A MAN'S RIGHT TO CHOOSE: SEARCHING FOR REMEDIES IN THE FACE OF UNPLANNED FATHERHOOD

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I. INTRODUCTION

Throughout social and legal history, great emphasis has been placed on women's procreational rights. Any law student surely has fond memories of the barrage of "privacy rights" cases in their fundamental constitutional law studies. But a vital element has been left out of most of those privacy cases—the man. What rights does a man have in terminating a pregnancy, or even in choosing to be a father in the first place? When a man does father a child, does he have any rights after the child is born—especially in those cases in which the mother fraudulently conceived the child (in other words, tricked the man into engaging into intercourse for the purpose of becoming pregnant)? Do the interests of the child always outweigh those of the man?[1]

A recent Illinois Appellate Court case has attracted much attention to this area due to its rather unusual facts. *Phillips v. Irons*,[2] which was remanded in 2005 and has not yet reached a final opinion, involved a case of fraudulent conception of the most bizarre degree—a woman salvaged sperm that had been deposited in her mouth during oral sex with a consenting male partner and then used it to impregnate herself.[3] As a result, a man is now required to pay child support for a completely unforeseeable child.[4]

The case raises many interesting questions that touch nearly every aspect of the law. What property interests does a man have in his sperm? Can a man assert a valid claim against a woman for fraudulent conception? Would fraudulent conception also form the basis for a contract-based claim? What constitutional rights does a man have in choosing to be a father? All of these questions, and more, will be explored in this Note.

It should be emphasized that this Note does not deal with cases

1. The dogma of family law is that the best interest of the child prevails, not the parents' interests. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The State . . . has a duty of the highest order to protect the interests of minor children, particularly those of tender years. . . . [M]ost state[] . . . law mandates that custody determinations be made in the best interests of the children involved.").

2. Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. Feb. 22, 2005).

3. *Id.* at * 2; *see also* State v. Frisard, 694 So. 2d 1032, 1035 (La. Ct. App. 1997) (alleging a woman performed oral sex on a man whom she made wear a condom and then used his sperm to inseminate herself with a "red looking bulb with a glass tube").

4. *Phillips*, 2005 WL 4694579, at *2. No one could argue that pregnancy resulting from oral sex was foreseeable. *Id.* at *3.

involving a mother wishing for the father to have no rights with regard to the conceived child. Rather, this Note addresses the difficulties a man faces in trying to disclaim his paternity rights and responsibilities to a child against the will of the mother.[5] Usually, the mother seeks help from the father to support the child financially, even if she does not necessarily want the father to be part of the child's life.[6] As a result, most women will take legal action to ensure they can depend upon the support of the father.[7]

The ideas in this Note are based on those cases in which the woman wishes to establish the paternity of the child (or has already done so) and the man wishes to either: (1) contest paternity; (2) counterclaim against the woman's claim; or (3) receive some other sort of recovery or indemnification for a child that he wanted nothing to do with in the first place. Similarly, this Note also looks at a man's say in decisions regarding abortion and the disposition of preembryos.

It should also be highlighted that this Note does not deal with men's rights in divorce and subsequent custody decisions. This is not an examination of the man's right to be a father, but rather the man's right to *not be* a father, much like a woman's right to choose *not* to be a mother by having an abortion. The right to a continuing relationship with a child is much different than the right to choose to be a parent in the first place. As such, it requires a different form of legal analysis that will not be considered in this Note.

The mission of this Note is to establish awareness of men's procreational rights and their potential remedies in combating the wrongs they face regarding the unwanted conception of a child. Part II of this Note provides a look into making a claim for fraudulent conception—that is, a claim (usually asserted as a counterclaim or a defense to a child support claim) by a man that a woman misrepresented material facts in order to become pregnant by the man.[8] Part II also examines the various ways a man can state these claims, the public policy reasons that go into the courts' decisions on these claims, and issues involving damages and

5. *See*, *e.g.*, Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 245–46 (App. Div. 1985) (denying a putative father's claim that the mother's fraud cancelled his paternal responsibilities after the mother had successfully sued for paternity).

6. *See*, *e.g.*, Krufal v. Jorgensen, 830 So. 2d 228, 229 (Fla. Dist. Ct. App. 2002) (describing a situation in which a woman said she did not want the man involved in her life or her child's life, yet he was still required to make child support payments).

7. *See*, *e.g.*, *id.* (noting that establishing paternity preceded securing child support payments).

8. *See* discussion *infra* Part II.

possible gender discrimination.[9]

Part III looks into the importance of child support—we know it is there, but what function does it serve?[10] Part IV then delves into the ever-controversial issue of abortion.[11] Men's rights will be analyzed in the context of women's rights to abortion.[12] Part IV also offers an interesting look into a new area of litigation that is causing controversy—the disposition of embryos and preembryos.[13] Part V provides further analysis of the constitutional law issues presented throughout this Note.[14] Finally, Part VI deals with those odd issues particular to the *Phillips* case—intentional infliction of emotional distress and the property interests of sperm.[15]

II. COMBATING FORCED FATHERHOOD

Situations in which a man has been fooled into impregnating a woman are far from rare.[16] Even though he may have explicitly told her several times that he had no interest in fathering her child, the woman may have had plans of her own to proceed with a pregnancy with no respect for the man's wishes. In these cases of fraudulent conception, what rights does the unplanned father have? Case analysis shows that public policy creates barriers to recovery for men that prove impossible to jump over, regardless of the malicious motive of the woman.

A. *Stating a Claim*

For a man to bring a case of fraudulent conception into court, he must first have a valid claim to assert.[17] He can either assert his claim on his own

9. *See* discussion *infra* Part II.
10. *See* discussion *infra* Part III.
11. *See* discussion *infra* Part IV.
12. *See* discussion *infra* Part IV.
13. *See* discussion *infra* Part IV.
14. *See* discussion *infra* Part V.
15. *See* discussion *infra* Part VI.
16. *See*, *e.g.*, Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Ct. App. 1980) (deceiving of man into sexual acts by false allegations of contraception usage on part of the woman); L. Pamela P. v. Frank S. (*L. Pamela P. I*), 449 N.E.2d 713, 714 (N.Y. 1983) (deceiving of man into sexual acts by misrepresentation of contraception usage); Smith v. Price, 340 S.E.2d 408, 409–10 (N.C. 1986) (deceiving of man into sexual acts by false allegations of being on the "safe" part of her menstrual cycle).
17. FED. R. CIV. P. 8(a); *see, e.g.*, *Stephen K.*, 164 Cal. Rptr. at 619 (discussing actionability of Stephen's claims).

to seek recovery or assert a cross-claim or counterclaim to combat paternity or child support claims that are made against him.[18] The biggest barrier is that his claim must be legally enforceable.[19] He cannot simply state a claim because he feels he has been wronged. Both federal and state rules of civil procedure serve as preliminary obstacles that must first be overcome before any relief may be sought.

Tort-based claims have been a common route for men in these cases; however, this route seems to have led nowhere.[20] A few have even tried using contract law[21] and rules of civil procedure[22] to recover. Another route for the deceived father to get his case heard has been through claims arising under the Constitution, which will be discussed later in greater detail.[23] As will be seen, the chances of stating a valid claim are virtually non-existent.[24]

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18. FED. R. CIV. P. 8(a), 13; *see also* The Nat'l Ctr. for Men, Big Decisions for Paternity Suit Defendants, http:// www.nas.com/c4m/finding_an_attorney_to_lc4m.html (last visited Aug. 21, 2007) (setting up a flowchart to help men decide how to bring these sorts of claims).

19. FED. R. CIV. P. 8(a).

20. *See generally Stephen K.*, 164 Cal. Rptr. at 619 (cross-claiming "'for fraud, negligent misrepresentation, and negligence'"); Wallis v. Smith, 22 P.3d 682, 683 (N.M. Ct. App. 2001) (bringing fraud and prima facie tort action against mother); *Smith*, 340 S.E.2d at 409 (counterclaiming for fraud); Jose F. v. Pat M., 586 N.Y.S.2d 734, 735 (Sup. Ct. Suffolk County 1992) (filing action for fraud and intentional infliction of emotional distress); Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 244 (Sup. Ct. N.Y. County 1985) (bringing action for fraud); *L. Pamela P. I*, 449 N.E.2d at 715 (asserting defense of fraud and deceit); Linda D. v. Fritz C., 687 P.2d 223, 224 (Wash. Ct. App. 1984) (claiming negligent misrepresentation and fraud). The tort claims in each of these cases were rejected.

21. *See*, *e.g.*, Henson v. Sorrell, No. 02A01-9711-CV-00291, 1999 WL 5630, at *2 (Tenn. Ct. App. Jan. 8, 1999) (alleging breach of contract for "express agreement to practice and be responsible for birth control procedures").

