternity.<sup>131</sup> The father of a child born to the wife of another man may,

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<sup>124</sup> See, e.g., [Univ. of S. Ala. v. Patterson, 541 So. 2d 535, 538 \(Ala. 1989\)](#); [In re Marriage of Lusby, 75 Cal. Rptr. 2d 263, 267-68 \(Cal. Ct. App. 1998\)](#); [Oeler v. Oeler, 594 A.2d 649, 651 \(Pa. 1991\)](#); see also [In re S.P.B., 651 P.2d 1213 \(Colo. 1982\)](#) (rejecting an equal protection and due process violation claim against the Uniform Parentage Act, which imposes child-support obligations on the father without regard to his choice concerning an abortion).

<sup>125</sup> [In re Marriage of Flaherty, 646 P.2d 179, 183 \(Cal. 1982\)](#).

<sup>126</sup> [In re Marriage of Lusby, 75 Cal. Rptr. 2d at 267-68](#) ("Parents do not have the power to agree between themselves to abridge their child's right to support.").

<sup>127</sup> See, e.g., [Minnich v. Rivera, 506 A.2d 879, 882 \(Pa. 1986\)](#), aff'd, [483 U.S. 574 \(1987\)](#) ("The Commonwealth is concerned in having a father responsible for a child born out of wedlock. This not only tends to reduce the welfare burden by keeping minor children, who have a financially able parent, off the rolls, but it also provides an identifiable father from whom potential recovery may be had of welfare payments which are paid to support the child born out of wedlock.").

<sup>128</sup> E.g., Ala. Code 26-10A-5(b) (Supp. 2002); [Del. Code Ann. tit. 13, 903](#) (1999); [D.C. Code Ann. 16-302](#) (2001); [Fla. Stat. Ann. 63.042](#) (West 1997); [NY Dom. Rel. Law 110](#) (McKinney Supp. 2004). See [In re Munson, 534 N.W.2d 192, 193 \(Mich. Ct. App. 1995\)](#) (per curiam).

<sup>129</sup> E.g., [Fla. Stat. Ann. 742.14](#) (West 1997); [N.H. Rev. Stat. Ann. 168-B:11](#) (2001).

<sup>130</sup> E.g., Ala. Code 26-17-5(a) (Supp. 2002); [Cal. Fam. Code 7540](#) (Deering 1996); [Iowa Code Ann. 252A.3](#) (West 2000); [W. Va. Code Ann. 48-24-101](#) (Michie 2001).



therefore, have no right to assert his paternity.<sup>132</sup> These factors undermine the notion that the government has a compelling interest in ensuring that children are supported by both of their biological parents.

Moreover, although courts have typically relied on a child's right to support from both parents in order to enforce child-support obligations against the father, the balance between the child's right to support and the father's right to procreate should fall on the father's side. The child may have a right to support, but he does not necessarily have a specific interest in any particular person paying the support. The child's right cannot be a legitimate governmental reason **[\*236]** for permitting a woman to avoid responsibility for her procreative actions while not permitting the same luxury to a man.

Assuming, however, that the government's interest in securing financial support is compelling enough to allow the state to infringe upon a man's right to procreation, the means used to accomplish that end must be narrowly tailored.<sup>133</sup> Child-support statutes, however, are not narrowly tailored to meet the financial needs of children. The primary justification behind child-support statutes is that a parent has an absolute obligation to provide for his children. This notion, however, "rests on the "baggage of sexual stereotypes."<sup>134</sup> In effect, although also obligating women to pay child support, child-support laws are founded on the notion that "generally it is the man's primary responsibility to provide a home and its essentials."<sup>135</sup> Strictly speaking, the governmental interest in financial support for children does not require that biological fathers necessarily support their biological offspring. The ends of child support could be met without infringing the father's right of procreational autonomy.

Child-support laws need not assume an automatic relationship between biological paternity and parental obligations. "It is axiomatic that a man ought to support his children. Our child support laws are reflections of that commonly held idea... . Simply put, paternal child support is also only a custom... . That custom can also be changed."<sup>136</sup> Child support is a custom of our society, but one that impinges on fundamental freedom.

**[\*237]** The child-support statutes make no distinction between a father who voluntarily becomes a parent and a father whose procreation was compelled by legal recognition. In order to make such a distinction, child support could be enforced against those fathers who had voluntarily assumed the responsibilities of parenthood while allowing those who had not to avoid bearing the burden of an unwanted child.

<sup>131</sup> See Ala. Code 26-17-5(a) (Supp. 2002); [Cal. Fam. Code 7540](#) (Deering 1996).

<sup>132</sup> See [Michael H. v. Gerald D., 491 U.S. 110 \(1989\)](#) (holding that a biological father had no right to assert his paternity over the child of a married woman when her husband was presumed to be the father); [P.G. v. G.H., No. 2000815, 2002 Ala. Civ. App. LEXIS 553 \(June 28, 2002\)](#).

