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You Made Your Bed...Now You Are Going to Pay for It: An Analysis of the Effects of Virginia's Mandatory Paternal Identification in AFDC Cases Will Have on the Rights of Unwed Fathers

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YOU MADE YOUR BED . . . NOW YOU ARE GOING TO PAY
FOR IT¹: AN ANALYSIS OF THE EFFECTS VIRGINIA'S
MANDATORY PATERNAL IDENTIFICATION IN AFDC CASES
WILL HAVE ON THE RIGHTS OF UNWED FATHERS

"Dream child in my head is nightmare born in a borrowed bed."²

I. INTRODUCTION

Imagine yourself a young man, and you just learned that your girlfriend is pregnant. You think to yourself, was it an accident? Or, did she plan the pregnancy by not taking the precautions the two of you had agreed to use at the onset of your sexual relationship? This actually happened to Peter Wallis, a thirty-six year-old real estate broker, who filed suit against his former girlfriend, Kellie Smith, for breach of contract, fraud, conversion, and prima facie tort.³ This case has caused a nationwide stir among advocates of both women's and men's rights.⁴ Is Mr. Wallis' assumption that the state will eventually come after him for child support a hasty presupposition or an astute precaution? Again, debate on the topic continues, but at the heart of the matter rests the issues of equal justice and equal protection under the Constitution.⁵

1. "We are going to make you pay." Governor Bill Clinton, Acceptance Speech at Democratic Presidential Nomination Convention (July 16, 1992). This was Governor Bill Clinton's message in his democratic Presidential nomination acceptance speech to fathers who owe child support payments. See Michael Marriot, *Fathers Find That Child Support Means Owning More Than Money*, N.Y. TIMES, July 20, 1992, at A1.

2. NATALIE MERCHANT, *Eat For Two*, on BLIND MAN'S ZOO (Virgin Records 1986).

3. See Wallis v. Smith, No. CV-98-08929 (D.N.M. filed Sept. 16, 1998); see also Bonnie Erbe, *Mother Plus Father Equals Child (Minus Father)*, CHI. SUN-TIMES, Dec. 1, 1998, at 29, available in 1998 WL 5609536.

The latest twist in the battle between the sexes comes in the bizarre case of Peter Wallis and Kellie Smith, who met at work, fell in love, moved in together and accidentally conceived a child. . . . [H]e's suing her for becoming pregnant against his will and "intentionally acquiring and misusing" his semen.

Id.

4. See Erbe, *supra* note 3, at 29.

While the beginning of their story was storybook perfect, the end is a classic contest of wills. It raises melodramatic questions about whose rights prevail in parenthood. It even makes us ponder whether women have the right to "use" sperm in ways in which men never intended it to be used and whether in our high-tech society sperm is becoming just another commodity to be used, stolen, banked or donated like so much grain and oil.

Id.

5. By not being given the same reproductive rights and protections that women enjoy, is Peter Wallis being deprived of his right to life, liberty, and the pursuit of justice? See U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the

The modern American woman has more rights and freedoms than ever before in our nation's history.⁶ She has the power to determine her future financially, politically and reproductively.⁷ With the assistance of sperm donors and fertility clinics, women may now bear and raise a child without knowing much about the father, other than what has been represented about him on paper.⁸ In addition, a woman who gets pregnant has no obligation to tell the father of the child's existence—until she needs public assistance.⁹

jurisdiction thereof, are citizens of the United States wherein they reside. No State shall make or enforce any law which shall bridge 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 protections of the laws.

Id.; see also Cathy Young, *Women Choose, But Men Can't*, ST. PETERSBURG TIMES, Dec. 6, 1998, at 6D, available in 1998 WL 18307212 ("For men to fight for the right to desert their children may seem monstrously selfish. But that's exactly how it looks when some women fight to abort their potential children.").

6. See MICHAEL D. BAYLES, REPRODUCTIVE ETHICS 35 (1984).

Reasons often given in the past for instrumentally preferring children of one sex (particularly males) are to inherit, to carry on the family name, and to have workers. But none of these reasons are relevant in the modern Western world. Today, male and female children inherit equally. Females can carry on the family name if they want; they need not change their names when they marry.

Few jobs exist that women cannot fulfill as well as men

Id.; see also NGAIRE NAFFINE, LAW AND THE SEXES 136 (1990) ("Today, in most respects, women appear to be treated as formal equals with men. They are now recogni[z]ed to be citizens with almost the same rights as men.").

7. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (holding that the Alabama statute that allowed only wives to receive alimony violated the Equal Protection Clause of the Constitution. Women thereby had the financial right and responsibility to support their children.). See also Paul Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 930-31 (1997) ("The common law rule that only men were liable for support has been broadened to include women. State courts uniformly have interpreted their equal rights provisions to impose reciprocal and mutual support obligations upon both husbands and wives.") (citations omitted).

8. See GEORGE P. SMITH, II, FAMILY VALUES AND THE NEW SOCIETY: DILEMMAS OF THE 21ST CENTURY 95 (1998).

It has been determined in a 1990 study that in the United States some eighty thousand babies are born through artificial insemination by a donor . . . each year. The Congressional Office of Technology Assessment issued a 1988 report that found over eleven thousand physicians have performed artificial insemination on approximately 172,000 women each year.

Id. (citations omitted); see also Cindy Richards, *In Bizarre Feud, Parents Miss the Point*, CHI. TRIBUNE, Dec. 6, 1998, available in 1998 WL 2923290 at *5 ("A lot of women see men only as a biological necessity. They think they can pick a man and deceive him. [Wallis'] role was that of a sperm donor," [Jeffrey] Leving said. "Now sperm is just a commodity.").

9. See Mary A. Totz, *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, 143 (1994) ("[S]hould 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, e.g., VA. ADMIN. CODE § 22 VAC 40-35-30 (1998) (explaining that it

Amidst the wave of welfare reform in the mid-1990s,¹⁰ some states, like Virginia, enacted laws with stringent provisions that went beyond simply requiring the identification of the father of each child who receives public assistance.¹¹ While the novel idea of shifting the financial burden of supporting children from the government to the parents would seem to be a viable option for relieving the pressures on the "public purse," unwed fathers unfairly have become the targets of this relief.¹²

When attempting to determine who bears financial responsibility for raising a child, federal and state governments have determined that responsibility lies with both parents.¹³ Due to the

is mandatory that women identify the father of their child before receiving public assistance).

10. See Ralph S. Hambrick, Jr. & Gary T. Johnson, *The Future of Homelessness*, SOC'Y, Sept. 1, 1998, at *15, available in 1998 WL 11168783.

[A] second round of even more stringent requirements and an effort to close the "loopholes" of the earlier legislation were launched. These resulted in reforms which made eligibility requirements more stringent and exemptions more difficult to receive. . . . There was a "rush to the bottom" in benefits packages and no state wanted to provide more benefits than its neighbors, for fear of attracting low-income migrants.

Id.

11. See Leslie Taylor, *Judge: 2 Women to Get Welfare for Now*, ROANOKE TIMES & WORLD NEWS, June 26, 1996, at A1; see also VA. ADMIN. CODE § 22 VAC 40-35-30 (1998).

- A. As a condition of eligibility, the caretaker-relative shall cooperate, as defined in 22 VAC 40-35-20, with the Division of Child Support Enforcement (DCSE) and the local department of social services in establishing paternity.
- B. If the caretaker-relative does not cooperate, the adult portion of the grant shall be denied or terminated until the individual has disclosed the required information.
- C. If, after six months of receipt of AFDC, paternity has not been established and the local department determines that the caretaker-relative is not cooperating in establishing paternity, the local department shall terminate the entire grant for a minimum of one month and until cooperation has been achieved. An individual whose AFDC case was terminated due to such non-cooperation must cooperate and file a new application for AFDC to receive further benefits.

Id. See generally *infra* notes 64, 67-68 and accompanying text (showing that the meaning of "cooperating" has been redefined to mean that the mother is able to identify the father by name and at least three other "characteristics" that might help the state find him).

12. See Roger Levesque, *Targeting "Deadbeat" Dads: The Problem with the Direction of Welfare Reform*, 15 HAMLINE J. PUB. L. & POL'Y 1, 9 (1994) [hereinafter Levesque, *Targeting "Deadbeat" Dads*] (explaining the recent AFDC goal of forcing unwed fathers to contribute to public funds while they continue to receive the least amount of benefits).