22. *See*, *e.g.*, Hughes v. Hutt, 455 A.2d 623, 625 (Pa. 1983) (arguing counterclaim "[arose] from the same transaction or occurrence").

23. *See* discussion *infra* Part V; *see also Linda D.*, 687 P.2d at 227 (claiming violation of constitutional right to procreative freedom).

24. *See* Dan Subotnik, "*Sue Me, Sue Me, What Can You Do Me? I Love You" A Disquisition on Law, Sex, and Talk*, 47 FLA. L. REV. 311, 333 n.106 (1995) ("A frequent pattern in sex fraud cases is where one sexual partner falsely claims to be infertile or to be using birth control. If a child is subsequently born, does the defrauded have a claim of action? I have found no cases holding for the plaintiffs in these circumstances.").

1. *Civil Procedure-Based Claims*

The rigid rules of civil procedure have offered no help to men wishing to make a counterclaim for fraudulent conception.[25] Those in the legal profession become acquainted with these rules early in their studies and are undoubtedly aware that defendants are allowed to raise a counterclaim when it "'arises from the same transaction or occurrence'" as their opponent's claim.[26] In *Hughes v. Hutt*, [27] the putative father argued that this rule would permit the court to hear his counterclaim alleging fraudulent conception and a refusal of an abortion by the mother.[28] He felt his claims and the woman's paternity claim both arose from the same transaction—sexual intercourse between the two of them.[29] The putative father reasoned that "because support actions are civil in nature and because the Rules of Civil Procedure permit defendants to raise" these sorts of claims, the trial court erred in dismissing his counterclaim.[30] The court held that the rules of civil procedure were inapplicable to the putative father's claim because support actions were governed by a "special set of civil rules."[31]

Furthermore, in *Stephen K. v. Roni L.*, [32] a similar case, the court found that the father's tort-based counterclaim was "one of an alleged wrong to him personally and alone."[33] As a result, the claim was "separate and apart from any issue of either parent's obligation to raise and support the child."[34] This procedural barrier, coupled with policy concerns, prevented the court from hearing the issue.[35] However, even when claimants have overcome the barriers created by the rules of civil procedure, they have rarely prevailed in the end.

2. *Tort-Based Claims*

A common method men have used to attempt recovery under tort law

25. *See*, *e.g.*, *Hughes*, 455 A.2d at 624 (stating that the rules of civil procedure are irrelevant in paternity proceedings).
26. *Id.* at 625 (citing PA. R. CIV. P. 1031, 1046).
27. Hughes v. Hutt, 455 A.2d 623 (Pa. 1983).
28. *Id.* at 624–25.
29. *See id.*
30. *Id.* at 625.
31. *Id.* (citing PA. R. CIV. P. 1910.1 *et seq.*).
32. Stephen K. v. Roni L., 164 Cal. Rptr. 618 (Ct. App. 1980).
33. *Id.* at 619.
34. *Id.*
35. *Id.*

is through claims or defenses of misrepresentation, also known as fraud.[36] The men state that their "injury" (the birth of the child)[37] is a direct result of fraud on the mother's behalf (lying about fertility or contraception usage). However, the mere fact that someone has suffered harm or injury resulting from an event does not necessarily give rise to a legal cause of action.[38]

Misrepresentation can either be negligent or intentional. Intentional misrepresentation generally requires proof of the following elements: "(1) representation; (2) falsity [of that representation]; (3) materiality; (4) scienter; (5) intent to deceive; (6) [reasonable] reliance; and (7) resulting injury and damage."[39] Negligent misrepresentation eliminates the "scienter" element, thereby removing the requirement of knowledge.[40] As a result, negligent misrepresentation only requires a lack of reasonable care in making a representation.[41]

If a woman tells a man that she is using birth control or cannot become pregnant, when in fact she is not using any contraception or is actually fertile, she is making a false statement of a material fact.[42] When a

36. *See*, *e.g.*, *id.*; *cf.* Jane E. Larson, "*Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 401–02 (1993) (explaining how the tort of seduction grew over time to create the concept of sexual fraud).

37. Courts believe that the birth of a healthy child should not be considered an injury to the parties. *E.g.*, C.A.M. v. R.A.W., 568 A.2d 556, 563 (N.J. Super. Ct. App. Div. 1990). *But see* Zehr v. Haugen, 871 P.2d 1006, 1013 (Or. 1994) (allowing recovery for birth of a healthy child after the physician failed to sterilize the mother).

38. Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 610 (N.M. 1991) ("Harm, like injury, is not necessarily actionable. Both, to be actionable, must be legally caused by the tortious conduct of another. In addition, harm, which is merely personal loss or detriment, gives rise to a cause of action only when it results from the invasion of a legally protected interest . . ." (citing RESTATEMENT (SECOND) OF TORTS § 7(1) cmts. a, b, d (1965))).

39. Rosenberger Enters., Inc. v. Ins. Serv. Corp. of Iowa, 541 N.W.2d 904, 909 (Iowa Ct. App. 1995) (citing Garren v. First Realty, Ltd., 481 N.W.2d 335, 338 (Iowa 1992)).

40. *See* Alice D. v. William M., 450 N.Y.S.2d 350, 354 (Civ. Ct. 1982) (citing Bivas v. State, 411 N.Y.S.2d 854, 857 (Ct. Cl. 1978)).

41. *Id.* at 354–55 (citing WILLIAM PROSSER, LAW OF TORTS 704 (4th ed. 1971)). However, it should be noted that under Iowa law, negligent misrepresentation can only be applied to defendants "who are in the business of supplying information and to the exclusion of defendants in an adversarial relationship with the plaintiff." Lee County v. IASD Health Service Corp., No. LALA001334, 2000 WL 290367, at *8 (Iowa Dist. Ct. Feb. 9, 2000) (citations omitted).

42. Usage of contraception or reproductive difficulties are material to

man who does not want a child has sexual intercourse with the woman making these false statements, he may state that he was relying upon her representations, such as in *Stephen K.*[43] However, virtually no courts have allowed men to use misrepresentation as a claim for fraudulent conception or as a defense to paternity.[44] Furthermore, these fraudulent conception claims can be rebutted by bringing attention to the fact that the man himself did not use any contraceptive devices of his own.[45] And even if either of them had used contraceptives, birth-control devices are never 100% effective,[46] meaning it cannot be said that but for the misrepresentation of contraception usage, pregnancy would not have occurred.

In *Stephen K.*, after the mother (Roni) and child had brought a paternity suit against the father (Stephen), Stephen filed a cross-complaint for fraud, negligent misrepresentation, and negligence.[47] In his complaint, Stephen alleged that Roni told him she was taking birth-control pills, and in reliance he engaged in sexual intercourse with her, which later resulted in the unwanted child.[48] The California appellate court did not even reach

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pregnancy. Generally, they stand as major obstacles. By falsely stating that they are present when they are not, one is making a false representation of a material fact.

43. Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Ct. App. 1980) (arguing reliance on a misrepresentation); *see also* Paul C. Murray & Brenda J. Winslett, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. ILL. L. REV. 779, 805 (stating that a man could not be said to have justifiably relied on an assurance made "'in the passion of the moment'"). When decisions are made shortly before engaging in sexual activity, these reliances could be said to have been made "in the passion of the moment."

44. *See, e.g.*, Henson v. Sorrell, No. 02A01-9711-CV-00291, 1999 WL 5630, at *7 (Tenn. Ct. App. Jan. 8, 1999) (affirming judgment for the woman, but stating "[w]e simply feel that until the legislature speaks on this matter, the common law rights resulting from fraudulent misrepresentation should not be abolished in an appropriate case where legal causation can be shown"). The concurrence in this case thought the quoted sentence was misleading because it inferred that the man may recover damages for any payments related to the pregnancy and birth. *Id.* (Lillard J., concurring) (citing Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987)).

45. *See* Wallis v. Smith, 22 P.3d 682, 685 (N.M. Ct. App. 2001) (stating the father could have used his own contraceptive measures rather than depending on the woman's methods alone).

46. *See Stephen K.*, 164 Cal. Rptr. at 621 ("Even if Roni had regularly been taking birth control pills, that method, though considered to be the most reliable means of birth control, is not 100 percent effective."); *see also* FDA, Pregnancy Rates for Birth Control Methods, http://www.fda.gov/fdac/features/1997/conceptbl.html (last visited Aug. 21, 2007).

47. *Stephen K.*, 164 Cal. Rptr. at 619.