<sup>133</sup> See [Zablocki v. Redhail, 434 U.S. 374, 388-89 \(1978\)](#) ("The permission-to-marry proceeding furnishes an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations; and the welfare of the out-of-custody children is protected. We may accept for present purposes that these are legitimate and substantial interests, but, since the means selected by the State for achieving these interests unnecessarily impinge on the right to marry, the statute cannot be sustained... . The statute provides incentive for the applicant to make support payments to his children. This "collection device" rationale cannot justify the statute's broad infringement on the right to marry.") (citation omitted).

<sup>134</sup> [Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464, 476 \(1981\)](#) (quoting [Orr v. Orr, 440 U.S. 268, 283 \(1979\)](#)).

<sup>135</sup> [Orr, 440 U.S. at 279-80](#) (quoting [Stanton v. Stanton, 421 U.S. 7, 10 \(1975\)](#)) (invalidating an Alabama statute that imposed alimony obligations on husbands but not wives). See Steven D. Hales, Abortion and Fathers' Rights, in Biomedical Ethics Reviews: Reproduction, Technology, and Rights 5, 12 (James M. Humber & Robert F. Almeder eds., Humana Press 1996) (arguing that a "man has the moral right to decide not to become a father (in the social, nonbiological sense) during the time that the woman he has impregnated may permissibly abort." In making this argument, Hales suggests that the principle that fathers are under an absolute moral obligation to support their children should be rejected.)

<sup>136</sup> [Bobo v. Jewell, No. CA 1316, 1987 WL 12245, at 11 \(Ohio Ct. App. May 13, 1987\)](#) (Grey, J., dissenting), aff'd, [528 N.E.2d 180 \(Ohio 1988\)](#).

The governmental interest in providing support for the unwanted children could be realized in two ways without infringing on the freedom of procreation. The government could undertake to support such children through public assistance or by encouraging parental support through governmental assistance, such as larger income tax credits. The state could also require the mother to shoulder the entire financial burden of raising the child. In addition, states can require support payments from non-biological parties. For instance, an individual who assumes a parental role toward a child may be required to pay child support.<sup>137</sup>

The government's interest in securing financial support for children is not fulfilled by narrowly tailored means. Child-support statutes are broadly drawn to require child support from all biological parents whose parental rights have not been judicially terminated. As such they unconstitutionally trample upon the man's right to procreational autonomy and should be modified to allow him equality in his right to procreate.

#### V. Solving the Child Support Dilemma

The argument presented in Part III that child support should not be forced upon involuntary fathers does not mean that the state should not collect child support. The state should encourage the payment of child support, but it should not mandate support unless the man has voluntarily accepted parental responsibility.

This does not mean that a man should be able to avoid responsibility for his procreative actions. The father and the mother both share responsibility for the conception. It does not necessarily follow, however, that both parties are responsible for the birth of the [\*238] child. For the law to be logically consistent in its treatment of the men and women, if the father does not want the child, if he is not ready to accept the responsibilities of parenthood, his choice not to procreate should not be unilaterally overridden by the choice of the mother.

There are four possible solutions in a situation in which the mother chooses to keep the child against the father's wishes. The first is the one that legislatures and courts have already adopted, namely, that a father is financially responsible for any offspring he has sired regardless of whether he wants them.

The second option would be to empower either the father or the mother to elect an abortion. If the father does not want the child, he could require the mother to undergo an abortion. Clearly, such an option requires an extremely invasive procedure for the mother and would substantially infringe upon her freedom to procreate. It is just as clear that such an option would be unconstitutional through its violation of the mother's freedom.<sup>138</sup> Similarly, the third option, that the father could have the right to insist that the child be placed for adoption upon its birth, would infringe upon the mother's freedom to procreate and would violate her constitutionally protected right in the parental relationship.<sup>139</sup>

Finally, a father could be allowed to express his intention of separating himself permanently from the child by voluntarily terminating his responsibility through legal channels. In order for the father's right to terminate his responsibility to be equivalent to the mother's, it must be similarly tempered by state involvement after the point of viability. The father should not be allowed to end his responsibility without some remuneration to the mother, but the damages for which the father should be liable should parallel the options afforded to the mother in the exercise of her freedom to procreate. Under the current legal system, abortion and childbirth are the choices available to a mother. By taking this tragic state of affairs to its logical conclusion, the financial obligations necessary to cover the

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<sup>137</sup> [L.S.K. v. H.A.N., 813 A.2d 872, 878 \(Pa. Super. Ct. 2002\)](#) (holding in a suit for child support from a former lesbian partner that "although statutory law does not create a legal relationship, applying equitable principles we find that in order to protect the best interest of the children involved, both parties are to be responsible for the emotional and financial needs of the children").

