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Family Law - Support - The Natural Father of a Child Born Out of Wedlock May Not Assert as a Defense against His Support Obligation the Mother's Deliberate Misrepresentation That She Was Using Contraception

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FAMILY LAW—SUPPORT—THE NATURAL FATHER OF A CHILD BORN OUT OF WEDLOCK MAY NOT ASSERT AS A DEFENSE AGAINST HIS SUPPORT OBLIGATION THE MOTHER'S DELIBERATE MISREPRESENTATION THAT SHE WAS USING CONTRACEPTION

L. Pamela P. v. Frank S. (N.Y. 1983)

In March 1980, L. Pamela P. gave birth to a child out of wedlock.[1] She subsequently instituted a paternity action against Frank S. seeking support for the illegitimate child.[2] After the New York Family Court entered an order of filiation,[3] Frank S. asserted as a defense to his potential support obligation that Pamela P. had purposefully deceived him by representing that she was using contraceptives.[4] The family court found that Pamela P.

1. Pamela P. v. Frank S., 110 Misc. 2d 978, 979, 443 N.Y.S.2d 343, 344 (N.Y. Fam. Ct. 1981).

2. L. Pamela P. v. Frank S., 59 N.Y.2d 1, 449 N.E.2d 713, 462 N.Y.S.2d 819 (1983). Frank S. is Frank Serpico, the police officer who led a crusade to stamp out police corruption approximately 10 years ago. *See* Fox, *Fathers' Deception Claims Barred in Paternity Suits*, N.Y.L.J., June 28, 1982, at 1, col. 2. *See also* P. MAAS, SERPICO (1973).

3. 59 N.Y.2d at 1, 449 N.E.2d at 714, 462 N.Y.S.2d at 820. The family court concluded that Pamela P. had met her burden of showing paternity by clear and convincing evidence. *See id.* Prior to adjudication of any support issue, paternity must be established. N.Y. FAM. CT. ACT §§ 511, 542, 545 (McKinney 1975). Paternity may be established by two types of physiological tests. *See* Pamela P. v. Frank S., 110 Misc. 2d 978, 979 n.2, 443 N.Y.S.2d 343, 344 n.2 (N.Y. Fam. Ct. 1981). Prior to 1981, the results of blood tests were admissible only where they definitively disproved paternity. N.Y. FAM. CT. ACT § 532 (McKinney 1975). However, in 1981, the statute was amended to allow admission of Human Leukocyte Antigen (HLA) test results, a type of blood test, where they aid in proving or disproving paternity, unless other blood tests have disproved paternity. 1981 N.Y. Laws 9, N.Y. FAM. CT. ACT § 532(a) (McKinney Supp. 1982).

Paternity was proven in *L. Pamela P.* through both in-court testimony and the use of the HLA test. *Pamela P. v. Frank S.*, 110 Misc. 2d at 979, 443 N.Y.S.2d at 344. Pamela P. testified during a family court hearing that her only sex partner during the conception period was Frank S. *Id.* Furthermore, the HLA analysis showed "that the 'plausibility' of respondent's paternity was 0.997." *Id.* at n.2.

4. 59 N.Y.2d at 4, 449 N.E.2d at 714, 462 N.Y.S.2d at 820. Frank S. testified that in response to his questions regarding her use of contraception, Pamela P. had told him that she was using birth control pills. 110 Misc. 2d at 979-80, 443 N.Y.S.2d at 344. At trial, Pamela P. denied discussing contraception with Frank S., but admitted that she had not been using any type of contraception despite the fact that they had engaged in intercourse during the most fertile phase of her monthly cycle. *Id.* at 980, 443 N.Y.S.2d at 344 (N.Y. Fam. Ct. 1981). A witness who had carried on a sexual relationship with Pamela P. until approximately two months prior to the date of the child's conception testified that he had terminated their relationship because Pamela P. wanted to have a child and was no longer using contraceptives. *Id.* The witness further testified that when he told Pamela P. that he was not willing to father

had deceived Frank S. with regard to her use of contraception[5] and held that such circumstances warranted suspension of the customary rule that child support be apportioned equitably between the parents according to their respective means.[6] Rather, the court held that Frank S. was liable for only that amount by which the mother's means were insufficient to meet the needs of the child.[7]

On appeal, the Appellate Division of the Supreme Court of New York[8] refused to recognize the defense of misrepresentation in a child support pro-

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her child, she replied that she would have a child by Frank S., with or without Frank's consent, and would not even tell him that she had stopped using birth control pills. *Id.*

Frank S. also argued that the imposition of a support award against him under these circumstances would be an infringement of his constitutional right to privacy in sexual matters and, more specifically, his right to decide for himself whether to father a child. 59 N.Y.2d at 5-6, 449 N.E.2d at 715, 462 N.Y.S.2d at 821. Freedom of choice in reproductive matters is a particular application of the constitutionally protected right to privacy, or "right to engage in certain highly personal activities." J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 523-28 (1978) [hereinafter cited as NOWAK]. For a discussion of the constitutional right to privacy, see notes 71-77 and accompanying text *infra*.

5. 59 N.Y.2d at 4, 449 N.E.2d at 714, 462 N.Y.S.2d at 820.

6. *Id.*, 449 N.E.2d at 715, 462 N.Y.S.2d at 821. The customary rule is contained in the New York Family Court Act which states, "The court shall direct the parent or parents possessed of sufficient means or able to earn such means to pay . . . a fair and reasonable sum *according to their respective means* . . . for such child's support and education . . . . " N.Y. FAM. CT. ACT § 545 (McKinney Supp. 1982-83) (emphasis added). For cases discussing this proportionality rule, see, e.g., Morrow v. Morrow, 62 A.D.2d 1142, 1143, 404 N.Y.S.2d 766, 768 (1978) (modifying the child support award in light of the father's changed financial obligations); Tessler v. Siegel, 59 A.D.2d 846, 846-47, 399 N.Y.S.2d 218, 218-19 (1977) (remanding the case to the family court to fashion a support award according to the proportionality rule) (quoting Carter v. Carter, 58 A.D.2d 438, 447, 397 N.Y.S.2d 88, 94 (1977)).

7. 59 N.Y.2d at 4, 449 N.E.2d at 714, 462 N.Y.S.2d at 821. The family court held that both constitutional and common law principles mandated such a result. 110 Misc. 2d at 979, 443 N.Y.S.2d at 344. The court asserted that Pamela P. should not be permitted to benefit financially from her misrepresentation at Frank S.'s expense, noting that it is "[c]onsistent with the judicial function of following an equitable approach in support cases [for the] court [to] consider the inequitable conduct of one who invokes its relief." 110 Misc. 2d at 982, 443 N.Y.S.2d at 346 (quotation and citations omitted). Moreover, the court asserted, application of the customary rule "would raise constitutional doubt under the fourteenth amendment." *Id.* at 984, 443 N.Y.S.2d at 347. The court noted, however, that the welfare of the child is the paramount concern of the court in a support proceeding and cautioned that the new rule must never be applied to the detriment of the child. *Id.*

Finding that Pamela P. was unable to bear a large portion of the child's needs which totalled $945 per month, the family court ordered Frank S. to pay $790 per month for the child's support. 59 N.Y.2d at 4 n.*, 449 N.E.2d at 715 n.*, 462 N.Y.S.2d at 821 n.*.

8. 88 A.D.2d 865, 451 N.Y.S.2d 766 (1982). The nomenclature of the New York court system differs from that of most other states. The Supreme Court of New York is, in both law and equity, the court of general jurisdiction. N.Y. CONST. art. VI & VII(a). Other courts, such as the family court, have been established by statute pursuant to constitutional authority and given concurrent original jurisdiction over specific proceedings. *See id.* § 13; N.Y. FAM. CT. ACT §§ 113-115 (McKinney Supp.

ceeding and modified the support award to comport with the traditional rule.[9] The New York Court of Appeals[10] affirmed, *holding* that the natural father of a child born out of wedlock may not assert as a defense against his support obligation the mother's deliberate misrepresentation that she was using contraception. *L. Pamela P. v. Frank S.*, 59 N.Y.2d 1, 449 N.E.2d 713, 462 N.Y.S.2d 819 (1983).

Throughout history, the illegitimate child[11] has been the subject of great societal scorn and discrimination.[12] For example, under early English

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1982). For an explanation of the concurrent nature of the family court's original jurisdiction, see N.Y. FAM. CT. ACT § 114 Practice Commentary.

The Appellate Division of the Supreme Court of New York has original, immediate appellate, and final appellate jurisdiction in certain cases. *See* N.Y. CONST. art. VI, § 4; N.Y. CIV. PRAC. R. 3222 (McKinney 1970) (original jurisdiction); N.Y. CIV. PRAC. R. 5501(c), 5701-04 (McKinney 1978) (immediate appellate jurisdiction); N.Y. CIV. PRAC. R. 5501(b) (McKinney 1978) (implied final appellate jurisdiction, given the limits on appellate jurisdiction of New York Court of Appeals).

The highest court in New York is the court of appeals, which exercises final appellate review of questions of law only, unless the judgment entered below is of death or represents a reversal or modification of the trial court's judgment based on a new finding of fact. *See* N.Y. CONST. art. VI, § 3; N.Y. CIV. PRAC. R. 5501(b), 5601-02, 5611-15 (McKinney 1978).

The case at hand involved two hearings in the family court, an appeal to the appellate division and finally an appeal to the court of appeals. *See* 59 N.Y.2d at 4-5, 449 N.E.2d at 714-15, 462 N.Y.S.2d at 820-21.

9. 59 N.Y.2d at 5, 449 N.E.2d at 715, 462 N.Y.S.2d at 821. The appellate court held that once paternity had been established, a family court judge was "bound by the statute" to consider only the child's needs and the parents' means in fashioning a support order. 88 A.D.2d at 865, 451 N.Y.S.2d at 767.

The court also summarily dismissed the father's constitutional contention, stating that an inquiry into a mother's use of birth control and any assertions pertaining thereto would itself involve "an impermissible invasion of 'the zone of privacy created by several fundamental constitutional guarantees.'" 88 A.D.2d at 866, 451 N.Y.S.2d at 767.

Thus, the appellate division court applied the customary support allocation rule, and ordered Frank S. to pay $945 per month. 88 A.D.2d at 866, 451 N.Y.2d at 767. For a discussion of the customarily applied support allocation rule, see note 6 and accompanying text *supra*.

10. Judge Wachtler wrote the opinion of the court in which Chief Judge Cooke and Judges Jasen, Jones, Fuchsberg, Meyer and Simons concurred.

In regard to the father's constitutional challenge, the court concluded that no recognized aspect of the father's right to privacy in sexual matters had been violated. 59 N.Y.2d 1, 449 N.E.2d 713, 462 N.Y.S.2d 819 (1983).

