

# MEASURING FATHERHOOD: “CONSENT FATHERS” AND DISCRIMINATION IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

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*In New York State, unmarried fathers have only tentative rights to parent their children. Unmarried fathers, unlike mothers and married fathers, must prove that they are “consent fathers”—that is, a father who pays child support and maintains contact with his children—before they are allowed to intervene in adoption proceedings. While this makes sense in a private adoption scenario, in which the interests and rights of the mother must be balanced against those of the father, and in which the State has a substantial interest in promoting already intact families, the same analysis should not be unthinkingly applied to termination of parental rights proceedings, as it is now. Unlike the private adoption scenario, a termination of parental rights proceeding involves very different interests on the part of the mother and the State as well as a completely different analysis of what may be best for children. I argue that unmarried fathers should be given the protections in termination of parental rights proceedings that are automatically afforded mothers because the law as it currently stands works against the State’s interest in promoting unified families and violates the Equal Protection Clause of the U.S. Constitution.*

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INTRODUCTION

Kayla was born in April 2008.<sup>1</sup> Her father, George, lived with Kayla’s mother at the time. He paid for Kayla’s birth expenses, and he supported Kayla’s mother financially before and after Kayla’s birth. In July 2008, Kayla’s mother asked George to move out of their apartment. George complied and continued giving Kayla’s mother money for Kayla’s expenses. In August 2008, the New York City Administration for Children’s Services (ACS) removed Kayla from her mother’s care and placed her into foster care. ACS named Kayla’s mother as a respondent in the neglect case, but never accused George, who was not a respondent, of misconduct. George visited Kayla every week. He filed for formal paternity recognition of Kayla in January 2010 and was recognized as Kayla’s legal father.

During this time, Kayla’s mother was entitled to certain protections. When Kayla was removed from her care, Kayla’s mother was entitled to an emergency hearing to contest Kayla’s placement in state care.<sup>2</sup> Kayla’s mother was also entitled to a fact-finding hearing to determine whether or not she had neglected Kayla, and, once she was determined to have neglected Kayla, she was entitled to a hearing to determine the placement that was in Kayla’s best interests.<sup>3</sup> Kayla’s

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<sup>1</sup> Many thanks are owed to Ryan Napoli and Patrick Clark of the Bronx Defenders for sharing the basics of this scenario, which is based on an actual client’s story, though it is modified for the purposes of this Note.

<sup>2</sup> See N.Y. FAM. CT. ACT § 1027 (McKinney 2010) (instructing that a hearing must be held “no later than the next court day” when a child is removed without a prior court order or where a parent was not present or represented by counsel at a prior court date).

<sup>3</sup> See *id.* §§ 1044, 1045, 1047 (defining fact-finding and dispositional hearings and describing the order in which they take place).

mother was represented by an attorney at the State's expense at all of these hearings.<sup>4</sup> Though George was neither a respondent in the case against Kayla's mother, nor ever accused of abusing or neglecting Kayla, he voluntarily completed services, such as parenting classes, recommended by the agency caring for Kayla. Though he never tested positive for drugs, he also participated in and completed a drug education program recommended by the agency.

Despite George's obvious involvement with Kayla, his active and manifest desire to serve as her parent, and the fact that he was never accused of abuse or neglect, George may not even have a right to a formal termination of parental rights (TPR) hearing if the agency attempts to release Kayla for adoption by a third party. If the agency files to terminate Kayla's mother's parental rights in order to free Kayla for adoption, Kayla's mother will be entitled to a specific hearing at which the State will have to prove by clear and convincing evidence that Kayla's mother permanently neglected her.<sup>5</sup> This is a separate finding from the original finding of neglect. Only after this fact-finding hearing will a judge be allowed to consider Kayla's "best interests" in placement.<sup>6</sup>

Despite a court's determination that he is Kayla's father, George will have to prove that he qualifies as a "consent father"—a father who is entitled to give or withhold consent to his child's adoption—before he is afforded the formal protections provided to Kayla's mother in a TPR proceeding.<sup>7</sup> Unless he does so, George will not be entitled to a TPR proceeding and the State will not have to prove that he neglected Kayla before a judge can place her with an adoptive family. Significantly, in order to qualify in this way, George will have to prove that he paid child support while Kayla was in state care; not only will Kayla's mother not be asked to prove that she paid any child support, but she will also not be asked to pay at all.<sup>8</sup>

Ironically, unmarried fathers end up in this predicament as a result of a series of U.S. Supreme Court and New York Court of Appeals decisions that *expanded* recognition of the rights of unmarried fathers. As recently as the beginning of the 1970s, states were free

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<sup>4</sup> See *id.* §§ 262, 1022-a (providing for court-appointed attorneys).

<sup>5</sup> See *id.* §§ 611, 614, 622 (outlining the fact-finding stage of termination of parental rights proceedings).

<sup>6</sup> See *id.* §§ 623, 625 (describing the dispositional stage of termination of parental rights proceedings).

<sup>7</sup> See *infra* notes 35–39 and accompanying text (laying out the consent father standard in termination of parental rights proceedings).

<sup>8</sup> See *infra* notes 35–39, 55–63 and accompanying text (discussing the consent father standard and child support requirement in termination of parental rights proceedings).

to deny unmarried fathers rights as parents of their children.<sup>9</sup> Beginning with *Stanley v. Illinois* in 1972, which established a baseline of rights for unmarried fathers, the Supreme Court recognized the right of unmarried fathers who were involved in their children's lives to give or withhold their consent in private adoption scenarios.<sup>10</sup> Accordingly, the State of New York also recognizes the rights of unmarried fathers in private adoptions, subject to an analysis of their involvement in their children's lives. Unmarried fathers whose children may be placed for adoption have the right to give or withhold consent only if they meet certain criteria, entitling them to recognition as a consent father.<sup>11</sup> These criteria, which include paying child support, are meant to identify those fathers who are involved in their children's lives. This framework was designed for private adoption scenarios in which a mother wanted her child to be adopted by the child's stepfather or wanted to give her child up for adoption at birth.<sup>12</sup>

This Note addresses unmarried fathers' rights in termination of parental rights proceedings in New York in the child welfare context.<sup>13</sup> In this context, the State has been involved in the child's life already, usually by removing the child from the mother's care against her wishes in light of accusations of abuse or neglect, and the State or a third party is now moving to terminate parental rights against the wishes of the parents. In New York, the consent father criteria discussed above also apply to unmarried fathers in these proceedings, in which the mother generally opposes placing the child for adoption.<sup>14</sup>

In these TPR proceedings, there are clear standards regarding both the responsibilities of the child welfare agency prior to the hearing and the procedural protections afforded parents, including the

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<sup>9</sup> See *Stanley v. Illinois*, 405 U.S. 645, 648–50 (1972) (describing the state of the law regarding unmarried fathers in Illinois prior to the Supreme Court's decision in this case).

<sup>10</sup> See *infra* Part II (discussing the Supreme Court cases establishing this right).

<sup>11</sup> See *infra* notes 35–39 and accompanying text and note 76 (describing the statute and case law that establish the consent father criteria).

<sup>12</sup> See *infra* notes 91–110 and accompanying text (describing Supreme Court cases that clarify the rights of unmarried fathers).

<sup>13</sup> To be clear, this Note does not address circumstances in which a child is placed privately for adoption with the mother's consent. These circumstances, including situations in which the mother voluntarily ends her parental rights in order to allow another family to adopt an infant or in which a stepfather adopts a child he raised along with the child's mother, have been fully addressed by the Supreme Court. See *infra* notes 91–110 and accompanying text (discussing Supreme Court cases in which the mother wishes adoption).

<sup>14</sup> In situations in which termination of parental rights proceedings take place, the child has generally already been placed in foster care or some other form of state care. See, e.g., N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2010) (cited by N.Y. FAM. CT. ACT § 611 as the source of the definition of “permanently neglected child” for the purposes of termination of parental rights, and defining a “permanently neglected child” as a child in agency care whose parent has failed to maintain contact or plan for the child).

burden of proof required of the entity pursuing termination of parental rights. The U.S. Supreme Court has held, for instance, that an entity or person petitioning for termination of parental rights—often the agency caring for the child in foster care—must prove its case by “clear and convincing” evidence.<sup>15</sup> Yet while mothers and married fathers in New York have an automatic right to the procedural protections mandated by statute and the U.S. Constitution, unmarried fathers are subjected to an analysis of whether or not they are consent fathers before they are entitled to a TPR hearing. The procedural protections and burdens of proof in the consent father context are significantly lower, meaning that the unmarried father has far fewer protections against termination of his rights than mothers and married fathers.<sup>16</sup>

These circumstances, what I will refer to as “TPR” in this Note, implicate an analysis of unmarried fathers’ equal protection rights, but neither the U.S. Supreme Court nor the New York Court of Appeals has considered the constitutionality of consent father criteria in the TPR context. This Note provides an analysis of how the Court of Appeals should evaluate the use of the consent father standard in TPR contexts if and when the appropriate case arises, arguing that the current standards burden unmarried fathers unnecessarily, denying them constitutional rights afforded mothers and married fathers. The current application of the consent father standard also undermines clear state interests in the rehabilitation of families and promotion of biological ties. Evidence demonstrates that children benefit from engagement with their fathers, and the State clearly articulates a preference for promoting the maintenance of biological families.<sup>17</sup>

Throughout this Note, the following terms will have specific meanings. “Private adoption” is a situation in which a mother voluntarily consents to free her child for adoption. She may give up her own rights as a parent, or she may consent to allow the child’s stepfather to adopt the child without terminating her own rights as a parent. “TPR” is the involuntary termination of a parent’s rights following an adjudication or admission of abuse or neglect by at least one parent and in which mothers and married fathers have certain constitutionally mandated protections. These protections include a high burden of proof that is borne by the entity petitioning to terminate rights. In these

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<sup>15</sup> *Santosky v. Kramer*, 455 U.S. 745, 769 (1982). This is a higher standard than the “preponderance of the evidence” standard that applies in most family court proceedings. FAM. CT. ACT § 1046(b).