<sup>138</sup> See, e.g., [Planned Parenthood v. Casey, 505 U.S. 833, 859 \(1992\)](#); [Arnold v. Bd. of Educ., 880 F.2d 305, 310 \(11th Cir. 1989\)](#) (holding that "coercing a minor to abort a child violates the minor's constitutionally protected freedom to choose whether to abort or bear her child").

<sup>139</sup> See *supra* notes 62-63.

cost of an abortion or childbirth are therefore the harsh equivalents afforded to the father if he elects to terminate his responsibility.

The father's right to terminate voluntarily without obligation should also cease when the mother's right unilaterally to terminate [\*239] her relationship with the child ends. At the very least, the mother has an unconditional right to terminate her pregnancy until the viability of the child.<sup>140</sup> Therefore, at the very least, a man's right to terminate his parental relationship should extend until the viability of the child. States with more lenient laws on abortion should allow the father the time to terminate his relationship equal to that of the mother. States should also provide for voluntary termination of rights prior to birth if necessary for the health of the father.

A model statute providing for the voluntary termination of paternal rights and obligations should provide:

(1) Voluntary termination of paternal rights prior to viability.

(a) Any putative father of a child may, prior to the viability of that child, voluntarily terminate all parental rights and obligations to that child by filing a statement of voluntary termination with the court in the district in which the mother of the child resides, or;

(b) if the residence of the mother is unknown, such statement may be filed with the court in the district in which the father resides, with an affidavit stating that the residence of the mother is unknown.

(2) Voluntary termination of paternal rights subsequent to viability.

(a) Any putative father of a child may, subsequent to the viability of that child, voluntarily terminate all parental rights and obligations to that child by filing a statement of voluntary termination with the court in the district in which the mother of the child resides, or;

(b) if the residence of the mother is unknown, such statement may be filed with the court in the district in which the father resides with an affidavit stating that the residence of the mother is unknown;

(c) termination of parental rights under this section shall be granted if  
[\*240]

(i) the father was unaware of the existence of the child and the court in which the statement was filed determines that the father neither knew or should have known about the existence of the child prior to the viability of the child; or

(ii) the court in which the statement was filed determines that termination is necessary for the health of the father.

(3) Failure of the mother to notify the father of the existence of the child prior to viability shall constitute a defense for failure to comply with the time requirements of this section, and shall constitute a defense to any subsequent suit for child support.<sup>141</sup>

(4) Termination of paternal rights under this section is final and irrevocable.

Allowing the father of a child the right to exercise his right of procreation and to decide not to become a parent will undoubtedly have repercussions for the mother. The mother may become solely financially responsible for the child. The knowledge that she cannot rely on the father for support may affect her decision whether to undergo an abortion or whether to place the child for adoption. Since, however, it is her decision alone that will bring the child

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<sup>140</sup> E.g., [Casey, 505 U.S. at 879](#).

<sup>141</sup> See McCulley, *supra* note 26, at 40. Insofar as the statute proposed by the article requires that the father prove grounds for termination and leaves the final decision in the hands of a judge, I do not think that the proposed statute does enough to equalize the procreation playing field.

into the world, placing additional cost on her shoulders would not create an unjust result. In addition, although the father's decision may affect the mother's decision, any impact cannot be any more of an infringement on her right to procreate than the mother's choice to terminate the child is on the father's right to procreate when he wants to keep the child. When the mother chooses to terminate her pregnancy, she has irrevocably exterminated the child of the father. She has frustrated any procreative intent he may have had and any desire he had for the child to live. On the other hand, a father's refusal to become a father does not have the same irrevocable effect. Neither does his action have the effect of frustrating the procreative desire of the other party. His refusal to become a father may increase the difficulty of the mother's decision, but the decision of whether to keep the child will still belong to her.

**[\*241]**

#### Conclusion

Despite claims of equality and responsibility, current legal trends are hypocritical. The current law claims for a woman that which it refuses for a man: the ability to choose parenthood. Instead, the law imposes parenthood on a man solely as a result of the choice of the woman. Allowing a man equal protection by the ability to voluntarily terminate his paternal rights may be distasteful, contrary to custom and history, and bad public policy, but these are not legitimate reasons for refusing to give legal protection to fathers. Not only is the unborn child a victim under the current legal system, but the father is as well. Granted, the father's life is not threatened under the current regime as the life of the unborn child is, but clearly the father is not afforded the same legal protection as the mother. The ability to refuse parenthood is the result of the right to abortion. A child cannot be a child at conception for the man and not until birth for the woman. If the woman can avoid responsibility for the child by having an abortion, the man must have a similar right. It is inequitable and unjust to force responsibility on him for the choices made by the mother of his child.