11. At common law, an illegitimate child, or bastard, was a child conceived and born out of wedlock. 1 W. BLACKSTONE, COMMENTARIES 454-55 (1922); 2 J. KENT, COMMENTARIES 209 (1884). Thus, American jurisdictions have held that absent clear and convincing proof of bastardy, a child is legitimate if he is born either while his parents are married or within a normal gestation period following the lawful dissolution of their marriage. *See* Parker v. Nothomb, 65 Neb. 315, 318, 93 N.W. 851, 852 (1903); Powell v. State, 84 Ohio St. 165, 168-69, 95 N.E. 660, 661 (1911).

12. *See* Rowe v. Cullen, 177 Md. 357, 361-62, 9 A.2d 585, 587 (1939). After noting that the early English common law traced its treatment of illegitimates from Germanic law, the court discussed the breadth of the discrimination against bastards:

> In early times bastardy was considered so disgraceful "that to retain a bastard in a man's house was a reflection and the stain and reproach of the

law[13] a bastard was deemed *filius nullius*—a child belonging to no one—and as such had very few legal rights.[14] The illegitimate offspring could not in-

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parents." Crime dwelt always upon him so that he could not be admitted to feudal service. He was treated by the common law with great strictness, and was allowed but few privileges. For example, he was denied all rights as an heir, and he was not entitled even to a name, although he might gain one by reputation. He did not take his mother's place of settlement, but was settled wherever he chanced to be born. As he was related to nobody he could have no heirs, except of his own body; and if so he left no descendants, his property escheated. He was incapable of holy orders, and was disqualified from holding any dignity in the church. In Germany, no farther back than the time of the Reformation, bastards could not give evidence on the rights of citizens, and down to a very recent period certain Saxon local laws enacted that no persons of illegitimate birth should officiate in any judicial office. Inquiries were made into the birth of a person, at the academies and schools, before he was admitted to the degree of a doctor, or of any other high dignity.

Id. at 361, 9 A.2d at 587 (quoting 7 AM. JUR. *Bastards* § 136, at 712-13 (1937)) (footnote omitted).

Similarly, under thirteenth century French law, it was clear "that the bastard was a stranger to his family and an inferior person in society." Fritz, *Judging the Status of the Illegitimate Child in Various Western Legal Systems*, 23 LOY. L. REV. 1, 11 (1977). While parental support obligations were acknowledged by statute as early as the sixteenth century, other restrictions on the rights of bastards were not lifted until the past two centuries. *Id.* at 11-12. For an historical development of the law relating to illegitimate children under Roman, French, English, and American law, see *id. passim*. *See also* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 5.1-5.4 (1968) (analyzing the sources and content of American laws on illegitimates); Comment, *Legitimacy and Marriage*, 16 HARV. L. REV. 22 (1902) (discussing the relative influence of Roman civil and canon law on illegitimates upon the English and American legal systems).

13. While certain limits on the rights of bastards were retained under early English common law, the scope of discrimination against illegitimates in England was considerably less than the mistreatment in other cultures. *See* F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 396-97 (2d ed. 1899). The authors stated as follows:

> In our English law bastardy can not be called a status or condition. The bastard can not inherit from his parents or from anyone else, but this seems to be the only temporal consequence of his illegitimate birth . . . . In all respects he is the equal of any other free and lawful man, so far as the temporal law is concerned. This is well worthy of notice, for in French and German customs of the thirteenth century, bastardy is often a source of many disabilities, and sometimes the bastard is reckoned among the "rightless."

Id. Pollock and Maitland suggest that the reason for this improved treatment of illegitimates is the fact that William the Conqueror was himself a bastard: "[I]t well may be that the divergence of English from continental law [with respect to bastardy] is due to no deeper cause than the subjection of England to kings who proudly traced their descent from a mighty bastard." *Id.* at 397. For a general discussion of the legal and customary disabilities of illegitimates, see J. TEICHMAN, ILLEGITIMACY 103-21 (1982) (analyzing the various barriers of lineage, inheritance, infant mortality, support, separation from kin, and social ostracism).

14. *See* J. TEICHMAN, *supra* note 13, at 60. This was also the case under the canon law. *Id.*

herit from or through either parent,[15] and neither parent was legally obligated to support it.[16] Moreover, a bastard had no right to the surname of either parent,[17] and no act by either parent could legitimate the child.[18]

Early American case law reflected many of the prejudices against illegitimates found in the English Common Law.[19] However, time has served to soften the harsh distinctions which were drawn between legitimate and illegitimate children.[20] The area of child support is exemplary of this trend

15. H. CLARK, *supra* note 12, at 155. Moreover, if the bastard died without a spouse or any children of his own, his property would escheat to the crown. *Id.*

16. Fritz, *supra* note 12, at 25. *See also* 1 W. BLACKSTONE, *supra* note 11, at 459; H. CLARK, *supra* note 12, at 155. In terms of maintenance, guardianship and custody, the bastard child at common law was considered *filius populi*, a child belonging to the state; thus the legal responsibility of support was placed upon the community instead of the natural parents. H. CLARK, *supra* note 12, at 25-26.

However, the notion of *fillius populi* and *filius nullius* did not remove all parental support obligations. While the bastard was considered a child of no one, "no one" meant no legal person, that is, no man. J. TEICHMAN, *supra* note 13, at 107. Teichman notes that "the *mother* of an illegitimate child did have a customary obligation (which eventually became a legal obligation) to care for the child, at least until such time as she could hand it over to someone else, or until she had it taken away from her." *Id.* (emphasis added). Furthermore, by 1576 Parliament had passed the Elizabethan Poor Law, which created a method by which the courts, through a pseudo-criminal procedure, could impose a support obligation upon the father. H. CLARK, *supra* note 12, at 162. However, while providing some sort of remedy, this law's "chief purpose was not so much the protection of the child as the relief of the parish from the expense of supporting the child." *Id.*

17. Fritz, *supra* note 12, at 25. However, as Blackstone states, an illegitimate child could "gain a surname by reputation." 1 W. BLACKSTONE, *supra* note 11, at 459.

18. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, 856 (1963) (discussing the English common law), *cert. denied*, 379 U.S. 945 (1964). Legitimation could only occur through specific action by Parliament. *Id.*

19. *See, e.g.*, Burris v. Burgett, 16 Del. Ch. 10, 139 A. 454 (1927) (common law principle of *filius nullius*, denying rights of inheritance or having heirs, applies in Delaware, subject to legislative amendment); Hicks v. Smith, 94 Ga. 809, 22 S.E. 153 (1895) (common law prohibition of inheritance by bastard changed only by statute permitting inheritance from mother); Murrell v. Industrial Comm'n, 291 Ill. 334, 126 N.E. 189 (1920) (bastard is without name, kindred, parents, and heritable blood unless provided by statute); Rowe v. Cullen, 177 Md. 357, 9 A.2d 585 (1939) (a bastard is *filius nullius* and has no right of inheritance except as provided by statute permitting inheritance from his mother); Voorhees v. Sharp, 63 N.J. Eq. 216, 49 A. 722 (N.J. Prerog. Ct. 1901) (common law treatment of bastard as kin to nobody changed only by statute permitting inheritance from mother).

In most jurisdictions, the state code or constitution incorporates the common law of England to the extent that it is not repugnant to the state constitution or overruled by a legislative enactment. *See, e.g.*, MICH. CONST. art. III, § 6; N.Y. CONST. art. I, § 14; ALA. CODE § 1-3-1 (1975); CAL. CIV. CODE § 22.2 (West 1982); COLO. REV. STAT. § 2-4-211 (1973); ILL. ANN. STAT. ch 28, § 1 (Smith-Hurd 1969); 1 PA. CONS. STAT. ANN. § 1503 (Purdon 1964 & Supp. 1982); S.D. CODIFIED LAWS ANN. § 1-1-24 (1980); TEX. CIV. CODE ANN. § 1 (Vernon 1969); VT. STAT. ANN. tit. 1, § 271 (1972); VA. CODE § 1-10 (1950). *See generally* E. FREUND, ILLEGITIMACY LAWS OF THE UNITED STATES AND CERTAIN FOREIGN COUNTRIES 9 (1919).

20. *See* Fritz, *supra* note 12, at 29-41 (tracing the United States Supreme Court's use of the equal protection clause to invalidate various legal disabilities of illegitimate children); Wolff & Cirillo, *The Bastard's Cause of Action: A Statutory Cause of Action for*

towards ameliorating the disparate treatment of these two groups of offspring.[21]

The first step in liberalizing the law with respect to the support of illegitimates involved judicial imposition upon the mother of a duty to support her illegitimate progeny.[22] This legal obligation was imposed by a number of courts in spite of the fact that at common law a mother had only a limited duty to support her illegitimate child.[23] Although never passing directly upon this issue, the New York courts, in dicta, recognized the existence of such an obligation.[24] In *People* ex rel *Davenport v. Kling*,[25] for example, the court stated that "[t]he mother of a bastard child, as its natural guardian, *is*

Illegitimate Children, 19 J. FAM. L. 463, 463 (1981) (asserting that bastards are treated the same as legitimate children in actions for wrongful death, child support, workmen's compensation, and certain inheritance areas). *See also* Rowe v. Cullen, 177 Md. 357, 361-62, 9 A.2d 585, 587 (1939). In *Rowe*, the court stated, "[T]he severity of those early rules has been relaxed nearly everywhere. Certainly in this country . . . the trend of the law has been to give to illegitimate children the status and privileges of legitimate children." *But see* H. CLARK, *supra* note 12, at 155-56 (noting that the stigma of illegitimacy seems "greater today than in the Middle Ages," and that "the law still discriminates against the illegitimate child in ways that can only be characterized as barbarous").

21. Abrogation of the severe common law rules has occurred in other areas also. *See generally* note 20, *supra*.

22. *See, e.g.*, Dickinson's Appeal, 42 Conn. 491, 493 (1875) (bastard is legal child of his mother, with all concomitant rights and duties); Wright v. Wright, 2 Mass. 109, 110 (1806) (while bastard is *filius nullius*, mother bound to support him as legal guardian); State *ex rel.* Mattes v. Juvenile Court, 147 Minn. 222, 224, 179 N.W. 1006, 1006 (1920) ("mother, as guardian by nature of her child, is legally bound to support it"); Friesher v. Symonds, 46 N.J. Eq. 521, 523, 20 A. 257, 259 (N.J. Prerog. Ct. 1890) (while bastard is *filius nullius*, mother as natural guardian has support obligation); Nine v. Starr, 8 Or. 49, 50 (1879) (mother, as natural guardian is legally obligated to support illegitimate child).

Judicial amelioration of the common law bias has occurred in other areas as well. The courts in one jurisdiction, for example, rejected *in toto* the fundamental common law doctrine of *filius nullius* along with all of its concomitant corollaries, including the rule that an illegitimate child had no inheritable blood. *See* Eaton v. Eaton, 88 Conn. 286, 91 A. 196 (1914) (illegitimate issue permitted to share in the income of a testamentary trust); *Dickinson's Appeal*, 42 Conn. at 491 (allowing illegitimate children to inherit by representation through their mother). Most jurisdictions, however, have retained the common law principle denying inheritance to illegitimates, only recognizing such a right where it was conferred by statute. *See, e.g.*, Burris v. Burgett, 16 Del. Ch. 10, 139 A. 454 (1927) (denying inheritance by illegitimate children as against claims by children born in lawful wedlock); Hardesty v. Mitchell, 302 Ill. 369, 134 N.E. 745 (1922) (denying the rights of inheritance by representation to an illegitimate where the statute did not "expressly by necessary implication" confer such a right); Karenius' Estate, 170 Misc. 652, 11 N.Y.S.2d 44 (permitting illegitimate relatives to inherit by representation since statute had altered the common law).