<sup>16</sup> See *infra* Part III.A (discussing the differences between the standards for mothers and fathers).

<sup>17</sup> See *infra* Part I.A.

situations, the child is generally in foster or kinship care. A “consent father” is an unmarried father who has met certain preliminary criteria in order to qualify for the protection of his rights—rights to which all mothers and married fathers are automatically entitled.

In Part I of this Note, I will analyze New York’s state interest in promoting filial ties and its current regime governing consent fatherhood. I will describe the State’s interest in promoting intact families and the standards for terminating parental rights. In Part II, I will describe the significant federal and state cases that have shaped the current consent father doctrine in the context of private adoptions. In this Part, I will discuss the implications of these cases and recognize that at no point did the courts contemplate that the consent father doctrine would apply in the termination context. In Part III, I will demonstrate why the application of consent father standards to TPR proceedings is an inappropriate extension of a doctrine developed for private adoption contexts. This uncritical extension of an analysis appropriate to private adoption scenarios violates unmarried fathers’ equal protection rights in TPR contexts. In Part IV, I will discuss the ways in which requiring an unmarried father to prove his status as a consent father undermines the State’s goal of promoting intact families.

## I

### STATE POWER AND FATHERHOOD

This Part describes New York’s important state interest in promoting relationships between children and their fathers. It then discusses the process for involuntary termination of parental rights and how unmarried fathers, as compared to mothers and married fathers, are subjected to additional requirements—principally, the payment of child support—and are afforded fewer protections for their parental rights.

#### *A. New York Has an Interest in Maintaining a Familial Connection Between Father and Child*

New York has an important interest in promoting unified and coherent families, as evidenced repeatedly in both its family law legislation and case law.<sup>18</sup> Section 1055(b)(iii)(C) of the Family Court Act (FCA) states that “it is the legal responsibility of the local commissioner of social services to reunite and reconcile families whenever

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<sup>18</sup> New York child welfare law is governed primarily by the New York Social Services Law (SSL) and the New York Family Court Act (FCA). New York Domestic Relations Law (DRL) is applied in matters of fatherhood and adoption.

possible and to offer services and assistance for that purpose.”<sup>19</sup> Section 384-b(1)(a) of the New York Social Services Law (SSL) acknowledges that “the child’s need for a normal family life will usually best be met in the home of its birth parent.”<sup>20</sup> Under FCA section 1017(1), “when the court determines that a child must be removed from his or her home . . . the court shall direct the local commissioner of social services to conduct an immediate investigation to locate any non-respondent parent of the child.”<sup>21</sup> Case law further establishes that the commissioner must conduct an investigation to locate any parent and any relatives of the child and

must inform the [parent or] relative of: (1) the pendency of the proceeding; (2) the opportunity for becoming a foster parent or for seeking custody or care of the child; and (3) that the child may be adopted by foster parents if attempts at reunification with the birth parents are not required or are unsuccessful.<sup>22</sup>

The New York State Legislature expresses a clear preference for maintaining biological family ties. The “legislative intent [of FCA section 1017] is to give a firm preference to placing children who must be removed from their parents with other family members.”<sup>23</sup> FCA section 1055(a) lists custody with relatives first among a child’s direct placement options and provides expedited approval of foster home qualifications for family members only.<sup>24</sup> According to SSL section 398(16), “[T]he social services official or the voluntary authorized agency under contract with such official *must* consider giving preference to placement of a child with an adult relative over a non-related caregiver, provided that the relative caregiver meets relevant child welfare standards.”<sup>25</sup> These policies in New York reflect a broader consensus signaled by the U.S. Congress, which, notwithstanding the States’ traditional dominance in areas of family law, also expresses a preference for relatives over non-kinship caregivers in legislation.<sup>26</sup>

There are important reasons for preferring that children remain with family members, particularly their biological parents. Studies suggest that children who have relationships with biological family members, including their fathers, have increased senses of emotional

<sup>19</sup> FAM. CT. ACT § 1055(b)(iii)(C).

<sup>20</sup> N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii) (McKinney 2010).

<sup>21</sup> FAM. CT. ACT § 1017(1).

<sup>22</sup> *In re Dionna W.*, 927 N.Y.S.2d 514, 515 (N.Y. Fam. Ct. 2011).

<sup>23</sup> *In re Joseph P.*, 559 N.Y.S.2d 623, 624 (N.Y. Fam. Ct. 1990).

<sup>24</sup> FAM. CT. ACT § 1055(a).

<sup>25</sup> N.Y. SOC. SERV. LAW § 398(16) (McKinney 2010) (emphasis added).

<sup>26</sup> 42 U.S.C. § 671(a)(19) (2006) (“[T]he State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child.”).

well-being and security.<sup>27</sup> Children report that their fathers are key figures in their lives, even when they see them infrequently.<sup>28</sup> Studies suggest that the frequency of a father's contact with his child has a significant effect on the child's behavior: Children who see their fathers more frequently fare better.<sup>29</sup> Further, some research has found that children with absent fathers tend to have lower cognitive ability and educational attainment, and are at a heightened risk for delinquent behaviors.<sup>30</sup> Evidence suggests that children fare better when they have continued contact with their natural parents, even if they will not return to live with their parents or their contacts are infrequent.<sup>31</sup> Moreover, across the United States, many more children are freed for adoption through the termination of their parents' rights each year than are actually adopted.<sup>32</sup> There are more than twice as many children in foster care who are not adopted—despite being freed for adoption—than who are adopted each year.<sup>33</sup> Terminating parental rights is far from a solution for many children.

### B. Termination of Parental Rights in New York

In New York, for a child to be released for adoption the mother must either consent to relinquish custody or be found unfit in a TPR hearing. A father who is married to the mother of his child enjoys the same legal rights as the mother. His parental rights can only be terminated by consent or by judicial order following a hearing. New York Domestic Relations Law (DRL) section 111 sets forth the requirements for voluntary consent to adoption. Consent is always required from the parents of a child conceived in wedlock or from an unmarried mother.<sup>34</sup>

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<sup>27</sup> Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 461 (1983).

<sup>28</sup> Paul R. Amato, *Father-Child Relations, Mother-Child Relations, and Offspring Psychological Well-Being in Early Adulthood*, 56 J. MARRIAGE & FAM. 1031, 1032 (1994).

<sup>29</sup> Jeong-Kyun Choi & Aurora P. Jackson, *Father's Involvement and Child Behavior Problems in Poor African American Single-Mother Families*, 33 CHILD. & YOUTH SERV. REV. 698, 701 (2011).

<sup>30</sup> Amato, *supra* note 28, at 1032.

<sup>31</sup> Garrison, *supra* note 27, at 425 ("The available evidence suggests that, even for a child who will never again live with his natural parents and whose contacts with them are infrequent, permanent placement that permits continued contact is better than adoption or any other placement that entails a total loss of contact with the natural parent.")

<sup>32</sup> See U.S. CHILDREN'S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION—FY 2002–FY 2010 (2011), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/trends\\_june2011.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends_june2011.pdf) (showing that 11,000 to 29,000 more children have been subject to termination of parental rights than have been adopted each year for the past nine years).

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

<sup>34</sup> N.Y. DOM. REL. LAW § 111(1)(b)–(c) (McKinney 2010).

For unmarried fathers, the story is quite different. For these men, consent is only required after a determination that the father is a consent father.<sup>35</sup> Unmarried fathers whose children are placed for adoption have the right to give or withhold consent only if they meet certain criteria, including whether the father pays child support.<sup>36</sup> Criteria for consent fathers of children under six months include “public acknowledgement of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child.”<sup>37</sup> The criteria are different when children are over six months of age, in which case fathers are required to maintain “substantial and continuous or repeated contact with the child.”<sup>38</sup> Such contact is apparent by payment of child support and either (i) visiting with the child at least monthly or (ii) maintaining contact with the child if unable to visit.<sup>39</sup> The criteria are meant to identify fathers who are involved in their children’s lives in order to protect the parental rights of those parents.

This framework was designed for two types of private adoption scenarios: (1) where a mother seeks to give her child up for adoption at birth or (2) where a mother wants her child’s stepfather to adopt the child.<sup>40</sup> Evaluating unmarried fathers to determine their involvement in their children’s lives makes sense in a private adoption scenario. Careful balancing is required to honor the rights of the mother, the child, and the unmarried father. However, this evaluation is problematic in a TPR setting, which has, as an initial triggering event, coercive state intervention in a family’s life. In these cases, the statutory scheme inadequately protects the rights of unmarried fathers and also runs counter to New York’s own stated interests in encouraging and promoting intact families.

