
IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-6033

SHARON ROE, ET AL., *Appellants*

v.

NICHOLAS NORTON, Commissioner of Welfare of the
State of Connecticut, *Appellee*

On Appeal from the United States District Court for the
District of Connecticut

**MOTION FOR LEAVE TO FILE BRIEF, AMICI
CURIAE AND BRIEF AMICI CURIAE**

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Inc.; the Family Service Association of America; the Interreligious Foundation for Community Organisation; the National Association for the Advancement of Colored People; the NAACP Legal Defense and Educational Fund, Inc.; the National Association of Social Workers; the National Conference of Catholic Charities; the Catholic Charities of Norwich, Connecticut; the Catholic Charities of Bridgeport, Connecticut; the National Council of Churches of Christ in the United States of America; the National Federation of Settlements and Neighborhood Centers; the National Urban League, Inc.; the Puerto Rican Legal Defense and Education Fund, Inc.; the Salvation Army; the United Church of Christ, Board of Homeland Missions, Health and Welfare Division; the United Presbyterian Church in the United States of America, Health and Welfare Development Unit; the Young Women's Christian Association of the United States of America; and the Children's Defense Fund of the Washington Research Project, Inc.

The organizations listed above, all of which have shown a continuing, substantial interest in child welfare, respectfully move this Court, pursuant to Rule 42(3), for leave to file a brief amicus curiae in this action. The attorneys for appellants have consented to the filing of the attached brief.

THE INTEREST OF AMICI

The Washington Research Project Inc. was established in 1968. The Children's Defense Fund was established by it in 1972. The Children's Defense

Fund focuses principally on the area of children's rights, where it seeks systematic reforms on behalf of all the nation's children, but with particular attention to the special problems of minority and poor children. The Children's Defense Fund's work to vindicate the rights of all children, depends, among other things, on eliminating the vestiges of discrimination against particular children at all levels of governmental policy-making. The statute involved in this case constitutes such discrimination.

The Children's Defense Fund is joined in this amicus brief by national and Connecticut organizations dedicated to the welfare of children, as follows:

The American Academy of Child Psychiatry is a professional society of physicians who are members of the American Psychiatric Association and who are qualified in child psychiatry. Its purpose is to stimulate and advance medical contributions to the knowledge and treatment of psychiatric problems of children. The issues raised by this case are of importance to the Academy because of their relationship to the healthy emotional development of infants and children.

The American Association of Psychiatric Services for Children comprises 180 organizations with a principal interest in providing and/or planning mental health services to children. Among other purposes, it seeks to represent the clinical perspective in those areas which bear upon the emotional development of children. The Association is concerned with the issues in this case because it is aware disruption of mother-child relations presents a serious threat to the intellectual, emotional and social development of infants and young children.

The American Orthopsychiatric Association is a national professional association of psychiatrists, psychologists, social workers and other professionals in the mental health field. Its purpose is to foster research and spread information concerning scientific work in the field of human behavior. The Association is concerned with the issues in this case and the threat they pose to the illegitimate children affected.

The American Parents Committee, Inc. was incorporated in 1947 as a non-profit, non-partisan public service association whose purpose is to work for federal legislation on behalf of the nation's children in the fields of education, child health, child welfare, juvenile delinquency, day care and family planning. The instant case raises an issue of concern to the Committee since research has shown that maternal deprivation impairs the healthy development of children, undermines the essential parental role of their mothers and leads to disruption rather than the strengthening of family life.

The Center for Community Change is a national organization devoted to assisting community development in low income, inner city areas. Its concern in this case arises out of its awareness of the need to assist families in low income inner city areas, rather than subjecting them to additional discriminatory disabilities.

The Child Welfare League of America, Inc. is a national organization with 380 local child welfare agency affiliates, devoted to securing public understanding, interest and support of programs that enhance the well-being of children and that insure the

protection and services they require. Its interest in this case arises from its concern that Connecticut, instead of assuring protection and services to those families most in need and so enhancing the well-being of children, threatens the mother-child relationship and the security of the child.

The Connecticut Child Welfare Association is a statewide organization dedicated to child advocacy and the advancement of child welfare for all children in Connecticut. As a child advocate in Connecticut, it has special concerns about the issue raised in this case. The Association regards the statute as likely to chill applications for public aid for children entitled to such aid, and as creating discriminatory, cruel state action against children who are poor and illegitimate.

The Consortium on Early Childbearing and Child Rearing is a cooperative organization devoted to research utilization and information sharing geared to helping communities improve services to adolescent school-age mothers, young fathers and their infants. The issues raised in this case are vital to working with young parents and their infants. Since the Connecticut statute would impede constructive efforts to help such parents and children and would discriminate against many of them by reason of poverty and illegitimacy, the Consortium is interested in this case.

The Council of Jewish Federations and Welfare Funds is the membership association and joint instrument of 225 local Jewish Federations, Welfare Funds and Community Councils in the United States and Canada. These organizations provide a wide range of services to parents and children. Through the Council they work together on common regional, national and

overseas problems. The Council is deeply concerned with the effects of this Statute upon services to young families most in need and the new discriminatory barriers to the rendering of such services which are raised by it.

The Day Care and Child Development Council of America, Inc. is a national organization devoted to promoting high standards and adequate provision of day care for all children who need and could benefit from it. The issues in this case are of special concern to the council because their resolution will determine whether a state can be permitted to intervene in the development of a child by removal of his sole guardian at the time in his life when maternal care is most crucial.

The Family Service Association of America is a membership federation of more than 340 community supported and community serving family agencies, each of which exists to aid families and individuals with personal or social needs and to advocate action for the needs of families under stress. The Association's interest in this case stems from its commitment to aid families with such needs. No group is more in need than that represented by the children in this case.

The Interreligious Foundation for Community Organization is an organization engaged in the field of social action to effect sound public policy in regard to social issues. It supports this challenge to the Connecticut statute because it regards the statute as unjust and oppressive and as leading to a cycle of poverty through denial of support to children in their natural homes.

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The National Association for the Advancement of the Colored People is a non-profit association representing the interests of approximately 500,000 members in 1,800 branches throughout the United States. Since 1909, the NAACP has sought to establish and protect the civil rights of minority citizens. In this respect, the NAACP has often appeared before the Supreme Court as amicus in cases involving school desegregation, employment, voting rights, jury selection, capital punishment and other cases fundamental human rights. It joins in this brief because this case threatens the civil rights of mothers and their children to remain together and not be subjected to threats of separation by reasons of poverty, illegitimacy or race.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation incorporated under the laws of the State of New York in 1939. It was formed to assist blacks in securing their constitutional rights by the prosecution of lawsuits. Its purposes include rendering legal aid gratuitously to blacks, suffering injustice by reason of race, who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years, its attorneys have represented parties in this Court and participated as amici in this Court in cases involving many facets of law, including the rights of welfare recipients. The present case is of particular importance to the Legal Defense Fund because it centers around a state effort to place a stigmatizing burden upon a group of children most of whom are poor and non-white.

The National Association of Social Workers is the professional association of social workers with 52,000 members in 172 chapters. Its purposes include the improvement of social conditions as well as activities

designed to strengthen the profession. The issues in this case are of importance to the NASW because they reflect a trend to further impair the development and treatment of illegitimate children who are poor and in need of services.

The National Conference of Catholic Charities is the central national organization for Catholic charities in the United States. It is joined by two of its affiliates, Catholic Charities of Norwich, Connecticut and Catholic Charities of Bridgeport, Connecticut. This case is of importance to the Catholic Charities because the Connecticut statute threatens the only family unit for a child born out of wedlock and may deprive the child of the care and protection of his mother. Such action violates the sanctity of the family.

The National Council of Churches of Christ in the United States of America is a federation of 33 Protestant and Eastern Orthodox denominations, comprising 139,962 churches with 42,278,990 members. The NCC has long been concerned that everyone should be able to enjoy a decent standard of living without regard to race, color or religion and has expressed distress at various restrictions placed upon public assistance programs such as that embodied in the Connecticut statute challenged in this case.