23. *See* J. TEICHMAN, *supra* note 13.

24. *See, e.g.*, People v. John Mitchell, 44 Barb. 245 (N.Y. App. Div. 1865); People *ex rel.* Davenport v. Kling, 6 Barb. 366 (N.Y. App. Div. 1849).

25. 6 Barb. 366 (N.Y. App. Div. 1849). In *Kling*, the mother of an illegitimate child sought a writ of habeas corpus, asserting that the father had illegally and with force taken the child from her custody. *Id.* at 366-67. Although according to the common law the mother had a right to custody superior to that of the father, the

bound to maintain it, and is entitled to the control of it."[26] A few years later, the same court in *People v. Mitchell*[27] commented that the law has "always secured to the mother of a bastard child its *care*, custody and possession."[28] Although most jurisdictions waited for legislative action to take any further steps in the area of support,[29] one progressive court also imposed upon the father a non-statutory duty to support his illegitimate child.[30]

In reaction to the disparate treatment of illegitmate children at common law, most, if not all, states eventually enacted statutes in an attempt to ameliorate the biases against these individuals.[31] This liberalization oc-

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court refused to order the father to deliver the child to the mother in light of her impoverished situation and unstable mental condition. *Id.* at 367, 369.

26. *Id.* at 367 (emphasis added).

27. 44 Barb. 245 (N.Y. App. Div. 1865). In *Mitchell*, the mother brought an action to compel the father to provide support for his illegitimate child, as mandated by a prior court decree. *Id.* at 345-47. Since a legislative enactment imposed a duty of support upon the father, the court found in favor of the mother. *Id.* at 248-50.

28. *Id.* at 249 (emphasis added).

29. *See* note 30 and accompanying text *infra*.

30. Doughty v. Engler, 112 Kan. 583, 211 P. 619 (1923). The *Doughty* court began its analysis by noting that blind adherence to the common law rule denying support obligation in the father ignores "the question whether the rule is so repugnant to present-day conceptions of social obligations that courts should refuse to follow it." *Id.* at 583, 211 P. at 619. After noting that the absence of a common law support obligation was not unique to illegitimate children, the court found that the evolving duty of child support arose from the status of parenthood. *Id.* at 585-86, 211 P. at 619-20. Since the parents' marital status, and the child's legitimacy status were irrelevant to their responsibility for bringing the child into the world, the court held that there was a non-statutory obligation of support for both the mother and the father. *Id.* One learned commentator on the subject called *Doughty* an "enlightened American case." H. CLARK, *supra* note 12, at 155 n.7.

The New York courts have never imposed a non-statutory duty of support on the father. *See People v. Mitchell*, 44 Barb. at 249 (father not chargeable with child support for bastard in any other way than [sic] that provided by the statute); *People ex rel Davenport v. Kling*, 6 Barb. at 367-68 ("[i]t is only by provision of statute, and the intervention of public offices, that the father can be compelled to support [the bastard child]").

31. *See* 10 AM. JUR. 2d *Bastards* § 8 (1963). For a representative sampling of New York statutes which exemplifies societal changes in attitude vis-a-vis illegitimates and attempts to eliminate the biases, both social and legal, directed against these persons, see N.Y. DOM. REL. LAW 524 (McKinney 1977) (conferring the status of legitimacy upon children conceived out of lawful wedlock where the parents have intermarried even if such marriage is voidable or actually void, and providing that the provisions of the section shall not operate to divest any rights or interests); *id.* § 33 (conferring legitimate status on children of a common law marriage); *id.* § 111 (requiring consent of parents before illegitimate child may be adopted by others); *id.* § 114 (stipulating that there be no mention of a child's illegitimate status in an adoption order); *id.* § 175 (mandating a presumption of legitimacy as to children concieved prior to the commencement of a divorce preceeding); N.Y. EST. POWERS & TRUSTS § 1-2.10 (McKinney 1981) (including within the term "issue," as utilized in a testamentary instrument, illegitimate as well as legitimate descendants, unless the contrary is indicated (as construed by *In re* Hoffman, 53 A.D.2d 55, 385 N.Y.S.2d 49 (1976)); *id.* § 3-3.3(b) (including illegitimate offspring within the meaning of the term "issue," as utilized in the state anti-lapse statute); *id.* § 4-1.2(a)(1),(2) (providing that an illegitimate child is to be considered the legitimate child of his mother for inheri-

curred in the area of support through the enactment of what is commonly referred to as "paternity legislation."[32] These paternity statutes vary in their formulation of the parental support obligation.[33] Some enactments provide

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tance purposes and further mandating that a child born out of wedlock is also to be considered the legitimate child of his father for these purposes where certain enumerated criteria are met); *id.* § 5-4.5 (stipulating that in terms of a wrongful death recovery, an illegitimate child is a distributee of its natural father); N.Y. GEN. CONSTR. LAW § 59 (McKinney 1951) (requiring that all notices and public papers use the term "child born out of wedlock" rather than the term "bastard" or "illegitimate child"); N.Y. PUB. HEALTH LAW § 4135 (McKinney 1965) (prohibiting the placement of any statement regarding illegitimate status on a child's birth certificate); N.Y. WORK. COMP. LAW § 2(11) (McKinney Cum. Supp. 1983-84) (including in the term "child," an illegitimate child which was dependent upon the deceased employee). For discussion of legislative enactments in the area of child support, see notes 32-48, 52 & 53 and accompanying text *infra*.

For examples of such legislation in other jurisdictions, see ALA. CODE § 26-11-2 (Supp. 1983) (legitimating the bastard child for inheritance purposes where the father has followed certain prescribed requirements); ALASKA STAT. § 25.20.050 (1983) (providing for legitimation of the bastard child by acknowledgment, adjudication or subsequent marriage); ARIZ. REV. STAT. ANN. § 14-2109 (1975) (conferring upon the illegitimate child the right to inherit from its mother, and also from its father provided certain statutory requisites have been met); GA. CODE ANN. § 51-4-3 (1982) (permitting an illegitimate child recovery for the wrongful death of its mother); KY. REV. STAT. ANN. § 199.500 (Bobbs-Merrill Supp. 1980) (requiring under most circumstances the consent of either the mother or the father prior to the adoption by third parties of a child born out of wedlock); MO. ANN. STAT. § 193.240 (Vernon 1983) (permitting disclosure of an individual's illegitimate status only upon court order or upon request by the illegitimate itself); NEB. REV. STAT. § 13-115 (1977) (requiring usage of the term "child born out of wedlock" in place of the terms "bastard" or "illegitimate child" in all public documents or judicial proceedings); N.J. STAT. ANN. (WEST SUPP. 1983-84) (expressly including illegitimate offspring within the definition of "dependents" in the state workmen's compensation act); W. VA. CODE § 42-1-7 (1982) (stipulating that the issue of a void or voidable marriage are to be considered legitimate); WISC. STAT. ANN. § 895.03 (West 1983) (including illegitimate children within the category of those offspring entitled to recover from the wrongful death of the mother and, under certain circumstances, the father) (as construed by Krantz v. Harris, 40 Wis. 2d 709, 162 N.W.2d 628 (1968)).

32. *See* H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 23 (1971). Although statutes of this type are generally termed "paternity" acts, a few statutes continue to refer to these enactments as "bastardy" acts. *See, e.g.*, ARK. STAT. ANN. § 34-701 (1947). The trend however, is towards renaming any such remaining statutes. *See* People *ex rel.* Covington v. Johnson, 79 Ill. App. 2d 266, 269, 224 N.E.2d 664, 666 (1966) (citing ILL. REV. STAT. ch. 106 3/4 § 51 (1959)) ("the legislature saw fit to give this chapter a more imposing and dignified title," in changing its name from "Bastardy" to "Paternity" Act). For a representative sampling of paternity legislation, see ALA. CODE §§ 26-12-1 to 26-12-9 (1977 & Supp. 1983); ARK. STAT. ANN. §§ 34-701 to 34-719 (1962 & Supp. 1983); CONN. GEN. STAT. ANN. §§ 466-160 to 466-178 (West Supp. 1983-84); DEL. CODE ANN. tit. 13, §§ 501-24 (1981 & Supp. 1982); IDAHO CODE §§ 7-1101 to 7-1123 (1979 & Supp. 1983); N.Y. FAM. CT. ACT §§ 511-71 (McKinney 1983); TEX. FAM. CODE. ANN. §§ 13.01-13.43 (Vernon Supp. 1982-83). All 50 states now have paternity statutes providing for the support of the illegitimate child.

33. *See generally* H. KRAUSE, *supra* note 32, at 22-25 (discussing the parental support obligation under various state statutes). Some statutes simply address the father's support obligation, while others refer to a parental duty to support. *Compare* ALA. CODE § 26-12-4 (1977) (referring to a father's obligations) *and* ARK. STAT. ANN.

the courts with standards to be utilized in fashioning a support order;[34] others leave the courts without any meaningful direction.[35] Among those statutes that establish specific criteria from which a court is to fashion a support award, the standards vary.[36]

The New York Legislature has been active in the area of support for the illegitimate child.[37] In 1925, New York enacted its first statute requiring parental support and education of illegitimate offspring.[38] The jurisdiction of this legislation extended to all of New York State, except New York City and miscellaneous counties.[39] Although no standards from which to fashion a support award were furnished, the statute did establish that the parents "are liable for the necessary support and education of the child."[40] Legislation giving New York City courts power to establish parental support and

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§ 34-706 (Supp. 1983) (compelling only paternal support) *with* CONN. GEN. STAT. ANN. § 466-171 (West Supp. 1983-84) (requiring both the father and the mother, if the mother is financially capable, to contribute to the support of the child) *and* N.Y. FAM. CT. ACT § 545 (McKinney 1983) (recognizing support obligations on the part of both parents). It is suggested however, that this difference between the statutes is merely a superficial one since most, if not all, jurisdictions hold that the mother has a common law obligation to support her illegitimate progeny. *See* notes 22-28 and accompanying text *supra*.

34. *See, e.g.*, DEL. CODE ANN. tit. 13, § 514 (1981) (requiring the court to consider, among other things, "[t]he health, relative economic condition, financial circumstance, income, including the wages, and earning capacity of the parties, including the children; [t]he manner of living to which the parties have been accustomed when they were living under the same roof; [t]he general equities inherent in the situation"); N.Y. FAM. CT. ACT § 545 (McKinney 1983) (directing that "the parent or parents possessed of sufficient means or able to earn such means to pay weekly or at other fixed periods a fair and reasonable sum according to their respective means . . . for such child's support and education").