In New York, the State must terminate the rights of parents in order to free a child in foster care for adoption.<sup>41</sup> Parental rights of mothers and married fathers may be terminated only in specific situations: (1) the parents have died, (2) the parents have abandoned the child, (3) the parents are unable to care for the child due to “mental illness or mental retardation,” (4) the child is a “permanently

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<sup>35</sup> N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2008). *See infra* notes 111–13 and accompanying text (describing requirements for consent fatherhood).

<sup>36</sup> *See infra* note 76 (describing the statute and case law establishing these criteria).

<sup>37</sup> *In re Raquel Marie X.*, 559 N.E.2d 418, 428 (N.Y. 1990).

<sup>38</sup> N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2008).

<sup>39</sup> *Id.*

<sup>40</sup> *See infra* notes 91–110 and accompanying text (describing the context in which these Supreme Court cases were decided).

<sup>41</sup> N.Y. SOC. SERV. LAW § 384-b(4) (McKinney 2010). The child’s foster parent or a relative caring for the child can also originate a termination of parental rights petition. *Id.*

neglected child,” or (5) the parent(s) have severely or repeatedly abused the child.<sup>42</sup> New York requires both a fact-finding and a dispositional hearing to terminate parental rights,<sup>43</sup> and those hearings are separate from, and occur subsequent to, hearings that adjudge abuse or neglect.<sup>44</sup>

In a fact-finding hearing, a judge determines whether or not a child under the age of eighteen and in the care of an agency falls under the statutory categories mentioned above; for instance, whether the child has been abandoned or permanently neglected.<sup>45</sup> The following discussion will assume that the case is one in which permanent neglect is alleged. In order to make this finding, the agency or entity petitioning for termination must prove, by clear and convincing evidence, that the parent “substantially and continuously or repeatedly failed to maintain contact with or plan for the future of the child, although physically and financially able to do so,”<sup>46</sup> despite “diligent efforts [by the agency] to encourage and strengthen the parental relationship.”<sup>47</sup> The clear and convincing evidentiary standard is constitutionally required because parents’ liberty interest in raising their children as they see fit is a fundamental right, and a preponderance of the evidence is not a high enough evidentiary standard to adequately protect that interest.<sup>48</sup> A dispositional hearing is held only if the judge finds against the parent in the fact-finding hearing.<sup>49</sup> During the dispositional hearing, the judge decides on custody and guardianship of the child based on the child’s “best interests.”<sup>50</sup>

A key component of the permanent neglect determination in a fact-finding hearing is whether or not the agency entrusted with the care of the child undertook “diligent efforts” to “encourage and strengthen the parental relationship.”<sup>51</sup> The New York Court of Appeals has held that the first question a court should address in a

<sup>42</sup> *Id.*

<sup>43</sup> N.Y. FAM. CT. ACT § 622–23 (McKinney 2010) (containing provisions for fact-finding and dispositional hearings).

<sup>44</sup> *See supra* notes 5–6 (containing relevant statutes).

<sup>45</sup> FAM. CT. ACT § 622 (“When used in this part, ‘fact-finding hearing’ means in the case of a petition for the commitment of the guardianship and custody of a child, a hearing to determine whether the allegations . . . are supported by clear and convincing proof.”); *Id.* § 614(1)(a)–(b).

<sup>46</sup> *Id.* § 614(1)(d).

<sup>47</sup> *Id.* § 614(1)(c)–(d).

<sup>48</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

<sup>49</sup> *See* FAM. CT. ACT § 625 (outlining the sequence of hearings).

<sup>50</sup> *Id.* § 623 (“When used in this part, ‘dispositional hearing’ means a hearing to determine what order of disposition should be made in accordance with the best interests of the child.”).

<sup>51</sup> *Id.* § 614(1)(c).

fact-finding hearing is whether or not the agency has satisfied its duty to work toward reuniting the child and parent.<sup>52</sup> Only after the agency shows that it fulfilled the duty to strengthen and support the parent-child relationship can a court proceed to consider parental actions.<sup>53</sup> The agency, therefore, has the burden of proving, by clear and convincing evidence, that it met its duty to encourage a parent-child relationship before it can prove permanent neglect of a child by a parent.

In the case of George and Kayla, once it has been determined by the court that Kayla's mother neglected the child, and once the agency has decided to attempt to terminate the mother's parental rights, Kayla's mother would be entitled to a hearing to determine whether or not she had, in fact, permanently neglected Kayla. Not only did the agency have to prove by clear and convincing evidence that she did so, but it also had to prove that it made diligent efforts to strengthen the relationship between Kayla and her mother. Only after the judge had made a finding against Kayla's mother was the court allowed to consider Kayla's "best interests." As I will show, the scenario is entirely different for George.

### C. *Child Support Is at the Heart of the Consent Fatherhood Analysis*

Because mothers and married fathers need not prove that they are consent parents in order to be entitled to the protections of a TPR hearing, their rights as parents are not contingent on payment to the State when their child is in state care. Though George regularly purchases toys and clothes for Kayla, he may not be able to prove his status as a consent father because he did not pay child support to the State while Kayla was in state custody. No one ever instructed George that he should pay child support to the State, even when he was adjudged to be Kayla's legal father, and no court ever ordered child support payments. Kayla's mother was never subjected to this requirement.

George, who acknowledged paternity, paid birth expenses, and gave financial support to Kayla's mother before and after Kayla's

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<sup>52</sup> *In re Sheila G.*, 462 N.E.2d 1139, 1140 (N.Y. 1984) (holding that "[w]hen a child-care agency . . . brings a [TPR] proceeding . . . on the ground of permanent neglect, it must affirmatively plead in detail and prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family").

<sup>53</sup> *Id.* ("Only when this duty [of the agency] has been deemed satisfied may a court consider and determine whether the parent has fulfilled his or her duties to maintain contact with and plan for the future of the child.").

birth, would almost certainly have been considered a consent father if Kayla's mother had chosen to place her for adoption. However, because Kayla's mother was forced to place Kayla in foster care, a court could find that George is not a consent father solely because he did not pay child support to the State while Kayla was in foster care.<sup>54</sup>

The determination of whether an unmarried father is a consent father turns on whether the unmarried father maintained "substantial and continuous or repeated contact with the child" under DRL section 111(1)(d).<sup>55</sup> This contact entails payment of child support and either visitation that takes place at least monthly or communication with the child or agency caring for the child.<sup>56</sup> If an agency prevents visitation, the father need not have visited with the child at least monthly, but DRL section 111(1)(d) explicitly states that agencies are not required to encourage the father to perform these activities.<sup>57</sup>

When a child is in foster care, agencies can recommend services for parents to complete, and a court can order agencies to provide such services, such as parenting classes, to promote reunification of the parents and child.<sup>58</sup> Such services are a component of planning for the child's return.<sup>59</sup> Even if unmarried fathers complete all such services, they face additional burdens not borne by other parents. Unmarried fathers' rights are more easily terminated than those of other parents because payment of child support is a requirement for determining "substantial and continuous or repeated" contact with the child.<sup>60</sup> In order to be a consent father of a child more than six months old, the father *must* pay child support.<sup>61</sup> There is no such requirement for mothers and married fathers.<sup>62</sup> Case law even sug-

<sup>54</sup> N.Y. DOM. REL. LAW § 111 (McKinney 2008).

<sup>55</sup> See *supra* notes 38–39 and accompanying text.

<sup>56</sup> N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2008) ("In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph.").

<sup>57</sup> *Id.*

<sup>58</sup> N.Y. FAM. CT. ACT § 1015-a (McKinney 2010). See also *infra* note 171 and accompanying text (noting that fathers who have not been found to be unfit can be ordered to complete services).

<sup>59</sup> See *supra* note 46 and accompanying text (referencing the requirement that parents plan for their children's return).

<sup>60</sup> N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2008).

<sup>61</sup> *Id.* (describing substantial and continuous or repeated contact as "the payment by the father toward the support of the child of a fair and reasonable sum" *and* actual contact with the child).

<sup>62</sup> See N.Y. DOM. REL. LAW § 111(1)(b)–(d) (providing that consent is required from parents of children "conceived or born in wedlock," and from mothers regardless of marital status, but providing conditions that must be met before consent is required of a father where the child is "born out-of-wedlock"); *supra* notes 41–47 and accompanying text (referencing standards for termination of parental rights for mothers and married fathers).

gests that it is more important that the father pay child support to the State after a child enters state custody than to the child's mother before the child entered state custody. For example, in *In re Jamize G.*, the New York Appellate Division determined that a father was not a consent father in part because the father did not pay child support when the child was placed in foster care, even though he had made child support payments to the mother prior to the child being placed in foster care.<sup>63</sup>

Courts have noted that the most relevant time frame for consideration when determining consent fatherhood is the six months preceding the filing of an adoption or termination petition.<sup>64</sup> In George's case, though he supported Kayla through payments to her mother before Kayla's entry into state custody, the fact that he did not make payments to the State while Kayla was in foster care means to many judges that he is not a consent father. Moreover, the agency has no obligation to inform George of this child support requirement.<sup>65</sup> In fact, the agency has no affirmative responsibility at all toward George. Rather, it must simply refrain from hindering visitation.