13. See generally Roger Levesque, *Looking to Unwed Dads to Fill the Public Purse: A Disturbing Wave in Welfare Reform*, 32 U. LOUISVILLE J. FAM. L. 1 (1993-94) [hereinafter Levesque, *Unwed Dads*] (establishing the existence of a trend that shifts the burden of welfare costs from the government to the parents). See also *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.") (citation omitted).

traditional role men have played as "breadwinners," state welfare reforms often target unwed fathers as the suggested financial supporters of children who receive public assistance.¹⁴ This notion, however, creates a paradox within feminist jurisprudential theory.¹⁵ While today's woman has achieved more rights, both reproductively and economically, this trend, which places an undue and unsubstantiated economic burden on her children's putative father[s], hinders a woman's independence.¹⁶

The juxtaposition between a woman's independence and a man's burden is heightened by the new welfare laws. Some women are single mothers, either because they and the fathers chose to have their children out of wedlock or because of a "deadbeat dad" scenario (where the father chose not to be a part of the child's life). Some women have chosen unilaterally not to have the father involved in the child's life.¹⁷ Regardless of the reasons, the new

14. See Levesque, *Unwed Dads*, *supra* note 13, at 31.

15. See Carol Smart, *Power and Politics of Child Custody*, in CHILD CUSTODY AND THE POLITICS OF GENDER 17 (Carol Smart & Selma Sevenhuijsen eds., 1989).

[The] entangling of the new fatherhood and fathers' rights movements is unfortunate for feminism, even though it is arguably of political benefit for fathers' rights. This is because the progressive potential of shared parenting has tended to become overshadowed by the way in which it can be annexed by a reactionary movement which simply aims further to empower men.

Id.; see also Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of Woman's Right to Choose: A Paradox of the Skeptics*, 4 WM. & MARY J. WOMEN & L. 91, 116 (1997) ("[W]hen women, via the constitutional vehicle of privacy, undermine shared societal concerns with selfish autonomy for the sake of individual liberty, that liberty is transformed to incongruity and self-contradiction; thus the paradox."); Nancy Levit, *Feminism For Men: Legal Ideology and the Construction of Maleness*, 43 U.C.L.A. L. REV. 1037, 1042 (1996) ("The goals of liberal feminism were assimilationist in nature: making legal claims that would ensure women received the same rights, opportunities, and treatment as men Equal treatment theory viewed men as the benchmark, the norm. Male experiences were an accepted and unquestioned reference point."). Thus, in failing to give men equal grounds for asserting their reproductive rights, feminist ideals are shattered as the heretofore male benchmark of sexual independence is essentially "surpassed" by women's unilateral rights to reproduce.

16. See generally *supra* note 15 (explaining the paradox between giving women unilateral rights to reproduce and the progression of feminist legal theory); *Roe v. Wade*, 410 U.S. 113 (1973) (granting women more reproductive freedoms).

17. Some women fear their domestic partners' physical or emotional abuse or simply do not want the fathers to be a part of their lives because of their choice of lifestyle. See Linda J. Lacey, Book Review, *As American as Parenthood and Apple Pie: Neutered Mothers, Breadwinning Fathers and Welfare Rhetoric*, 82 CORNELL L. REV. 79, 95 (1996) ("[I]t seems clear that for the children of the approximately three to four million women beaten by their husbands or boyfriends every year, a single parent family is preferable to a violent home.") (citations omitted); see also *Monthly Vital Statistics Report*, Vol. 46, No. 1, Supp. 2 (visited Jan. 20, 1999) <<http://www.cdc.gov/nchswww/fastats/virginia.htm>> (stating that in 1996, in Virginia, 28.8% of children were born to unwed mothers while the national percentage was 32%); *infra* notes 27, 31 (noting the rise in single-parent households and detailing the reasons for the rise).

welfare laws generally are not considered when parents make reproductive and economic decisions about having a child. However, in the instance where a mother cannot afford to support her child, the new welfare laws make it impossible for a father to be relieved of the economic burden of that child.¹⁸

This Note primarily concerns itself with the fundamental unfairness of requiring unwilling or unknown fathers to support children, and their mothers, when they are entitled to no other parental rights. This Note also discusses the importance of achieving true equality for both men and women in the areas of reproductive and economic rights. The current trend has removed the role of the complete family unit in child-rearing by giving reproductive freedoms to women alone.¹⁹ While the progression away from the family²⁰ may be partially responsible for this distinction, the rights of unwed fathers have also been long forgotten. Still, irrespective of the rights of unwed fathers, society remembers their responsibilities and, in the evolving age of mandatory paternal identification, society aggressively places the financial burden on these putative fathers. Finally, as this Note discusses the need to recognize the rights of unwed fathers, both reproductively and financially, it also proposes possible solutions in the wake of these situations.

II. HISTORY OF THE TREND TARGETING UNWED FATHERS IN WELFARE REFORM

'That is no excuse,' replied Mr. Brownlow. . . . 'for the law supposes that your wife acts under your direction.' 'If the law supposes that,' said Mr. Bumble, . . . 'the law is a ass—an idiot. If that's the eye of the law, the law is a bachelor; and the worst

18. See, e.g., *State Dep't of Human Serv. v. T.D.G.*, 861 P.2d 990, 994 (Okla. 1993) (holding that a mother could not contract away her child's right to child support).

19. See Lacey, *supra* note 17, at 79; see also MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF PUBLIC PHILOSOPHY* 112-15 (1996) (noting the rise in single-parent families and the evolution of notions of personhood independent from marital status). See generally Naomi R. Cahn, Review Essay, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225 (1997) (examining the moral complexities within the current trend of moving away from the "traditional family," as well as the subsequent fears of moral degeneracy and family breakdown resulting from support for welfare reform).

20. See SMITH, *supra* note 8, at 1 ("While recognizing family, and parenthood, are linked, ideally to form the 'good life,' it remains a vexatious conundrum to find agreement on the content of these terms as they evolve in contemporary society.") (citations omitted); see also Lacey, *supra* note 17, at 91-96 (discussing the change in the modern family, and the reasons behind the current decline of the "traditional" nuclear family).

I wish the law is, that his eye may be opened by experience—by experience.²¹

American society has moved away from maintaining a delicate balance between individual rights and familial rights to a more "individualistic" approach in defining protected rights.²² This concept lies at the heart of an unwed father's responsibility—he is only the financial provider for the child. His child's mother has the power to make decisions while he has the results of her choices thrust upon him.²³ With visitation rights, custody, and child support, an unwed father has no say, reproductively or economically, about the direction the mother's actions will take him.²⁴

A. *An Overview of the Federal Government's Role in Welfare*

Originally designed to assist widowed mothers, the Aid to Families with Dependant Children program (hereinafter AFDC)²⁵ transformed itself, over the years, into a vehicle to support unwed mothers with illegitimate children.²⁶ With this trend in mind, Congress has recognized a continuing need to support children living in poverty.²⁷

21. CHARLES DICKENS, *THE ADVENTURES OF OLIVER TWIST* 399 (Oxford University Press 1966) (1837).

22. See *supra* note 19 and accompanying text; see also *Roe v. Wade*, 410 U.S. 113 (1973) (defining a woman's liberty interest in relation to the state's interest, and not in relation to her family).

23. See Totz, *supra* note 9, at 148 ("Generally, once a pregnant woman makes a decision regarding a fetus, the father is completely bound by the consequences of her decision. This is true despite the fact that the male progenitor was given no input into the procreative decision . . .").

24. See *id.* at 143 ("[S]hould 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.").

25. While it is important to note that the Personal Responsibility and Work Opportunity Act of 1996, 42 U.S.C. § 1305, re-titled the "Aid for Families with Dependant Children" (AFDC) program to "Temporary Assistance for Needy Families" (TANF), this Note will discuss welfare issues by referring to AFDC, as it was in response to the AFDC mandates that caused Virginia to act initially. Additionally, in spite of the linguistic change at the federal level, Virginia has continued to refer to its welfare program as AFDC.

26. See Levesque, *Targeting "Deadbeat" Dads*, *supra* note 12, at 6 (discussing the original use of the "unworthy person standard" with early welfare recipients by characterizing the mother's moral character as a measurement of her "worthiness" to receive publicly assisted funds. Some women who were considered "morally unworthy" were not able to receive funding); see also WINIFRED BELL, *AID TO DEPENDENT CHILDREN* 174-98 (1965) (discussing the usual starting point for the early focus on "suitable home" policies).

27. See Levesque, *Targeting "Deadbeat" Dads*, *supra* note 12, at 9 (noting that the history of AFDC, current amendments, and proposals reveal that the focus and use of the worthy person standard has materially shifted from the unwed mother and her illegitimate children

In the late 1960s, three events significantly changed the welfare system. First, the Supreme Court rejected the "worthy person" standard in favor of a "more sophisticated and enlightened [standard],"²⁸ namely that of maintaining the family unit. Second, the Supreme Court began to enforce welfare eligibility provisions through the same concepts as the civil rights movement.²⁹ Third, Congress extended the eligibility for AFDC support to mothers of the beneficiaries.³⁰

These changes in the welfare law ballooned the cost of AFDC, as the number of benefit recipients increased dramatically.³¹ In response to this progression, remedial changes in the 1970s largely reversed the welfare rights movement and brought about the reemergence of the "worthy person standard."³² Congress, however, took a new approach to the standard by targeting fathers for child support.³³ Despite Congress' efforts, the Department of Health and Human Services did not adequately regulate or monitor the states' implementations of the federal child support program. Only after welfare rolls became overburdened did Congress finally address this issue.³⁴

to the unwed father and his illegitimate family); see also JENNY TEICHMAN, *ILLEGITIMACY* 1 (1982) (noting that the Oxford English Dictionary defines "illegitimacy" as "not correctly deduced or inferred."); Andrew Bush, *Fathers and Welfare Reform*, *THE PUBLIC INTEREST*, Sept. 22, 1997, at A1 (emphasizing that today an increasing number of children are born illegitimate, with either no "father" to speak of or to mothers who are not wed to their biological fathers).