35. *See, e.g.*, CONN. GEN. STAT. ANN. § 466-171 (West Supp. 1983-84) (simply directing that the father, and the mother if she is financially able to do so, contribute to the "support and maintenance" of the child); IDAHO CODE § 7-1105 (1979) (merely stating that "[e]ach parent of a child born out of wedlock is liable for the necessary support and education of the child").

36. *See* note 34 and accompanying text *supra*.

37. For a discussion of these statutes, see notes 38-43, 52 & 53 and accompanying text *infra*. New York is unusual however, in that there developed in this jurisdiction two separate court systems for dealing with these problems, each governed by a separate set of legislative enactments. *See* N.Y. FAM. CT. ACT § 112 and Practice Commentary (McKinney 1983). This dual system of courts and legislation resulted in much confusion. *Id.* The enactment of the Family Court Act, which provided for statewide jurisdiction, ended this confusion. *See* N.Y. FAM. CT. ACT § 112 and Practice Commentary (McKinney 1983).

38. 1925 N.Y. Laws 255 (amending the Domestic Relations Law, 1909 N.Y. Laws 19). The children's court had jurisdiction over all cases arising under the Domestic Relations Law. 1922 N.Y. Laws 547 (amended 1930) (repealed 1962). Following an amendment in 1930, this legislation became collectively known as the Children's Court Act. 1930 N.Y. Laws 393 (repealed 1962). The Children's Court Act was later repealed by the Family Court Act. 1962 N.Y. Laws 688. *See* N.Y. FAM. CT. ACT § 111 committee comments (McKinney 1975).

39. 1922 N.Y. Laws 547, § 1 (amended 1930) (repealed 1962).

40. 1925 N.Y. Laws 255, § 120(1).

education obligations regarding illegitimate children was enacted in 1929.[41] Providing little judicial direction, the act merely stated that "[t]he parents of a child born out of wedlock are liable for the necessary support and education of the child."[42] The act was subsequently amended, however, to provide that the court, in determining a proper support award, must consider "the age of the child and the station in life of its mother and the financial ability of its parents."[43]

Initially, many of these statutes were only marginally effective in providing assistance to the illegitimate child.[44] In terms of support, court awards were frequently minimal.[45] Moreover, anything more than a nominal award was often reduced on appeal.[46] The reasons for the inadequacy of

41. 1929 N.Y. Laws 343 (amending the Inferior Criminal Courts Act of the City of New York, 1910 N.Y. Laws 659).

42. *Id.* §§ 35, 35-b(1). Section 35-b(1) defines the paternal obligation in accord with the earlier support provision applicable to areas other than New York City and selected counties. *See* notes 38 & 40 and accompanying text *supra*.

43. 1930 N.Y. Laws § 35-a(4).

44. *See* notes 45-48 and accompanying text *infra*. Support enactments were nevertheless an improvement in the illegitimate child's situation because they provided it with a statutory claim for support; thus, the child was no longer in a position where it had to hope that the judiciary would "recognize" the existence of a common law support obligation. *See* notes 22-30 and accompanying text *supra*. *See also* H. KRAUSE, *supra* note 32, at 23. Similarly, in other areas, statutes served to soften the rigors of the common law. However, even today, such legislative efforts are regarded by some commentators as inadequate. *See* H. CLARK, *supra* note 12, at 159 (discussing the deficiencies of legitimation statutes); H. KRAUSE, *supra* note 32, at 6 (noting that "more often than not" legislative attempts to ameliorate the bias against illegitimates produce "limited" and "narrow" statutes).

45. *See, e.g.*, Fowler v. Rizzuto, 205 Misc. 1088, 132 N.Y.S.2d 29 (1954). In *Fowler*, the court ordered support for the illegitimate child in the amount of $25 per week despite evidence that the father owned stock worth up to $400,000, and had a net income of up to $52,000 per year. *Id.* at 1091, 132 N.Y.S.2d at 31. The court reasoned that since the mother's station in life was one criterion in establishing the support obligation, the mother's minimal financial worth mandated a similarly minimal child support award, regardless of the father's worth. *Id.* at 1090-91, 132 N.Y.S.2d at 31. *See generally* Schaschlo v. Taishoff, 2 N.Y.2d 408, 411, 141 N.E.2d 562, 563, 161 N.Y.S.2d 48, 50 (1957) (when the father was first obliged to support his bastard child, an award was adequate if it provided the bare necessities, thus preventing the mother or child from becoming a public charge); Storm v. None, 57 Misc. 2d 342, 344, 291 N.Y.S.2d 515, 517-18 (1968) (tracing statutory perpetuation of distinction between legitimate and illegitimate children concerning support obligations). For a discussion of the minimal awards under other early support statutes, see E. FREUND, *supra* note 19, at 52-54.

46. *See, e.g.*, Commissioner of Public Welfare *ex rel.* Oertli v. Margulies, 258 App. Div. 952, 17 N.Y.S.2d 871 (1940), *discussed in* W. GELLHORN, CHILDREN AND FAMILIES 194-95 (1954) (child support order of $25 per week reduced to $15 despite father's weekly income of $250).

In other areas of concern to illegitimates, the ineffectiveness of early legislation was also evident. For example, under early statutes which sought to give illegitimate children inheritance rights, illegitimates faired poorly. *See, e.g.*, Reynolds v. Hitchcock, 72 N.H. 340, 56 A. 745 (1903) (construing statute permitting an illegitimate child to inherit from its mother and providing the mother's ancestors and collateral heirs rights of inheritance via the illegitimate child to not confer upon such offspring

these enactments as applied were twofold: first, the courts felt that, since the statutes were in derogation of the common law, a narrow construction was required;[47] and second, when confronted with a support issue, the courts reasoned that since the sole policy behind the statute was indemnification of the public purse and not protection of the child, the smallest award effectuating that purpose was all that was necessary.[48]

Eventually, among a few jurisdictions, a changing rationale became apparent. The New York Court of Appeals in *Schaschlo v. Taishoff*,[49] held that New York's support legislation should be given a liberal construction.[50] The *Schaschlo* court rejected the mechanically applied rule that a father's support

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the right to inherit through its mother); Tuttle v. Woolworth, 74 N.J. Eq. 310, 77 A. 684 (1908) (construing statute conferring inheritance rights upon illegitimate children to be applicable only when there were no legitimate progeny surviving).

47. *See, e.g.*, Croan v. Phelps, 94 Ky. 213, 215-16, 21 S.W. 874, 874-75 (1893) (legislation conferring upon illegitimates the ability to inherit and to transmit an inheritance must be strictly construed because it is contrary to common law precepts); Barron v. Zimmerman, 117 Md. 296, 302, 83 A. 258, 260 (1912) (legislation altering common law rules regarding illegitimates must be strictly construed); Hutton v. Bretsch, 216 N.Y. 23, 24, 109 N.E. 858, 860 (1915) (illegitimate child support statute must be strictly followed); Kessler v. Anonymous, 18 N.Y.S.2d 278, 278 (Just. Ct. 1940) (statute contravening common law must be strictly construed); Prager v. Manowitz, 243 A.D. 284, 286, 276 N.Y.S. 875, 876 (1935) (legislation creating support obligation for illegitimate child is contrary to common law and must be strictly construed); *In re* Wallace's Estate (*In re* Cross), 197 N.C. 334, 337, 148 S.E. 456, 457 (1929) (statute providing for legitimation of bastard child must be strictly construed because is in derogation of common law). Such restrictive interpretation of support statutes led to small support awards. *See* Schaschlo v. Taishoff, 2 N.Y.2d 408, 411, 141 N.E.2d 562, 563, 161 N.Y.S.2d 48, 50 (1957). A few jurisdictions favored liberal construction of illegitimacy legislation, regarding such statutes as remedial. *See, e.g.*, Spencer v. Burns, 413 Ill. 240, 254-57, 108 N.E.2d 413, 420-21 (1952) (statute conferring rights upon illegitimates should be broadly construed to effectuate the legislative purposes of removing "the onus of illegitimacy from the unoffending children"); Berry v. Powell, 101 Tex. 55, 104 S.W. 1044, 1045-46 (1907) (statute investing the illegitimate child with maternally inheritable blood, since remedial in nature, must be liberally construed). The modern trend is towards broad construction of illegitimacy legislation. *See* 10 AM. JUR. 2D *Bastards* § 148 (1963).

48. The first statutes required parents to pay support in order to relieve the community from bearing the financial burden of raising illegitimate children. *See* Schaschlo v. Taishoff, 2 N.Y.2d 408, 411, 141 N.E.2d 562, 563, 161 N.Y.S.2d 48, 50 (1957) (sole purpose of the first bastardy law was to protect community from having either mother or child become a public charge). Thus the award should be "no more than necessary" to protect community funds. *See id.*; 10 AM. JUR. 2D *Bastards* § 127 (1963). *See generally* H. KRAUSE, *supra* note 32, at 83-84 (statutory obligation created by society to shift burden from itself to the father); Note, *Wealth of Father Held Material in Determining Level of Support Duty to Illegitimate Child*, 57 COLUM. L. REV. 1191, 1192 (1957) (early bastard-support statutes designed to relieve community of expense, and therefore provided only bare necessities).

49. 2 N.Y.2d 408, 141 N.E.2d 562, 161 N.Y.S.2d 48 (1957). The case involved an appeal by the father from a lower court order requiring him to pay a certain sum for the care and maintenance of his illegitimate child. *Id.* at 408, 141 N.E.2d at 561, 161 N.Y.S.2d at 48.

50. *Id.* The court stated that in light of the statute's purpose, its provisions should be liberally construed. *Id.* The modern trend among the jurisdictions is towards broad construction of illegitimacy statutes. *See* 10 AM JUR. 2D *Bastards* § 148

liability was limited by the mother's station in life, openly embracing as its primary concern the welfare of the illegitimate child.[51]

In 1962, in reaction to *Schaschlo*, the New York Legislature passed the

(1963) ("the decided trend of modern authority is to regard such legislation as basically remedial and to indulge in a liberal interpretation").

51. 2 N.Y.2d at 411, 141 N.E.2d at 563, 161 N.Y.S.2d at 50. The court openly disavowed as a primary concern indemnification of the public purse, noting that although this had been "[t]he sole purpose of the first bastardy law," such a policy "no longer reflects the social philosophy present in the laws of this State." *Id.* The court asserted that legislation providing parental support for illegitimate children is instead "chiefly concerned with the welfare of the child." *Id.*

Recognizing the inequities inherent in the rejected rule, the court stated that if such a rule were allowed to stand,

> it would mean that an illegitimate child born to an impoverished woman or one of obviously low station would have to suffer the added misfortune of a meager support award sufficient only to provide for his needs at that humble level, regardless of the father's ability to afford a comfortable or advantageous existence.

Id. at 411-12, 141 N.E.2d at 564, 161 N.Y.S.2d at 51.