The National Federation of Settlements and Neighborhood Centers is the national association of 447 centers in 90 cities and 20 states, founded in 1911 by Jane Addams. Settlement houses work for community change affecting families, individuals, community groups and their social environment. As heirs to the pioneering work of Jane Addams, they are concerned with achieving constructive community

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change. This case is of great importance to the Federation because the Connecticut statute constitutes harsh, hostile and discriminatory coercion of those who are poor and powerless.

The National Urban League, Inc. is a national organization, with affiliates in 98 cities, devoted to assisting urban communities with minority group problems that develop out of segregation, discrimination and neglect in overcrowded population areas. This case is of great significance to the League because the Connecticut statute places further burdens on those already faced with problems that result from segregation, discrimination and neglect of their social needs. The League views this statute as one more shocking attempt to chill welfare applications from the poor.

The Puerto Rican Legal Defense and Education Fund, Inc. is an organization devoted to protecting and promoting the legal rights of Americans of Puerto Rican background. Its interest in this case is due to the steady and mounting attacks on indigent Puerto Ricans which seek to deprive them of entitlement to aid under Federal law. It sees the Connecticut statute as an effort to chill applications for welfare.

The Salvation Army is a religious and charitable organization carrying out a variety of programs designed to promote the spiritual life and material well-being of all people. Its interest in this case stems from its view that the Connecticut statute is an attempt to avoid and cast aside illegitimate children if they are poor and need public aid. It regards this approach to human problems as violating the right of all inhabitants of this land to assistance when in need.

The United Church of Christ, Board of Homeland Missions, Health and Welfare Division is the central agent for the United Church of Christ's activities in the fields of health and welfare. Its concern is for improvement of the health and welfare of all people, with special concern for poor and minority groups. It opposes any state action like Connecticut Statute 52-440b which separates or segregates those who are entitled to assistance or seeks to demand of recipients of aid conditions that are humiliating or coercive.

The United Presbyterian Church in the United States of America, Health and Welfare Development Unit, is the central organization for agencies and individuals primarily interested in issues of health, education or welfare. The membership includes community centers and neighborhood houses, and health agencies—including hospitals, nursing and convalescent homes, out-patient clinics, chaplaincies, services to children and families, and services to the aging. Its interest in this case springs out of concern for services to children and their families. The Connecticut statute undermines equal access to services, segregates and coerces applicants and denies full access to benefits to poor children.

The Young Women's Christian Association of the United States of America is a national organization with 1,463,000 individual members and 6,800 local units. Its common goal is that of helping all women and girls make their full contribution to society. Its interest in this case stems from its opposition to the imposition of conditions of aid on those who need it on the ground of birth, status and poverty. It believes that the Connecticut statute fails to promote the welfare of all children and equal justice for all under the law.

This case raises serious questions as to the constitutional right of illegitimate children to be raised by their natural mothers. The above organizations, dedicated to the welfare of children, believe that this brief will be of assistance to the Court in its consideration of the issues involved.

Respectfully submitted,

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INTRODUCTION

We present this brief in support of the appellants and with their consent.

We rely on the appellants' treatment of this Court's jurisdiction, of the facts as to the individual appellants and of the opinions below.

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment of the United States Constitution forbids the enforcement of Connecticut Statute 52-440b absent individual consideration of the actual best interests of the children affected by it.

2. Whether the Fourteenth Amendment of the United States Constitution forbids the discriminatory enforcement of Connecticut Statute 52-440b against only one class of people, based on their indigency.

3. Whether the Fourteenth Amendment of the United States Constitution forbids the imposition of the penalty of incarceration, pursuant to Connecticut Statute 52-440b, where the judge has no discretion, because of the defendants' indigency, to give less than the maximum penalty.

4. Whether the Eighth and Fourteenth Amendments of the United States Constitution forbid the incarceration of the mothers of illegitimate children, pursuant to Connecticut Statute 52-440b, as cruel, unusual and disproportionate punishment of these children.

INTEREST OF THE AMICI

The Interest of the Amici is set out, *supra.*, in the Motion for Leave to File this brief.

STATEMENT OF THE CASE

Connecticut Statute Section 52-440b¹ forces the

¹ Section 52-440b reads:

§ 52-440b. Compelling disclosure of name of putative father and institution of action.

a. If the mother of any child born out of wedlock, or the mother of any child born to any married woman during marriage which child shall be found not to be issue of the marriage terminated by a divorce decree or by decree of any court of competent jurisdiction, fails or refuses to disclose the name of the putative father of such child under oath to the welfare commissioner, if such child is a recipient of public assistance, or to a selectman of a town in which such child resides, if such child is a recipient of general assistance, or otherwise to a guardian or a guardian ad litem of such

mother of an illegitimate child to disclose to the state the name of her child's natural father, and then to prosecute a paternity action against him. If the mother fails to comply either with the duty to disclose or prosecute, she is punishable under the statute for contempt of court. The penalties provided by the statute are a fine of not more than \$200 and/or imprisonment for not more than one year.

This statute is the outgrowth of two prior unsuccessful attempts by the state of Connecticut to coerce mothers of illegitimate children who are receiving welfare to name and prosecute the children's natural fathers.

Connecticut's initial attempt was a welfare regulation which provided that if a mother failed to make disclosure of the father's name to the Welfare Department she would be denied Aid to Families with Dependent Children (hereafter AFDC) benefits for her children. This was challenged on the grounds that punishing the children in order to coerce compliance by the mother violated the terms of the AFDC program and the federal Constitution. A three-judge federal district court, reaching only the statutory issue, declared that this provision conflicted with federal eligi-

child, such mother may be cited to appear before any judge of the circuit court and compelled to disclose the name of the putative father under oath and to institute an action to establish the paternity of said child.

b. Any woman who, having been cited to appear before a judge of the circuit court pursuant to subsection (a), fails to appear or fails to disclose or fails to prosecute a paternity action may be found to be in contempt of said court and may be fined not more than two hundred dollars or imprisoned not more than one year or both.

bility criteria established by Congress for the AFDC program and permanently enjoined its operation. *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn.), *appeal dismissed*, 396 U.S. 488.

The state Welfare Department changed its regulation after the decision in *Shapiro* to provide that if the mother failed to make disclosure, her own AFDC benefits would be cut off. The *Shapiro* court enjoined the new regulation and held that its enforcement constituted contempt of the prior injunction because it had the same harmful effect on the children. *Doe v. Harder*, 310 F.Supp. 302 (D. Conn.), *appeal dismissed*, 399 U.S. 902.

Connecticut did not give up. It passed the present statute which differs from the old schemes in two apparent respects. First, it appears to apply across the board to all mothers of illegitimate children, not just AFDC recipients. In fact, however, this appearance is illusory. The state has applied this statute only to mothers receiving public assistance, and has (as set forth more fully below) forced mothers who have refused to disclose the name of their children's father to choose between relinquishing AFDC benefits and going to jail.

Second, the new statute purports to punish the mother, not the child, and to offer the court a continuum of possible punishments, from modest fines to imprisonment (or both). This, too, is illusory. Since the statute has been applied only to mothers receiving public assistance, the choice of a fine is meaningless because they have no money to pay. The *de facto* sanction of the statute as applied to them, then, is imprisonment. Thus while purporting to punish only the

mother, the statute in this case has the devastatingly perverse effect of making the illegitimate child an orphan, a far more serious result than the prior schemes that were invalidated.

The psychological consequences of such separation to the child could be enormous. Specialists in child development and psychiatric medicine are in unanimous agreement that maternal deprivation could stunt the child's psychological, emotional and social development.