48. *Id.*

the question of whether the father had established a claim under recognized principles of tort law; rather it chose to stay out of the matter due to minimal state interest.[49]

Tort law is not meant to correct all the problems of human life and many things lie far beyond its healing powers.[50] The conduct that led to the alleged tort in this case was of such a private nature that it was not the court system's place to correct it.[51] If the court would have allowed Stephen to assert his claims, the court would have been acting to encourage "unwarranted governmental intrusion into matters affecting the individual's right to privacy," which would go against one of the very foundations of our society.[52]

A short-lived glimmer of hope does exist for the man who has justifiably relied on a woman's representations of using birth control and wishes to state a claim for misrepresentation. The facts of some fraudulent conception cases could possibly fulfill the elements for a misrepresentation claim.[53] For example, in *Welzenbach v. Powers*, [54] the court found that the putative father had established all of the elements for intentional misrepresentation.[55] Public policy, however, prohibited the court from ruling in his favor.[56]

Allowing these tort claims to be actionable, even when the requisite elements are present, would only interfere with the privacy rights of

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49. *Id.* at 619–20.

50. *Id.* ("To attempt to correct such wrongs or give relief from their effects 'may do more social damage than if the law leaves them alone.'" (quoting Morris Ploscowe, Comment, *An Action for "Wrongful Life,"* 38 N.Y.U. L. REV. 1078, 1080 (1963))).

51. *Id.* at 619.

52. *Id.* at 620; *see also* Stanley v. Georgia, 394 U.S. 557, 564 (1969) (recognizing the right to privacy as the most comprehensive and valued in our society). It should be noted that at the turn of the twentieth century a number of states enacted anti-heartbalm statutes that provided a statutory bar to matters involving "tender matters of romantic or sexual emotion." Askew v. Askew, 28 Cal. Rptr. 2d 284, 292–293 (Ct. App. 1994).

53. *See*, *e.g.*, Welzenbach v. Powers, 660 A.2d 1133, 1135 (N.H. 1995) (finding that "plaintiff conditionally set forth the requisite elements of two recognized causes of action"); *cf.* Alice D. v. William M., 450 N.Y.S.2d 350, 354–55 (Civ. Ct. 1982) (permitting a woman's claim for misrepresentation after finding that the woman had justifiably relied on the man's representations that he was sterile).

54. Welzenbach v. Powers, 660 A.2d 1133 (N.H. 1995).

55. *Id.* at 1135.

56. *See id.* ("The underlying inquiry in this case is whether the injuries claimed are in fact *actionable*. Public policy persuades us that they are not.").

individuals and cause an unneeded interference by the state.[57] As such, public policy stands firmly against tort liability for fraudulent conception, because it serves as a barrier to child support.[58] Furthermore, there is a general reluctance to get involved in these tort claims due to proof issues.[59] There are generally only two witnesses to the sexual acts and the events that led up to them—the parents themselves.[60] This creates a "he said, she said" atmosphere in which both parties are claiming different things and one can never be certain which version of the facts is the correct one.

3. *Contract-Based Claims*

In addition to tort claims, a less commonly used method of overcoming fraudulent conception has been attempted in cases like *Linda D. v. Fritz C.*,[61] in which the putative father attempted a cross-claim based on a contract theory.[62] Here, the father alleged that he and the mother had formed an "oral contract" whereby the mother promised to use birth-control.[63] When she failed to do so, she effectively breached their oral contract.[64] He even alleged that the mother's refusal to have an abortion constituted a failure to mitigate damages caused by the "breach."[65] The court, however, did not share the putative father's line of reasoning.[66] In fact, the court never even considered the validity of the contractual claim.[67]

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57. *See* Jose F. v. Pat M., 586 N.Y.S.2d 734, 736 (Sup. Ct. Suffolk County 1992) ("It is inappropriate for the court to intrude into an intimate relationship in an attempt to substantiate what is tantamount to an action for seduction."); Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 245–46 (Sup. Ct. N.Y. County 1985) ("The judiciary should not attempt to regulate all aspects of the human condition. Relationships may take varied forms and beget complications and entanglements which defy reason."); *L. Pamela P. I*, 449 N.E.2d 713, 716 (N.Y. 1983) ("[J]udicial inquiry into so fundamentally private and intimate conduct as is required to determine the validity of respondent's assertions may itself involve impermissible State interference with the privacy of these individuals."). *But cf.* Subotnik, *supra* note 24, at 316–17 (discussing reasons why women's cases for misrepresentation have been allowed against men). *See also* discussion *infra* Part II.D.

58. *Welzenbach*, 660 A.2d at 1136.

59. Murray & Winslett, *supra* note 43, at 799.

60. *Id.*

61. Linda D. v. Fritz C., 687 P.2d 223 (Wash. Ct. App. 1984).

62. *Id.* at 224.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 225.

67. *Id.* at 225–26 (querying whether a breach of contract claim should be considered in a support proceeding).

Instead, it concluded that even if a contractual agreement had been made between the parties, it was not relevant in computing child support because it had nothing to do with the needs of the child.[68]

Had the court reached the issue of the oral contract, the idea of the "contractual agreement" would likely have failed because, as other courts have explained, "children, the persons for whose benefit child support guidelines are enacted, have the same needs regardless of whether their conception violated a promise between the parents."[69] Furthermore, neither parent has the privilege to contract away the right of support, because support is a right that is exclusive to the child.[70]

B. *Gender Discrimination?*

It is all too clear that there is a plethora of barriers standing in the way of a man's right to recovery in fraudulent conception cases. But are they being discriminated against simply because they are male? Conversely, women have been allowed to bring actions against men who have misrepresented themselves in matters of conception early in legal history.[71] Why should the case be any different for men? In fraudulent conception cases, men have not been victorious in establishing claims of gender-based discrimination.[72]

In *Linda D.*, the putative father, in an attempt to recoup damages, argued denial of the privilege to enforce his statutory and constitutional

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68. *Id.* at 226 ("[O]nly those facts relating to the needs of the child and the ability of the respective parents to meet . . . those needs are to be considered. . . ." (citing WASH REV. CODE § 26.26.130(5)(1984))). *But see* Mary A. Totz, Comment, *What's Good for the Goose is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141, 152–54 (1994) (arguing that legal presumptions should apply in the procreative context under which unmarried couples can enter into implied contracts not to procreate by engaging in casual sexual activity and that a woman who gets pregnant, and bears the child, has breached that contract).

69. Wallis v. Smith, 22 P.3d 682, 685 (N.M. Ct. App. 2001). A few years after its decision in *Linda D.*, the Washington Court of Appeals ruled similarly, noting that "the moral responsibility for creating human life is not voidable as if sex were a simple contractual transaction." Moorman v. Walker, 773 P.2d 887, 889 (N.M. 1989).

70. *See* K.S. v. R.S., 657 N.E.2d 157, 165 (Ind. Ct. App. 1995), *vacated on other grounds*, 699 N.E.2d 399 (Ind. 1996).

71. *See* M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQ. 33, 41–64 (1990) (citations omitted) (discussing the historical treatment of fraudulent conception cases brought forward by women).

72. *See, e.g.*, Linda D. v. Fritz C., 687 P.2d 223, 229 (Wash. Ct. App. 1984) (discussing a claim of differential treatment of mothers and fathers).

rights to be free from gender-based discrimination.[73] The court found that no gender-based discrimination had been shown, and thus Washington's law against discrimination had not been violated.[74] To establish a violation of the anti-discrimination statute, the defendant first had to show "'practices of discrimination *against* any of its inhabitants.'"[75] The child support statute required that both parents' means and ability be considered for child support calculations and that the father's liability for past support had to be proportional to the mother's liability.[76] It also gave both the mother and the father the right to sue to establish paternity.[77] Thus, no gender-based discrimination could be shown because both parents faced the same rights and liabilities under the statute,[78] and the father was never singled out and treated disparately.

Similar to the Washington statute in *Linda D.*, other states' child support statutes do not include language that singles out men. Rather, the focus is on support from both parents.[79] The mother has the same liability as the father for child support, provided she has reasonable economic means.[80] Clearly, an argument for gender discrimination is made in vain and will likely never be found to exist on these grounds.[81]

C. *Damages?*

If a man somehow manages to get over the hurdle of stating a claim, he will still have trouble proving that he has suffered damages. Some

73. *Id.* at 225.

74. *Id.* at 229 (citing WASH. REV. CODE § 49.60 (1984)).

75. *Id.* (quoting WASH. REV. CODE § 49.60.010).

76. *Id.* at 228 (citing WASH. REV. CODE § 26.26.130).

77. *Id.* (citing WASH. REV. CODE § 26.26.170).

78. *Id.* at 229; *see also* Dorsey v. English, 390 A.2d 1133, 1138 (Md. Ct. App. 1978) (denying father's assertion that Maryland's paternity statute discriminates against men by treating them in the same manner as mothers even if the man's circumstances are drastically different than the mother's).