There appear to be only a few other jurisdictions which have joined New York in so strongly embracing a policy of promoting the illegitimate child's welfare. *See, e.g.*, Sullivan v. O'Sullivan, 130 Ind. App. 142, 146, 162 N.E.2d 315, 317 (1959) (the purpose of the support statute is solely to benefit the illegitimate child); Polk v. Harris, 46 Md. App. 591, 598-99, 420 A.2d 1004, 1008-09 (1980) (the primary concern of the state's paternity legislation is promotion of the child's welfare and best interests) (citing MD. ANN. CODE art. 16 § 66 A (1981)).

While few states have openly accepted promotion of the illegitimate child's welfare as the paramount goal of support proceedings, most states acknowledge that such a policy is the guiding principle of custody proceedings concerning illegitimates. *See, e.g.*, Pi v. Delta, 175 Conn. 527, 400 A.2d 709 (1978) (father of illegitimate child has same custody rights as divorced father because interests of child are paramount); *In re* One Minor Child, 295 A.2d 727 (Del. 1972) (there is "no doubt . . . that the father of an illegitimate child has the right either to custody . . . or to visitation when such is found to be in the best interests of the child"); Bazemore v. Davis, 394 A.2d 1377 (D.C. 1978) (best interests of the illegitimate child is the standard used in a custody dispute between the mother and the father); Gay v. Cairns, 298 N.W.2d 313 (Iowa 1980) (acknowledging that father of illegitimate child has right of visitation upon establishing that such visitation is in the child's best interests); Bauch v. Shaw, 121 N.H. 562, 432 A.2d 1 (1981) ("proper standard to be used in a custody proceeding is the 'present and future welfare of the child' standard regardless of the child's legitimacy status at birth"); D. v. B., 298 N.W.2d 493 (N.D. 1980) ("[a]s in custodial cases, the question of visitation should be resolved to promote the best interests of the [illegitimate] child"); State *ex rel.* Bennett v. Anderson, 129 W. Va. 671, 41 S.E.2d 241 (1947) (mother's custody rights of illegitimate child are subordinate to child's best interests); State *ex rel.* Lewis v. Lutheran Social Services, 68 Wis. 2d 36, 227 N.W.2d 643 (1975) (determinations of parental rights "are to be made giving paramount consideration to the best interests of the child").

As a further indication of judicial concern for the child's well-being, some courts have begun to order *support* awards based upon the father's means and the child's needs instead of limiting support to a mere subsistence level. *See* Wong v. Wong Hing Young, 80 Cal. App. 2d 391, 181 P.2d 741 (1947) ("father's duty of support [of legitimate or illegitimate child] does not end with the furnishing of mere necessities if he is able to afford more"); Hughes v. Hutt, 50 Pa. 209, 212-13, 455 A.2d 623, 625 (1983) ("[t]he only issues which are to be considered in a support action are the needs of the child and the means of both parents").

Family Court Act.[52] This statute requires "the parent or parents possessed of sufficient means, or able to earn such means" to pay for the child's support and education "a fair and reasonable sum"[53] in accordance with their respective means. In applying the Family Court Act, the New York courts have continued to give highest priority in support determinations to the illegitimate child's welfare.[54]

The United States Supreme Court has recently become active in issues concerning illegitimacy, subjecting to scrutiny under the equal protection clause of the Constitution legislative enactments which treat legitimate children more favorably than their illegitimate counterparts.[55] Although not

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52. 1962 N.Y. Laws 686 (codified as amended at N.Y. FAM. CT. ACT § 111-1211 (McKinney 1975)). This act applies to the entire state of New York, including New York City. N.Y. FAM. CT. ACT § 122 (McKinney 1975).

53. N.Y. FAM. CT. ACT § 545 (McKinney Supp. 1982-83). The full text of the section provides in pertinent part as follows:

> In a proceeding in which the court has made an order of filiation, the court shall direct *the parent or parents possessed of sufficient means or able to earn such means to pay* weekly or at other fixed periods *a fair and reasonable sum according to their respective means* as the court may determine and apportion *for such child's support and education*, until the child is twenty-one . . . . The order may also direct each parent to pay an amount as the court may determine and apportion for the support of the child prior to the making of the order of filiation . . . . [and] for good cause shown, support may be continued in the discretion of the court.

Id. (emphasis added).

To carry out this policy, the New York legislature has granted the family court broad jurisdiction in paternity proceedings: "Except as otherwise provided, the family court has exclusive original jurisdiction in proceedings to establish paternity and, if any such proceedings in which it makes a finding of paternity, to order support." *Id.* § 511. The only exception to the Family Court's exclusive original jurisdiction in this area is where the determination of paternity is involved in an adoption proceeding. *See* N.Y. DOM. REL. LAW § 111-b(1) (McKinney Supp. 1982-83). In this situation, the jurisdiction does not include any authority to order child support. *Id.* § 111-b(2).

The otherwise exclusive jurisdiction of the family court was granted with the goal of promoting the illegitimate child's welfare by "permit[ting] the Family Court to draw upon all its resources in protecting and caring for the innocent child of an illicit relation." N.Y. FAM. CT. ACT § 511 committee comment 2 (McKinney 1975).

Unlike New York, many state legislatures have remained silent as to the policies underlying their support provisions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-849 D (1982); FLA. STAT. ANN. § 742.031 (West 1964); MASS. GEN. LAWS ANN. ch. 273, § 15 (West Supp. 1983); MICH. COMP. LAWS ANN. § 722.712 (1968).

54. *See, e.g.*, *In re* J. (Anonymous) Children, 50 A.D.2d 890, 377 N.Y.S.2d 530 (1975) (protection of illegitimate child's welfare is the primary purpose of filiation proceedings); Nardone v. Coyne, 23 A.D.2d 819, 258 N.Y.S.2d 511 (1965) (welfare of child is the most important factor in evaluating the adequacy of support award), *aff'd*, 18 N.Y.2d 626, 219 N.E.2d 290, 272 N.Y.S.2d 775 (1966). Moreover, the legislature endorsed the policy of promoting the child's welfare under the Family Court Act. *See* N.Y. FAM. CT. ACT § 545 committee comment 1 (McKinney 1975) (the needs of the child, the financial ability of the parents, and their total responsibilities are decisive in support proceedings). For a discussion of the approach taken in other jurisdictions, see note 51 *supra*.

55. *See* Picket v. Brown, 103 S. Ct. 2199 (1983) (statute denying illegitimate child the right to support from its father unless a support or paternity action was

held to be among those classifications labelled "suspect," illegitimacy classifications have received meaningful equal protection review.[56] In *Gomez v. Perez*,[57] the Justices were confronted with a statute dealing specifically with the issue of parental support of the illegitimate child. The legislative enactment in question embodied the common law rule that a father is under a duty to support only his legitimate offspring.[58] In invalidating the legislation, the Court asserted that once a state grants to children a right to necessary sup-

commenced prior to the child's attaining the age of two, found constitutionally defective); Mills v. Habluetzel, 456 U.S. 91 (1982) (statute denying illegitimate child the right to support from its father unless a paternity suit had been commenced prior to the child's first birthday deemed unconstitutional); Caban v. Mohammed, 441 U.S. 380 (1979) (statute requiring only the mother's consent prior to the adoption of an illegitimate child by others, constitutionally impermissible); Parham v. Hughes, 441 U.S. 347 (1979) (statute permitting the illegitimate child's father to sue for wrongful death of the child only under certain conditions deemed constitutionally valid); Lalli v. Lalli, 439 U.S. 259 (1978) (statute denying illegitimate a share in father's intestate estate unless there had been an order of filation while the father was alive determined constitutional); Fiallo v. Bell, 430 U.S. 787 (1977) (statute denying illegitimate children of foreign immigrants certain preferences in immigration which were accorded to legitimate children deemed constitutional) (fifth amendment objection); Trimble v. Gordon, 430 U.S. 762 (1977) (statute denying illegitimate children inheritance from father found unconstitutional); Mathews v. Lucas, 427 U.S. 495 (1976) (statute denying illegitimates presumption of dependency as accorded legitimate children for the purpose of obtaining survivor's benefits deemed constitutional) (due process objection); Jimenez v. Weinberger, 417 U.S. 628 (1974) (statute denying certain illegitimate children disability insurance payments found unconstitutional) (scrutinized under fifth amendment due process clause); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (per curiam) (statute denying illegitimate children welfare assistance found constitutionally invalid); Gomez v. Perez, 409 U.S. 535 (1973) (statute denying illegitimate child support from father deemed unconstitutional); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (statute denying unacknowledged dependent illegitimate children workmen's compensation benefits following their father's death found constitutionally defective); Stanley v. Illinois, 405 U.S. 645 (1972) (statute denying a hearing to father of illegitimate child prior to child's adoption by third party held constitutionally invalid); Labine v. Vincent, 401 U.S. 532 (1971) (statute conditioning illegitimate's intestate distribution from natural father upon formal acknowledgment by father during his lifetime deemed constitutional); Glona v. American Guarantee Co., 391 U.S. 73 (1968) (statute denying mother recovery for the wrongful death of illegitimate child found unconstitutional); Levy v. Louisiana, 391 U.S. 68 (1968) (statute denying illegitimate children recovery for the wrongful death of their mother deemed unconstitutional). For a discussion of these decisions, see J. NOWAK, R. ROTONDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 701-13 (1983) [hereinafter referred to as 1983 NOWAK]; Maltz, *Illegitimacy and Equal Protection*, 1980 ARIZ. ST. L.J. 831, 832-39.

56. *See* 1983 NOWAK, *supra* note 55, at 701. The author states as follows: "The compelling interest test has not been applied to these classifications, but the justices will independently review the basis of these classifications to determine if they reasonably advance a legitimate government purpose." *Id.* It is difficult, however, to ascertain from the decisions the exact bounds of such review. *See generally id.* at 702; Maltz, *supra* note 55, at 831.

57. 409 U.S. 535 (1973).

58. *Id.* For a discussion of the common law doctrine that a father had no duty to support his illegitimate children, see generally note 16 and accompanying text *supra*.

port from their father, there is no constitutionally acceptable justification for denying this right to an illegitimate child solely because his natural parents have not married. For a state to take such a position is "illogical and unjust."[59] Similarily, in *Pickett v. Brown*,[60] legislation placing a two-year limit on an illegitimate child's right to establish paternity and to obtain support from his natural father was found constitutionally defective in light of the mandate of the equal protection clause.[61]

The right of an illegitimate child to support from his biological father has recently been reexamined in light of two recent state court cases involving a mother's misrepresentation that she was using birth control at the time she became pregnant with an illegitimate child. In *Stephen K. v. Roni L.*,[62] the father, after admitting paternity, cross-claimed for damages in tort, alleging that in reliance upon the mother's fraudulent deception, he engaged in sexual intercourse which resulted in the conception of an unwanted child.[63] In declining to entertain the tort claim, the California Court of Appeals found that a judicial attempt to correct the social wrong involved in this case would prove improvident.[64] The *Stephen K.* court refused to police the private sexual conduct of two consenting adults, believing that such court interference would result in unwarranted governmental intrusion into

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59. 409 U.S. at 538.