The state of Connecticut claims two underlying purposes for this statute: (1) protection of the state's coffers by mitigating the financial burdens imposed in supporting impoverished illegitimate children; and (2) protection of the children's best interests by establishing their paternity "so that they might enjoy the long term psychological and economic advantages to be gained thereby." (*Doe v. Norton*, 365 F. Supp. at 73.) Yet the statutory scheme applies (1) even though there is no possibility of financial recovery from the father, for example, where the statute of limitations has run, and (2) regardless of proof that disclosure of the father's name in a given circumstance may be utterly contrary to the best interest of the child. Indeed, neither the mother nor the child are allowed an opportunity under the statute to make such a showing. The statute simply presumes that coercion of the mother and disclosure of the father's name will always serve the child's best interest.

The Children's Defense Fund and twenty-seven other organizations committed to the welfare of children, concerned with the cruel treatment of indigent illegitimate children under this statute, offer this brief in support of the appellants' constitutional challenge to

it. The Amici focus particularly on the constitutional rights of *the children* which are abridged by this statute. They demonstrate herein that § 52-450 is unconstitutional because (a) it creates a false, but irrefutable, presumption that forced disclosure or incarceration of the mother is in the child's best interest; (b) it denies the illegitimate children of impoverished mothers the equal protection of the laws; and (c) it imposes upon such children a cruel, unusual and disproportionate punishment.

SUMMARY OF ARGUMENT

This is a case which touches a most fundamental interest embodied in the concept of liberty protected by the Fourteenth Amendment: the right of a child to remain with and be raised by his parents. To be sure, that Amendment does not totally bar the states from legislating in this area. But this is a case in which the state has gone too far.

The state of Connecticut has enacted a statute purporting to serve the best interests of illegitimate children by establishing their paternity through legal action. Its means of enforcement—coercion and/or incarceration of the child's mother—demonstrates that it is precisely the child's interest that the statute destroys.

The Statute does not permit a case-by-case review of the child's best interests but operates on the basis of an irrefutable presumption that the child's interests will be served best by the coercion and incarceration of his mother as a means of establishing paternity. The state's insistence on this presumption, despite persuasive evidence that it is harmful to the children in whose name it is used, is unconstitutional.

Moreover, the state applies this statute in cases where no legitimate interest of the child (or the state) can conceivably be served by it. To coerce or incarcerate the child's mother so indiscriminately is a violation of the child's rights under the Fourteenth Amendment.

Connecticut statute 52-440b, as drafted, applies to all mothers of illegitimate children. It is not applied as written; the state prosecutes only the mothers of illegitimate children who are receiving public assistance. The unequal impact of the manner of enforcement is a violation of the children's rights to equal protection of the laws. This violation is compounded by the fact that the statute operates against the poor. The Connecticut legislature has established penalties for the mother's refusal to disclose the father's name—from fines to imprisonment. Where the mother is poor, the judge cannot exact a fine and must send her to prison. Thus the child's mother is singled out because she is poor and incarcerated because she is poor all in violation of the Fourteenth Amendment.

Finally, the incarceration of mothers of illegitimate children works an obvious punishment upon these children. This punishment is severe and without justification and it violates these children's rights to be free from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments.

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I. THE ENFORCEMENT OF CONNECTICUT STATUTE 52-440b, WITHOUT CAREFUL INDIVIDUAL CONSIDERATION OF THE ACTUAL BEST INTERESTS OF THE CHILDREN INVOLVED, DEPRIVES ILLEGITIMATE CHILDREN OF THE FUNDAMENTAL RIGHTS AND LIBERTIES GUARANTEED TO THEM BY THE FOURTEENTH AMENDMENT.

A. THE RIGHT OF A CHILD TO BE RAISED BY HIS NATURAL PARENTS IS A FUNDAMENTAL RIGHT IMPLICIT IN THE CONCEPT OF LIBERTY THAT MAY NOT BE DEPRIVED WITHOUT DUE PROCESS.

The due process clause of the Fourteenth Amendment is a constitutional guarantee of respect for those personal immunities which are "so rooted in the traditions and conscience of our people to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (Cardozo, J.).

The interest of parents and children² in establishing and maintaining a coherent, private family unit, free from domination by the state, is indisputably a paramount and protected interest.³

² Of course, most cases which deal with the fundamental interests of family life were brought by and for parents to protect their rights to privacy in family life and child rearing. The court has dealt with the issues as they regard these parental rights. Within the purview of both *Meyer v. Nebraska*, *infra.* and *Pierce v. Society of Sisters*, *infra.* however, are expressions consistent with a holding that a child has a fundamental interest in the protection of his family as well. *Cf. In re Gault*, 387 U.S. 1, which states:

[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone. [where the state directly abridges a child's rights,] it is necessary that the basic requirements of due process and fairness be satisfied.

³ *Cleveland Board of Education v. La Fleur*, 94 S.Ct. 791; *Roe v. Wade*, 410 U.S. 155; *Loving v. Virginia*, 388 U.S. 1, 12; *Griswold v. Connecticut*, 381 U.S. 479; *Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390. *Cf. United States v. Orito*, 413 U.S. 139, 142; *Prince v. Massachusetts*, 321 U.S. 158, 165; *Skinner v. Oklahoma*, 316 U.S. 535.

B. WHILE THE STATES ARE NOT PRECLUDED FROM LEGISLATING IN AREAS WHICH ABRIDGE SOME FAMILY INTERESTS, THEY MAY DO SO ONLY IF THE INTEREST TO BE SERVED CONCERNS THE ACTUAL WELFARE OF CHILDREN, WHERE THAT INTEREST OUTWEIGHS THE FAMILY INTEREST, AND WHERE THE LEGISLATION IS NARROWLY DRAWN TO EXPRESS ONLY LEGITIMATE STATE INTERESTS. CONNECTICUT STATUTE 52-440b MEETS NONE OF THESE CRITERIA.

Legislation restricting the liberty and privacy of family life must have a demonstrable relationship to valid state purposes:

The essential doctrine is that these liberties may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.

Meyer v. Nebraska, 262 U.S. 390, 400.

Where such legislation specifically restricts the freedom of parents to make decisions affecting the welfare of their children, the Court has imposed an even heavier burden on the state—that it demonstrate that the legislation benefits substantially the welfare of the children affected.⁴

⁴ Of course, the fiscal interest of the State is not disregarded either by the Attorney General or the court below. See State's brief at 4; *Doe v. Norton*, *supra.*, at 73 n. 10.

Neither this interest nor the interest of the state in obtaining, by the most efficient means, the name of the father [see State's brief at 1] we submit, is sufficient to establish constitutionality where the statute is detrimental to the welfare and best interests of the children it affects. Where the legislation specifically restricts the freedom of parents to make decisions affecting the welfare of their children, the Court has imposed a heavy burden on the state. The state must demonstrate not merely that the legislation serves a permissible state purpose, but it must prove that the restriction is

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In addition to the Constitutional requirement that the state show a demonstrable, actual relation between the welfare of children and the challenged legislation, the state must demonstrate that the legislation is narrow enough to "express only the legitimate interests at stake." *Roe v. Wade*, 410 U.S. 155 (1973). Connecticut Statute Section 52-440b palpably fails to do this. It restricts the child's right to remain with his parents but does not serve the best interests of the child in all

necessary for and actually promotes the welfare of the children affected by it. For example, in *Wyman v. James*, 400 U.S. 309, a New York statute which permits AFDC caseworkers to make unannounced home visits to determine if dependent children are being abused or neglected was upheld against the mothers' challenge that it restricted their privacy. The Court recognized the mother's rights to privacy and to make decisions for her child but it held that her rights were properly limited by this statute.

Where the state clearly proved a countervailing interest in the welfare of the child, the Court said:

The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child. The focus is on the *child*, and, further, it is on the child who is *dependent*. There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitancy would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights. *Wyman v. James*, *supra*. at 318.