79. *See*, *e.g.*, *Dorsey*, 390 A.2d at 1138 (treating both mother and father the same in obligation by statute (citing MD. CODE ANN. art. 16 § 66A-66-O (1977))); Beard v. Skipper, 451 N.W.2d 614, 615 (Mich. Ct. App. 1990) (obligating both parents to pay support by statute (citing MICH. COMP. LAWS § 722.711 (2002))).

80. *See Linda D.*, 687 P.2d at 229 & n.9 (stating that support allocation requires consideration of all relevant facts).

81. *But see* Totz, *supra* note 68, at 174 (arguing that although the support statutes *are* gender neutral, they are discriminatory in effect because "women will only be responsible to support those children they have chosen to bear, while men are responsible for both those children they have and those they have not chosen to beget.").

damages that men have claimed include the obvious costs of child support,[82] as well as the costs of blood tests,[83] legal fees,[84] and child birth.[85] Even though a dollar value could possibly be put on these damages, courts have been hesitant to find as a matter of law that the claimant had asserted any damages.[86] Second, many courts find that claims for damages other than child support are simply attempts to circumvent child support obligations.[87]

Some putative fathers have made arguments using mitigation principles, contending that the mother refused to mitigate damages by not having an abortion.[88] As fault in conception is not relevant to the needs and requirements of a child, a father's claim of fraud cannot be used to mitigate the amount of child support.[89] Because most courts do not find there to be actual damages claimed,[90] this argument is of little merit. It is impossible to mitigate damages that do not even exist.

D. *The Heavy Hand of Public Policy*

In analyzing the court systems' treatment of fraudulent conception, public policy is a constant force overshadowing a man's desire of

82. Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Ct. App. 1980); Faske v. Bonanno, 357 N.W.2d 860, 861 (Mich. Ct. App. 1984); *Linda D.*, 687 P.2d at 224; *see also* Smith v. Price, 340 S.E.2d 408, 416 (N.C. Ct. App. 1986) (claiming "compensatory damages" to recover from child support payments).

83. *E.g.*, *Linda D.*, 687 P.2d at 224 (discussing the necessity of blood tests and the damages requested to cover the cost of the tests).

84. *E.g.*, *id.* (asserting damages for legal fees).

85. *E.g.*, *id.* (asserting damages for amounts associated with child birth).

86. *See* C.A.M. v. R.A.W., 568 A.2d 556, 562–63 (N.J. Super. Ct. App. Div. 1990) (rejecting plaintiff's claims for damages based on the "wrongful birth of her normal, healthy child").

87. *See*, *e.g.*, Wallis v. Smith, 22 P.3d 682, 683–84 (N.M. Ct. App. 2001) ("It is self-evident that [the father] seeks to recover for the very financial loss caused him by the statutory obligation to pay child support."). For a more in depth treatment of child support, see discussion *infra* Part III.

88. *C.A.M.*, 568 A.2d at 562–63; *see also* discussion *infra* Part III.B. (discussing attempts of mitigation in contract theory).

89. *Linda D.*, 687 P.2d at 225.

90. *See*, *e.g.*, Faske v. Bonanno, 357 N.W.2d 860, 861 (Mich. Ct. App. 1984) (refusing to award damages because it would be to the detriment of the child); Smith v. Price, 328 S.E.2d 811, 817 (N.C. Ct. App. 1985) (rejecting claim for damages because such an "argument is simply not appropriate in a civil action to establish paternity"), *aff'd in part*, *rev'd in part*, 340 S.E.2d 408, 416 (N.C. 1986) ("We do not decide here whether there can ever be a proper situation for allowing a fraud claim in a paternity suit. . . .").

compensation for deception by a woman.[91] Although "declarations of public policy are more properly made by the Legislature or by the Appellate Courts," lower courts still have held that men's claims for fraudulent conception violate public policy.[92] The most common reason is that courts simply do not want to get involved in these matters.[93] Our society is one that places great concern on the well-being of the family and the child. The regulation of family relations is "'so much a matter of public policy that the law in relation to them is based on principles not applicable in other cases.'"[94] If the courts were to get involved, there is the fear that it would lead to an increase of fraudulent and frivolous claims in this area.[95]

Policy also dictates that parents have a duty to support their children, and the facts surrounding conception cannot serve as an exception to that rule.[96] For this reason, the child should not suffer from a parent's indiscretion concerning the events leading to conception.[97] The best interest of the child is carried out when both parents are made financially accountable for conception and birth.[98] The loss of a great deal of the father's financial support would undoubtedly be to the detriment of the child and against public policy—no matter the reason for the decrease in support.[99]

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91. *See*, *e.g.*, Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620 (Ct. App. 1980) (denying recovery on policy and social grounds). *But see* Henson v. Sorrell, No. 02A01-9711-CV-00291, 1999 WL 5630, at *7 (Tenn. Ct. App. June 28, 1999) (holding, notwithstanding public policy, that "until the legislature speaks on this matter, the common law rights resulting from fraudulent misrepresentation should not be abolished in an appropriate case where legal causation can be shown.").

92. Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 246 (App. Div. 1985).

93. *See* Perry v. Atkinson, 240 Cal. Rptr. 402, 406 (Ct. App. 1987) ("The courts should not undertake the adjudication of promises and representations made by consenting adults regarding their sexual relationships."); *Stephen K.*, 164 Cal. Rptr. at 619 ("[T]he state has minimal if any interest in this otherwise entirely private matter."); *Douglas R.*, 487 N.Y.S.2d at 245–46 ("The judiciary should not attempt to regulate all aspects of the human condition.").

94. Inez M. v. Nathan G., 451 N.Y.S.2d 607, 611 (Fam. Ct. N.Y. County 1982) (quoting Piper v. Hoard, 13 N.E. 626 (N.Y. 1887)).

95. *See Douglas R.*, 487 N.Y.S.2d at 245 ("[T]he Court is convinced that if such a cause of action is sanctioned, it will serve as a vehicle for much vexatious and fraudulent litigation.").

96. Faske v. Bonanno, 357 N.W.2d 860, 861 (Mich. Ct. App. 1984).

97. *Id.*

98. Wallis v. Smith, 22 P.3d 682, 684 (N.M. Ct. App. 2001).

99. Barbara A. v. John G., 193 Cal. Rptr. 422, 429 (Ct. App. 1983). *But see* Jill E. Evans, *In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045, 1092 (2005) ("[S]tate interest

III. THE IMPORTANCE OF CHILD SUPPORT

Child support is the main motivation behind most paternity suits, including those involving cross-claims and defenses of fraudulent conception. It ensures that the custodial parent (in these instances—the mother) does not have to carry the sole financial responsibility for the child.[100] In paternity proceedings, not only is the man declared to be the legal father, but he is also assigned responsibility for child support payments.[101] If a father has the ability to pay child support, then he must do so.[102]

The purpose of child support is to benefit the child, not to punish the father.[103] For this reason, just because a man does not wish to become a father does not mean he can avoid paying child support.[104] He cannot make the child a victim by refusing to pay support.[105] To fully benefit the child, *both* parents should support the child.[106]

A. *Paternity Statutes*

What happens in cases in which a child is born out of wedlock? Plainly, only the mother can be determined at that time. Procedurally, a child born out of wedlock can gain the support needed from both parents through a paternity suit. For situations in which the child is born into a marriage, it is presumed that the husband is the father of the child.[107] But

in protecting the safety and welfare of its citizens is both strong enough, and the interference minimal enough, that fraud should not be wrapped in a cocoon of constitutional right."); J. Terrell Mann, Note, *Misrepresentation of Sterility or Use of Birth Control*, 26 J. FAM. L. 623, 636 (1988) (describing methods of asserting a father's defense claim against child support payments in fraudulent conception cases while still abiding by the policy for "best interest of the child").

100. Murphy v. Myers, 560 N.W.2d 752, 754 (Minn. Ct. App. 1997).

101. *Id.*

102. Krufal v. Jorgenson, 830 So. 2d 228, 229 (Fla. Dist. Ct. App. 2002).

103. *Id.* at 230 (citing Bardin v. State Dep't of Revenue, 720 So. 2d 609 (Fla. Dist. Ct. App. 1998)).

104. *See* Beard v. Skipper, 451 N.W.2d 614, 615 (Mich. Ct. App. 1990) ("[R]espondent's constitutional entitlement to avoid procreation does not encompass a right to avoid a child support obligation simply because another private person has not fully respected his desires in this regard." (quoting Pamela P. v. Frank S., 462 N.Y.S.2d 819 (1983))).

105. *See* Faske v. Bonano, 357 N.W.2d 860, 861 (Mich. Ct. App. 1984) (holding that a child should not suffer from a parent's fault regarding conception).