60. 103 S. Ct. 2199 (1983).

61. *Id.* at 2209. In *Pickett*, the mother had instituted a paternity and support action approximately 10 years subsequent to the child's birth. *Id.* at 2200. The alleged father filed a motion to dismiss based upon the statute which provided, in pertinent part, that such proceedings "shall not be brought after the lapse of more than two (2) years from the birth of the child." *Id.* at 2200, 2201 n.1 (quoting TENN. CODE ANN. § 36-224 (2) (1977)). Prior to *Pickett*, the Court had invalidated a statute setting a one-year limitation on the right to commence a paternity proceeding. Mills v. Habluetzel, 456 U.S. 91 (1982).

62. 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980).

63. *Id.* at 641-42, 164 Cal. Rptr. at 619 (1980). The father sought general damages in the amount of $100,000 to compensate for his support obligation to the child and for the emotional distress and mental anguish he suffered as a result of the mother's deception and subsequent birth of the child. *Id.* at 642, 164 Cal. Rptr. at 619. In addition, the father sought punative damages amounting to $100,000. *Id.*

At trial level, the court sustained without leave to amend, the mother's demurrer to the father's cross-complaint. *Id.* at 640, 164 Cal. Rptr. at 618.

64. *Id.* at 642-43, 164 Cal. Rptr. at 619-20. The *Stephen K.* court stated:

> It does not lie within the power of any judicial system, however, to remedy all human wrongs. There are many wrongs . . . [which] are beyond any effective legal remedy and any practical administration of law. To attempt to correct such wrongs or give relief from their effects "may do more social damage than if the law leaves them alone." The present case falls within that category.

Id. (quoting Ploscowe, *An Action For "Wrongful Life,"* 38 N.Y.U. L. REV. 1078, 1080 (1963)).

Historically, it has not been unusual for a court to at least partially base its decision on such pragmatic grounds. *See* W. PROSSER, HANDBOOK ON THE LAW OF TORTS 21-22 (4th ed. 1971). *See also* L. GREEN, JUDGE AND JURY 77-96 (1930).

an individual's right to privacy.[65] Since the practice of birth control was thought to be best left with the sexual partners, the court concluded that the natural father could have taken his own precautionary measures to avoid conception.[66]

In *Hughes v. Hutt*,[67] the Pennsylvania Supreme Court was also confronted with the issue of a mother's tortious misrepresentation. The court compared the mother's deception with the father's support obligation in light of the goals of support proceedings.[68] After noting the procedural prohibitions on the argument raised by the father, the supreme court explained the policy underlying those restrictions by reaffirming that "[t]he only issues which are to be considered in a support action continue to be the needs of the child and the means of both parents."[69] Consequently, the court concluded that arguments about the mother's misrepresentations that she was using birth control "have no place in a proceeding to determine

65. 105 Cal. App. 3d at 643, 164 Cal. Rptr. at 619-20.

The concept that judicial intervention in private rights could constitute state action sufficient to rise to the level of a constitutional violation had its origin in the well-known case of *Shelley v. Kraemer*. *See* 334 U.S. 1 (1948). *See generally* 1983 NOWAK, *supra* note 55, at 509. It has never been held, however, that the mere involvement of a court in the protection of rights automatically establishes state action. In recent years, the trend embarked upon in *Shelley* to expand state action through the notion that judicial intervention may imbue private actions with sufficient governmental flavor to give it constitutional significance has been greatly curtailed. *See* 1983 NOWAK, *supra* note 55, at 510; Glennon and Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 239; Comment, *State Action and the Burger Court*, 60 VA. L. REV. 840, 841 (1974).

66. 105 Cal. App. at 645, 164 Cal. Rptr. at 621. The court explained that even birth control pills were not completely effective. *Id.* Therefore, any decision concerning use of contraception, the court concluded, must be a personal one. *Id.* However, as a practical matter, there is only one contraceptive device—the condom—available to men. *See* Quinby, *Contraceptives: Choosing the One That's Right for You*, 88 MADEMOISELLE 66 (Jan. 1982). This particular device is not as effective as contraceptives available to women. *Id. See* Frank, *Beyond the Pill: Contraceptives of the Future*, 88 MADEMOISELLE 139 (Oct. 1982); *Women Doctors Talk About Birth Control*, 99 LADIES HOME J. 64 (Sept. 1982).

67. 50 Pa. 209, 455 A.2d 623 (1983).

68. *Id.* at 212-13, 455 A.2d at 624-25. The father first demanded that a jury hear his argument that the mother's deception should eliminate his paternity liability. *Id.* at 211, 455 A.2d at 624. The state supreme court agreed with the lower courts' refusal to grant such a demand, holding that the jury's role is solely to determine paternity and that any alleged misrepresentation has "no relevance to the question of this paternity." *Id.*

69. *Id.* at 212-13, 455 A.2d at 625. The father argued that Pennsylvania law treats a paternity proceeding as a civil action. *Id.* at 212, 455 A.2d at 624-25 (quoting 42 PA. CONS. STAT. ANN. § 6704(f) (Purdon 1982) (current version at *id.* § 6704(c) (Purdon Supp. 1983)). Thus, the father reasoned, he was entitled to assert a counterclaim pursuant to the Pennsylvania Rules of Civil Procedure. *Id.* at 209, 455 A.2d at 625. *See* PA. R. CIV. P. 1031, 1046. The supreme court dismissed the claim with two comments: first, the civil form of action is only an effort to decriminalize the proceeding, not broaden the available actions; second, support proceedings are governed by a unique set of rules, none of which can be read to authorize the father's claim. 50 Pa. at 212, 455 A.2d at 625. *See* PA. R. CIV. P. 1910.1-.31.

child support."[70]

A federal constitutional issue regarding an individual's right to privacy arises in cases where a state imposes a support obligation on the father in instances where the mother's misrepresentation as to her use of contraception led to the birth of an illegitimate child.[71] The Supreme Court's first express acknowledgement of the existence of such a right of privacy occurred in *Griswold v. Connecticut*.[72] Confronting a statute prohibiting married persons from using contraceptives, the *Griswold* Court found an unconstitutional infringement of the right to privacy in the marital relationship.[73] In *Eisenstadt v. Baird*,[74] the Court expanded upon this concept by recognizing the right of a

70. 50 Pa. at 212, 455 A.2d at 625. The court felt its conclusion was compelled by the following factors: (1) the possibility of fabricated accusations; (2) the less than certain effectiveness of birth control methods; and (3) the fact that claims like the one asserted by the father, if successful, could result in the denial of support to innocent children whom the support law was designed to protect. *Id.*

71. *See Stephen K. v. Roni L.*, 105 Cal. App. 3d at 640, 164 Cal. Rptr. at 618.

The concept of an individual right to privacy in sexual matters can be traced to *Skinner v. Oklahoma*. 316 U.S. 535 (1942). See NOWAK, *supra* note 4, at 624-25. In this 1942 opinion, the United States Supreme Court held unconstitutional a statute that permitted sterilization of persons convicted of certain crimes three or more times. *Skinner*, 316 U.S. at 535. The statute at issue was Oklahoma's Habitual Criminal Sterilization Act, 1935 Okla. Sess. Laws 26, art. 1 (held unconstitutional 1942). The act defined "habitual criminal" as a person who, having been convicted at least twice of "felonies involving moral turpitude," is convicted again of a "felony involving moral turpitude" and sentenced to imprisonment. *Id.* § 3. Anyone who was ruled a habitual offender, pursuant to the act's provisions, was to be "sexually sterilized." *Id.* § 4.

The Court's holding of unconstitutionality was based on the equal protection clause of the fourteenth amendment. 316 U.S. at 538. Of relevance, however, is the fact that the opinion, although not mentioning a right of privacy in sexual matters, did establish marriage and procreation as interests of important constitutional significance. *Id.* at 541. *See generally* NOWAK, *supra* note 4. The Court asserted, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.*

72. 381 U.S. 479 (1965). *See generally* NOWAK, *supra* note 4, at 625-27.

73. 381 U.S. at 479. The statute in *Griswold* provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." CONN. GEN. STAT. § 53-32 (1958) (repealed 1971). In addition, Connecticut law provided that "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.* § 54-196. The two appellants in the case had been convicted for giving information on birth control to married persons. 381 U.S. at 480.

After tracing the development of the right to privacy under the Constitution, the Court noted that it was addressing "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees" and "a law which . . . seeks to achieve its goals by means having a maximum destructive impact upon that relationship." *Id.* at 485. The Court concluded that it was "deal[ing] with a right of privacy older than the Bill of Rights . . . . Marriage is . . . intimate to the degree of being sacred." *Id.* at 486.

74. 405 U.S. 438 (1972).

single person to have the same access to contraceptives as a married person.[75] Further, in *Carey v. Population Services International*,[76] the Justices again acknowledged the right to decide for oneself whether or not to avoid procreation through the use of contraception.[77]

Against this background, the New York Court of Appeals faced the issue of whether misrepresentation by a mother concerning her use of contraception may be asserted by the natural father of an illegitimate child as a

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75. *Id.* at 453. The statute under attack in *Eisenstadt* provided a maximum five-year imprisonment for "whoever sells, lends, gives away, exhibits or offers to sell, lend or give away . . . any drug, medicine, instrument or article whatever for the prevention of conception," except as permitted in § 21A. MASS. GEN. LAWS ANN. ch. 272, § 21 (West 1970) (held unconstitutional 1972). Section 21A provided as follows:

> A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

Id. § 21A. The appellee had been convicted for displaying contraceptives at a lecture on the subject, and for giving an unmarried adult woman a package of vaginal foam. 405 U.S. at 440.

In invalidating the legislation, the Court stressed the individual nature of the right, defining it as "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." *Id.* at 453 (emphasis in original). *See generally*, Comment, *The Right of Privacy: A Black View of* Griswold v. Connecticut, 7 HASTINGS CONST. L.Q. 777, 811 (1980); Note, *Expanding the Right of Sexual Privacy*, 27 LOY. L. REV. 1279, 1286 (1981).

76. 431 U.S. 678 (1977).

77. *Id.* The constitutionality of New York's restrictions on access to birth control were discussed in *Carey*. 431 U.S. 678 (1977). The New York law prohibited the sale or distribution of contraceptives to minors under 16 years of age, the sale or distribution of contraceptives to anyone 16 years of age or older by anyone other than a licensed pharmacist, and the display or advertisement of any contraceptives. N.Y. EDUC. LAW § 6811(8) (McKinney 1972) (held unconstitutional 1976). One of the appellees was Population Planning Associates, Inc., a corporation engaged in the sale, through mail order, of various nonmedical contraceptive devices. 431 U.S. at 682. In finding the statute contrary to constitutional mandates, the Court asserted that "the constitutionally protected right of privacy extends to an individual's liberty to make choices regarding conception . . . . *Id.* at 685.