28. *King v. Smith*, 392 U.S. 309, 325 (1968) (determining that the "paramount goal" of AFDC is to maintain and strengthen the family).

29. See David Rosenbloom, *The Great Society and the Growth of "Juridical Federalism"—Protecting Civil Rights and Welfare*, in *THE GREAT SOCIETY AND ITS LEGACY* 208 (Marshall Kaplan & Peggy L. Cuciti eds., 1986) (presenting an overview of the increased use of the federal judiciary to protect welfare rights).

30. See 42 U.S.C. §§ 601, 606(b) (1988).

31. As a result of the changes, only about 3.5% of those children receiving AFDC aid had a deceased father. Approximately 76% of all single-parent families were the result of divorce or extended separation. In addition, illegitimacy accounted for about 20% of single-parent families. See Brian L. Calistri, Note, *Child Support and Welfare Reform: The Child Support Enforcement Provisions of the Family Support Act of 1988*, 16 J. LEGIS. 191, 192-93 (1990).

32. See S. REP. 1356, reprinted in 1974 U.S.C.C.A.N. 8146-48 (explaining the reemergence of the worthy person ideology).

33. See Levesque, *Targeting "Deadbeat" Dads*, *supra* note 12, at 12.

The 1974 Congressional amendment, Title IV-D, essentially established the federal government as an overseer, standard-bearer, and benefactor of child support enforcement. By 1975, the essential features of the current welfare child support system—compulsory participation and the assignment of rights to the state—were added to the Social Security Act.

Id. (citations omitted).

34. See *id.*

A decade later, after realizing that a general standard alone was insufficient, Congress implemented measures requiring states to hone their laws and to strengthen enforcement powers for their child support programs.³⁵ In 1996, as part of the Republican Congress' "Contract with America," Congress passed several controversial reforms to the existing welfare regulations, including: (1) implementing wage withholding; (2) changing the states' uses of child support guidelines; and (3) implementing measures requiring the establishment of paternity.³⁶ Through these reforms in the federal welfare program, some scholars argue that the federal government attempted to reconstruct "traditional family values."³⁷

In June of 1996, an Executive Order issued by President Clinton set forth the mandate that mothers seeking public assistance must identify the fathers of their children.³⁸ "His order defined cooperation as giving the name, address, Social Security number, place of employment and names of relatives."³⁹ The definition of "cooperation," however, remained for the most part, in the states' discretion.⁴⁰ In more specific state regulations, the definition of cooperation has delved into providing the actual whereabouts of the putative father, rather than simply requiring the "name" of the individual.⁴¹ The "step-up" in this legislation has given the states greater power to deny welfare benefits to "uncooperative" mothers while also giving the welfare agencies more tools by

35. See Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988) (codified in scattered sections of 42 U.S.C.) (making use of staggered implementation of child support enforcement); see also STAFF OF HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., 1ST SESS., GENERAL EXPLANATION OF THE FAMILY SUPPORT ACT OF 1988 (Comm. Print 1989); *Child Support Enforcement Act of 1992: Hearing on S. 2343 Before Subcomm. of Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources*, 102d Cong., 2d Sess. 67-69 (1992) (testimony and prepared statement of Irwin Garfinkel) (finding that child support enforcement continues to fail because agencies are underfunded and understaffed, caseloads are unmanageably high, child support workers lack training, and parents are unable to be located and pursued).

36. See *supra* note 35 (explaining the reasoning behind the passage of the numerous welfare reforms).

37. See Elaine Sorenson & Robert Lerman, *Welfare Reform and Low-Income Noncustodial Fathers*, CHALLENGE, July/Aug. 1998, at 101, 103-04.

38. Federal regulations historically defined cooperation in establishing paternity to include providing information reasonably obtainable by the recipient and under penalty of perjury. See 45 C.F.R. § 232.12(b) (removed Dec. 5, 1997). The Court of Appeals for the Ninth Circuit stated: "[t]o give meaning to the inclusion of the attestation in definition of cooperation, an attestation of lack of information should create a presumption of cooperation that may be overcome by showing that the attestation was false, or that the applicant failed to cooperate in [another] respect under 45 C.F.R. § 232.12(b)." *Tomas v. Rubin*, 926 F.2d 906, 910 (9th Cir. 1991).

39. Taylor, *supra* note 11, at A1.

40. See Levesque, *Unwed Dads*, *supra* note 13, at 13.

41. See, e.g., VA. ADMIN. CODE § 22 VAC 40-35-30 (1998).

which to locate the putative fathers.⁴² Through their legislative action, "Congress nevertheless concluded that financial responsibility for welfare children could be transferred from the government to the children's fathers."⁴³

B. *Analysis of the Trends in Welfare Reform on a Federal Level*

The new focus on supporting the child out of the father's pocket, rather than the mother's, is quickly becoming the easiest way for states to regulate welfare disbursement.⁴⁴ For example, stringent requirements for paternal identification demonstrate the power that mothers have in determining the financial fate of their child's father.⁴⁵ Once the mother has "cooperated in identifying the father," the burden then shifts to the father to disprove his paternity.⁴⁶

With an increasing number of children born out-of-wedlock each year,⁴⁷ and with the growing cultural acceptance of single-parent families,⁴⁸ the idea of a mother, a father and 2.5 children no longer fits the "traditional" nuclear family mold.⁴⁹ As a result of the

42. *See id.* (explaining that the state will revoke some, if not all, of the portion of the mother's welfare benefits if the mother is unable to "cooperate" within six months of receiving the aid).

43. Levesque, *Targeting "Deadbeat" Dads*, *supra* note 12, at 31.

44. *See id.*

45. Women have the power to identify, or not to identify, the fathers of their children, if they know their identity. In Virginia, for instance, the state will revoke some, if not all, of their welfare subsidy if the mother does not cooperate in naming the father. *See generally* VIRGINIA DEPT OF SOCIAL SERV., AFDC MANUAL § 201.10 (requiring that after the father is preliminarily identified through information given by the mother, the putative father must then refute the accusation of his paternity, normally by submitting to a blood test).

46. *Id.*

47. *See* Ken Bryson, *Household and Family Characteristics: March 1997*, in CURRENT POPULATION REPORTS § P20-520, at 1 (April 1998). While the 1990s have been relatively stable with respect to family status, the rapid decline of the traditional American family dipped most sharply between 1970 and 1990 (from 40% to 26%). By contrast, however, the percentage of family groups with a never-married mother has increased sharply from 33% in 1990 to 41% in 1997. *See id.*

48. *See* Ken Bryson, *Household and Family Characteristics: March 1995*, in CURRENT POPULATION REPORTS § P20-488, at 1 (Oct. 1996). In 1970, 5 to 6 million families were maintained by women with no husbands present, as compared to the 12.2 million families in 1995. *See id.*

49. An increasing number of children do not live in the traditional nuclear family, consisting of a mother, a father, and children under the age of eighteen. In 1995, only 25% of households were composed of married couples with children under the age of eighteen, as compared to 40% in 1970. *See id.* Since 1970, the number of female-householder families has increased by 122% (from 5.5 million to 12.8 million). The number of male-householder families grew by 213% (from 1.2 million to 3.8 million). *See* Ken Bryson, *Household and Family Characteristics: March 1997*, in CURRENT POPULATION REPORTS § P20-509, at 3 (April 1998); *see also* Ken Bryson, *Household and Family Characteristics: March 1995*, in CURRENT

growing acceptance of these "non-traditional" families, the children are often born into poverty and require the assistance of federal funds to support both their mothers and themselves.⁵⁰ The change in the "typical" family begs the inquiry of where are the fathers? Indeed, does the mother even know who the father of her child is? Because women bear and deliver children, identifying the mother is easy. Yet, even when a good indication of who fathered the child exists, proving paternity is more elusive.⁵¹

While the movement away from the traditional nuclear family may expand women's rights, the trend simultaneously severs men's rights.⁵² As this trend continues, the danger of "forgetting" unwed fathers may lead to laws that create further undue burdens on these fathers.⁵³

POPULATION REPORTS § P20-488, at 3 (Oct. 1996) (stating that 12.2 million households were maintained by women with no husbands present (29% of *all* households)) (emphasis added).

50. "Over the past several decades, the composition of households has changed significantly due to changes in the age structure of the population and the changes in social values." Ken Bryson, *Household and Family Characteristics: March 1995*, in CURRENT POPULATION REPORTS § P20-488, at 1 (Oct. 1996).