106. Wallis v. Smith, 22 P.3d 682, 684 (N.M. Ct. App. 2001).

107. *See*, *e.g.*, Richard B. v. Sandra B.B., 625 N.Y.S.2d 127, 129 (App. Div.

what makes an unmarried man legally liable for child support payments? States have enacted paternity statutes in order to remedy these situations.[108] The typical statute legally obligates *both* parents to support minor children.[109] Besides determining paternity, these parentage statutes also help the child in obtaining legal rights like inheritance, medical support, the ability to "bring certain causes of action . . . workers' compensation dependents' allowances, and veterans' education benefits."[110]

Sometimes an unmarried man pronounces himself the father through a signed voluntary acknowledgment;[111] other times, genetic testing is necessary to determine if he is the father.[112] By analyzing blood tests, a doctor can establish an opinion on paternity with a reasonable degree of medical and mathematical certainty.[113] Such blood tests are user-friendly and inexpensive, making them a valuable tool in adjudicating paternity.[114] Blood tests can be used to "absolutely exclude a man who could not possibly be a child's genetic parent and establish with great certainty whether a particular man is a child's biological father."[115] Therefore, such tests can be a great tool for establishing *and* disestablishing paternity.[116]

Several states have adopted the Uniform Parentage Act, which includes methods for determining paternity—including guidelines for genetic testing.[117] The main policy behind the Act is that the support of two parents is better for a child than only one.[118] The most controversial

1995) (discussing the presumption of paternity for a child born into a marriage).

108. *E.g.*, Support of Dependents Law, IOWA CODE § 252A (2007); The Paternity Act, MICH. COMP. LAWS §§ 722.711–.730 (2007); Parentage Act, MINN. STAT. §§ 257.51–.74 (2007).

109. *E.g.*, TENN. CODE § 34-1-102 (2007).

110. Murphy v. Meyers, 560 N.W.2d 752, 754 (Minn. Ct. App. 1997) (citing Johnson v. Hunter, 447 N.W.2d 871, 875 (Minn. 1989)).

111. Stephen J. Hyland, *The Changing and Uncertain Status of Same-Sex Families*, N.J. LAW., Oct. 2005, at 16, 17.

112. *See* State *ex rel.* Hamilton v. Snodgrass, 325 N.W.2d 740, 743 (Iowa 1982) (stating that "[t]he question in a paternity suit is really one of biology").

113. *See* State *ex rel.* Buechler v. Vinsand, 318 N.W.2d 208, 210–11 (Iowa 1982) (explaining the blood testing process).

114. Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 56 (2003).

115. *Id.* at 56–57.

116. *Id.*

117. *Id.* at 65; *see also* UNIF. PARENTAGE ACT (2002), *available at* http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf. States adopting the Act include Delaware, Texas, and Washington. Iowa has not adopted the Act.

118. Sara Cotton et al., *Model Assisted Reproductive Technology Act*, 9 J.

aspect of the Act is that it considers a man to be the father of a child through a social definition of parent.[119] If a man and a child were to develop a relationship over a long period of time, that social father-child relationship could take priority over a biological father-child relationship.[120] With all this in mind, the Act is designed to create a more efficient system for determining paternity.[121]

B. *How Much Should He Pay?*

Once a man is determined to be a "father" by the state's parentage statute, he is obligated to pay child support.[122] But how much is his obligation? Guidelines for the amount of child support are also imposed by state statutes.[123] These support orders generally take into account factors such as the living situation of the child, the amount of care and support available from the mother, and the father's ability to pay.[124] Often,

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GENDER RACE & JUST. 55, 85 (2005).

119. *See* Ira Mark Ellman, *Do Americans Play Football?* 19 INT'L J.L. POL'Y & FAM. 257, 266 (2005) (discussing how the Act gives rise to parentage through a durational relationship between the father and child). The most controversial implications of this definition are that it can create a parent-child obligation for the same-sex partner of the parent of the child. Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 435–436 (2005).

120. *See* Ellman, *supra* note 119, at 266 (allowing "a child's social father, with a relational status necessarily established over time, to supplant the biological father as the child's legal father").

121. *See, e.g.*, County of L.A. v. Sheldon P., 126 Cal. Rptr. 2d 350, 352 (Ct. App. 2002) (noting with respect to a similar statute that "[t]he Legislature further found that a simple system for voluntary paternity declarations would result in a significant increase in the ease of establishing paternity and a significant decrease in the time and money needed to establish paternity, and was in the public interest").

122. *See, e.g.*, Rivera v. Minnich, 483 U.S. 574, 580 (1987) ("[T]he putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law."); *In re* Marriage of McMorrow, 342 N.W.2d 73, 75 (Iowa 1983) ("Our law is plain that upon a child's birth a father becomes legally and morally obligated to support it.").

123. *E.g.*, COLO. REV. STAT. § 14-10-115 (2007); FLA. STAT. § 61.30 (2007); Beard v. Skipper, 451 N.W.2d 614, 615 (Mich. Ct. App. 1990) (discussing Michigan's statute); Henson v. Sorrell, No. 02A01-9711-CV-00291, 1999 WL 5630, at *5 (Tenn. Ct. App. June 28, 1999) (discussing Tennessee's statute).

124. *See*, *e.g.*, Krufal v. Jorgensen, 830 So. 2d 228, 229 (Fla. Dist. Ct. App. 1990) (discussing Florida's child support obligation guidelines); Beard v. Skipper, 451 N.W.2d 614, 615 (Mich. Ct. App. 1990) (discussing Michigan's child support obligation guidelines). Also note that in divorce and similar situations in which the father is the custodial parent, the mother is usually required to pay child support; therefore the laws

the child support obligation faced by a putative father is more than that needed to support the child.[125] In *Pamela P. v. Frank S.*, [126] the court opined the father should be obligated to give more support in order to provide the child with a standard of living comparable to his.[127] The argument that making the father pay this much violates his privacy rights has no merit. In proceedings under statute to determine the parental support obligation, a parent has no privacy interest because "support levels are not purely private determinations, but serve a public function and are subject to court approval."[128]

Child support is especially problematic for the "student" father. In *Wollschlager v. Veal*, [129] the putative father argued that he should not be ordered to pay child support until he completed dental school.[130] The trial judge had calculated the putative father's income at minimum wage for purposes of calculating his support obligation, even though he was going to school and not working.[131] The court found he had made a decision on his own to attend school—not in cooperation with the mother—and as such should not be able to avoid his support obligation.[132] Arguments that not paying child support while attending school because "'the minor children will ultimately benefit'" from the increased income *after* completion of

do not base payment on gender.

125. *See* Evans, *supra* note 99, at 1064 (discussing how putative fathers often are obligated to pay more simply because they can (citing Joann P. v. Gary W., 441 A.2d 1161, 1162 (N.H. 1982))).

126. Pamela P. v. Frank S., 443 N.Y.S.2d 343 (Fam. Ct. N.Y. County 1983).

127. *Id.* at 348. Basically, the court was attempting to allow the child to live as if the parents had been married. *See also In re* Marriage of Nimmo, 891 P.2d 1002, 1009 (Colo. 1995) (excluding step parent's income and support contributions because they are not relevant to what the child would have had, had the family been intact); Evans, *supra* note 99, at 1065 (citations omitted).

128. Stillman v. State, 87 P.3d 200, 201 (Colo. App. 2003) (citing Ga. Dep't of Human Res. v. Sweat, 580 S.E.2d 206 (2003)); Linda D. v. Fritz C., 687 P.2d 223 (Wash. Ct. App. 1984). The statutes also do not infringe upon a fundamental right or discriminate against a suspect class. *Id.* (citing Ga. Dep't of Human Res. v. Sweat, 580 S.E.2d 206 (2003); *In re* Marriage of McGinley, 19 P.3d 954 (2001)).

129. Wollschlager v. Veal, 601 So. 2d 274 (Fla. Dist. Ct. App. 1992).

130. *Id.* at 276.

131. *Id.* at 277.

132. *Id.* at 276–77. *But see* Overbey v. Overbey, 698 So. 2d 811, 815 (Fla. 1997) (disapproving of the decision in *Wollschlager* because of its reliance on the distinction between voluntary and involuntary financial difficulty and not the best interests of the child). The court in *Overbey* reached the same result—the father could not mitigate his support obligations simply because he was a student—but reached the conclusion for different reasons. *Id.*

school have likewise failed.[133]

It is nearly impossible for a putative father to mitigate his child support obligations based on some sort of wrongdoing by the mother.[134] In addition to reducing child support payments, payment of damages to the putative father would also reduce the mother's financial ability to support the child.[135] This would clearly be to the detriment of the child.