Likewise, in *Prince v. Massachusetts*, *supra*., the Court upheld the state's power to prevent children from selling religious newspapers on the streets at night. The Court recognized the "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents." *Id.* at 169. But it found that in this instance the family interest was outweighed by the overriding need to safeguard the children's welfare:

[The parent claims the right to] authority in her own household in the rearing of her children Against these sacred private interests, basic in the democracy, stand the interests of society to protect the welfare of children.

Prince v. Massachusetts, *supra*. at 165.

cases. Instead it creates an irrebuttable presumption that coercion of the mother and disclosure of the name of the putative father are in the best interests of the child, though it can be demonstrated that in many, if not most, cases the child's best interests will not be served thereby. Moreover, the statute is not drawn narrowly to express only the legitimate interests of the state in advancing each child's welfare. Rather, it applies to a wide range of situations in which the child's interests cannot conceivably be served.

(1) **Unconstitutional Presumption**

The state has, in its enforcement of this legislation, created an unconstitutional presumption that in all cases the child's best interests are served by the statute. It has alleged, and the District Court below found, that in all cases the primary purpose of the statute is the protection and establishment of the present and future interests of the illegitimate child 1) by establishing his paternity shortly after his birth and 2) where the mother does not volunteer the father's name, by her forced disclosure and prosecution of the father for non-support. The state argued *inter alia*,

Aside from the matter of support, there are other valuable, existing and potential rights, that the illegitimate child has, or may have, that demand the ascertaining and establishing of his paternity.

He has the potential right to share in the social security benefits and Veterans Benefits . . . , and the rights of the illegitimate child to be treated without discrimination. . . .

The status of legitimacy, or of having knowledge and proof of one's paternity is a real and substantial asset to a person. . . . It means for example,

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that when an application for employment, or security clearance, or a passport or any of the myriad of forms that we file in our daily lives, are filled out by an illegitimate child, he can fill in the blanks pertaining to "FATHER"

Next we must consider the question of rights that . . . may attach in the future with respect to inheritance. . . .⁵

There exists . . . the valuable status of being the child of an individual male. . . . [T]o have one's paternity established by whatever suitable means, probably confers upon the child membership in a class of children who can take estates under documents of testacy.

State's brief at 5-7.

The Court below expressly accepted the state's characterization of the purpose of the statute:

[T]he scope of this statute was intended not only to protect the state's coffers but also to establish the paternity of all illegitimate children so that they might enjoy the long-term psychological and emotional advantages to be gained thereby.

Doe v. Norton, supra. at 73 n.10.

and it found that disclosure would invariably be in the interests of the child, stating that "[i]nstead of operating to the disadvantage of children born out of wedlock the statute operates to their benefit." *Id.* at 79.

This assumption is patently incorrect and is directly in conflict with the psychological and factual data available on this subject. In many, and we think most

⁵ Connecticut Statute 45-274 permits an illegitimate child to inherit from his father only if his natural parents later intermarry. Thus, an illegitimate child who establishes his paternity stands to gain nothing, under Connecticut law, from his natural father's estate.

cases, the advantages which may be gained by the identification of the putative father are far outweighed by the detrimental psychological effects on the child of coercion and/or incarceration of his natural mother.

(a) Coercion creates tension and anxiety for the mother which is harmful to her child.

Where the state compels the mother to disclose the father's name against her best judgment, it will inevitably be creating tension and anxiety for the mother. This tension and anxiety will be especially destructive for a child who is already suffering from the handicap of an absent parent. The mother may blame the child for creating strain between her and the father. Where this occurs, the harm to the child will be compounded because the anxiety felt by the mother may find its expression as anger and resentment at the child for being the cause of mother's embarrassment. Affidavit of Edward Zigler, Ph.D., Children's Exhibit 5 at 5, Joint Appendix.

(b) Forced disclosure and prosecution threatens the father-child relationship.

If the natural father has some tenuous relationship with his child, the fact of disclosure (and prosecution) by the mother may serve to permanently alienate him from both the mother and the child.

[T]he father would avoid contact with the child which otherwise he might maintain and he might avoid contact with the mother . . . if he feels that the condition for the relationship is one required by the law in order to provide economic support for the child.

Deposition of Albert J. Solnit, M.D., Children's Exhibit 1 at 7, Joint Appendix.

which may be gained by the active father are far outweighed by the psychological effects on the child of the separation of his natural mother.

and anxiety for the mother which is harmful to her child.

Compels the mother to disclose the truth in her best judgment, it will increase the tension and anxiety for the mother. This will be especially destructive to a child suffering from the handicap of illegitimacy if the mother may blame the child for the separation between her and the father. The harm to the child will be compounded if the guilt felt by the mother may be transferred to the child and resentment at the child's illegitimacy and embarrassment. Affidavit of Edward Zigler, Children's Exhibit 5

threatens the father-

continuous relationship (and prosecution) will likely alienate him

with the child and he might feel that the support required is not being provided

Children's Ex-

(c) Identification of the father prevents the child's psychological and emotional adaptation to the fact of his illegitimacy.

Where the child does not know his father, psychological and emotional adaptation to his status of illegitimacy may actually be threatened by the disclosure of the father's identity. Child psychiatrists have found that the child can best adapt to the father's absence by "imagin[ing] a father who is larger than life to help overcome his sense of loss at not having a father present in his home. Part of this idealization includes a belief that the father wants to come live with the family and the child but for some reason is unable to. This creation of an idealized image of a father is frequently the most successful adjustment possible for a child." Affidavit of Edward Zigler, *supra.* at para. 6.

Learning the father's identity is likely to impair his psychological adjustment.

When a child learns who his father is, he has to cope with the knowledge that his father is not ideal but may be . . . someone the child is ashamed to have for a father. In such a situation the child's self-image will be severely damaged. . . . [He] may model himself after his image of his real father [which is] likely to be bad—to coincide with society's image of men who are unwilling to support their families and desert their children. . . .

The child's self-image will also be severely damaged . . . where [the knowledge of his father's identity] brings home the fact of the father's failure to live in the home. A young child will assume that his father is absent because the child is unworthy in some way or because his father hates him.

Affidavit of Edward Zigler, *supra.* at para. 7, 8.

In sum, "disclosure—and particularly compelled disclosure—of the identity of a child's father . . . will in many cases be extremely destructive to the child's emotional well-being." *Id.* at para. 3.

(d) The incarceration of the mother will interfere with the child's emotional and psychological development.

In cases where the mother refuses to disclose the father's name,⁶ and where she is incarcerated pursuant to Section 52-440b, the potential for psychological and emotional harm to the child is greatly increased.

The statute of limitations applicable to paternity actions is three years.⁷ Thus, in most cases, the child whose mother is incarcerated will be under three years of age. Leading child development authorities have shown that maternal deprivation during the crucial

⁶ And where, as in Connecticut, the reasons for her failure to do so are not considered. See *infra.* at 21-26.

⁷ Connecticut Statute Section 52-440a provides, in pertinent part,

No petition [to establish paternity] shall be brought after three years from the birth of such child, or after three years from cessation of contribution toward support of the child by the putative father, whichever is later. . . .

The transcripts of hearings in the Connecticut Circuit Court, Ninth Circuit show that, in all cases, the children were under three years of age.

Date of Hearing

April 2, 1973	Maria Harcega	born 2/16/72	1 year + 6 weeks
	Ann Abascal		18 months
	Susan Bilodeau		26 months
	Cynthia Iverson		9 months
May 7, 1973	Phyllis Clarke	1/ 3/73	4 months
Oct. 2, 1973	Sharon Burr	3/31/71	2 years + 6 months
	Rosalyn Carr	11/ 1/71	1 year + 5 months

[The complete transcripts of these hearings are attached as Appendix A hereto.]