51. See *A v. X, Y v. Z*, 641 P.2d 1222, 1225 (Wyo. 1982) (denying a putative father adjudication of paternity of a child born out of wedlock while the mother was married to another man); see also *Lalli v. Lalli*, 439 U.S. 259, 268-69 (1978) ("That the child is the child of a particular woman is rarely difficult to prove. Proof of paternity, by contrast, frequently is difficult when the father is not part of a formal family unit.").

52. Society's movement away from the "traditional family" brings a financial burden to unwed fathers, yet supports the women it once shunned. See, e.g., *McCullough v. McCullough*, 760 F. Supp. 613 (1991) (noting that the court denied visitation for the father, but required child support payments because of his abusive background, thereby severing his rights, but maintaining the father's monetary contribution). See also Levesque, *Targeting "Deadbeat" Dads*, *supra* note 12, at 27 ("Two important trends have radically transformed the American family: (1) the dramatic increase in the proportion of children living with only one parent; and (2) the increasing difficulty of supporting a family with children on just one income. Social policy has not kept up with these trends.").

53. Cf. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2819 (1992). The Court stated that "[o]nly where state regulation imposes an undue burden on a woman's ability to make this [personal] decision does the power of the State reach into the heart of the protected liberty." *Id.* However,

[a] husband has no enforceable right to require a wife to advise him before she exercises her personal choices . . . [w]omen do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where the power is employed for the supposed benefit of a member of the individual's [family].

Id. at 2831.

C. *Virginia's Responses to the Welfare Reform*

As early as 1976, Virginia enacted requirements for a proposed welfare program.⁵⁴ According to Virginia law, eligibility for the AFDC program requires: (1) furnishing of a Social Security number for the recipient; (2) assigning the child's right to income to the state; and (3) cooperating in identifying and locating parents and/or monies to assist with the state's contribution to that applicant's/recipient's aid.⁵⁵ These primary requirements, however, were insufficient to relieve the state of its heavy burden of funding for the impoverished.⁵⁶

In 1994, the Virginia Assembly amended the welfare law by adding a "good cause" exception for women who were unsure of the identity of their children's fathers.⁵⁷ In the Welfare Reform Act of 1995, Virginia also attempted to redefine the role that a father should play in his child's life.⁵⁸ At that time, President Clinton

54. See 1976 Va. Acts ch. 215 § 63.1-105.1 (describing requirements for receiving aid). To be eligible for payment for aid to dependant children, an applicant or recipient shall:

1. Furnish, apply for or have an application made in his behalf for, a Social Security account number to be used in the administration of the program;
2. Assign the State any rights to support from any other person such applicant may have in his own behalf of any other family member for whom such applicant is applying for or receiving aid and which have accrued at the time such assignment is executed;
3. Cooperate in (i) identifying and locating the parent with respect to whom aid is claimed, (ii) establishing paternity of a child born out of wedlock with respect to whom aid is claimed, (iii) obtaining support payments for such applicant or recipient and for a child with respect to whom aid is claimed and (iv) obtaining any other payments or property due such applicant or recipient of such child.

Id.

55. See *id.*

56. See *Floor Debate on HB 1030 Before the Virginia House of Delegates*, 1994 Reg. Sess. (Feb. 10, 1994) [hereinafter *1994 Floor Debate*] (statement of Gentleman Fisher) (Jay Sears News Service 1994) (on file with the Virginia House of Delegates) (explaining that the 1994 bill "tightens up . . . provisions in an attempt to find the parents of children who are being claimed [under AFDC].").

57. See *id.*; see also 1994 Va. Acts ch. 934. The new third section reads:

Identify the parents of the child for whom aid is claimed, subject to the "good cause" provisions or exceptions in federal law or regulations. However, this requirement shall not apply if the applicant or recipient submits a statement under penalty of perjury that the identity of the parent is not reasonably ascertainable and the local department of social services is aware of no other evidence which would refute such statement

Id.; The Assembly also removed the requirement that the applicant cooperate in identifying the other parent. Now the Code only requires cooperation in locating the parent. See *id.*

58. See 1995 Va. Acts ch. 450. The Assembly amended the Virginia Code and struck the language requiring that the "applicant or recipient submit[] a statement under penalty of perjury that the identity of the parent is not reasonably ascertainable and the local

granted Virginia a waiver from the federal welfare regulations, giving the state the option to sanction women who would not, or could not, cooperate as the state dictated.⁵⁹ The new law redefined the primary eligibility requirements for AFDC, requiring not just a simple identification of the potential father, but also "cooperation in locating him."⁶⁰ At the time, Virginia was one of only thirteen states to enact this mandatory and strict compliance to the federal suggestions.⁶¹

The most recent changes to the AFDC program in Virginia came in 1996, when amendments to the Virginia Code, § 63.1-105.1, made obtaining aid even more difficult.⁶² The law indicates that in order

[t]o be eligible for payments for aid to families with dependant children, an applicant or recipient shall:

....

3. Identify the parents of the child for whom aid is claimed, subject to the "good cause" provisions or exceptions in federal

department of social services is aware of no other evidence which would refute such statement" *Id.* In its place the Assembly added the following language:

If paternity is not established after six months of receipt of AFDC, the local department may suspend the entire grant or the adult portion of the grant, subject to regulations promulgated by the State Board, in cases where the local department determines that the recipient is not cooperating in the establishment of paternity.

Id.; see also *Floor Debate on HB 2001 Before the Virginia House of Delegates*, 1995 Reg. Sess. (Feb. 7, 1995) [hereinafter *1995 Floor Debate*] (statement of Gentleman Brickley) (Jay Sears News Service 1995) (on file with the Virginia House of Delegates) (explaining that the 1994 welfare reform bill was among the toughest in the Nation); *Id.* (statement of Gentleman Bennett) (Jay Sears News Service 1995) (on file with the Virginia House of Delegates) (explaining that the principles adopted in the 1994 bill included the belief "that a stable, two-parent family is the best defense against poverty and that parents have a moral and legal obligation to be responsible adults and to support their children.").

59. See Taylor, *supra* note 11, at A1; see generally *1995 Floor Debate*, *supra* note 58 (statement of Gentleman Brickley) (Jay Sears News Service 1995) (on file with the Virginia House of Delegates) (explaining the necessity and history of the Presidential waiver with respect to evolving welfare reform programs in state legislation).

60. Taylor, *supra* note 11, at A1; see also *1995 Floor Debate*, *supra* note 58 (statement of Gentleman McDonnell) (Jay Sears News Service 1995) (on file with the Virginia House of Delegates) (arguing that the addition of the requirement to cooperate in locating the parents of AFDC recipients had as its primary goals for effective welfare reform: (1) accountability and self-reliance of participants; (2) provision of services necessary to make the transition from welfare to work; and (3) an assurance of savings for the Virginia taxpayers).

61. See Taylor, *supra* note 11, at A1.

62. See VA. ADMIN. CODE § 22 VAC 40-35-30(C) (1998) (dictating "if, after six months of receipt of AFDC, paternity has not been established and the local [D]epartment [of Social Services] determines that the caretaker-relative is not cooperating in establishing paternity, the local department *shall* terminate the entire grant for a minimum of one month and until cooperation has been achieved.") (emphasis added).

law or regulations. However, this requirement shall not apply if the child is in a foster care placement or if the local department determines, based upon the sworn statement of the applicant or recipient or of another person with knowledge of the circumstances, that the child was conceived as the result of incest or rape; and

4. Cooperate in (i) locating the parent of the child with respect to whom aid is claimed, (ii) establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, (iii) obtaining support payments for such applicant or recipient and for a child with respect to whom aid is claimed, and (iv) obtaining any other payments or property due such applicant or recipient of such child.

Any applicant or recipient who intentionally misidentifies another person as a parent shall be guilty of perjury and, upon conviction therefor, shall be punished⁶³

Because 1996 was the last year Virginia reevaluated its welfare reform program, it is important to look to the program's enforcement, as well as its effects and intended effects on the recipients, to see the "reality" of the changes in the system.

D. Enforcement by Virginia's Department of Social Services

The Virginia Department of Social Services, in order to enforce the welfare reform program, has implemented standards that disallow the claim, "I don't know who the father is."⁶⁴ The change from a "good cause" requirement to the more strict standard of "cooperating under penalty of perjury" has created the increased

63. VA. CODE ANN. § 63.1-105.1 (Michie 1998); see also *Floor Debate on HB 1069 Before the Virginia House of Delegates*, 1996 Reg. Sess. (Feb. 8, 1996) (statement of Gentlewoman Cunningham) (Jay Sears News Service 1996) (on file with the Virginia House of Delegates) (explaining that the bill was to make it clear that cases of incest or rape would be 'good cause' exceptions to the paternal identification cooperation requirement).