C. *Why Do We Care? The State's Interest in Child Support*

The relationship between a putative father, an illegitimate child, and the mother would seem to be a wholly private affair. However, the state does have an interest in the correct determination of paternity and therefore an interest in child support.[136] By obtaining a correct determination of paternity, there is an increased probability that the father will actually pay the court-ordered child support payments.[137] Because it is the state's interest to further the best interests of the child, it is also the state's interest to make sure the child is getting the support that it requires. But what obligations does the state have to unborn children?

IV. ABORTION

Over the course of time, there has been a vast amount of litigation regarding a woman's right to an abortion. The Supreme Court has been flooded with cases concerning the legality of abortion and abortion regulations. In 1973, the Court held in the landmark case *Roe v. Wade*[138] that a woman has a constitutionally protected right to obtain an abortion.[139] However, the Court also held that there were compelling state interests

133. *Overbey*, 698 So. 2d at 815.

134. *See supra* Part II.C (discussing refusal to mitigate damages based on fraudulent conception); *see also In re* Paternity of J.L.H., 441 N.W.2d 273, 276 (Wis. Ct. App. 1989) (the man's opposing affidavits alleging rape by the woman in a paternity suit failed to raise a genuine issue of material fact and therefore were not an available defense).

135. Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Ct. App. 1980).

136. State *ex rel.* Hamilton v. Snodgrass, 325 N.W.2d 740, 750 (Iowa 1982). The state's interest in establishing accurate paternity can be found by an inverse—"'the state has no legitimate interest in incorrectly ascribing parentage and imposing the obligations of fatherhood on someone other than the child's actual father.'" *Id.* (quoting Salas v. Cortez, 593 P.2d 226, 233 (Cal. 1979)).

137. *Id.*

138. Roe v. Wade, 410 U.S. 113 (1973).

139. *Id.* at 153.

that limited this right.[140] Since *Roe*, the Court has heard several other abortion cases and has changed and shaped regulations affecting abortion.[141] As a result, women have been given a constitutionally protected choice to abort a pregnancy within the confines of state interests.

A. *The Man's Right to Prevent a Woman from Procuring an Abortion*

In stark contrast with a woman's right to choose to have an abortion lies a man's lack of rights to choose abortion. When a man asserts these "paternal rights" to stop a woman from having an abortion, they directly interfere with the woman's constitutionally protected right to abortion.[142] Both married and single men lack the right to interfere with a woman's choice.[143] The Court's prohibition of spousal consent regulations of abortion in *Planned Parenthood of Central Missouri v. Danforth*[144] served not only to block married men from having a say in their wife's choice, but also to create a substantial roadblock for unmarried men.[145] Men have argued, but to no avail that women waive their right to an abortion by engaging in consensual sexual intercourse.[146] Other courts have rejected

140. *See id.* at 155–56 (recognizing that the involvement of a fetus that had the potential to develop into a human being gave the state a compelling interest to protect).

141. *See generally* Dalton v. Family Planning Servs., 516 U.S. 474 (1996) (prohibiting use of Medicaid to obtain an abortion); Bellotti v. Baird, 443 U.S. 643–44 (1979) (establishing parental consent guidelines for minor females); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) (stating that the state cannot delegate authority to anyone, including the spouse, to prevent abortion during the first trimester of pregnancy); Melissa Prober, Note, *Please Don't Tell My Parents: The Validity of School Policies Mandating Parental Notification of a Student's Pregnancy*, 71 BROOK. L. REV. 557 (2005) (discussing issues relating to parental notification and abortion rights).

142. Andrea M. Sharrin, Note, *Potential Fathers and Abortion: A Woman's Womb Is Not a Man's Castle*, 55 BROOK. L. REV. 1359, 1363 (1990).

143. *See generally* Jones v. Smith, 278 So. 2d 339, 344 (Fla. Dist. Ct. App. 1973) (holding that a putative father was without standing to obstruct the woman's abortion decision); Doe v. Doe, 314 N.E.2d 128, 130 (Mass. 1974) (holding that a married man was without standing to enjoin his wife and their doctor to perform an abortion procedure on their child). *But see* Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 612–13 (N.M. 1991) (identifying parents' legally protected interest in limiting the size of their family).

144. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 52 (1976).

145. *Id.* at 69; *see also* Rothenberger v. Doe, 374 A.2d 57, 59 (N.J. Super. Ct. Ch. Div. 1977) ("[W]here there is no marital relation involved, the natural father has even less equity in compelling the mother to suffer an unwanted pregnancy.").

146. *See Jones*, 278 So. 2d at 342–43 (rejecting the consent/waiver argument and holding that a woman's right to privacy cannot be obstructed by a sexual act).

the argument to enjoin an abortion on the basis that cases involving women's privacy choices are not meant to control the decisions of other private citizens but were simply protections against government intrusions.[147]

Potential fathers have also argued that the holdings of "*Roe* and *Danforth* are inapplicable since they preclude only action by a state legislature," and the action of a court does not constitute state action.[148] It has also been argued that even if the action was found to be state action, *Danforth* left "open a case-by-case balancing test of competing constitutional rights" by restraining the state from granting unrestricted veto power to the father.[149] Although these arguments may seem compelling, it should be kept in mind that *Roe* and *Danforth* are still good law on potential fathers' rights and remain precedent.[150]

B. *A Man's Right to Compel a Woman to Procure an Abortion*

What about men who *want* the woman to have an abortion? Do they have any rights? Although there has not been as much attention paid to men seeking to compel a woman to have an abortion, there have been some cases in which men have tried to use the woman's failure to have an abortion to mitigate their liability for child support, as mentioned earlier.[151] Generally, however, the right to decline an abortion has been a right that courts have found to belong to the woman alone.[152]

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147. *See Doe*, 314 N.E.2d at 130 (stating that other cases "involved a shield . . . against government action, not a sword of government assistance to enable him to overturn the private decisions of his fellow citizens"); Sharrin, *supra* note 142, at 1381 (describing *Doe* in more detail).

148. Sharrin, *supra* note 142, at 1385–86 (citing Brief for Appellee at 27–36, Jane Doe v. John Smith (Ind. Ct. App. 1988) (No. 84A01-8804-CV-00112)).

149. *Id.* at 1386 (citing Brief for Appellee at 36, Jane Doe v. John Smith (Ind. Ct. App. 1988) (No. 84A01-8804-CV-00112)).

150. *See id.* ("A contrary determination would misrepresent the principles embodied in the right to privacy and the right to procreation. In addition, a determination in favor of the potential father's arguments would be a regression back to archaic stereotypes . . . ." (citing Brief for Appellee at 36–40, 43, Jane Doe v. John Smith (Ind. Ct. App. 1988) (No. 84A01-8804-CV-00112))).

151. *See* discussion *supra* Part II.C (explaining that most courts do not allow for mitigation arguments based on failure to have an abortion).

152. *See* Harris v. State, 356 So. 2d 623, 624 (Ala. 1978) ("'The obvious fact is that when the [parents] disagree on this decision, the view of only one of the two . . . can prevail. Since it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.'" (citation omitted)).

In *In re S.P.B.*,[153] the father argued that a state child support statute that placed responsibility upon both parents violated constitutional equal protection rights by not granting fathers the right to decide to terminate the pregnancy.[154] He felt that the statute created a presumption that he should have been allowed to rebut.[155] He also argued the availability of legalized abortion, as well as the mother's decision to not have an abortion against his will, served as an "intervening factor," effectively removing the connection between him and the child and therefore ridding him of any support obligation.[156] His equal protection argument was quickly struck down on the basis that allowing the man equal treatment in this case could only be accomplished through forcing the woman to get an abortion—a choice that is constitutionally preserved for the woman.[157] Likewise, in *Harris v. State*,[158] the Supreme Court of Alabama held that the decision not to have an abortion was that of the woman, and the woman alone.[159]

A law review comment on men's reproductive rights poses an interesting solution.[160] The author suggests legislating a "male abortion option" that would require "a single pregnant woman [to] release a paternity claim against a single biological father in exchange for his payment of the mother's medical costs associated with the pregnancy, her lost wages and all other costs needed to compensate her for either an abortion or the adoption of the child."[161] This would allow the mother to retain her decision of whether to obtain an abortion, but would also allow the man to exercise his equal right to avoid procreation.[162] Therefore, a greater balance would be struck between women's rights and men's lack of rights in this area.[163]

153. *In re* S.P.B., 651 P.2d 1214 (Colo. 1982).

154. *Id.* at 1214.

155. *Id.*

156. *Id.* It should be noted that the court here stated that there was no question the child support duty fell upon both parents, regardless of their marital status, and therefore that obligation would continue to rest on the father. *Id.* at 1215.

157. *Id.* at 1216.