The Court in *Roe v. Wade* had previously recognized as fundamental a woman's right to decide whether or not to have a child. Roe v. Wade, 410 U.S. 113 (1973). In deeming a statute limiting a woman's right to an abortion unconstitutional, the *Wade* Court also emphasized the individual, or personal, nature of the right and held that the right of privacy encompasses "a woman's decision whether or not to terminate her pregnancy." *Id.* at 152-53. The statutes in question made it a crime to obtain an abortion unless it was obtained "for the purpose of saving the life of the mother." *Id.* at 117-18 & n.1 (discussing TEX. PENAL CODE ANN. §§ 1191-1194, 1196 (Vernon 1925) (held unconstitutional 1973)). The plaintiff, an unmarried pregnant woman, was seeking a declaratory judgment that the abortion statutes were unconstitutional. *Id.* at 120.

As the cases illustrate, governmental interference with one's right to privacy, a fundamental right, invokes substantial judicial scrutiny. *See generally* 1983 NOWAK, *supra* note 55, at 418-19, 458-59 & 492-94.

defense to his support obligation.[78] The court began its analysis by establishing that the primary concern in a paternity proceeding is the well-being of the child.[79] Such a policy, the court pointed out, is reflected in the paternity provisions of the Family Court Act which require consideration of only two factors in fashioning a support award: the child's needs and the parents' financial ability to meet those needs.[80] In light of this policy, the court maintained that an inquiry into the respective fault of the mother or father in causing the child's conception was neither contemplated by the legislature, nor jurisdictionally permissible.[81] Therefore, the court concluded that the father may not raise as a defense in a support proceeding the mother's deliberate misrepresentations as to her use of contraception.[82]

The court next addressed the appellant's contention that the mother's misrepresentation regarding contraception served to deprive him of his constitutional right to privacy: his right to choose whether or not to father a child.[83] Conceding that the mother's conduct did not, in itself, involve state action, the father argued that the court's action in ordering him to pay support in this situation constituted sufficient state involvement to give rise to a constitutional claim.[84] Assuming, without deciding, that sufficient state action existed, the court acknowledged that a man has a fundamental right to decide whether or not to father a child.[85] However, the court concluded that since the mother's conduct did not in any way interfere with the father's right to use contraception, the interest asserted by Frank S. was not actually "his freedom to choose to avoid procreation."[86] Rather, the court characterized his interest as the right to avoid a child support obligation arising out of a relationship between two private parties.[87] Under constitutional analysis, the court reasoned that the protected right "involves the freedom to decide

78. 59 N.Y.2d at 4, 449 N.E.2d at 714, 462 N.Y.S.2d at 820.

79. *Id.* at 5, 449 N.E.2d at 715, 462 N.Y.S.2d at 821. The primary objective, the court noted, is no longer to prevent the child from becoming a public ward. *Id.* For a thorough examination of the shift in objectives from concern over expenditures of public monies to the welfare of the child, see notes 16, 45, & 48-54 and accompanying text *supra*.

80. 59 N.Y.2d at 5, 449 N.E.2d at 715, 462 N.Y.S.2d at 821. For the text of § 545 of the Family Court Act, see note 53 *supra*. For a discussion of the legislature's affirmative embrace of this policy of promoting the child's welfare as the polestar of the Family Court Act, see notes 53 & 54 and accompanying text *supra*.

81. 59 N.Y.2d at 5, 449 N.E.2d at 715, 462 N.Y.S.2d at 821. The court stated that since the principal objective of a paternity proceeding and the establishment of a support award is to promote the child's wellbeing, "the Family Court, as *a court of limited jurisdiction, is* simply *not the proper forum* for adjudicating disputes existing solely between the parents." *Id.* (emphasis added).

82. *Id.*

83. *Id.* at 5-6, 449 N.E.2d at 715, 462 N.Y.S.2d at 821.

84. *Id.* at 6, 449 N.E.2d at 715, 462 N.Y.S.2d at 812.

85. *Id.* at 6, 449 N.E.2d at 715-16, 462 N.Y.S.2d at 821-22 (citing *Carey*, 431 U.S. at 678; *Eisenstadt*, 405 U.S. at 438). For a discussion of the Court's analysis in *Carey* and *Eisenstadt*, see notes 74-77 and accompanying text *supra*.

86. 59 N.Y.2d at 6, 449 N.E.2d at 716, 462 N.Y.S.2d at 822.

87. *Id.*

for oneself, without unreasonable governmental interference, whether to avoid procreation through the use of contraception."[88] Nonetheless, the right to privacy, stated the court, has never been extended so as to regulate the conduct of private parties.[89] The *L. Pamela P.* court noted that a judicial determination of the validity of such a constitutional claim may itself constitute impermissible state action.[90] In conclusion, the court indicated that no matter how unfair the conduct of the mother in not affording the father an equal voice in the child's conception, her action did not give rise to a constitutional wrong.[91]

In reviewing the decision of the New York Court of Appeals in *L. Pamela P.*, it is submitted that the court reached a decision wholly consonant with the general purpose of the Family Court Act when it based its prohibition of the defense of misrepresentation on jurisdictional grounds.[92] Although a literal reading of the family court's jurisdictional grant fails to reveal an express prohibition of jurisdiction over the defense of misrepresentation,[93] such a jurisdictional preclusion can reasonably be inferred from the language of the support statute[94] and its legislative history.[95]

As the New York Court of Appeals correctly noted, the family court is limited by the Family Court Act to a consideration of two factors in fashioning a support order: the needs of the child and the means of the parent.[96] Furthermore, since the drafters of the Act indicated that the family court's goal in fashioning an order is to protect the welfare of the child,[97] to entertain the defense would fail to promote the very purpose for which the court

88. *Id.*

89. *Id.* (emphasis added). The Court found that the father's attempt to raise the constitutional issue was not an effort to prevent others from infringing upon his right of privacy; rather, it was an effort to force others to compromise their privacy right in deference to his choice. *Id.*

90. *Id.* (citing *Stephen K. v. Roni L.*, 105 Cal. App. 3d at 640, 164 Cal. Rptr. at 618). For a discussion of *Stephen K.*, see notes 62-66 and accompanying text *supra*.

91. 59 N.Y.2d at 6-7, 449 N.E.2d at 716, 462 N.Y.S.2d at 822.

92. For a discussion of the court's reasoning concerning the lack of family court jurisdiction, see notes 79-82 and accompanying text *supra*. For a discussion of the proposition that the child's welfare and the parent's means are the only relevant considerations in a support proceeding, see notes 49-54 and accompanying text *supra*.

93. *See* N.Y. FAM. CT. ACT. §§ 115, 511 (McKinney 1975). For a discussion of the family court's jurisdiction, see note 53 *supra*.

94. *See* note 96 and accompanying text *infra*. For the text and analysis of § 545, the support order provision, see notes 53 & 54 and accompanying text *supra*.

95. *See* notes 97-100 and accompanying text *infra*. For a discussion of the committee comments regarding the support order and jurisdiction provisions, which suggest the absence of any concern about the mother's deception, see notes 53 & 54 *supra*.

96. 59 N.Y.2d at 5, 449 N.E.2d at 715, 462 N.Y.S.2d at 821. For the text of the provision establishing the criteria imposing a support obligation, see note 53 *supra*. There is no mention in the statute of any other factors that warrant consideration. *See id.*

97. N.Y. FAM. CT. ACT. art. 1 practice commentaries (McKinney 1975) (quoting *Committee Comments, Joint Legislative Committees on Court Reorganization* 3420). This legislative commentary indicates the legislature's affirmative acceptance of the principle openly espoused by the court as the polestar of New York's illegitimacy legisla-

was created.[98] Moreover, a finding that the legislature intended to make the defense of misrepresentation available to a father would not comport with the trend in New York law towards promoting the welfare of the bastard child,[99] a trend exemplified in the Family Court Act.[100] It is thus submitted that the court was correct in finding a jurisdictional bar to an issue which stemmed from a dispute "existing solely between the parents,"[101] and which did not in any way serve to promote the child's welfare.[102]

It is suggested that the court's conclusion that no recognized aspect of the father's right to privacy was violated by the mother when she fraudulently deceived him, was a correct application of constitutional principles.[103] While the father has a constitutionally protected fundamental right to

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tion: promotion of the child's welfare. For further discussion of the legislative approval of this principle, see notes 53 & 54 and accompanying text *supra*.

98. For a discussion of these purposes, see notes 53 & 54 and accompanying text *supra*. On the other hand, it could be argued that *the child's welfare would not be compromised in any way* by permitting the defense of fraud and deceit to be asserted. The family court did not hold that recognition of this defense would relieve the defendant of all support obligations. *See* 59 N.Y.2d at 4 & n.*, 449 N.E.2d at 715 & n.*, 462 N.Y.S.2d at 821 & n.*. Instead, the family court placed limitations upon this defense such that a court's acceptance of this type of claim would result in the child receiving the same overall amount of support as it would have received had the defense not been permitted and the usual support allocation rule been applied. *See id*. The only difference between allowing the defense as delineated by the family court and not permitting it to be asserted lies in the proportion of support that each parent would be called upon to bear. *Id*. Under the family court's ruling, the father is relieved of his support obligation only to the extent that the mother is able to provide for the child's needs herself. *Id*. The family court stated, however, that the rule must be applied "without detriment to the child" and that "the child is entitled . . . to no less a standard of living than his father's." 110 Misc. 2d at 985, 443 N.Y.S.2d at 348 (footnote omitted). Furthermore, "the child . . . cannot be relegated to a public assistance standard." *Id*.

However, the fact that such a rule does not compromise the child's financial status is not a cogent argument in favor of its application since the criterion is whether the support award *promotes* the child's welfare, not whether it is a detriment to this individual's well-being. For a discussion of this policy, see notes 53-54 & 97 and accompanying text *supra*. It is suggested that an inquiry into the fraud and deceit of the mother in causing the child's conception is purely a controversy between the two parents, the resolution of which in no way promotes the child's interest. For a discussion of the proposition that some legal inquiries may do more harm than good, see notes 64 & 65 and accompanying text *supra*.

99. For a discussion of the development of the legislative and judicial protection afforded to illegitimate children in New York State, see notes 22-28, 31-34 & 37-54 and accompanying text *supra*.

100. For a discussion of the Family Court Act's consistency with the policy of promoting the child's welfare, see notes 53-54 & 97 and accompanying text *supra*.

101. 59 N.Y.2d at 5, 449 N.E.2d at 715, 462 N.Y.S.2d at 821.

102. For a discussion concluding that although such an inquiry would not harm the child, it would nevertheless fail to *promote* the child's well-being, see note 98 *supra*. For an analysis of the court's agreement that the legislature did not envision the availability of this defense, see notes 79-82 and accompanying text *supra*.