64. See VIRGINIA DEP'T OF SOC. SERV., AFDC MANUAL § 201.10 (1998):

COOPERATION IN OBTAINING SUPPORT:

As a condition of eligibility, each applicant/recipient of AFDC must cooperate with the Division of Child Support Enforcement (DCSE) or local department of social services, *** unless good cause for refusing to do so is determined to exist, **** in:

- identifying the parent for whom aid is claimed;
- establishing paternity of a child born out-of-wedlock for whom aid is claimed;
- obtaining support payments for the applicant of recipient and for a child for whom aid is claimed; and
- obtaining any other payments or property due the applicant or recipient or the child.

potential for penalties, as these penalties now can extend to the whole family, rather than just to the mother who violates the cooperation standard.⁶⁵

Under regulations from the Virginia Department of Social Services,

in order to be found eligible to receive AFDC, a child must meet certain financial and categorical eligibility requirements. One such categorical requirement is that the child must be deprived of parental care and support by reason of death, continued absence from the home, or physical or mental incapacity of a parent.⁶⁶

In the AFDC Manual, the requirements for cooperation are strict and inflexible, requiring that even if a mother does not know the identity of the father of her child[ren], she must fill out a form titled "List of Putative Fathers."⁶⁷ The custodial parent must provide at least three of the following pieces of information about the noncustodial parent: (1) social security number; (2) race; (3) date of birth; (4) place of birth; (5) telephone number; (6) address; (7) schools attended; (8) occupation; (9) employer; (10) driver's license number; (11) make and model of motor vehicle; (12) motor vehicle license plate number; (13) places of social contact; (14) banking institutions utilized; (15) names, addresses, or telephone numbers of parents, friends or relatives; or (16) other information that the agency determines is likely to lead to the establishment of paternity.⁶⁸

Under these heightened standards, the Department of Social Services, in accordance with Virginia's legislation, created a "barrier," such that unwed fathers could not avoid economic responsibility for illegitimate children who were being supported by state aid. While no gender distinction in the Virginia laws exists, the focus on the noncustodial parent creates an undue burden on unwed fathers who may not even be aware that they are partially

65. See Taylor, *supra* note 11, at A1 (explaining that a mother who violates the standard will lose all of her aid, rather than just the aid for the child about whom she failed to supply information).

66. VA. ADMIN. CODE § 22 VAC 40-530-20(B) (defining "continued absence" in part as being unestablished paternity).

67. See VIRGINIA DEPT OF SOC. SERV., AFDC MANUAL § 201.10(A)(1)(a)(2). The manual explains that if the mother lists two putative fathers, she is cooperating. If neither man turns out to be the father, the mother is viewed as not cooperating, until paternity is established.

68. See *id.* § 201.10(A)(1)(b).

responsible for the life of the child.⁶⁹ Regardless of whether a biological father wants to be a father, he is, by Virginia's standards, unquestionably responsible for the child's economic well being. It is clear that both the Virginia Legislature and the enforcement division have identified a financial void and are seeking to fill it through the unwed father's wallet.⁷⁰

III. ALL OF THE BURDEN AND NONE OF THE BENEFIT

Unwed, unnotified fathers have been deprived of the ability to offer input in determining the future of their children but are nonetheless expected to provide the primary financial support for their children.⁷¹ "[T]oday, the law places an absolute economic burden on the man, and then, figuratively speaking, slices [his] reproductive capacity by affording him unequal protection in deciding whether to bear or beget a child."⁷²

From abortion to adoption, and even in the area of presumption of paternity laws, unwed fathers have very little say regarding the lives of their children.⁷³ Because in most instances both the burden and benefit of making reproductive decisions fall on the mother, unwed fathers are generally given little or no say in any of these decisions. For a father who wishes to raise his child, it is hardly fair that the child's mother may choose, at times unilaterally, to abort the child or to give the child up for adoption. Conversely, a man who does not want to be a father is forced into fatherhood in order to satisfy the mother's wish to keep the baby.⁷⁴

A. *Fathers' Rights and Abortion*

Roe v. Wade⁷⁵ clearly established that an "adult woman has an untrammelled constitutional right to choose an abortion in the first

69. See Levesque, *Targeting "Deadbeat" Dads*, *supra* note 12, at 36 (explaining that men are typically the noncustodial parent).

70. See *supra* note 60 (explaining the legislative intent behind relieving taxpayers of the burden of paying for AFDC recipient children). But see Levesque, *Targeting "Deadbeat" Dads*, *supra* note 12, at 21 (noting that the fathers are not generally the best way to obtain financial support for their children).

71. See *supra* note 60.

72. Totz, *supra* note 9, at 145.

73. See *infra* notes 78, 81, 101-03, 110 and accompanying text (explaining how in the areas of abortion, adoption and the presumption of paternity, unwed fathers, and sometimes even wedded fathers, have, at times, had no choice in the future of their children once the mothers made a decision).

74. See Levesque, *Targeting "Deadbeat" Dads*, *supra* note 12, at 41-43.

75. 410 U.S. 113 (1973).

trimester. . . . The Court has never upheld a potential father's arguable right to stop an abortion."⁷⁶ With courts placing the abortion right unilaterally in a woman's hands, a man's reproductive rights are essentially destroyed.⁷⁷ If a man, married or not, desires to raise a child whom the mother wishes to abort, he is unlikely to be able to legally compel her to bear the child.⁷⁸ Because the Supreme Court established that the right to abort an unborn child unilaterally belongs to the woman,⁷⁹ a man has no say in the choices made by the mother of his child.

This unilateral power that women possess destroys any reproductive right of her child's father. In *Planned Parenthood v. Casey*,⁸⁰ while the Supreme Court upheld several restrictions on abortion, it held that the mother does not have to tell her husband she plans to have an abortion.⁸¹ *Casey* reiterated the fact that a woman's abortion rights are unilateral and protected by her privacy interests, consequently failing to consider the effects that such unilateral decisions have on potential fathers. In contrast, however, if a woman decides not to have an abortion, her male counterpart has no right to compel her to undergo the procedure. Yet, he is financially obligated to support both mother and child.⁸²

B. Fathers' Rights and Adoption

While a man has no say in a woman's decision to abort a child, his rights expand if the woman chooses to give birth. When a woman has decided to bear her child, but plans to give that child up for adoption, the courts have responded with more supportive views

76. Andrea M. Sharrin, *Potential Fathers and Abortion: A Woman's Womb Is Not a Man's Castle*, 55 BROOK. L. REV. 1359, 1359-62 (1990).

77. See Totz, *supra* note 9, at 144-45.

78. See generally *Doe v. Doe*, 314 N.E.2d 128 (Mass. 1974) (holding that an estranged husband has no statutory or constitutional right to decide whether a fetus should be aborted); *Rothenberger v. Doe*, 374 A.2d 57 (N.J. 1977) (refusing to grant a husband's petition to enjoin his wife from having an abortion); *Reynolds v. Reynolds*, 788 P.2d. 1044 (Utah 1990) (granting a husband a restraining order to stop his wife from having an abortion, which was later dissolved by a higher Utah court); *Coleman v. Coleman*, 471 A.2d 1115, 1119 (Md. 1984) (holding that a husband is "constitutionally prohibited from enjoining the abortion of the wife.").

79. See generally *Roe v. Wade*, 410 U.S. 113 (1973).

80. 505 U.S. 833 (1992).

81. See *id.* at 853 (finding that for women who would not tell their husbands voluntarily about an abortion, forcing them to tell their husbands would be an undue burden on their liberty interests, which they did not resign upon marriage).

82. See generally *State Dep't of Human Serv. v. T.D.G.*, 861 P.2d 996 (Okla. 1992) (explaining that a mother cannot contract away her child's right to child support).

of a putative father's rights.⁸³ Prior to 1972, putative fathers had few or no rights concerning the adoption of their children.⁸⁴ In *Stanley v. Illinois*,⁸⁵ the Supreme Court first recognized the existence of a putative father's right to custody, even when he was not married to the mother.⁸⁶ In *Stanley*, the putative father lived with the mother for eighteen years and maintained essentially the same relationship with his children as if he had married their mother.⁸⁷ Before granting the father paternal rights, however, the Court first determined the father's fitness as a parent.⁸⁸ To determine whether the father should have some legal rights to the custody of his children, the Court examined factors such as his relationship with the children and his relationship with their mother.⁸⁹

In *Quilloin v. Walcott*,⁹⁰ the relationship between the child's mother and father was not established because they were not cohabiting. In this case, the Supreme Court refused to extend constitutional protection to the putative father strictly based on biological parentage.⁹¹ The *Quilloin* decision limited *Stanley* to apply only where a "familial relationship" existed.⁹²

One year later, in *Caban v. Mohammed*,⁹³ the Court relied on *Quilloin* to uphold the natural father's parental rights. Although never legally married, Caban and Mohammed lived together for five

83. A putative father is defined as "[t]he alleged or reputed father of a child born out of wedlock." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990). See generally *infra* notes 84-103 and accompanying text (explaining that the courts have been more supportive of men who want to take responsibility for children after the mothers have given birth).