158. Harris v. State, 356 So. 2d 623 (Ala. 1978).

159. *Id.* at 624; *see also* Maher v. Roe, 432 U.S. 464, 472 (1977) ("A woman has at least an equal right to choose to carry the fetus to term as to choose to abort it.").

160. Totz, *supra* note 68.

161. *Id.* at 166–67.

162. *Id.* The author also points out that such a concept would make adoption more secure because there would have been consent by *both* parents ahead of time; thus reducing the risk of a biological father coming out of the woodwork and seeking custody. *Id.* at 166.

163. *See generally* Totz, *supra* note 68. Mary A. Totz's commentary on this

C. *The Preembryo Argument: Hope for Men's Rights?*

An interesting conflict with respect to a man's right to father a potential child is posed when it comes to preembryos.[164] *Davis v. Davis*[165] is the landmark Tennessee Supreme Court case that evaluated custody issues involving preembryos.[166] The case involved a couple who filed for divorce and agreed on all terms of the marriage dissolution except for who was to have custody of the couple's frozen embryos that had been stored at a fertility clinic.[167] While they were married, the couple never made any agreement as to the disposition of the preembryos upon divorce.[168] Had they made an agreement beforehand (or had a statute existed that dealt with such dispositions), the court would have honored the prior agreement; however, this was not the case.[169]

The trial court held that the mother was to be given custody of the preembryos due to the court's determination that the preembryos were "human beings" beginning at fertilization.[170] However, the court of appeals reversed the lower court's holding on the basis that Junior Davis (the husband) had a "'constitutionally protected right not to beget a child where no pregnancy has taken place.'"[171] The court held that "'there is no compelling state interest to justify [ ] ordering implantation against the will of either party.'"[172]

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issue is highly recommended to any reader interested in this topic. She provides several innovative and commendable ideas that are not included in this Note.

164. *See generally* Susan L. Crockin, Commentary, *"What is an Embryo?": A Legal Perspective*, 36 CONN. L. REV. 1177 (2004) (discussing embryos and preembryos in a legal context). Preembryos are the "frozen embryos" obtained in the process of in vitro fertilization (IVF). Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992).

165. Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

166. *Id.*

167. *Id.* at 589.

168. *Id.* at 590. *But cf.* Kass v. Kass, 663 N.Y.S.2d 581, 584 (App. Div. 1997), *aff'd*, 696 N.E.2d 174 (N.Y. 1998) (involving a contract signed by both parties to an in vitro fertilization (IVF) procedure that provided "[i]n the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction").

169. While Tennessee did not have a statute governing disposition of preembryos, Louisiana had one enacted at the time (entitled "Human Embryos") that declared that disputes over custody of the preembryo were to be "resolved in the 'best interest' of the embryo." *Davis*, 842 S.W.2d at 590 n.1.

170. *Id.* at 589.

171. *Id.*

172. *Id.* The court of appeals also held that "'the parties share an interest in

At the time of the court of appeals' decision, Mary Sue Davis (Junior Davis's ex-wife) wished to use the preembryos to get pregnant after the marriage had ended.[173] By the time her case reached the Tennessee Supreme Court, she wanted to donate the preembryos to a childless couple.[174] Junior Davis was strongly opposed to this idea and would rather have seen the preembryos discarded than implanted into another woman.[175]

In formulating its opinion, the Tennessee Supreme Court had no precedential or statutory guidance.[176] As a result, it looked to several legal journals for guidance.[177] The court felt that if just one model was chosen, it would create a bright-line test to determine how to resolve the problem.[178] The court decided, however, that this was not the best route to take, because it needed to retain some flexibility to allow for the development of new policies and technology.[179] The court determined the most equitable method in determining custody would be through weighing the interests of the parties in terms of all the facts and models of analysis.[180]

The first analysis the court performed was determining the nature of the preembryos: were they persons or property?[181] Under federal law, preembryos did not enjoy protection as persons.[182] The preembryos'

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the seven fertilized ova.'" *Id.*

173. *Id.* at 589.

174. *Id.* at 590.

175. *Id.*; *cf. In re* Marriage of Witten, 672 N.W.2d 768, 772–73 (Iowa 2003) (discussing a similar case in which the wife wanted the preembryos to be implanted in herself or a surrogate mother and was strongly opposed to discarding or donating the embryos; the man only opposed implantation of the eggs in his ex-wife).

176. *Davis*, 842 S.W.2d at 590.

177. *See id.* (The court benefited from models put forth by medical-legal scholars and ethicists in legal journals).

178. *Id.* at 591.

179. *Id.*

180. *Id. But see* Kass v. Kass, 663 N.Y.S.2d 581, 592 (App. Div. 1997), *aff'd* 696 N.E.2d 174 (N.Y. 1998) (Friedmann, J., concurring) (disagreeing with the *Davis* balancing test and instead favoring a rule allowing the objecting party to be able to veto the former spouse's proposed implantation).

181. *Davis*, 842 S.W.2d at 594. *But see* Jeter v. Mayo Clinic of Ariz., 121 P.3d 1256, 1269 (Ariz. Ct. App. 2005) ("It should be up to the Legislature and not the courts to consider and balance the competing interests and policy questions involved in whether to further expand the meaning of 'person' beyond that explained in *Summerfield* and when to consider life as beginning.").

182. *Davis*, 842 S.W.2d at 595; *see* Roe v. Wade, 410 U.S. 113, 157–62 (1973) (explicitly refusing to hold that the fetus possessed independent rights under law based on examination of the Constitution, relevant common law principles, and the lack of scientific consensus to when life begins).

potential of "developing into independent human life" also arguably excluded them from the property category.[183] Therefore, the preembryos were part of an interim category between persons and property.[184] Even so, the parties did maintain an interest in the nature of property ownership of the preembryos, to the extent "that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."[185]

The value of the preembryos to the parties was not due to their classification as property; rather, their value rested in the fact that they had the "'potential to become, after implantation, growth and birth, *children*.'"[186] Therefore, the real issue was whether the parties would become parents, not who owned the preembryos.[187] It relates directly to the individual freedom of the right to procreate for both parties.[188] This right of privacy was one for "'the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'"[189] It should be emphasized that this right of procreational autonomy also includes the right to avoid procreation.[190]

In *Davis*, Junior Davis and Mary Sue Davis had to be seen as "entirely equivalent gamete-providers."[191] Due to the in vitro fertilization

183. *Davis*, 842 S.W.2d at 595–96.

184. *Id.* at 597.

185. *Id.*

186. *Id.* at 598.

187. *Id.*; *see also In re* Marriage of Witten, 672 N.W.2d 768, 775 (Iowa 2003) ("[T]hey involve the more fundamental decision of whether the parties will be parents at all.").

188. *Davis*, 842 S.W.2d at 600; *see also* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (describing the right to procreate as "one of the basic civil rights of man" and stating that "[m]arriage and procreation are fundamental to the very existence and survival of the race").

189. *Davis*, 842 S.W.2d at 600 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)); *see also* Kass v. Kass, 663 N.Y.S.2d 581, 590 (App. Div. 1997) (finding decision to have children through IVF is an intensely personal and private matter).

190. *Davis*, 842 S.W.2d at 601; *see also Kass*, 663 N.Y.S.2d at 592 (Friedmann, J., concurring) ("Once lost, the right not to procreate can never be regained. It is the irrevocability of parenthood that is most crushing to the unconsenting gamete provider; and it is principally because of this that I find it hard to imagine a situation where a court should undertake to foist parenthood upon an unwilling individual."). Interestingly enough, *Davis* appeared to be the first case to recognize in the IVF context that there were both fundamental rights to procreate and to avoid procreation. *Id.* at 596 (Miller, J., dissenting).

191. *Davis*, 842 S.W.2d at 601.

(IVF) process, experiences must be viewed "in light of the joys of parenthood that is desired or the relative anguish of a lifetime of unwanted parenthood"—concerns that usually exist about a woman's bodily integrity that have prevented men from having a say in abortion decisions have been removed and are therefore inapplicable.[192] The existence of the right of procreational autonomy leads to procreation decisions belonging entirely to both of the gamete-providers because the state's interest in the abortion context is slight until the end of the first trimester.[193] The court concluded that an interest in avoiding genetic parenthood could be great enough to "trigger the protections afforded to all other aspects of parenthood."[194] In essence, the court conducted a fact-intensive balancing test to see which party's interests should prevail—the party seeking parenthood, or the party trying to prevent fatherhood.[195]

In analyzing the burden on the parties, the court noted that any gestation, whether in Mary Sue Davis or in a donee, of the preembryos would impose unwanted parenthood—with possible financial and psychological consequences—on Junior Davis.[196] If Mary Sue Davis were allowed to donate the preembryos, Junior Davis would "face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it."[197] Donation of the preembryos would not only rob Junior Davis of his procreational autonomy, but also deprive him of his relationship with his offspring.[198]

192. *Id.* (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976)).