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early years of a child's life may be psychologically and
emotionally disastrous:

Disruptions of continuity have different conse-
quences for different ages. In infancy . . . any
change in routine leads to food refusals, digestive
upsets, sleeping difficulties and crying . . . Change
of the caretaking person for infants and toddlers
further affects the course of their emotional de-
velopment. Their attachments at these ages are as
thoroughly upset by separations as they are effec-
tively promoted by the uninterrupted presence of
a familiar adult. *When infants and young children
find themselves abandoned by the parent, they not
only suffer separation distress and anxiety but
also setbacks in the quality of their next attach-
ments, which will be less trustful.* They tend to
grow up as persons who lack warmth in their con-
tacts with others *Adults who as children suf-
fered from disruptions in continuity may them-
selves treat their children as they were treated—
continuing a cycle costly both for a new generation
of children as well as for society itself.* (emphasis
added.)

Freud, Goldstein and Solnit, *Beyond the Best Interests
of the Child* at 31-34 (emphasis added).

Among the growth processes of the child which may
suffer the greatest damage are those which society and
the state should do most to engender and support, e.g.,
educational ability, cognitive development and the
capacity to work productively in society:

Certain findings point to the likelihood that ma-
ternal deprivation has a specially adverse effect
on particular processes. Among intellectual proc-
esses, the most vulnerable seem to be language and
abstraction. Among personality processes, the

most vulnerable seem to be those underlying the ability to establish and maintain deep and meaningful interpersonal relations and the ability to control impulses in the interests of long range goals.

Bowlby, *Child Care and the Growth of Love* at 219.⁸

The court below erroneously stated that enforcement of Section 52-440b will not harm the child because the consequences of maternal deprivation will be mitigated

⁸ In cases where the child has no other parent (as here) even more severe consequences may result. In a study done for the United Nations, a psychiatrist found that of children in orphanages who received adequate health and nutritional care, many young children died or became mentally retarded without any medical explanation. The psychiatrist concluded that this syndrome, anaclitic depression, was caused by the deprivation of the child's mother:

We discovered that all children in our sample population who developed this syndrome had one experience in common: at some point between the sixth and eighth month of life all were deprived of the mother. This separation took place for unavoidable external administrative reasons.

Spitz, *The First Year of Life* at 271.

For other discussions of the harmful psychological and emotional effects on children of maternal deprivation, see White, *Federal Programs for Young Children*; Maccoby and Masters, "Attachment and Dependency." *Manual of Child Psychology*, at 73-157; Bowlby, *Attachment and Loss*; Williams, *Children Who Break Down in Foster Homes: A Psychological Study of Patterns of Personality Growth in Grossly Deprived Children*, 2 J. Child Psychol. Psychiat. 5; Yarrow, *Maternal Deprivation: Toward an Empirical and Conceptual Re-evaluation*, 58 Psychol. Bull. 459; Rheingold & Bayley, *The Later Effects of an Experimental Modification of Mothering*, 30 Child Develpm. 363; Scott, *The Effects of Separation from the Mother in Early Life*, 1 Lancet 624; Ainsworth & Boston; *Psychodiagnostic Assessments of a Child After Prolonged Separation in Early Childhood*, 25 Brit. J. Med. Psychol. 170; Glueck & Glueck, *Unraveling Juvenile Delinquency*; Spitz, "Anaclitic Depression," *Psychoanalytic Study of the Child*, Vol. 2 at 313.

(but not prevented) by the state's obligation to provide for alternate care for these children. Even so,⁹ the effects of foster care are demonstrably not beneficial for all children. Psychological studies of children in foster care homes and in institutions demonstrate that young children who are separated from their mothers suffer acute distress regardless of the "circumstance and quality of substitute care."¹⁰

⁹ In fact, the transcripts of state cases show that the state refuses to make arrangements for children whose mothers are to be detained. See, for example, the transcript in *Welfare Commissioner v. Rosalyn Carr* (Circuit Court, 9th Circuit, Middletown, Connecticut, October 2, 1973, Hon. Eli L. Cramer, Judge.) In pertinent part, it reads:

THE COURT: You be back here two weeks from today . . . , Mrs. Carr, and you have arrangements made if you do not disclose at that time, you have arrangements made to take care of your child.

See also the Transcript in *Welfare Commissioner v. Elizabeth Stone* (Circuit Court, 1st Circuit, Norwalk, Connecticut, January 28, 1974, Hon. G. Sarsfield Ford, Judge.)

THE COURT: I accept her declining to identify the punitive [sic] father. I will continue the matter until next Monday at two o'clock . . . I find her refusal, through you, is an act of contempt at this time. Rather than place her in custody at this time I will give her until next Monday at two o'clock to purge herself from contempt. . . .

I would suggest she get everything in order by next Monday . . . if she is going to be continuing in this position and I have to restrain her, that someone is able to take care of her child and so forth.

MR. GERLIN: And if there is no one?

THE COURT: Then that will be her problem.

Appendix A.

¹⁰ J. Robertson, "Young Children in Brief Separation", *The Psychoanalytic Study of the Child*, Vol. 26 at 265.

There is nothing in the record to show that quality foster care is available for these children and it is unlikely that they will have access to the most desirable foster or temporary care. The women affected by the statute are poor; their immediate relatives are not likely to have the financial resources to be able to care for an additional child during the mother's absence. The children will have to be placed, in all probability, in institutions and outside their natural families.

There is substantial risk that under the Connecticut law the fracture of the mother-child relationship will never be healed. Connecticut law requires the Court to place guardianship of a child whose mother is incarcerated in the Department of Welfare until the child becomes 18 or until the order of guardianship is revoked.¹¹ For the mother to regain guardianship, she must prove that it is in the best interest of the child to be returned to her custody.¹² The fact of her imprisonment, with the probable loss of the home she had with her child, would hardly prepare her to meet this burden. Studies have shown that the image of foster care as a temporary source oriented to short-term treatment of a family or child is no longer correct. Instead as things stand now, the majority of children who enter foster care are likely to spend their growing years there. This has been shown to be especially true of children who are poor or belong to minority groups, the objects of the Connecticut statute, so that their place-

¹¹ Connecticut Statute Section 17-62d.

¹² Connecticut Statute Section 17-62f.

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ment of them in foster care or institutions carries with
 it an additional danger of permanent separation from
 their natural families:

Poverty and living arrangements operate against
 early return to natural parents . . . It is as if foster
 care can well be temporary only if the child or
 parents are tenacious in being visible . . . the de-
 sired placement seems least likely to be carried
 out for the poorest families . . . Children in foster
 care take their chances; poorer children take a
 greater chance.¹³

Where it is clear or can be shown that the child's best
 interests vary with the facts of each family situation,
 the state cannot constitutionally create an irrebuttable
 presumption that coerced disclosure or imprisonment
 is in the best interest of all children.

Assistant Attorney General Higgins stated at oral
 argument that Connecticut presumes that the enforce-
 ment of Section 52-440b will be in the best interests of
 children in all cases and the state should not allow the
 mother or the child¹⁴ to rebut this presumption in spe-
 cific instances.¹⁵

¹³ Wiltse, *Foster Care, 1973: A Reappraisal*, Public Welfare at
 at 7.

¹⁴ In other instances where the *actual* harm or benefit to the child
 is considered relevant by the State, Connecticut statutes provide
 for the appointment of an attorney to represent the child's inter-
 ests. See, e.g., Connecticut Statute Section 46-26b.

¹⁵ In his argument to the District Court, the State Assistant
 Attorney General was asked to clarify this point:

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

In fact, Mr. Higgins has accurately described the actual practice of Circuit Court judges as they have applied this statute throughout Connecticut. Excerpts from the transcripts of two cases decided under Section 52-440b illustrate the practice:

The case of *Welfare Commissioner v. Elizabeth Stone*, Circuit Court, 1st Circuit, Norwalk, Connecticut, January 28, 1974, Hon. G. Sarsfield Ford, Judge:

MR. GERLIN: Your Honor, we have a situation here, I think, where the law is hard . . . [t]he father of this child is

Can she litigate that issue in the contempt hearing?

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

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

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

JUDGE NEWMAN: Yes. But what issue would he have to resolve to get to that ultimate consequence?

MR. HIGGINS: Well, the issue as in the case I stated, that it was impossible for her to disclose, [that she didn't know the father's name].