84. See JOAN H. HOLLINGER ET AL., ADOPTION LAW AND PRACTICE 1-1, § 2.02, 2-13 (1994). [F]or a child born out of wedlock, the consent of the biological mother, if living is always necessary. But the consent of the biological father, if living, is typically not required unless he has formally legitimated the child or otherwise acknowledged his paternity [Further, unwed fathers are not] presumptively entitled to the legal right to consent to their child's adoption.

Id.

85. 405 U.S. 645 (1972).

86. See *id.* at 645.

87. See *id.*

88. See *id.*

89. See *id.*

90. 434 U.S. 246 (1978).

91. See *id.* at 246.

92. *Id.* at 248-49. The natural father, Quilloin, never married or established a home with the mother, Walcott. See *id.* at 247. The child was in Walcott's custody and control for the child's entire life. See *id.* After marrying and living as a family unit for nine years, Walcott consented to the adoption of her child by her new husband. See *id.* Thus, no familial relationship existed between Quilloin and Walcott.

93. 441 U.S. 380 (1979).

years, during which time they had their two children.⁹⁴ Mohammed then left Caban and married another man.⁹⁵ After two years of marriage, Mohammed instituted adoption proceedings so that her husband could adopt her children, seeking to cut off all of Caban's rights and obligations as a father.⁹⁶ The decision in *Caban* was consistent with *Quilloin* in that the focus continued to be on the existence of the nuclear family. In *Caban*, the Court distinguished between the natural father's simple biological and social relationship with his children and the existence of a nuclear family with the second husband.⁹⁷

In *Lehr v. Robertson* the Supreme Court reaffirmed the decision in *Quilloin*.⁹⁸ In *Lehr*, the mother deliberately kept her child away from the father.⁹⁹ Because no actual parental relationship existed between the father and the child, the Court found that the father had no right to custody.¹⁰⁰

Although the Supreme Court has attempted to remedy problems associated with putative fathers' rights, the Court has failed to enunciate a clear test when there is no established relationship between the father and his child.¹⁰¹ When an actual relationship is established, however, courts have generally favored giving rights to the father, but only after the mother has renounced hers.¹⁰² "States are now left with having to discern how to apply the broad-based holdings from *Stanley* to *Lehr* where the father has not

94. See *id.* at 382.

95. See *id.*

96. See *id.* at 383-84.

97. See Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 U.C.L.A. L. REV. 637, 657 (1993).

98. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (stating that "[t]he difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant.").

99. See *id.* at 268-69. Justice White noted in the dissent that the mother did not respond to contact from the father and moved many times, thus making it difficult for the father to keep in contact with his child. See *id.*

100. See *id.* at 248.

101. See Susan Swingle, Comment, *Rights of Unwed Fathers and the Best Interests of the Child: Can These Competing Interests Be Harmonized? Illinois' Putative Father Registry Provides an Answer*, 26 LOY. U. CHI. L.J. 703, 720 (1995).

[A]bsent a putative father registry, an unwed father must actively participate in the support and rearing of his child in order to maintain any parental rights in an adoption proceeding involving his child. Once he has created this relationship, these cases indicate that he has established a liberty interest in his relationship with his child.

Id.

102. See *id.* See generally *Stanley v. Illinois*, 405 U.S. 645 (1972) (explaining the secondary nature of the unwed father's rights); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (same); *Caban v. Mohammed*, 441 U.S. 380 (1979) (same); *Lehr v. Robertson*, 463 U.S. 248 (1983) (same).

established a relationship with his child."¹⁰³ Subsequently, a father who has not, or can not, pursue a relationship with the child the mother wants to give up for adoption loses all rights of custody of that child. If the mother, however, decides to keep the child and she needs support, the father is expected to be economically responsible for the child.

C. *Fathers' Rights and the Irrebutable Presumption of Paternity*

Until recently, the common law presumption that a father of a child is naturally the husband of the child's mother was the established "law of the land."¹⁰⁴ In *Stanley*, the Supreme Court established a balancing test for cases where the father of the child was not the husband of the mother.¹⁰⁵ This test requires courts to weigh the biological father's interests against the state's interests in strengthening the family and securing the welfare of the child.¹⁰⁶ Through this "balancing test," courts may deny the natural father any legal rights over his offspring if the state's interests are greater.¹⁰⁷

The most recent consideration by the Supreme Court of unwed fathers' reproductive rights occurred in 1989, in the context of California's law on the presumption of paternity.¹⁰⁸ In *Michael H.*, the Supreme Court's decision rested on factors such as history and tradition, rather than on factors such as biological parenthood and an established parental relationship.¹⁰⁹ Thus, the Court preserved the "sanctity" of the marital family at the expense of the rights of

103. Janet Ann Briseno, Note, *Idaho's Putative Father Registry Statue: Is There Really an Opportunity Interest for Putative Fathers?*, 33 IDAHO L. REV. 415, 430 (1997); cf. Swingle, *supra* note 101, at 724 ("In general, the Court has been content to allow the states to progress individually in deciding what laws provide the most reasonable distribution of individual rights in adoptions," thus leaving the potential for great uncertainty).

104. See Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 253 (1995) ("At common law, . . . [a] man obtained parental rights only through marriage. . . . Recent Supreme Court cases involving parental rights of unwed fathers suggest that legal paternity continues to depend more on the father's relationship with his children's mother than on a genetic tie with the children."); see also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding the presumption that the man married to a child's mother is the child's father).

105. See *Stanley v. Illinois*, 405 U.S. 645, 650-51 (1972).

106. See *id.*

107. See *id.*

108. See *Michael H.*, 491 U.S. at 110.

109. See *id.* at 123-24 ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.") (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion)).

the natural father of an "adulterously conceived" child.¹¹⁰ *Michael H.* "exemplif[ies] the Court's inability to craft a clear and succinct analysis of the boundaries of an unwed father's liberty interest in his relationship with his child."¹¹¹ The plurality opinion in *Michael H.* also determined that the father's interest in his child was ultimately a matter of state law, not constitutional law, thereby allowing room for great differences among opinions.¹¹²

Even with the precedent set by *Michael H.*, many states have concluded that if blood tests determine that one person is not the father, then he should be excluded from involvement as a "father."¹¹³ This progression may be the only "right step" state courts are taking. If the "father" of the child (by the presumptive paternity statutes) is found not to be the biological father of the child, then he would no longer be considered a potential father, able to pay child support.¹¹⁴ However, despite the fact that states are finally recognizing that the presumptive paternity laws may be rather outdated, stringent measures requiring proof that a man is the father, via blood tests, together with the finding of an expert,¹¹⁵ demonstrate the residual effects of the outdated tradition.¹¹⁶

All of these factors epitomize the law's focus on the father as a source of financial responsibility for the children he creates, while ignoring his right to make procreative decisions. These laws and traditions, while empowering to the women who they aid, create a legal and financial obstacle that unwed fathers must unfairly endure.

110. See *id.* at 128-29 (explaining that the Court did not recognize the biological father as having any relationship or legal right to a relationship with the child). The father essentially was denied the right to be a father simply because he was not the husband of his child's mother.

111. Swingle, *supra* note 101, at 723.

112. See *Michael H.*, 491 U.S. at 129-30 ("It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.")

113. Many paternity statutes require a court to exclude a putative father if blood tests reveal he could not be the biological father. See, e.g., CAL. FAM. CODE § 7554 (West 1998); COLO. REV. STAT. § 13-25-126(e)(I) (1998); DEL. CODE ANN. tit. 13, § 810 (1998); FLA. STAT. ANN. § 19-7-40(c) (West 1998); IDAHO CODE § 7-1116(5) (1998); IND. CODE ANN. § 31-14-6-3 (West 1998).

114. See CAL. FAM. CODE § 7554 (West 1998); COLO. REV. STAT. § 13-25-126(e)(I) (1998); DEL. CODE ANN. tit. 13, § 810 (1998); FLA. STAT. ANN. § 19-7-40(c) (West 1998); IDAHO CODE § 7-1116(5) (1998); IND. CODE ANN. § 31-14-6-3 (West 1998).

115. See, e.g., IND. CODE ANN. § 31-14-6-3 (West 1998) (requiring a blood test and an expert finding to determine paternity).

116. By the plain meaning of some statutes, blood tests are not enough; state codes mandate the testimony of an expert as well. See, e.g., *id.*

D. All of the Economic Burden

While men have no choice in the decision to "bear" a child,¹¹⁷ they also have no say in choosing when *not* to "bear" a child. If a father decides he does not want to bring a child into the world, post-conception, he is unable to "opt out" or even to contract out of the responsibility for that child.¹¹⁸ Society decidedly has given reproductive protection to women and yet has placed reproductive blame on men.

In *State Department of Human Services v. T.D.G.*, a divorced couple decided that the mother would raise, and would be solely responsible for, the child with whom she was pregnant at the time of the couple's divorce.¹¹⁹ The Court of Appeals, however, invalidated the contract between the ex-husband and the ex-wife and held that a mother could not contract out of her child's right to financial support.¹²⁰ The father in that case, had no recourse to *not* be a father, at least in an economic sense.