Local social services departments, such as the New York City Administration for Children's Services, are empowered under New York State law to collect child support from parents of children in foster care who are supported by federal Title IV-E funds.<sup>66</sup> However, recognizing that the collection of child support is sometimes counterproductive to the State's ultimate goal of reuniting families, New York law specifically states that "[collection] will not be appropriate where such requirement will . . . impair the likelihood of the child returning

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<sup>63</sup> 838 N.Y.S.2d 499, 499 (App. Div. 2007); *see also In re Chandel B.*, 872 N.Y.S.2d 438, 438 (App. Div. 2009) (finding that a father's consent to adoption was not required under DRL § 111(1)(d) when the father had not paid child support or maintained continuous contact with his child).

<sup>64</sup> *See, e.g., In re Adoption of Adreona C.*, 914 N.Y.S.2d 546, 546 (App. Div. 2010) ("[I]n determining whether [the biological father] forfeited his right to consent to the adoption pursuant to section 111(2)(a), the court should have considered his contact with the child during the period of time, whether six months or longer, immediately preceding the filing of the adoption petition . . ."); *In re Vanessa Ann G.-L.*, 856 N.Y.S.2d 657, 659 (App. Div. 2008) ("[T]he evidence need not be limited to the six-month period immediately preceding the filing of an adoption petition. . . . Generally, however, more recent events are most relevant . . .").

<sup>65</sup> While notice to fathers that payment of child support is necessary would be a modest improvement over the status quo, it would not adequately address the equal protection and policy concerns identified in this Note.

<sup>66</sup> N.Y. SOC. SERV. LAW § 111-b(2) (McKinney 2002). Title IV-E funds are awarded by the federal government to reimburse states for the expense of foster care when the State has complied with federal guidelines for adjudicating and monitoring the child's placement. *See* 45 C.F.R. § 1356 (laying out requirements for states to obtain Title IV-E funds).

to his or her family when discharged from foster care.”<sup>67</sup> Ryan Napoli, a family defense attorney at the Bronx Defenders, says that caseworkers and foster parents do not accept money from the parents of the children in their care.<sup>68</sup>

However, because unmarried fathers must prove that they are consent fathers by paying child support before they are entitled to the protections of TPR hearings, they are ultimately never excused from paying child support if they want a say in their child’s adoption. Even incarceration does not excuse the father from “responsibility for supporting the child and maintaining regular communications.”<sup>69</sup> Even if a father has been relieved of an obligation to pay child support by a court, failure to pay can still cost him the right to object to his child’s adoption. In *In re Shane Chayann Orion S.*, the father “successfully moved to be relieved” of the obligation to pay child support.<sup>70</sup> Though he provided “modest gifts and clothing” to his child after that point, the court determined that this was inadequate, and the Appellate Division upheld the decision on appeal.<sup>71</sup> The court determined that the father did not have to consent to adoption, and it was in the child’s best interests to be released for adoption by his foster parent.<sup>72</sup>

#### *D. Unmarried Fathers Are Not Automatically Protected by the High Burden of Proof That Always Protects Mothers and Married Fathers*

While mothers and married fathers both have an automatic right to the procedural protections mandated by statute and the U.S. Constitution, unmarried fathers must prove they are consent fathers before they are entitled to a TPR hearing. The standards that determine whether or not an unmarried father is a consent father—which itself determines if an unmarried father receives a termination hearing—are significantly easier for the State to satisfy than the burden of proof and procedural protections that mothers and married fathers are entitled to in the TPR context. This means that the unmarried father faces numerous obstacles to attaining the protections that are automatically granted to mothers and married fathers.<sup>73</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> Telephone Interview with Ryan Napoli, Attorney, The Bronx Defenders (Oct. 19, 2011).

<sup>69</sup> *In re Bryant Angel Malik J.*, 908 N.Y.S.2d 48, 49 (App. Div. 2010).

<sup>70</sup> 912 N.Y.S.2d 46, 47 (App. Div. 2010).

<sup>71</sup> *Id.* at 430–31.

<sup>72</sup> *Id.* at 431.

<sup>73</sup> See *infra* Part III.A (discussing the differences between the standards for mothers and fathers).

The consent father standard relieves the State of the burden of showing “diligent efforts” by the agency to “encourage and strengthen” an unmarried father’s relationship with his child—efforts it is required by statute to undertake with mothers and married fathers.<sup>74</sup> The strict “clear and convincing” evidence standard, which the agency must meet when making showings of both parental neglect and its own efforts to encourage family communication, also protects mothers and married fathers.<sup>75</sup> For unmarried fathers, a determination must first be made as to whether or not the father is a consent father under DRL section 111(1)(d),<sup>76</sup> under which the agency must meet a much lower burden of proof than required under the TPR statutes. Furthermore, only if the father is determined to be a consent father does the agency have to prove diligent efforts in a termination of parental rights proceeding.<sup>77</sup>

Some courts imply that the State or agency bears this relatively high burden of proof by noting that the State can demonstrate that the father did not meet the “substantial and continuous or repeated contact” criteria set forth in DRL section 111(1)(d) by a showing of clear and convincing evidence.<sup>78</sup> However, other courts have not required clear and convincing evidence, and have even placed the burden of proving consent fatherhood on the father rather than on the State.<sup>79</sup> At least one court required the father to bear the burden of showing

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<sup>74</sup> See *supra* note 51 and accompanying text.

<sup>75</sup> See *supra* note 15 and accompanying text (describing the application of the evidentiary standard laid out in *Santosky*).

<sup>76</sup> The New York Court of Appeals struck down the part of DRL § 111(1)(d) that pertained to children under six months of age. *In re Raquel Marie X.*, 559 N.E.2d 418 (N.Y. 1990). The court established interim criteria for determining “consent” status, including “public acknowledgement of paternity, payment of pregnancy and birth expenses, steps taken to establish legal responsibility for the child, and other factors evincing a commitment to the child.” *Id.* at 428. Unmarried fathers of children older than six months are still held to the standard in DRL § 111(1)(d), which requires “substantial and continuous or repeated contact with the child,” including payment of child support. N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2008).

<sup>77</sup> See, e.g., *In re Chandel B.*, 872 N.Y.S.2d 438, 438 (App. Div. 2009) (holding that a father’s consent to adoption was not required because he did not maintain “substantial and continuous or repeated contact with the child,” under DRL § 111(1)(d)); *In re Kasiem H.*, 646 N.Y.S.2d 541, 542 (App. Div. 1996) (holding that consent to guardianship and adoption was not required if the parent “abandoned the child,” and that since the parent did not maintain “substantial and continuous or repeated contact with the child,” under DRL § 111(1)(d), his consent was not required).

<sup>78</sup> See, e.g., *In re Timothy M.*, 913 N.Y.S.2d 94, 95 (App. Div. 2010) (“Clear and convincing evidence supports the finding that respondent did not meet the parental responsibility criteria set forth in Domestic Relations Law § 111(1)(d).”).

<sup>79</sup> See *In re Doral B.*, 769 N.Y.S.2d 805, 806 (App. Div. 2003) (“Respondent failed to establish that he maintained ‘substantial and continuous or repeated contact’ with the child within the meaning of Domestic Relations Law § 111(1)(d) . . .”).

by clear and convincing evidence that he was a consent father.<sup>80</sup> An attorney at the Bronx Defenders states that his unmarried father clients routinely bear the burden of proof to establish consent fatherhood.<sup>81</sup>

## II THE CONSTITUTIONAL FRAMEWORK FOR FATHERS' RIGHTS

In this Part, I describe the evolution of the rights of fathers through a series of U.S. Supreme Court and New York Court of Appeals cases, from the baseline of no guaranteed rights for unmarried fathers to the current consent father framework. I will show that the case law created a framework to protect the interests of all parties specifically in private adoptions. It is important to understand that the standard of consent fatherhood evolved in the context of private adoptions. I do not criticize the application of this framework in that context, where the State must balance the interests of both the mother and father while considering the family unit as a whole. As I will demonstrate in Part III, however, this framework is inadequate when applied in termination of parental rights contexts.

In a private adoption proceeding, the consent of unmarried fathers is required for adoption of the child by another party only when the father has, and demonstrates to the court, a substantial relationship with the child. The Supreme Court has laid out parameters regarding adoption and unwed fathers in four cases: *Stanley v. Illinois*,<sup>82</sup> *Quilloin v. Walcott*,<sup>83</sup> *Caban v. Mohammed*,<sup>84</sup> and *Lehr v. Robertson*.<sup>85</sup> These cases all involve unmarried fathers, and all but *Stanley* involve private adoption actions initiated with the mother's support.

In *Stanley*, the landmark case that established that unmarried fathers have a right to parent their children, the State of Illinois declared Peter Stanley's children to be wards of the state after the

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<sup>80</sup> See *In re Commitment of Jayquan J.*, No. B27327/07, 2009 WL 3050882, at \*4 (N.Y. Fam. Ct. Sept. 24, 2009) ("In causes of action alleging that a father's consent to an adoption is not required, Domestic Relations Law § 111(1)(d) requires the father to show by clear and convincing evidence that he 'maintained substantial and continuous or repeated contact with the child as manifested by' the payment of child support and either regular visitation or regular communication with the child.").