103. For a discussion of Frank S.'s constitutional contention and the court's reasoning in dismissing this argument, see notes 83-91 and accompanying text *supra*.

choose for himself whether to father a child,[104] the Supreme Court has defined this procreative right in terms of an *individual's* right to make choices as to sterilization and an *individual's* right to obtain contraceptive devices in order to avoid procreation.[105] The interest sought to be protected by the father in *L. Pamela P.* was not his *individual* right to have access to contraception so as to avoid procreation; as the court correctly stated, "the mother's conduct in no way limited his right to use contraception."[106] Rather, he sought "to have his choice regarding procreation fully respected by other individuals and effectuated to the extent that he should be relieved of his obligation to support" his child.[107] Pamela P.'s failure to allow him equal say in the decision to have a child, however wrong, "should not rise to the level of a constitutional violation."[108]

A recognition by the *L. Pamela P.* court of an inability to remedy all human wrongs without engendering further social damage would, it is submitted, in itself be a policy ground sufficient to bar any claim or defense of fraud and deceit. A recognition of this public policy played an integral part in the court's decision to dismiss a similar action for tortious misrepresentation in *Stephen K.*,[109] a case favorably acknowledged by both the Pennsylvania Supreme Court in *Hughes*,[110] and the New York Court of Appeals in *L. Pamela P.*[111] In ascertaining the likelihood of any social damage which

104. 59 N.Y.2d at 6, 449 N.E.2d at 715-16, 462 N.Y.S.2d at 821-22 (citing *Carey*, 431 U.S. at 678; *Eisenstadt*, 405 U.S. at 438). For a discussion of the Court's analysis in *Carey* and *Eisenstadt*, see notes 74-77 and accompanying text *supra*.

105. For a discussion of the Supreme Court's development of this individual right to privacy, see notes 71-77 and accompanying text *supra*.

106. 59 N.Y.2d at 6, 449 N.E.2d at 716, 462 N.Y.S.2d at 822. For an analysis of the court's conclusion that the father's individual rights were not violated, see notes 86-91 and accompanying text *supra*. For a discussion of the contraceptive options available to a father, see note 66 *supra*.

107. 59 N.Y.2d at 6, 449 N.E.2d at 716, 462 N.Y.S.2d at 822. For a discussion of the court's analysis of this issue, see note 89. For a discussion of the Pennsylvania Supreme Court's analysis of this argument, see notes 68-70 and accompanying text *supra*.

108. 59 N.Y.2d at 6-7, 449 N.E.2d at 716, 462 N.Y.S.2d at 822. The court stated that the father's "constitutional entitlement to avoid procreation does not encompass a right to avoid a child support obligation simply because another private person has not fully respected his desires in this regard." *Id.*

The court seemed to indicate, however, that had the father's right to privacy been involved, judicial intervention might itself constitute an invasion of Frank S.'s constitutional right. *Id.* at 6, 449 N.E.2d at 716, 462 N.Y.S.2d at 822 (citing *Stephen K. v. Roni L.*, 105 Cal. App. 3d at 640, 164 Cal. Rptr. at 618). For a discussion of the assertion of this proposition by the *Stephen K.* court, see note 65 and accompanying text *supra*. This concept, by which the court is in effect acknowledging that an order mandating support constitutes sufficient government action to invoke constitutional proscriptions, rests upon a tenuous application of current constitutional interpretation. *See* note 65 *supra*.

109. 105 Cal. App. 3d at 640, 164 Cal. Rptr. at 618. For a discussion of the facts and analysis of *Stephen K.*, see notes 62-66 and accompanying text *supra*.

110. 50 Pa. at 209 n.2, 455 A.2d at 625 n.2. For a discussion of the facts and analysis of *Hughes*, see notes 67-70 and accompanying text *supra*.

111. 59 N.Y.2d at 6, 449 N.E.2d at 716, 462 N.Y.S.2d at 822.

might ensue from allowing the misrepresentation defense in a support action, the question arises as to whether in the first instance, it is proper for a court to delve into the private conduct of the parents,[112] and further whether the results of such an inquiry should result in a denial of support to an innocent third party, the child.[113] The difficulty which could occur in defining the parameters of such a defense could open a pandora's box of litigation problems.[114] For example, if the misrepresentation defense were permitted, the issue of whether a court should entertain this defense in a hearing for support of a *legitimate* child would arise. Although it is quite possible that a court would not recognize the defense,[115] disallowing the defense in cases involving legitimate children while permitting its use in hearings involving illegitimate children would raise serious equal protection issues.[116]

In view of the court's narrow holding denying the family court jurisdiction to entertain the misrepresentation defense, it is suggested that the impact of this decision upon support proceedings in other jurisdictions will be limited.[117] The strict holding of the New York Court of Appeals should also

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112. *Id.* at 4, 449 N.E.2d at 716, 462 N.Y.S.2d at 822. As the court stated, "[j]udicial inquiry into so fundamentally private and intimate conduct as is required to determine the validity of [the father's] assertions may itself involve impermissible state interference with the privacy of these individuals." *Id.* For a discussion of this consideration by the *Stephen K.* court, see note 65 and accompanying text *supra*.

113. *Hughes v. Hutt*, 50 Pa. at 209, 455 A.2d at 625. For a discussion of the *Hughes* court's view, see note 70 and accompanying text *supra*.

114. For a discussion of *Stephen K.* court's recognition of this problem, see note 65 and accompanying text *supra*. For a discussion of the *Hughes* court's view that these concerns weigh against judicial resolution of this matter, see note 70 and accompanying text *supra*. *See also* L. GREEN, *supra* note 64, at 76-96; W. PROSSER, *supra* note 64, at 21-22.

115. The family court; in permitting the father to assert the defense of fraud and deceit, briefly mentioned this question. 110 Misc. 2d at 982, 443 N.Y.S.2d at 346. Though refusing to address the issue as relevant to the instant case, the family court did state that "marriage is ordinarily deemed to represent a willingness to procreate." This dictum suggests that at least the New York Family Court would not permit such a claim or defense in a marital situation. *Id.*

116. Under the equal protection guarantee of the fourteenth amendment, classifications distinguishing illegitimate from legitimate children are unconstitutional if they fail to reasonably promote a permissible government purpose or if they place a burden on the illegitimate child *qua* illegitimate child. For a discussion of the Supreme Court's efforts in policing illegitimacy legislation through use of the equal protection clause, see notes 55-61 and accompanying text *supra*. *See also* NOWAK, *supra* note 4, at 601.

117. For a discussion of the court's analysis of the jurisdiction issue in light of the support statute's goal of promoting the child's welfare, see notes 79-82 & 96-102 and accompanying text *supra*.

The legislation on illegitimacy in force in most states is silent as to the purpose of, or policy behind, support provisions and few states have gone as far as New York in openly embracing promotion of the child's welfare as a primary policy. For examples of statutes lacking criteria for support awards or express policy goals, see note 35 *supra*. For a discussion of the paucity of states which have adopted the paramount goal of promoting the child's welfare, see note 51 *supra*. The open acceptance of such a policy may not be far away, however, and for those statutes that are deemed to

have little effect on other claims which might arise out of a mother's fraudulent deception in conceiving a child.[118] Application of the principles set forth in *L. Pamela P.* to tort or contract claims could occur only if a court chooses to follow the court of appeals' dicta asserting that judicial inquiry into intimate conduct may rise to the level of a constitutional violation.[119]

Currently, only three state courts have ruled on the effect of a mother's misrepresentation as to her use of contraception.[120] All three refused to reach the merits of the misrepresentation contention.[121] In light of the sensative nature of the interests involved, perhaps, as these courts realized, this is an issue best kept out of the legal system.[122] Although it is uncertain

embody this purpose, *L. Pamela P. v. Frank S.* will provide a rationale by which a court could bar the father's defense. For a discussion of cases in which various jurisdictions have adopted such a policy in custody and visitation proceedings, or have required support based upon the father's ability to pay rather than basic necessities, see note 51 *supra*. For a discussion of the court's analysis that a defense of misrepresentation is inconsistent with the goal of promoting the child's welfare, see notes 96-102 and accompanying text *supra*.

118. Such an action on the part of the mother could theoretically give rise to both tort and contract claims.

The assertion of such a claim under tort theory has already been attempted. *See Stephen K. v. Roni L.*, 105 Cal. App. 3d at 640, 164 Cal. Rptr. at 618. For a discussion of *Stephen K.*, see notes 62-66 and accompanying text *supra*. However, the *Stephen K.* court refused to entertain this claim on broad public policy grounds and thus did not reach the question as to whether tort liability existed. *Id.* at 642-45, 164 Cal. Rptr. at 619-20.

A breach of contract action against the mother for engaging in such action has not yet been attempted, however this claim would not be far-fetched in terms of contract principles. *See generally* A. CORBIN, CORBIN ON CONTRACTS (1952). Such a contract, if it were found to exist, could however, be deemed to be "contrary to public policy" and thus declared illegal. *See id.* at 1160-62.

119. As to whether such judicial inquiry would itself rise to the level of a constitutional wrong, see note 65 *supra*. Regarding the court's seeming approval of *Stephen K.*, a decision which further articulated policy rationales favoring the barring of any claim or defense of this type, see 59 N.Y.S.2d at 6, 449 N.E.2d at 716, 442 N.Y.S.2d at 822. For a discussion of the policies espoused in *Stephen K.*, see notes 62-66 and accompanying text *supra*.

120. *Stephen K. v. Roni L.*, 105 Cal. App. 3d at 640, 164 Cal. Rptr. at 618; *L. Pamela P. v. Frank S.*, 59 N.Y.2d at 1, 449 N.E.2d at 713, 462 N.Y.S.2d at 819; *Hughes v. Hutt*, 50 Pa. at 209, 455 A.2d at 623. That no legislative proclamation exists, see *Stephen K. v. Roni L.*, 105 Cal. App. 3d at 640, 164 Cal. Rptr. at 618.

121. One jurisdiction denied the derivation of an action for tortious misrepresentation. *Stephen K. v. Roni L.*, 105 Cal. App. 3d at 640, 164 Cal. Rptr. at 618. For a discussion of the analysis in *Stephen K.*, see notes 62-66 and accompanying text *supra*. Two jurisdictions have ruled that misrepresentation does not give rise to a defense to the obligation of child support. *L. Pamela P.*, 59 N.Y.2d at 1, 449 N.E.2d at 713, 462 N.Y.S.2d at 819; Hughes v. Hutt, 50 Pa. 209, 445 A.2d 623 (1983). For a discussion of the court's analysis in *L. Pamela P.*, see notes 78-91 and accompanying text *supra*. For a discussion of the court's analysis in *Hughes*, see notes 67-70 and accompanying text *supra*.

122. *See* notes 64, 70, 112 & 115-16 and accompanying text *supra*.

whether other jurisdictions will follow those rulings if confronted with similar fact patterns, one thing is assured—the issue has not been laid to rest.[123]

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123. Most jurisdictions have not yet been confronted with this issue. *See* note 121 and accompanying text *supra*. For a statement on the pervasiveness of social conditions that give rise to such an issue, see *Stephen K. v. Roni L.*, 105 Cal. App. 3d at 642, 164 Cal. Rptr. at 619.