Professor Totz argues that it takes two to make a child and that it should take two to make the decisions related to that child.¹²¹ In the establishment of unwed parents' rights, however, unwed fathers are expected to bear the financial burden of the child while the mothers are given the power to be the decision-makers because they are usually also the caretakers of the children.¹²²

117. See *Ponter v. Ponter*, 342 A.2d 574, 578 (N.J. Super. Ct. Ch. Div. 1975) ("[W]omen are individual persons with certain and absolute constitutional rights. Included within those rights is the right to procure an abortion or other operation without her husband's consent."); *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2829-31 (1992) (explaining that a husband's right to know about his wife's abortion would be an undue burden on the woman); *Coleman v. Coleman*, 471 A.2d 1115, 1120 (Md. App. 1984) (finding that a woman "is most definitely entitled, as a matter of right, to a medically induced abortion during the first trimester, notwithstanding the objections of the State or any other person, firm, corporation or association.").

118. See generally *State Dep't of Human Serv. v. T.D.G.*, 861 P.2d 990 (Okla. 1993) (holding that an unwed mother may not, through a settlement agreement, relieve a putative father of his obligation to support his minor child).

119. See *id.* at 991.

120. See *id.*

121. See Totz, *supra* note 9, at 150 ("Two persons who consensually engage in sexual relations may have more than one intention. They may intend to jointly create a child, or they may intend to merely engage in recreational sexual activities. The individuals may also have mixed intentions.") (citation omitted).

122. But see Levesque, *Targeting "Deadbeat" Dads*, *supra* note 12, at 25 ("Men are now being pictured as important, nurturing family members . . .").

The states' focus on recovering the money it has expended on child care¹²³ shifts the burden from the indigent mother to the fugitive father. This displacement, which creates problems that accompany the moral dilemma and breakdown of the family,¹²⁴ places an economic burden on fathers. Moreover, paternal identification laws, such as Virginia's, only overload them.

IV. THE UNWED FATHER'S RESPONSIBILITIES WITH REGARD TO AFDC

While unwed fathers are not afforded the same rights as unwed mothers in decisions regarding their children, they are expected nonetheless to fulfill their economic duties associated with the rearing of a child.¹²⁵ Reforms in welfare laws have required men to pay in order to help support the mothers of their children, if needed.¹²⁶ Regardless of whether this reform is part of a fair and just system, lost in the process still exists an unfairly targeted group: unwed fathers.

Virginia's newly reformed parental identification requirement (where women have to "cooperate" in locating the fathers of their illegitimate children¹²⁷ for receipt of public assistance funds) is exactly the type of legislation that is designed to target unwed fathers. While the legislative intent is laudable¹²⁸ and mirrors

123. See, e.g., *Welfare Recipients Feel States' Power; For Tough Paternity Identification Rules, the Rate of Mother's Compliance Is High*, RICHMOND-TIMES DISPATCH, Apr. 27, 1997, at B1 [hereinafter *Welfare Recipients*]. "It's critical to bring in every dollar the child deserves," said Scott Oostdyk, deputy secretary for the Department of Health and Human Resources. "It's fine to know the name of the father, but the . . . goal is to locate him and collect child support."). See also *supra* note 60.

124. See *supra* notes 47-50 and accompanying text. By categorizing men as the "breadwinners" and women as the caretakers, even though not intentionally, the "family" and the "best interests of the child" are no longer factors looked at with regard to law-making. Instead, there is an individualized tendency to displace the burden of who is going to take care of the child, physically, emotionally and financially.

125. See Totz, *supra* note 9, at 148 (explaining that it is presumed that when a man decides to "have sex with a woman," he decides that he will be responsible for any and all consequences associated with procreating); Peter D. Feaver et al., *Sex as Contract: Abortion and Expanded Choice*, 5 STAN. L. & POL'Y REV. 211, 218 (1992-93) (presuming that fathers have implicitly agreed to provide for the children they help to conceive).

126. See 42 U.S.C. § 606(b) (1988).

127. See VA. ADMIN. CODE § 22 VAC 40-35-30(C) (West 1998).

128. See *supra* note 60 and accompanying text (noting the legislative intent behind the establishment of welfare reform).

national trends in welfare reform,¹²⁹ it is not consistent with possible, essential constitutional protections for unwed fathers.¹³⁰

Arguing from the mother's perspective, feminists contend that because the state requires women to identify the father of their children in order to receive assistance, women will be discouraged from seeking this public assistance.¹³¹ The fear is also that women may merely feel encouraged to "guess" the father, if they are unsure of his actual identity, in order to receive their weekly check.¹³² Such guessing would therefore decrease women's integrity as they would be acting solely out of monetary concerns.

More troubling, however, are the cases where the mother never knew for certain who the father of her child was. If women are required to list in good faith the person they believe to be the father, then a heavy burden may shift to the unwed fathers, as it would be up to them to disprove their paternity. This phenomenon could pose a significant burden which would be decidedly difficult to surmount. The majority of fathers in these situations are poor and may not be able to withstand the loss of part of their salary.¹³³ This situation would intensify if the fathers were forced to battle the state government to prove their lack of paternity.¹³⁴

These negative repercussions unwed fathers encounter are not merely theoretical. One mother, facing the requirement that she identify the father of her child, first named her ex-husband, only to find blood tests proved otherwise.¹³⁵ Next, she identified another man, also shown through blood tests not to be the father.¹³⁶ Finally, she pointed to one other possibility, identifying the man only as

129. See 1995 *Floor Debate*, *supra* note 58 and accompanying text (explaining how Virginia is attempting to lead the nation in the new wave of welfare reform).

130. Cf. Erbe, *supra* note 3, at 29 (suggesting that perhaps through the Equal Protection Clause, by a heightened scrutiny classification for gender, men, who are forced into "fatherhood," are a "protected class" and hence, should be protected).

131. But see *Welfare Recipients*, *supra* note 123, at B1 ("[S]tate officials said 99.6% of welfare mothers have complied with Virginia's paternity identification rules, which are among the toughest in the nation.").

132. See, e.g., *infra* notes 135-41 and accompanying text.

133. See GENERAL ACCOUNTING OFFICE, INTERSTATE CHILD SUPPORT: MOTHERS RECEIVING LESS SUPPORT FROM OUT-OF-STATE FATHERS, GAO/HRD 92-39FS19 (1992) (finding that the majority of fathers who do not pay child support to custodial mothers who have court orders do not pay because they are unable to pay).

134. Even though the states generally pay for the paternity testing, the "cooperation" in Virginia seems to encourage guessing in order to keep receiving AFDC payments. Otherwise, women may be penalized by losing benefits. See *supra* note 62 and accompanying text (explaining the harsh penalties women face if they are unable to give the Department of Social Services required information).

135. See Taylor, *supra* note 11, at A1.

136. See *id.*

"Mark," a man with whom she had had a one-night stand.¹³⁷ Her benefits from AFDC were subsequently taken away due to her definitive lack of identification of the father.¹³⁸ In a similar scenario, another woman had her application for AFDC benefits turned down because, having been overly promiscuous, she was unable to identify any particular man with whom she had had intercourse with at the time of her daughter's conception.¹³⁹

The outcomes of this "identify or else" approach can, as exemplified here, place enormous undue burdens on innocent men. While one of these women was "guessing" and the other one was unable to be accurate, both were "punished" for being unable to identify the fathers of their children.¹⁴⁰ Under the new Virginia legislation, requiring more than a guess could lead women to identify those men about whom they know the most information, rather than those men who are in fact the fathers, thereby burdening innocent men.¹⁴¹

Critics argue that this type of legislation reverts back to the "worthy person" standard,¹⁴² found in the earliest welfare laws. State legislators argue that the burden of caring for "ill-conceived children" should not fall on them.¹⁴³ In "cracking down" on mothers who do not want to cooperate, however, states may actually encourage mothers to take any means necessary to receive aid.¹⁴⁴

Other critics argue that the establishment of paternity "remains a weak area in child-support enforcement: Despite 1995's record paternity numbers, the fathers of more than 2 million children on welfare still had not been identified."¹⁴⁵ Because

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.*

141. *See Cheryl Wetzstein, Welfare Reform Uncovers Deadbeat Dads; Women Have More Incentive to Help*, WASH. TIMES, Feb. 13, 1998, at A2 (explaining that the "tell-us-the-father-or-lose-your-benefits" welfare rule has been on the books for years, but many mothers learned to tell authorities enough to cooperate, yet not enough to find the fathers).

142. *See Levesque, Targeting "Deadbeat" Dads*, *supra* note 12, at 9 (defining the worthy person standard).

143. *See supra* note 60 (describing the intentions of the Virginia Legislature when establishing the new welfare laws).

144. *See Wetzstein, supra* note 141, at A2 (reiterating that faced with a cut in benefits, some women have admitted to "misspelling" a man's name in the past or have introduced new information about a man's address or job that they just "found out yesterday").