<sup>81</sup> Telephone Interview with Ryan Napoli, *supra* note 68.

<sup>82</sup> 405 U.S. 645 (1972).

<sup>83</sup> 434 U.S. 246 (1978).

<sup>84</sup> 441 U.S. 380 (1979).

<sup>85</sup> 463 U.S. 248 (1983).

children's mother, who was Stanley's partner but not his wife, died.<sup>86</sup> The Supreme Court held that denying Stanley the right to a hearing before depriving him of his parental rights was a violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.<sup>87</sup> The Court noted that the State presumed that unmarried fathers were unfit out of convenience, and found that if Stanley was a fit father, the State's interest in caring for his children was "de minimis."<sup>88</sup> The Court concluded that Stanley's right to parent was far more significant than the State's convenience, and that parents have a Due Process right to a hearing to have their lack of fitness proven.<sup>89</sup> The Court also found that Illinois's actions violated the Equal Protection Clause because the State denied Stanley a hearing to which all Illinois parents were constitutionally entitled under the Due Process Clause.<sup>90</sup> This important case established the principle that unmarried fathers are parents entitled to concrete legal rights and protections.

After *Stanley*, the Court refined and developed the rights of unmarried fathers in cases that involved private adoption scenarios. In *Caban v. Mohammed*, Abdiel Caban fathered two children with Maria Mohammed, with whom he lived for several years before separating from her.<sup>91</sup> Caban maintained contact with the children, but when Mohammed married, a New York court allowed Mohammed's new husband to adopt Caban's children without his consent.<sup>92</sup> The Supreme Court held that requiring a fit unmarried father to prove that retaining custody was in the best interests of his children, while not requiring the same thing of an unmarried mother, violated his rights under the Equal Protection Clause.<sup>93</sup> The Court found that no substantial state interest was advanced by differentiating between unmarried fathers and unmarried mothers.<sup>94</sup> In this situation, Mr. Caban's rights as a parent were held to be indistinguishable from those of the mother.

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<sup>86</sup> *Stanley*, 405 U.S. at 646.

<sup>87</sup> *Id.* at 657–58.

<sup>88</sup> *Id.* at 657.

<sup>89</sup> *Id.* at 657–58.

<sup>90</sup> *Id.* at 658 (“[A]ll Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley . . . is inescapably contrary to the Equal Protection Clause.”).

<sup>91</sup> 441 U.S. 380, 382 (1979).

<sup>92</sup> *Id.* at 382–84.

<sup>93</sup> *Id.* at 385–87, 392–94. The Court noted that because it found that the New York statute violated the Equal Protection Clause, it had no reason to reach a finding regarding Caban's claim under the Due Process Clause. *Id.* at 394 n.16.

<sup>94</sup> *Id.* at 393.

Although the Supreme Court has clarified the rights of unmarried fathers who maintained active roles in their children's lives, the Court has refused to uphold unmarried fathers' rights in private adoption contexts when fathers are not "substantially" involved in their children's lives. For example, in *Quilloin v. Walcott*, another private adoption case in which the child's mother wanted the child to be adopted by his stepfather, the Court said that substantive due process rights do not apply to fathers who have not sought custody or who have not been substantially involved in their children's lives.<sup>95</sup> The *Quilloin* Court held that an unwed father who was not substantially involved in his child's life could be deprived of his parental rights without a finding of unfitness.<sup>96</sup> In *Quilloin*, the unwed father did not follow Georgia's procedures for claiming the child as his own, even though his name appeared on the birth certificate, and he only occasionally visited and supported the child.<sup>97</sup> Clearly marking the significance of the private adoption scenario, in which a child was being adopted by a stepparent and the family unit was already in place, the Court allowed the child's stepfather to adopt the child, reasoning that "the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant."<sup>98</sup> The Court allowed the adoption because it found that it was "not a case in which the unwed father at any time had, or sought, actual or legal custody of his child."<sup>99</sup>

In *Lehr v. Robertson*, an unwed father sought to prevent the adoption of his child by the child's stepfather.<sup>100</sup> New York law at the time required that unwed fathers take particular steps to protect their legal interest in the child. One such step was registration with the "putative father registry."<sup>101</sup> *Lehr* met some statutory requirements, but he did not enter his name into New York's registry.<sup>102</sup> One month before the child's mother and stepfather commenced adoption proceedings, *Lehr* filed a paternity petition in another county seeking to be formally recognized as the child's father.<sup>103</sup> He was not notified

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<sup>95</sup> 434 U.S. 246, 254–55 (1978). In *Caban*, the Court noted that the State need not require consent for adoption from a parent who has "abandoned" his child. *Caban*, 441 U.S. at 392.

<sup>96</sup> *Quilloin*, 434 U.S. at 255.

<sup>97</sup> *Id.* at 249 & n.6.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 463 U.S. 248, 251–53 (1983).

<sup>101</sup> *Id.* at 250.

<sup>102</sup> *Id.* at 251.

<sup>103</sup> *Id.* at 252–53.

that adoption proceedings were taking place.<sup>104</sup> When he learned about the adoption proceedings—after the adoption was approved—Lehr sought to vacate the adoption order, which he claimed violated his constitutional rights.<sup>105</sup> The family court denied the application.<sup>106</sup> The Appellate Division<sup>107</sup> and the Court of Appeals affirmed this decision.<sup>108</sup> Lehr filed a petition for certiorari in the U.S. Supreme Court, arguing that his due process and equal protection rights were violated. The Court rejected his claims, concluding that unwed fathers must demonstrate a commitment to parenthood before being awarded the rights of parents and that Lehr had failed to do so.<sup>109</sup> Again marking the significance of the private adoption context, the Court noted that the State preference for a formal family was reasonable.<sup>110</sup>

In the wake of *Caban*, New York's legislature established two sets of criteria to determine if a father was meaningfully involved in his child's life and was thus allowed to veto an adoption of his child: one for fathers of children older than six months and another for fathers of children younger than six months.<sup>111</sup> As originally adopted, DRL section 111(1)(e) required an unmarried father's consent to adoption of children under six months of age only if the father lived with the child or the child's mother, "held himself out to be the father of such child," and paid a reasonable sum towards the pregnancy and birth expenses.<sup>112</sup> DRL section 111(1)(d) required an unmarried father's consent to an adoption of a child over the age of six months only if he "maintained substantial and continuous or repeated contact" with his child by paying child support and visiting or regularly communicating with the child.<sup>113</sup>

In *In re Raquel Marie X.*, in which two cases were heard together by the New York Court of Appeals, two unmarried fathers sought custody of their newborn children after adoptions had been approved by

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<sup>104</sup> *Id.* at 253.

<sup>105</sup> *Id.*

<sup>106</sup> *In re Adoption of Martz*, 423 N.Y.S.2d 378 (N.Y. Fam. Ct. 1979).

<sup>107</sup> *In re Adoption of Jessica XX*, 434 N.Y.S.2d 772 (App. Div. 1980).

<sup>108</sup> *In re Jessica XX*, 430 N.E.2d 896 (N.Y. 1981).

<sup>109</sup> *Lehr*, 463 U.S. at 261–62 (“[T]he mere existence of a biological link does not merit equivalent constitutional protection. . . . The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. . . . If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.”).

<sup>110</sup> *Id.* at 256–58.

<sup>111</sup> *In re Raquel Marie X.*, 559 N.E.2d 418, 422–23 (N.Y. 1990).

<sup>112</sup> N.Y. DOM. REL. LAW § 111(1)(e) (McKinney 2008), *invalidated by In re Raquel Marie X.*, 559 N.E.2d 418.

<sup>113</sup> *Id.* § 111(1)(d).

consent of the mothers of the children. These fathers had not lived with the mothers of their children prior to the adoption, but they both subsequently reconciled with the mothers and sought the right to veto the adoptions.<sup>114</sup> The New York Court of Appeals struck down as unconstitutional the provision in DRL section 111(1)(e) that required a biological father to live with the mother of a child under six months of age in order to preserve the right to veto an adoption proceeding.<sup>115</sup> The court stated that the standard could be used to “block the father’s rights” even when he had undertaken other actions that “would satisfy the State as substantial, continuous and meaningful by any other standard.”<sup>116</sup> The court held that this provision “neither legitimately further[ed] the State’s interest nor sufficiently protect[ed] the father’s,”<sup>117</sup> and noted that the test spoke more to the father’s relationship with the mother than his relationship with the child.<sup>118</sup> Since the test was neither indicative of the father’s relationship with the child nor his willingness to assume responsibility, it could not further a legitimate state interest in promoting permanency for the child.<sup>119</sup>

The decision in *In re Raquel Marie X.* involved cases in which biological mothers voluntarily gave up their infants for adoption to unrelated persons.<sup>120</sup> The Court of Appeals noted that the adoptive parents were “strangers” and said:

[I]n an adoption proceeding by strangers, an unwed father who has been physically unable to have a full custodial relationship with his newborn child is also entitled to the maximum protection of his relationship, so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child.<sup>121</sup>

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<sup>114</sup> *In re Raquel Marie X.*, 559 N.E.2d at 419–20.