JUDGE NEWMAN: That is one. That is really standard--knowledge. What about the more current problem of desirability of disclosure? . . . Would you oppose them litigating that?

MR. HIGGINS: I would oppose them litigating that issue of desirability.

Transcript of the Argument before District Court at 43-45.

as accurately described the Court judges as they have about Connecticut. Excerpts two cases decided under the practice:

Commissioner v. Elizabeth Circuit, Norwalk, Connecticut, Sarsfield Ford, Judge:

... we have a situation ... where the law is ... the father of this child is

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... the Circuit Court ... his discretion what ... if she can't litigate

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a man who has been arrested for narcotics violations, for assault and battery, apparently has been diagnosed as a schizophrenic . . . Now my client is terrified of this man . . . I believe the court should have discretion to examine . . . the Statute should be read so the court does have discretion. The law, I think, is hard.

THE COURT: It may even be harsh. I assume by reason of this citation that . . . [t]here is a child born which is living with her and is the recipient of Welfare Assistance . . . And to date Elizabeth Stone has failed to voluntarily disclose the name of the punitive (sic) father . . . Then under the Statute . . . I will order that she disclose the name of the punitive father . . . I have compassion for her too, but I can't let that shade my obligation to my oath to do what this law says I should do.

The case of *Welfare Commissioner v. Robin Janes*, Circuit Court, 16th Circuit, West Hartford, Connecticut, November 27, 1973, Hon. Henry J. Goldberg, Judge:

MR. ALDEN: [D]o you want to tell your Honor why you refused to [disclose the name of the father] ?

MS. JANES: He's threatened my life and my daughter's life. He's threatened me physically with his own hands and he has come after me with a gun and he has been on drugs charges and he's also threatened my daughter's life with a gun and I feel that

it's just a danger to me and my daughter's life to state his name

THE COURT: I simply want to tell you that we have a statute which in essence states that the mother of a child, your situation, born out of wedlock, may be cited . . . to disclose who the father is and if that person refuses to disclose the putative father, that person may be found in contempt of court

MS. JANES: Well, . . . I'm afraid of him and I'm going to be getting married in the Spring and my fiancée is going to be adopting my daughter and I think it would be harmful to state his name right now because I'm afraid of him.

THE COURT: [T]he statute does give the court the authority to compel you to name the father and if you still refuse, the court here wouldn't have any alternative except to fine you up to \$200 and imprison you for not more than one year or both.¹⁶

Such application collides with the long standing view of this court that

the wholesale condemnation of a class to . . . an invasion of personal liberty, without opportunity

¹⁶ Appendix A. See also affidavit of *Frances Foe*, Plaintiff, who was cited for contempt despite the fact that:

"the child was conceived either under incestuous conditions or by a person who is emotionally unstable and whose whereabouts [were] unknown to her."

Affidavit of Frances Foe, para. 3(b).

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to any individual to show that his is not the case
which would justify resort to it . . . is lacking in
the first principles of due process.

Skinner v. Oklahoma, 316 U.S. 535, 544-45 (Stone,
C.J., concurring). *Vlandis v. Kline*, 93 S.Ct. 2230;
Stanley v. Illinois, 405 U.S. 645; *Bell v. Burson*, 402
U.S. 535; *Carrington v. Rash*, 380 U.S. 89.

A similar case to this was presented in *Stanley v. Illinois*. There, an Illinois statute purportedly operated "to protect the moral, emotional, mental and physical welfare of the minor and the best interests of the community."¹⁷ It provided that upon the death of their mother, illegitimate children would be declared dependents and be placed in foster care. The state refused to allow the natural father to prove his fitness to have custody of his children. This court held that the state could not, consistently with due process requirements, presume that the child's best interests would not be served by giving his father custody. It stated:

[T]he State has made its interest quite plain. Illinois has declared that the aim of the Juvenile Court Act is to protect the welfare of the minor. . . . But we are here not asked to evaluate the legitimacy of the state ends, rather, to determine whether the means used to achieve these ends are constitutionally defensible. . . . We observed that the State registers no gain toward its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit parent, the State spites its own articulated goals when it needlessly separates him from his family. . . .

¹⁷ *Stanley v. Illinois*, *supra*. at 1213; compare State's argument in *Doe v. Norton*, 356 F. Supp. 202, 207 (D. Conn.) and *Doe v. Norton*, *supra*. at 73 n.10.

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children . . .

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

Stanley v. Illinois, supra. at 1213-15.

Under the standards established by the Court in *Stanley*, Connecticut's enforcement of Section 52-440b unconstitutionally deprives illegitimate children of their right to remain with their natural parent without the individual determination required by due process of law. First, the state categorically assumes that the child's best interests lie in coercion or incarceration of his mother despite significant persuasive evidence that this is demonstrably false in some cases. *Supra.* at 12-21. Second, the state has impermissibly refused to allow consideration of the individualized particular interests of each child in each case. *Supra.* at 21-24.

As in *Stanley*, the state of Connecticut "insists on presuming rather than proving the child's interests" (*Id.* at 1216) despite strong indications that they may not be served by uniform enforcement of Section 52-440b. And as in *Stanley*, the due process clause requires a different approach.

(2) **The Statute is Unconstitutionally Over-Inclusive.**

The state has unconstitutionally failed to narrow the application of this statute to express only the legitimate state interests at stake in prosecuting paternity actions. Section 52-440b applies to all mothers of illegitimate children regardless of whether

a) the father can be identified;¹⁸

¹⁸ While the State Attorney General stated at argument that a mother would not be punished where she could not identify the father, the application of this statute in specific cases has demonstrated that this is not so. See, for example, the case of *Welfare Commissioner v. Rosalyn Carr*, Circuit Court, 9th Circuit, Middletown, Connecticut, October 2, 1973, Hon. Eli L. Cramer, Judge:

THE COURT: I am giving you fair warning, Mrs. Carr, that I don't want any games played. Disclose the name. You are under oath. No you have five minutes, I don't want any speeches, just disclose the name.

THE DEFENDANT: I do not know. I am under oath in the court of the State of Connecticut and I can truthfully say I do not know the name of my child's father.

THE COURT: Well, I'm going to order you. This is no gross intrusion. Legislature has determined it is not and the United States District Court. Disclose the name and whether it intrudes on your privacy is something you can come forth yourself on later. If you don't I will exercise the penalty by law and I am going to send you to jail.

THE DEFENDANT: Your Honor, you are trying to make me say something that I don't know . . . [H]aving to be here is a gross intrusion of my privacy.

THE COURT: If you wish to discontinue it, discontinue being a ward of the State of Connecticut and they will have no right to compel you . . . You be back here two weeks from today, Mrs. Carr, and you have arrange-

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- b) the statute of limitations for paternity actions has run;
- c) the child has a formal acknowledgement of paternity; or
- d) the state has another, less intrusive means of establishing the identity of the child's father.

In cases where the father cannot be identified, and the state's enforcement is futile, the child's interest cannot be served in anyway. Thus, the potential harm to the child of coercion and/or imprisonment of his mother clearly outweighs any benefit to the state. Indeed the import of the statute seems purely punitive in these cases. Similarly, in cases where the statute of limitations has run, no paternity action may be instituted by either the mother or the state. Thus, the assertion of state's fiscal interest in obtaining support money is nullified and the child's interest in legally establishing paternity for future benefits is nonexistent.

Where the child has formal acknowledgment of paternity, the child's interest in receiving support or future financial benefits can be enforced by him at his election. This Court has indicated that an illegitimate child's recovery of benefits due his father does not depend on proof that there has been a formal court adjudication of paternity. *Weber v. Aetna Casualty Co.*, 406 U.S. 164.

Moreover, the Connecticut legislature could demonstrate its professed claims of concern for illegitimate

ments made if you do not disclose at that time, you have arrangements made to take care of your child.