145. *Id.* "In 1995, a record 659,000 fathers were identified, according to the federal Office of Child Support Enforcement (OCSE). An estimated 243,000 additional fathers were identified in hospital programs." *Id.*

enforcing payment of child support burdens the public purse,¹⁴⁶ Virginia and other states are strongly motivated to encourage women to identify the fathers.¹⁴⁷

Two things are clear from the changes in the welfare laws in Virginia: (1) unwed mothers are now identifying the fathers of their children; and (2) the state is increasing its revenues while decreasing the amount of money it has to pay out in public assistance.¹⁴⁸ While these changes seem to be positive, the issues of inequity remain for unwed fathers who are now the "pocket books" for these welfare reforms.

V. CONCLUSION

With the new focus on unwed fathers as the "pocket books" to support AFDC programs, a dangerous trend may create a slippery slope which society will not be able to stop. The message sent to unwed mothers choosing to carry their children is to go ahead and have the baby, and if they can not pay for it, the state will help them obtain financial support from the fathers. While the number of teen pregnancies has decreased¹⁴⁹ and the laws currently require people to take responsibility for their actions, unwed fathers' rights remain on unequal footing.

When a woman chooses not to keep a baby, either by giving it up for adoption or by aborting it, the biological father has no say in that decision. Even in the few cases where the courts have found it to be a decision in which the father should have a role to play, mothers still have found ways of having abortions or going through with adoptions, without the father's input.¹⁵⁰

146. *Cf. id.* ("In 1995, the best year yet, there were 10.4 million welfare-related child-support cases, the OCSE said. But only 5.4 million—52%—had a court order to collect any money.").

147. The intent of the legislature is clear—the changes in welfare reform over the past five years have relieved the taxpayers. *See 1995 Floor Debate, supra* note 58.

148. *See supra* notes 145-47 and accompanying text (explaining that legislatures are motivated by an increase in access to the "public purse" and by the high identification of welfare illegitimate children).

149. *See Monthly Vital Statistics Report* (visited Feb. 8, 1999) <<http://www.cdc.gov/nchswww/releases/98facts/98sheets/tnbrth96.htm>>. Between 1991 and 1996, teen-age births fell in all states, the District of Columbia, and the Virgin Islands. Declines ranged from 6% to 29% and were statistically significant in all but three states. *See id.* Nationally, the birth rate for teenagers continued to decline in 1996, and has now fallen by 12% to 54.4 births per 1000 women aged fifteen through nineteen years, compared with 62.1 births in 1991. *See id.*

150. *See supra* notes 78, 102 (stressing that men have little to no reproductive rights in abortion and adoption situations).

One solution would be to require the father's identification at the beginning of the pregnancy in cases where mothers have not been victims of rape or incest. This phenomenon would reduce the "unknowns," even for a woman who has had several sexual partners.¹⁵¹ Requiring a woman to identify all of the possible fathers of her child, at the time she becomes pregnant, should afford the father an opportunity to decide whether he wants to be a part of the child's life. If he does not wish to be involved in the child's life, he should still be afforded the opportunity to be involved in decisions that will be made before the child's birth or abortion.¹⁵²

Requiring identification at the time of pregnancy is one way to achieve equal protection for both genders, with regard to procreative and economic rights. With this option, if a woman chooses to have her baby out-of-wedlock, she will also have to come to terms with whether the father of her baby wants to have a baby out-of-wedlock. If the father does not, the woman will remain the unilateral decision-maker, although she will not unilaterally be the responsible party. Indeed, according to current law, if a mother can no longer support her baby, the father of her child is ultimately responsible.

A second proposition to better address the plight of unwed fathers is to view sex as a contract.¹⁵³ If sex is viewed as a contract, then "[t]he burden is placed on the parties to make sure that their intent concerning their coital agreement is known."¹⁵⁴ Thus, the courts would no longer have to rely on constitutional or Congressional interpretations. "The courts could establish a requirement for a written covenant, analogous to a prenuptial agreement, or, more likely, accept oral contracts as binding."¹⁵⁵

151. See Richards, *supra* note 8, at 3 ("Proponents argue that since women can decide whether to have a child against the will of the father, then a man should have a right to terminate his parenthood legally.")

152. A putative father registry offers an option to the father. If mothers are required to establish a list of putative fathers at the onset of their pregnancies, there would be more room and time for the unwed fathers to make decisions concerning the life they helped create. See Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 2 (1996) ("In our society, fatherhood is defined by a 'man's biological relationship with the child, his legal or social relationship with the child's mother, and . . . his social and psychological commitment to the child.'" (citation omitted)). But see Richards, *supra* note 8, at 3 (claiming that men are seen only as sperm donors). Thus, some fear that with "[a] simple stroke of a judge's pen within, say, the first trimester of pregnancy and the guy is free. No threat of future child support payments. No need for weekend visitation or worrying about dad-kid bonding. No responsibility for creating and abandoning a child." *Id.*

153. See Feaver et al., *supra* note 125, at 218.

154. *Id.*

155. *Id.*

The current trends and decisions of today's courts, however, are no less ambiguous, just less fair to men.¹⁵⁶ According to contemporary law, the bottom line revolves around the understanding that unwed fathers are simply not given equal footing for making reproductive decisions.

While recognizing the problems of the historically "deadbeat dad" and the ease with which men can escape responsibility in most cases, the movement for equal gender rights is impeded by legislation that targets unwed fathers to pay for children they did not want. In an effort to help those fathers who wish to keep their children, and also to help those fathers who want to participate in financial decisions regarding their children, legislatures should not place the sole economic burden on unwed fathers.¹⁵⁷

The journey toward equal rights for women has come a long way. While the legal system has marched toward equality for women on the one hand, legal traditions remain that unfairly burden men. Laws that support women who are irresponsible "procreators," while punishing the men who are doing the same, create a dichotomy in which men and women are not treated equally.¹⁵⁸ Rather, the presumption that men are the solitary "breadwinners" and are ultimately responsible for the irresponsible actions of women reverts legal theory back to one hundred years

156. See *supra* Parts III.A-D.

157. See Young, *supra* note 5, at 6D.

The largely unnoticed irony is that these are precisely the arguments the right-to-life movement makes about a woman's right to choose. And these are the arguments denounced as evidence of a misogynistic desire to rob women of their sexuality and their freedom. When directed at women, 'You play, you pay' is widely regarded as callous and punitive; when directed at men, it is widely accepted.

Id.

158. See Smart, *supra* note 15, at 19 ("Taken out of context the father's rights movements might pose little threat to the advances made by women over the last century."); Kohm, *supra* note 15, at 117.

The problem with post-modern feminism is the myopic insistence on the concept that reproductive capacities are the only meaningful differences between men and women, and therefore are the "barrier" to be overcome for full participation in the male world. Particularly when combined with the feminist emphasis on sexual 'freedom,' abortion becomes a necessary component of the mainstream feminist vision.

Id. (citation omitted); cf. MUKTI JAIN CAMPION, WHO'S FIT TO BE A PARENT? 218 (1995) ("It is a threatening thought to many that the hunter-gatherer is turning soft—who will be providing macho men to populate the armies of the future if men start abandoning their aggressive, competitive roles honed in each other's company and turn instead to nappy changing, cooking and wiping fevered brows?"). But cf. Smart, *supra* note 15, at 19 ("[A]ttempts to reduce women's rights to abortion and to give married and unmarried fathers a voice in whether a termination should be permitted are part of a drive to reestablish men as the source of authority in households.").

ago—back to the idea that women are too incompetent to care for themselves and thus cannot be held responsible for their actions.¹⁵⁹

The seventy-plus years of equal rights for women should not be taken for granted.¹⁶⁰ If all “people” are created equal under the Constitution, and in accordance with our country’s laws, then women *and* men should be making economic and reproductive decisions together.¹⁶¹ At the very least, the law should allow fathers the opportunity to make decisions in such a manner.

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159. See NAFFINE, *supra* note 6, at 146.

What is wrong with anti-discrimination legislation framed . . . [as the comparison of the complainant with a male comparator] is that its essential purpose is to make women like men Practically speaking, this means that women are denied any legal redress if they are unable to find a male with whom to compare themselves. Obvious problems arise therefore when discrimination relates to pregnancy and a woman must look around for a pregnant man with whom to compare herself.

Id. See generally FARNSWORTH ET AL., SELECTIONS IN CONTRACT LAW (3d ed. 1995) (explaining the presumption at common law that women were not competent to hold property or to make contracts).

160. See U.S. CONST. amend. XIX (amending the Constitution to allow women to vote, beginning in 1920). See generally Anne N. Constain & Steven Majstrovovic, *Congress, Social Movement and Public Opinion Multiple Origins of Women's Rights Legislation*, 47 POL. RES. Q. 111 (1994) (explaining that although the first wave of women's suffrage began at the turn of the century, the modern women's rights movement continued an upward trend from 1958 through 1986).

161. See Feaver et al., *supra* note 125, at 218 (“Even if this routinely becomes a ‘he said/she said’ situation, the idiosyncratic bargainer should at least have his/her day in court.”).