<sup>115</sup> *Id.* at 427.

<sup>116</sup> *Id.* at 426.

<sup>117</sup> *Id.* at 419.

<sup>118</sup> *Id.* at 426.

<sup>119</sup> *See id.* (“At any rate, the ‘living together’ requirement adds nothing to either of these important considerations.”).

<sup>120</sup> *Id.* at 419–20.

<sup>121</sup> *Id.* at 424. A father’s right to avail himself of the opportunity to build a relationship with his child is limited in New York in the private adoption context. In *Robert O. v. Russell K.*, 604 N.E.2d 99 (N.Y. 1992), the New York Court of Appeals determined that a father who did not know he was the father of a child until after an adoption was finalized had no constitutional right to notice under DRL § 111-a. *Id.* at 105. The court said that the State’s interest in permanency of the adoption was significant enough to prevent the revocation of the adoption if a father who was never involved had not been notified. *Id.* at 104. The court noted that the birth mother did not actively hide the pregnancy from the father, though she never told him she was pregnant. *Id.* at 101. This suggests that a father who, for

The court distinguished *Lehr* and *Quilloin*, in which stepfathers had already assumed parental duties and wished to adopt the stepchild, thus securing legal recognition of a “family already in existence.”<sup>122</sup> The Court of Appeals noted that the State did not have a sufficiently strong interest in promoting two-parent families to “defeat the biological father’s right to a parental relationship.”<sup>123</sup> It is important to note that this is as far as the Court of Appeals’s analysis went; it recognized that the State’s interest in preserving intact families in private adoptions where a stranger adopts the child is less than where a stepfather adopts the child. However, it did not address in any way a situation in which a mother faced involuntary termination of her parental rights.

### III

#### THE CONSTITUTIONALITY OF CONSENT FATHERHOOD

Part II demonstrated how the U.S. Supreme Court and the New York Court of Appeals grappled with and answered the question of how the State should balance the interests of unmarried mothers and fathers in private adoption scenarios. Case law expanded fathers’ rights from the pre-*Stanley* baseline, but the decisions did not reach the context of terminations of parental rights. While the framework that came out of these cases is useful in a private adoption context, it is inadequate when applied to TPR contexts and violates the Equal Protection Clause of the Constitution.<sup>124</sup> There is a body of case law,

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whatever reason, has not been involved in his child’s life and whose child is in a permanent, stable adoptive home, has forfeited his parental rights in New York.

<sup>122</sup> *In re Raquel Marie X.*, 559 N.E.2d 418, 424–25 (N.Y. 1990).

<sup>123</sup> *Id.* at 427.

<sup>124</sup> The argument that it also violates the Due Process Clause is beyond the scope of this Note. In *Michael H. v. Gerald D.*, 491 U.S. 110, 128–29 (1989) (plurality opinion), the Supreme Court left open the possibility that denying a father an opportunity to develop a relationship with his offspring would be unconstitutional. The New York Court of Appeals, in *In re Raquel Marie X.*, noted that the result in *Michael H.* may very well have been different if the facts had been slightly different and the legal (though not biological) father had not wanted to raise the child with the child’s mother. 559 N.E.2d 418, 423 (1990). State custody automatically alters a father’s ability to develop a relationship with his child. On the one hand, it may facilitate such a relationship by bringing the child’s needs to the attention of the father. On the other hand, it can also impede the development of such a bond by imposing regulations and requirements that fall far outside of the natural parent child relationship, such as supervised visitation, drug tests, payments to the State, and enforced participation in classes and/or drug programs. Parents who are ordered to comply with court directives without procedural protections are less likely to stay involved in the court process. See Vivek S. Sankaran, *Parans Patriae Run Amuck: The Child Welfare System’s Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 79 (2009) (citing research that parents with procedural protections are more likely to stay involved and comply with court directives). See also *In re Christina I.*, 640 N.Y.S.2d 310, 310 (App. Div. 1996) (affirming order that non-respondent parent complete court-

including the cases described in Part II, *supra*, that makes clear that where the State's interest is great enough, the law can distinguish between mothers and fathers in certain contexts.<sup>125</sup> Standard analysis of gender-based distinctions under the Equal Protection Clause is based on an evaluation of whether or not the distinctions "serve important governmental objectives" and whether the distinctions are "substantially related to achievement of those objectives."<sup>126</sup> As we will see, the state interest in limiting the rights of unmarried fathers in termination of parental rights proceedings does not withstand that scrutiny, as it fails to satisfy either requirement of the Supreme Court's test. A proceeding in which a child is in state care and custody is fundamentally different from a proceeding in which the child is in the care and custody of persons to whom he or she is related or with whom he or she has already formed a familial relationship. Because New York State's gender distinction does not further an important objective in the former, it is a violation of the Equal Protection Clause.

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ordered services). Determining whether or not someone is a consent father by counting his payments of support to the State is effectively more a test of the father's relationship with the State than his relationship with his child. Paying support payments to the State, while perhaps one way to demonstrate commitment to one's child, is not a conclusive measure of such commitment any more than living with a child's mother is the only possible way to demonstrate a commitment to one's child. Like living with a child's mother, payments to the State are not directly related to the welfare of the child and are likely to reflect the father's relationship with and views of the State more than of his relationship with his child. The requirements for consent fatherhood in New York when an unmarried father's child is in state custody may effectively deny him the opportunity to form a relationship in a way that could be frowned upon by the U.S. Supreme Court or by the New York Court of Appeals. In *In re Raquel Marie X.*, the Court of Appeals invalidated a statute that measured a father's involvement by his relationship with the child's mother. 559 N.E.2d at 427.

<sup>125</sup> See Part II for a discussion of the state interest in private adoption scenarios. Intermediate scrutiny applies in all contexts when analyzing an equal protection claim based on gender. It should be noted that in the immigration context, the application of fathers' rights under the Equal Protection Clause is more limited than in the family law context because the government interest is considered very significant. In *Nguyen v. INS*, the Court applied intermediate scrutiny to a law that treated the children of unmarried mothers and fathers differently, stating: "For a gender-based classification to withstand equal protection scrutiny, it must be established 'at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 533 U.S. 53, 60 (2001) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). While the Court determined that mothers and fathers could be subjected to different requirements before their children were found to be American citizens, it did not apply a "lesser degree of scrutiny," for the proposition that congressional authority to exercise immigration powers in the manner it sees fit is an important governmental objective. 533 U.S. at 61 (citing *Miller v. Albright*, 523 U.S. 420, 434 n.11 (1998)).

<sup>126</sup> *Caban v. Mohammed*, 41 U.S. 380, 388 (1979) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

A. *Gender-Based Distinctions Deny Unmarried Fathers Equal Protection of the Law*

The current parental rights regime in termination proceedings bears important consequences for unmarried fathers alone. While the State protects the rights of mothers and married fathers, courts subject unmarried fathers to a substantially different standard than that required of mothers and married fathers. Mothers and married fathers are automatically protected by a strict “clear and convincing” evidence standard,<sup>127</sup> while unmarried fathers are not.<sup>128</sup> Moreover, when the rights of mothers and married fathers are at stake, the State must demonstrate that a child is a “permanently neglected child,” or a child whose parent(s) “substantially and continuously or repeatedly failed to maintain contact with or plan for the future of the child, although physically and financially able to do so” despite “diligent efforts [by the agency] to encourage and strengthen the parental relationship.”<sup>129</sup> This is substantially different from the standard for unmarried fathers, which does not automatically require that the agency encourage and facilitate the father’s contact with his child.<sup>130</sup>

Additionally, while both mothers and fathers are supposed to pay child support to the State when their children are in foster care,<sup>131</sup> only unmarried fathers are penalized by denial of parental rights when they fail to pay. The State may have an interest in incentivizing payments by unmarried fathers to the mothers of their children for those children’s support, but that interest is no longer present when the child enters foster care and the unmarried father is being asked to pay child support to the State. In those situations, when parental rights and children’s futures are at stake, there is no justification for penalizing unmarried fathers in a way that mothers and married fathers are not.

Demanding that a father be a consent father before granting him the right to a termination of parental rights proceeding denies fathers the same opportunity as mothers to have their relationship with their children supported and encouraged by the State. In *Caban*, the Supreme Court rejected the idea that mothers and fathers have inher-

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<sup>127</sup> See *supra* note 15 and accompanying text (describing application of the evidentiary standard laid out in *Santosky v. Kramer*, 455 U.S. 745 (1982)).

<sup>128</sup> See *supra* Part I.D (describing the standard and protections for consent fathers).

<sup>129</sup> N.Y. FAM. CT. ACT § 614(1)(c)–(d) (McKinney 2010).

<sup>130</sup> See *supra* Part I.C (describing procedures and standards in termination and consent father hearings).

<sup>131</sup> Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333, 1334 (2009).

ently different relationships with their children.<sup>132</sup> However, New York automatically distinguishes fathers—with significant effect—by requiring them to bear burdens of proof and action that mothers do not bear under any circumstances. By using a scheme designed for a situation in which the State had other interests to balance—the private adoption context—the State impermissibly discriminates between men and women when parental rights may be terminated.