Appendix A.

children by legislating away any formal disability of a child to recover benefits from his natural father where credible proof of paternity exists.

Where the state has another, less intrusive means of establishing the identity of the child's father, it should use it rather than be permitted to coerce and/or incarcerate the mothers of young children. The identity of the father can, in some cases, be obtained by mere examination of the birth certificate. This seems a simple step to take. But the state has conceded that it does no independent investigation to determine the identity of the natural father other than to question (and coerce) the mother.¹⁹ It should be required to do so.

Even if the state could show its present methods are more efficient, which we doubt, this statute, as applied, still could not stand:

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say

¹⁹ In the deposition of John A. Nadolski, an employee of the Welfare Department of Connecticut, whose responsibility was to establish the paternity of illegitimate children in his district, Mr. Nadolski described the extent of his investigation as follows:

[Knowledge of the existence of an illegitimate child would come to my attention] at the time of application, through an intake worker, or during an annual review of existing welfare mothers. . . .

[T]he welfare worker would ask the mother who the father of the child is. If at that time the [mother] refuses to name the father . . . I would . . . ask the mother who the father of the child was. I would inform her that under welfare laws, if she refuses to name the father of the child we can . . . cite her to appear before a judge of the Circuit Court If she still refuses to name the father of the child, I would turn it over to an attorney . . . to cite her.

Deposition of John A. Nadolski, Children's Exhibit 3, Joint Appendix at 4-6. *Accord*, Deposition of Joseph Mancini, Children's Exhibit 4, Joint Appendix at 4-7.

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of the Bill of Rights in general, and the Due Process clause in particular, that they were designed to protect the fragile values of vulnerable citizenry from the overbearing concern for efficiency. . . .

Stanley v. Illinois, supra. at 1215.

Where, as here, there exists severe threat of harm to children from coercion and incarceration of their mothers, the state must demonstrate that it has used all other reasonable means to establish paternity prior to embarking on such a drastic course.

The public interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child*, and, further, it is on the child who is *dependent*. There is no more worthy object of the public's concern. The dependent child's needs are paramount.

Wyman v. James, 400 U.S. 309, 318 (1971).

II. CONNECTICUT STATUTE SECTION 52-440b, AS ENFORCED, CONSTITUTES INDIVIDUOUS DISCRIMINATION ON THE BASIS OF WEALTH AGAINST INDIGENT ILLEGITIMATE CHILDREN IN VIOLATION OF THEIR RIGHT TO EQUAL PROTECTION OF THE LAWS IN THAT

A. THE STATUTE IS APPLIED ONLY TO MOTHERS OF ILLEGITIMATE CHILDREN WHO ARE RECEIVING PUBLIC ASSISTANCE.

AND

B. THE SENTENCING JUDGE HAS NO DISCRETION TO MITIGATE OR GIVE LESS THAN THE MAXIMUM PENALTY TO AN INDIGENT DEFENDANT.

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**A. THE COURT BELOW ERRONEOUSLY REJECTED THE PLAIN-
TIFF'S CLAIM THAT THE STATUTE UNCONSTITUTIONALLY
APPLIES ONLY TO THE CLASS OF MOTHERS OF ILLEGIT-
IMATE CHILDREN WHO ARE RECEIVING PUBLIC ASSIST-
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The Court held:

This statute which imposes a duty upon an un-
wed mother to disclose the name of the putative
father of her child does not distinguish between
unwed mothers who receive public assistance and
those who do not. The statute permits the com-
pelled disclosure of the name of the putative father
from any mother of an illegitimate child.

Doe v. Norton, supra. at 81.

This statute, while neutral on its face, has in fact
been applied only to mothers of welfare recipients.
Indeed, the state could not cite a single case brought
under Section 52-440b against a mother not receiving
public assistance. Transcript of Argument below at
40-41.

This statute was passed by the legislature only after
the repeated efforts of the state welfare department to
establish administrative procedures for identifying the
putative father were rejected. *Doe v. Norton, supra.* at
71. As the State conceded in its brief,

For a long time prior to the decision in *Doe v.*
Shapiro, 302 F.Supp 767 (D. Conn.), .and
Doe v. Harder, 310 F.Supp. 302 (D. Conn.) the
defendant welfare commissioner handled the prob-
lem of the non-disclosing mother of an illegitimate
child by terminating the public assistance benefits
of the mother and the child. After this decision,
the defendant commenced to cut off benefits to the
mother but not the child. These procedures were
held invalid by the Federal courts basically on the

theory that by so acting the commissioner was adding a condition to AFDC eligibility not provided for in the Federal Social Security Act, and, in effect, was visiting the sins of the mother upon the child. . . .

The severance of welfare benefits having been precluded as a means of ascertaining the identity of the father of a illegitimate child, the legislature determined that it would be proper to cause *these women* to be cited in before the Circuit court to disclose the name of the putative father (emphasis added).

State's brief below at 1-3.

Contempt cases heard subsequently show conclusively that State judges have refused to apply the statute to mothers who have discontinued public assistance or who agree to discontinue it rather than disclose the name of the father.

In the case of *Welfare Commissioner v. Susan Bilo-deau* (Circuit Court, 9th Circuit, Middletown, Connecticut, April 2, 1973 Hon. Nicholas F. Armentano, Judge.) the judge held the mother could not be cited for contempt unless she was receiving welfare:

MR. CARTA: Are you willing to disclose the name of the father?

THE DEFENDANT: No

MR. CARTA: Do you know what the statute says? Anyone who refuses to disclose the name of the father could be held in contempt of court . . . Do you understand that?

THE DEFENDANT: Yes.

the commissioner was added eligibility not provided Social Security Act, and, in favor of the mother upon the

benefits having been ascertaining the identity of the child, the legislature is proper to cause these the Circuit court to the father (emphasis

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MR. CARTA: And the child is presently a recipient of the State welfare?

THE DEFENDANT: No . . . You know I'm working.

THE COURT: [C]heck whether this child is a recipient now . . . Check that because she would have a right to refuse, . . . if the child is not presently a recipient.

The following colloquy occurred in the case of *Welfare Commissioner v. Rosalyn Carr*, (Circuit Court, 9th Circuit, Middletown, Connecticut, October 2, 1973):

THE COURT: Well, I'm going to order you to disclose [the father's name].

THE DEFENDANT: I feel that it is . . . a gross intrusion of my privacy.

THE COURT: If you wish to discontinue it, discontinue being a ward of the State of Connecticut and they will have no right to compel you.

THE DEFENDANT: All right. I will do that if that is what the Court wants, then that is finished.²⁰

This court consistently has held that a statute which appears on its face to make a rational classification is unconstitutional if, without a rational basis, it is

²⁰ Bilodeau transcript at 6-10; Carr transcript at 27-28. Appendix A. Thus, disclosure has become equivalent to another eligibility requirement and should be prohibited by the prior decisions in *Doe v. Shapiro, supra.*, and *Doe v. Harder, supra.*

actually applied only to one class of individuals. In *Yick Wo v. Hopkins*, 118 U.S. 356, it was stated:

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Yick Wo v. Hopkins, supra. at 573-74.

This principle has been applied to cases where the discriminatory application of the statute was based on the invidious classification of indigency. *Boddie v. Connecticut*, 401 U.S. 220; *Williams v. Illinois*, 399 U.S. 391; *Harper v. Virginia Board of Elections*, 383 U.S. 663; *Griffin v. Illinois*, 351 U.S. 12. Cf. *Shapiro v. Thompson*, 394 U.S. 618.²¹ It should be applied here.

B. THE STATUTE CREATES AN INVIDIOUS DISCRIMINATION AGAINST MOTHERS OF CHILDREN RECEIVING PUBLIC ASSISTANCE BECAUSE IT VESTS NO DISCRETION IN THE JUDGE TO PUNISH INDIGENTS EXCEPT BY IMPRISONMENT.