*B. The State's Interest in Efficiency Is Inadequate To Justify Gender-Based Distinctions in Termination of Parental Rights*

To analyze the constitutionality of the consent father framework in the termination context, I explore the possible government objective in employing a gender-based distinction. As noted by the New York Court of Appeals in *In re Raquel Marie X.*, the Supreme Court has acknowledged the State's legitimate purpose in maintaining an intact family unit, including recognizing the interests of a stepfather.<sup>133</sup> *Quilloin*, *Caban*, and *Lehr*, which addressed the standard of parental involvement, all concerned situations in which the mother wanted the stepfather to adopt the child.<sup>134</sup> In those situations, the State must balance its interest in maintaining an intact family unit and the interests of a child's mother against the rights of an unmarried father. On the other hand, in a termination of parental rights proceeding, there is no state interest in maintaining an intact family unit or in honoring the wishes of the child's mother.<sup>135</sup> In a termination scenario, unlike a private adoption scenario, there is no intact family unit to maintain, and the mother's interests do not conflict with the father's. In the termination of parental rights context, the family unit has already been torn asunder, and the foremost interest of the State, as articulated above, is in putting it back together.<sup>136</sup> As the Court noted in *Stanley*, "the State registers no gain towards its declared goals when it separates children from the custody of fit parents."<sup>137</sup>

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<sup>132</sup> 441 U.S. at 389.

<sup>133</sup> 559 N.E.2d 418, 425 (N.Y. 1990).

<sup>134</sup> See *supra* Part II (discussing these Supreme Court cases).

<sup>135</sup> In *Smith v. Organization of Foster Families*, the U.S. Supreme Court recognized that a foster family has no rights comparable to that of a biological family, saying: "Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents." 431 U.S. 816, 846 (1977).

<sup>136</sup> See *supra* Part I.A (describing the State's interest in promoting intact biological families).

<sup>137</sup> 405 U.S. 645, 652 (1972).

The State's interest in maintaining an intact family unit may be served by allowing an adoption by a stepfather over the objections of an unmarried father who is not substantially involved in his child's life. However, the State's interest is quite different in situations in which a child faces removal from a parent's home and adoption by a third party. The New York State legislature evinces a clear preference for biological parents, even imperfect ones, and makes clear that the State's primary goal is to help biological families function as a unit. Section 384-b(1)(a) of the New York Social Services Law (SSL) states:

To the extent it is consistent with the health and safety of the child, the legislature further hereby finds that . . . the child's need for a normal family life will usually best be met in the home of its birth parent . . . . [T]he state's first obligation is to help the family with services to prevent its break-up or to reunite it.<sup>138</sup>

This stated intent applies to both mothers and fathers.

Parents whose children are in the care and custody of the State are generally, by definition, not considered "fit parents" for the period in which their children are in such care. But this does not mean that their parental liberty interest in the care and custody of their children is less than that of other parents. The Supreme Court has made clear that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."<sup>139</sup> In *Santosky*, the Court stated that, when facing a loss of parental rights, the "private interest affected is commanding."<sup>140</sup> A judge can decide to terminate a parent's rights only based on "clear and convincing evidence" of statutorily authorized grounds for removal.<sup>141</sup>

The current consent father requirements for access to a termination of parental rights hearing do not further the State's articulated goal of "help[ing] the family with services to prevent its break-up or to reunite it."<sup>142</sup> The only state interest in denying unmarried fathers a termination of parental rights hearing is efficiency.<sup>143</sup> The idea that fit fathers pay child support provides an efficient way to weed out unfit fathers. Putting the burden of proof on fathers rather than the entity

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<sup>138</sup> N.Y. SOC. SERV. LAW § 384-b(1)(a) (McKinney 2010).

<sup>139</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

<sup>140</sup> *Id.* at 758.

<sup>141</sup> *Id.* at 747–48.

<sup>142</sup> N.Y. SOC. SERV. LAW § 384-b(1)(a) (McKinney 2012).

<sup>143</sup> I outline a potential solution that addresses efficiency concerns in the Conclusion to this Note.

petitioning for termination makes it easier for the State to terminate rights.

The problem is that this framework does a poor job of making thoughtful distinctions between different fathers' actual involvement in their children's lives, to the detriment of both fathers and children. Efficiency is rarely an acceptable rationale for discrimination,<sup>144</sup> and it is not acceptable here. Although the New York Court of Appeals noted in *In re Raquel Marie X.* that the State has a compelling interest in adoptive placement immediately following birth, that interest diminishes as the child ages.<sup>145</sup> And as the Supreme Court stated in *Stanley*:

[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights . . . [that it was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praise-worthy government officials no less, and perhaps more, than mediocre ones.<sup>146</sup>

Additionally, the State has different interests when parental rights are being terminated as opposed to when adoption into an intact family is taking place. While the State has an interest in supporting intact families, such as those in which stepfather adoptions take place, New York has also clearly articulated a preference for birth parents and an obligation to help biological families stay together.<sup>147</sup> The State's interest in efficiency in termination of parental rights situations is not sufficient to deny unmarried fathers the same procedural protections as mothers and married fathers. In fact, as discussed above, state interests in promoting family reunification may require agencies to better serve unmarried fathers—a goal best met by giving unmarried fathers the same automatic protections as mothers and married fathers.<sup>148</sup>

### C. *The Equal Protection Clause Demands Stronger Recognition of Unmarried Fathers' Rights*

The practice of ensuring that a father is a "consent" father before granting him the right to a termination of parental rights proceeding effectively denies fathers the same opportunity as mothers to have

<sup>144</sup> *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

<sup>145</sup> 559 N.E.2d 418, 425 (N.Y. 1990).

<sup>146</sup> *Stanley*, 405 U.S. at 656.

<sup>147</sup> See *supra* Part I.A (describing the State's interest in promoting intact biological families).

<sup>148</sup> See *id.* (describing the State's interest in promoting intact biological families); Part IV (arguing that the consent father standard impedes the State's interest).

their relationships with their children supported and encouraged by the State. In *Caban*, the Supreme Court rejected the idea that mothers and fathers had inherently different relationships with their children.<sup>149</sup> However, the State of New York still automatically distinguishes fathers from mothers with significant effect by requiring them to bear burdens of proof and requirements for action that mothers do not bear under any circumstances. By using a scheme designed for a situation in which the State had other interests to balance, the State impermissibly discriminates between men and women when parental rights may be terminated.

Distinguishing between married and unmarried fathers does not make the State's gender-based discrimination any more permissible because the consent fatherhood framework is both underinclusive and overinclusive, and is thus not substantially related to the State's goal of efficiently weeding out unfit fathers. The consent fatherhood framework is underinclusive in that it uses marriage as a proxy for involvement with a child, preemptively excluding all fit fathers who are not married to the mothers of their children. Case law shows that marriage is not necessarily an accurate gauge of a father's involvement.<sup>150</sup> It is also overinclusive because it indiscriminately sweeps up both involved and uninvolved fathers by using child support as a proxy for contact with the child, as described above.

In *In re Raquel Marie X.*, the New York Court of Appeals rejected a statute that required a father to live with the mother after their child's birth because the requirement was more indicative of the father's relationship with the mother than his relationship with the child.<sup>151</sup> As one family court judge stated, "It may be necessary to state the obvious: being married to the mother has no more to do with the father-child relationship than 'living with' her."<sup>152</sup> Differentiating between married and unmarried fathers impermissibly bases men's rights on the choices and actions of the mothers of their children.

At least one family court judge has held DRL section 111(1)(d) unconstitutional as applied to termination of parental rights contexts.<sup>153</sup> In *In re M./B. Children*, Judge Nora Freeman stated:

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<sup>149</sup> *Caban v. Mohammed*, 441 U.S. 380, 389 (1979) ("[M]aternal and paternal roles are not invariably different in importance. . . . The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother.").

<sup>150</sup> See, e.g., *id.*; *Stanley*, 405 U.S. 645.

<sup>151</sup> 559 N.E.2d 418, 426 (1990) ("[T]he State's objective cannot be constitutionally accomplished at the sacrifice of the father's protected interest by imposing a test so incidentally related to the *father-child* relationship as this one, directed as it principally is to the *father-mother* relationship.").

<sup>152</sup> *In re M./B. Children*, 7 Misc.3d 272, 281 (N.Y. Fam. Ct. 2004).

<sup>153</sup> *Id.* at 283–84.

There is no doubt that an unwed mother who at one point had custody, then lost it, who was incarcerated but maintained some contact with her children while imprisoned, who resumed contact upon her release could not be deprived of her rights unless a petition [for termination of parental rights was] filed and granted. This father is entitled to no less.<sup>154</sup>

Judge Freeman ordered the agency to “fil[e] the proper petitions and then prove them by clear and convincing evidence” if it wanted to terminate the father’s parental rights.<sup>155</sup>

#### IV POLICY CONSIDERATIONS

Not only does the consent father framework inadequately protect fathers’ rights in the face of weak state interest, it actually works against the state interest of promoting intact families. While the consent standard used in private adoption scenarios may adequately protect the rights of unmarried fathers, it does a great disservice to both fathers and children when children are in the care and custody of the State. Although the New York legislature has articulated a strong interest in encouraging and promoting reunification of children with their parents, the interests of agencies—which have little incentive to encourage children’s relationships with their unmarried fathers—are misaligned with the State’s interest. While child support payments are theoretically required of both mothers and fathers, only fathers can be disqualified as parents for not making payments to the State while their children are in foster care.<sup>156</sup> This emphasis on child support shifts the focus of agencies from building permanent relationships between children and their fathers to ignoring and penalizing the fathers. The interests of the State would thus be better met by abandoning the current consent fatherhood standard and establishing one that does not depend on the payment of child support. In this Part, I advance two policy-based arguments in support of this proposition.

##### *A. Child Support Payments Should Not Be the Basis for Determining Fatherhood*

Basing a decision about a father’s rights on his payment of child support is, at best, a discriminatory means of seeking administrative efficiency, and at worst, an effective way to deny low-income

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<sup>154</sup> *Id.* at 283.

<sup>155</sup> *Id.* at 284. This opinion by Judge Freeman is a strong statement in favor of the position of this Note. It is a decision of the Kings County Family Court, however, and carries no precedential value.

<sup>156</sup> *See supra* notes 66–72 and accompanying text.

unmarried fathers their rights as parents. The majority of children eligible for child support do not receive child support payments, possibly because the burden is too high for many low-income fathers.<sup>157</sup> Child support orders, while they vary from state to state, tend to be regressive in nature. In other words, low-income fathers pay a higher proportion of their income than higher income fathers.<sup>158</sup> When obligations are perceived to be too high, compliance rates are lower.<sup>159</sup> Many studies have found that low-income, urban, minority fathers “are often very involved with their children but, perhaps because of low skills and lack of employment opportunities, are unable to support them financially through the formal support system.”<sup>160</sup> Moreover, “punitive child support enforcement policies may drive such fathers to abandon their families altogether.”<sup>161</sup>

Compliance is also correlated with the perceived fairness of the orders.<sup>162</sup> Fathers are less likely to pay child support to the State than they would be in a private setting, making the judgment of fathers based on whether or not they paid child support to the State a less-than-useful yardstick. In families in which the children are in the care of their mother, compliance with child support orders on the part of fathers is higher when the father’s ties to the mother of his children are stronger.<sup>163</sup> Studies also suggest that fathers are more willing to pay child support if they see how their payments are spent and how they affect their children. Fathers increase voluntary support payments when they see their children more and observe expenditures on their children.<sup>164</sup> The State, of course, does not spend the proceeds of child support directly on the children whose parents are paying, but keeps it as reimbursement for amounts spent on foster care.<sup>165</sup> There is no way for a father to see that his money is being spent on his children because it is not going to them directly. While child support may be a reasonable indicator of paternal involvement in private adoption proceedings, such as stepfather adoptions in which the child lived with the mother and directly benefited from any financial support from the

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<sup>157</sup> Chien-Chung Huang, Ronald B. Mincy & Irwin Garfinkel, *Child Support Obligations and Low-Income Fathers*, 67 J. MARRIAGE & FAM. 1213, 1213 (2005).

<sup>158</sup> *Id.* at 1214–15.

<sup>159</sup> I-Fen Lin, *Perceived Fairness and Compliance with Child Support Obligations*, 62 J. MARRIAGE & FAM. 388, 393, 396 (2000).

<sup>160</sup> Lenna Nepomnyaschy, *Child Support and Father-Child Contact*, 44 DEMOGRAPHY 93, 109 (2007) (summarizing findings from a number of other studies).

<sup>161</sup> *Id.*

<sup>162</sup> Lin, *supra* note 159, at 396.

<sup>163</sup> Huang, Mincy & Garfinkel, *supra* note 157, at 1215.

<sup>164</sup> Nepomnyaschy, *supra* note 160, at 95.

<sup>165</sup> Hatcher, *supra* note 131, at 1334.

father, it is not a reasonable indicator of parental involvement in TPR proceedings. In these cases, the child is in the care of the State and does not directly benefit from the father's financial support.

Caseworkers have for some time expressed the opinion that enforcing child support orders is detrimental to parent-child relationships.<sup>166</sup> Paying child support increases parents' struggles for economic stability and weakens parents' ability to effectively plan for children.<sup>167</sup> Simultaneous goals of reuniting children with their parents, collecting child support payments, and moving children towards "permanency" quickly, even by terminating parental relationships, often cause conflicts and less than ideal casework toward parent-child reunification.<sup>168</sup> "[W]eakened parent-child relationships often result."<sup>169</sup>

The State gains little by collecting child support payments from the parents of children in foster care. Lower-income parents who have child support obligations and children in foster care may have low child support payments that are often outweighed by the government's collection costs. This undermines their usefulness as a tool for recouping costs.<sup>170</sup>

### *B. Consent Fatherhood Impedes New York's Interest in Promoting Fatherhood*

New York frustrates its own goal of permanency for children and its preference for biological families by holding unmarried fathers to a different standard than mothers and married fathers. A parent who is not accused of abusing or neglecting his child can be required to adhere to court orders, including services such as drug programs and parenting classes, if the other parent is adjudged to have been abusive or neglectful.<sup>171</sup> These asymmetrical requirements are difficult and discouraging for affected parents, and may cause them to disengage from the process. Fathers who lack the procedural protections of mothers and married fathers may thus be even more likely to disengage.<sup>172</sup> Furthermore, imposing requirements on non-offending

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<sup>166</sup> *Id.* at 1351 (citing OFFICE OF INSPECTOR GEN., DEP'T OF HEALTH & HUMAN SERVS., OEI-04-91-00530, CHILD SUPPORT FOR CHILDREN IN IV-E FOSTER CARE 7 (1992)).

<sup>167</sup> *Id.* at 1335.

<sup>168</sup> *Id.* at 1347.

<sup>169</sup> *Id.* at 1335.

<sup>170</sup> *Id.* at 1334-35, 1341.

<sup>171</sup> See *In re Christina I*, 640 N.Y.S.2d 310, 310 (App. Div. 1996) (upholding an order requiring a mother, against whom insufficient evidence of neglect was found to exist, to protect her children from their abusive father); see also Sankaran, *supra* note 124, at 70 (discussing burdens on non-offending parents).

<sup>172</sup> Sankaran, *supra* note 124, at 79.

parents unnecessarily allocates resources that the State might otherwise expend on parents who have actually been found neglectful of their children.<sup>173</sup>

While agencies must prove that they made “diligent efforts” to “encourage and strengthen the parental relationship” in order to prevail in a termination of parental rights proceeding,<sup>174</sup> agencies are not in any way required to encourage unmarried fathers who have not yet proven that they are consent fathers.<sup>175</sup> This means that agencies are required to “encourage” mothers but not unmarried fathers. The father’s burden of proving that he is a consent father frees the agency from the requirement of proving, as it must with mothers, that the parent did not act to preserve his rights despite the agency’s active encouragement. This provides the agency with much less of an incentive to work diligently with fathers than with mothers.

### CONCLUSION

Applying DRL section 111(1)(d) to determine whether or not an unmarried father is a consent father prior to granting him the right to be heard in a termination of parental rights hearing is unconstitutional because it denies unmarried fathers equal protection under the law. Not only does the State lack an important interest in differentiating unmarried fathers from mothers and married fathers, but also the policy of requiring fathers to demonstrate that they are consent fathers before they are afforded the procedural protections of termination of parental rights proceedings contravenes the State’s stated goal of encouraging intact families. It discourages collaboration between agencies and fathers, and makes it less likely that the agency will successfully unite the child of an unmarried father with a biological parent.

Unmarried fathers should be afforded greater protections when their children are subject to termination of parental rights proceedings. The State should grant unmarried fathers full termination of parental rights hearings. If all fathers are granted TPR hearings without first having to request them, truly unresponsive fathers or fathers who cannot be located will be found to have permanently neglected their children. Admittedly, this could result in a greater burden on the court system, though that additional burden could be minimized by requiring fathers to affirmatively request a termination

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<sup>173</sup> *Id.*

<sup>174</sup> N.Y. FAM. CT. ACT § 614(1)(c) (McKinney 2010).

<sup>175</sup> See N.Y. DOM. REL. LAW § 111(1)(d) (McKinney 2008) (“In making such a determination, the court shall not require a showing of diligent efforts by any person or agency to encourage the father to perform the acts specified in this paragraph.”).

of parental rights hearing at the time of the termination of the mother's rights. This would allow fathers who currently seek recognition as consent fathers full access to their rights, while minimizing the additional burden on the court system. Fathers are already entitled to a consent father hearing, and the additional protections in a TPR proceeding—the changed standards and burdens of proof—do not require significant additional court resources. At a minimum, the State should redesign the consent father standard in the context of terminations by dropping the bright line requirement for payment of child support and ensuring that the burden of proof is placed on the agency, not the father.

Any solution should prioritize creating incentives for agencies to involve fathers in order to better serve the state goal of uniting biological families. It should also take care that any differentiation between mothers and fathers be necessary for legitimate state purposes. For George, the full protections of a termination of parental rights hearing would mean more than just holding a hearing. It would mean offering George the same treatment by the agency and the courts that Kayla's mother receives. Recognizing his rights as a parent would incentivize the agency caring for Kayla to encourage George and promote the unification of his family, rather than contravene state reunification goals.