In his concurring opinion in the District Court, Judge Newman stated that a balance should be struck

²¹ Of course, classification by indigency implies classification by race. In the separation of children from their natural families, now threatened by Connecticut Statute 52-440b, one finds a disproportionate percentage of children from poor non-white families. The 1970 Census shows that the population of Connecticut is six percent black and ninety-three percent white. United States Bureau of the Census, *Characteristics of the Population, 1970*, Vol. 1, Pt. 8., Connecticut, Table 18 at 39. However, of the 8,600 recipient families of AFDC in Connecticut, 5,400 were black. HEW, "Characteristics of Recipients" (1971).

me class of individuals. In U.S. 356, it was stated:

It be fair on its face, and yet, if it is applied and authority with an evil eye practically to make un- situations between persons material to their rights, be still within the pro-

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to cases where the statute was based indigency. *Boddie Williams v. Illinois, Board of Elec Illinois, 351 U.S. 618.*²¹ It should

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in each case between the mother's "constitutionally protected interest . . . in making decisions to maintain the harmony of her family unit" and the state's interest in enforcement of the father's obligations to support his child. He concluded that Section 52-440b permits such a balance to be made:²²

The statute accords the state judges ample discretion to determine the appropriateness of contempt remedies in specific cases.

Doe v. Norton, supra. at 86.

But the statute is applied only to welfare mothers. Thus discretion allowed by the legislation as to stringency of penalties is nullified by the fact that the mothers cannot afford to pay fines. A judge, faced with a recalcitrant welfare mother, must either disregard his duty under Section 52-440b or give the maximum penalty prescribed imprisonment.²³

The Constitution should not permit the arbitrary imposition of jail sentences on indigents where the legislature has provided for the imposition of a fine under appropriate circumstances. To impose prison sentences in such cases is an invidious discrimination based on wealth which constitutes a denial of equal protection

²² But see *supra.* at 21-26.

²³ See *Morris v. Schoonfield*, 399 U.S. 508, 509 (White, J., concurring). In fact, state judges have indicated that where any penalty will be imposed on the mothers, it will be a jail term. See Transcript of *Welfare Commissioner v. Robin Janes, supra.* at 27. (Appendix A).

of the law. Cf. *Tate v. Short*, 401 U.S. 318; *Williams v. Illinois*, *supra.*; *Frazier v. Jordan*, 457 F.2d 726 (CA 5) (Wisdom, J.).

III. INCARCERATION OF THE MOTHERS OF ILLEGITIMATE CHILDREN, PURSUANT TO CONNECTICUT STATUTE 52-440b, CONSTITUTES CRUEL, UNUSUAL AND DISPROPORTIONATE PUNISHMENT OF THESE CHILDREN IN VIOLATION OF THEIR RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. THE COURT SHOULD LOOK BEYOND THE STATE'S ASSERTION THAT IT IS ONLY PUNISHING THE MOTHER BY THE ENFORCEMENT OF THIS STATUTE²⁴ CONNECTICUT IS PUNISHING THE CHILD.

As shown earlier, the incarceration of the mother will have its most drastic and harmful effects upon the psychological and emotional well-being of the child. *Supra.* at 13-21. And the child who will suffer in these circumstances has power to neither rebut the state's presumption that the statute works to his best interests nor to control his mother's behavior so as to prevent her incarceration. Where the greatest punishment falls on the child, the Court must look beyond the nominal designation of the mother as "defendant" to examine whether its potential impact on the child is consistent with the Eighth Amendment. See *Taylor v. Martin*, 330 F.Supp. 85, 89 (N.D. Cal.) *aff'd. sub nom, Carleson v. Taylor*, 404 U.S. 980; *Doe v. Harder*, 310 F.Supp. 302, 303 (D. Conn.), *appeal dismissed*, 399 U.S. 902.

²⁴ The amici in no way intend to derogate the plaintiffs' argument that they are unconstitutionally subjected to this statute because their right to remain silent is protected by the First, Fifth, Ninth and Fourteenth Amendments. Rather, we assert that even if the court rejects the plaintiffs' right to privacy in this matter, it must hold that punishment by incarceration is unconstitutional because it constitutes disproportionate and cruel punishment of children.

Short, 401 U.S. 318; *Wil-Frazier v. Jordan*, 457 F.2d).

THE MOTHERS OF ILLEGITIMATES SUANT TO CONNECTICUT STATUTES CRUEL, UNUSUAL AND EXCESSIVE PUNISHMENT OF THESE CHILDREN OF THEIR RIGHTS UNDER THE EIGHTH AMENDMENTS.

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incarceration of the mother has harmful effects upon the well-being of the child. The child who will suffer as a result to neither rebut the statute works to his best advantage. Where the greatest harm to the mother as "deprived of the essential impact on the child's health Amendment. 39 (N.D. Cal.) 104 U.S. 980; Conn.), *ap-*

plaintiffs' argument that the statute being challenged, Fifth, that even in this matter, the constitutional right of the parent of

B. PUNISHMENT OF THE CHILD IS UNCONSTITUTIONAL IN THIS CASE BECAUSE (1) IT CONSTITUTES PUNISHMENT FOR THE "STATUS" OF BEING AN ILLEGITIMATE CHILD OF A WOMAN RECEIVING WELFARE ASSISTANCE; (2) THE CHILD'S CONDUCT IS NOT MORALLY BLAMEWORTHY; AND (3) A CIVIL CONTEMPT SANCTION, WHICH DOES NOT ALLOW THE CHILD CONTROL OVER HIS MOTHER'S RELEASE IS A DISPROPORTIONATE PUNISHMENT.

This Court has held that punishment may not be imposed, consistent with the Eighth Amendment, upon persons who have not committed any criminal act. *Robinson v. California*, 370 U.S. 661. *Cf. Powell v. Texas*, 392 U.S. 531.

Where the child has committed no criminal act but is deprived of his mother solely because he is the illegitimate child of a mother receiving public assistance, the child is being punished for the accident of his birth, a result not tolerable under the Eighth Amendment.

Further, the child, unlike the mother, has no control over the outcome of the disclosure proceeding or over the length of incarceration: He does not "carry the keys to [his] prison in [his] own pocket." *Doe v. Norton*, *supra.* at 83. It is that very element which has been held to be the necessary justification for punishment for civil contempt. *Shillitani v. United States*, 384 U.S. 364.

Second, the state may not constitutionally punish a person whose conduct is not morally blameworthy. *Morissette v. United States*, 342 U.S. 246. In the instant case, the child's conduct is morally blameless. Indeed, it is not considered at all. Nor can the mother's conduct be deemed conclusively blameworthy where Connecticut refuses to allow her to present any defenses for her refusal to disclose the father's name.

See *supra.* at 21-26. Indeed, her concern for her child's best interests may dictate her refusal to cooperate.

Finally, the punishment is disproportionate. In the state's view the child stands to benefit from the knowledge of his father's name and from future possible benefits which he may gain from the knowledge of his paternity. In contrast, where the child cannot benefit, because of the father's unavailability (*supra.* at 27-29), because of psychological reasons (*supra.* at 13-21) or because his mother refuses to disclose, the state has seen fit to deprive the child of the most substantial benefit he has—the right to remain with his mother, the only available caring parent. This extreme, harsh punishment far outweighs the seriousness of the mother's offense and it cannot be imposed. *Trop v. Dulles*, 356 U.S. 84; *Weems v. United States*, 217 U.S. 349.

CONCLUSION

Under the Connecticut statute only illegitimate children dependent on public assistance are threatened by the loss of their mothers. These children are poor and largely non-white.

The fundamental rights of the child in this class are violated by the statute which subjects him to removal from his sole caring parent and to the psychological and emotional harm which this removal may engender. For this class alone, the statute undermines established standards for the separation of natural families based both on knowledge and law, which require that the best interests of the child must in all cases be considered paramount. Such state action violates constitutional guarantees and requires the

most careful scrutiny by this Court since those who are most powerless are subject to the deprivation of their constitutional rights.

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