193. *See id.* at 602 ("[N]o other person or entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF process, because no one else bears the consequences of these decisions in the way that the gamete-providers do.").

194. *Id.* at 603.

195. *See id.* at 604 (holding in the absence of a prior agreement on what to do with the preembyros "the relative interests of the parties in using or not using the preembryos must be weighed" by the court). *But see In re* Marriage of Witten, 672 N.W.2d 768, 783 (Iowa 2003) (holding that there could be no use or disposition of embryos unless both parties reached an agreement).

196. *Id.* at 603; *see also* Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 97 (1999) ("Compelled parenthood . . . imposes an unwanted identity on the individual, forcing [him] to redefine [him]self, [his] place in the world, and the legacy [he] will leave after [he] dies.").

197. *Davis*, 842 S.W.2d at 604.

198. *Id.* Junior Davis also stated to the court that if implantation of the preembryos was allowed, he would fight for custody of the resulting child. *Id.*

The court affirmed the holding of the appellate court and awarded custody of the preembryos to Junior Davis.[199] In its holding, the court held "the party wishing to avoid procreation should prevail," a holding that bestows upon the man the ability to step in and stop implantation from occurring if he has no desire to become a father.[200]

Why is it that a man has no control over a woman's abortion decision, yet wins when it comes to custody of preembryos? These propositions seem to be in direct opposition of each other, as decisions about both abortion and preembryos deal with making decisions for a child before birth.[201] A recent New York Times article focused on the disparity between cases involving men's rights regarding embryos and abortions.[202] Legal experts posit the disparity hinges on women's bodily integrity—with abortion, the embryo is inside the woman and therefore her decisionmaking involves not just the child, but also her body.[203] In the preembryo context, the woman's body is not directly involved. As science and technology progress, the legal landscape of men's rights in these regards will undoubtedly face interesting new changes.[204]

D. *The Changing Face of the Supreme Court's Possible Effect on Men's Abortion Rights*

The changing composition of the Supreme Court could have a great impact on men's rights. The abortion debate is one of the most heated issues faced by the Court—with the views and restrictions on abortion changing with almost every case the Court hears. Although few abortion

199. *Id. But cf.* Kass v. Kass, 663 N.Y.S.2d 581, 601 (App. Div. 1997) (Miller, J., dissenting) (endorsing the *Davis* balancing test but suggesting that a woman's procreative choices should not be to her disadvantage).

200. *Davis*, 842 S.W.2d at 604. Interestingly, in its opinion the court also stated that "[i]f no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered." *Id.* Had Mary Sue Davis still intended to use the preembryos to impregnate *herself* and had no other means by which to become pregnant, her lack of alternatives would have weighed heavily on her side. *Id.*

201. However, a recent case emphasized that there are differences between embryos and fetuses—namely, "many variables affect whether a fertilized egg outside the womb will eventually result in the birth of a child." Jeter v. Mayo Clinic of Ariz., 121 P.3d 1256, 1262 (Ariz. Ct. App. 2005).

202. Pam Belluck, *The Right to Be a Father (or Not)*, N.Y. TIMES, Nov. 6, 2005, § 4, at 4.

203. *Id.*

204. *Id.*

cases have been heard recently, the issue is still prevalent.[205]

The recent nomination and appointment of Justice Samuel A. Alito, Jr., has created an interesting twist to the story. Alito authored a dissenting opinion in the court of appeals' decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[206] a case in which the Supreme Court later upheld the legality of abortion.[207] In his dissent, Alito favored upholding a Pennsylvania statute that required spousal consent for abortions.[208] In essence, his view afforded men more abortion rights than the Supreme Court's majority decisions have. His addition to the Supreme Court could have a large impact on future abortion rights cases.

V. CONSTITUTIONAL ISSUES AND REQUIREMENTS

No area of law could be complete without the restrictions and freedoms provided to it by the Constitution. As seen above, constitutional law has been an overriding force in the treatment of cases dealing with a woman's right to an abortion and, more recently, a man's right regarding a woman's choice. An important question should be asked when viewing the Constitution in light of men's procreative rights: Do men have the same freedoms in reproduction as women?

A. *Privacy Rights*

One of the most important rights governing the area of abortion law

205. The state of South Dakota has recently made efforts to get an abortion case in front of the Supreme Court. David Crary, *South Dakota Abortion Ban Rejected; Blow to Conservatives*, ALBANY TIMES UNION, Nov. 8, 2006, at A4. During the November 2006 election, a strict ban on abortion passed by the state senate was rejected. *Id.* South Dakota's new abortion bill would ban abortions, but would allow exceptions for rape and incest, as well as for pregnancies that would endanger the life of the mother. Joe Kafka, *Abortion Restrictions Proposed in S. Dakota*, CHI. TRIB., Feb. 1, 2007, § 1, at 8. It is likely that the statute, if passed, will be challenged on constitutional grounds, making it likely to appear before the Supreme Court at some point in time. If the Court upheld the statute as constitutional, then many more states would likely follow with similar legislation. Kate Michelman, Editorial, *Reproductive Rights on the Line in South Dakota*, THE NATION, Oct. 22, 2006, *available at* http://www.thenation.com/doc/20061106/michelman ("[a]s many as twenty-nine state legislatures are ready to pass blanket abortion bans.").

206. Planned Parenthood of S.E. Pa. v. Casey (*Casey I*), 947 F.2d 682, 719–27 (3d Cir. 1991) (Alito, J., dissenting).

207. Planned Parenthood of S.E. Pa. v. Casey (*Casey II*), 505 U.S. 833, 871 (1992).

208. *Casey I*, 947 F.2d at 719–27.

is the right to privacy. However, this right is not explicitly found in the Constitution, but rather has been found in the "penumbras" of the Bill of Rights.[209] This implicit right of privacy extends to personal decisionmaking in areas such as marriage, procreation, contraception, abortion, family relationships, child rearing, and education.[210] However, we must not forget that these privacy rights are not absolute and must give way to a compelling state interest when in conflict with that interest.[211]

The most relevant of these privacy rights when dealing with a man's right to fatherhood is the right of procreation, which also involves the right to avoid procreation.[212] The right of procreation is material to more than just the previously mentioned issues dealing with preembryos and abortion.[213] It is also crucial to understanding child support and conception.[214]

In *Pamela P. II*, the man's right of procreation was considered a defense to a paternity order when the woman became pregnant after making fraudulent misrepresentations.[215] On appeal, however, this defense was struck down as "an impermissible invasion of 'the zone of privacy.'"[216] This constitutional right was deemed to be overshadowed by the compelling state interest in enforcing parental support for children, and the

209. *See* Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (discussing the lack of a right of privacy in the words of the Constitution, but how it can be found in the Bill of Rights).

210. Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisentadt v. Baird, 405 U.S. 438 (1972) (contraceptives); Prince v. Massachusetts, 321 U.S 158 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (education and child rearing)); Mann, *supra* note 98, at 628–29 (citing Loving v. Virginia, 388 U.S. 1 (1967) (marriage)).

211. Mann, *supra* note 99, at 629 & n.56 (using as an example that "'assuring . . . the primary obligation for support of illegitimate children falls on *both* natural parents rather than on the taxpayers of this State' was held to be a compelling state interest" (quoting Linda D. v. Fritz C., 687 P.2d 223, 229 (1984))).

212. Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

213. *See supra* Part IV.

214. *See L. Pamela P. I*, 449 N.E.2d 713, 715–16 (N.Y. 1983) (discussing the right in the context of choosing to be a father); Linda D. v. Fritz C., 687 P.2d 223, 228 (Wash. Ct. App. 1984) (dealing with the right of procreation in the setting of a paternity hearing).

215. L. Pamela P. v. Frank S. (*L. Pamela P. II*), 443 N.Y.S.2d 343, 346 (Fam. Ct. 1981), *aff'd*, 449 N.E.2d 713 (N.Y. 1983). See also *supra* Part II for discussion on fraudulent conception.

216. L. Pamela P. v. Frank S. (*L. Pamela P. III*), 451 N.Y.S.2d 766, 767 (App. Div. 1982), *aff'd* 449 N.E.2d 713 (N.Y. 1983).

court was justified in constricting the man's procreative rights.[217] His "constitutional entitlement to avoid procreation does not encompass a right to avoid a child support obligation simply because another private person has not fully respected his desires . . . ."[218] In addition to compelling state interests, the public policy of keeping the courts out of the bedroom provides another barrier blocking a man from exercising his procreational freedoms.[219]

With the exception of the preembryo cases,[220] men have not succeeded in exercising their privacy rights regarding their right to not be a father. Even when men try to use these rights to exercise their right to be a father, they have been unsuccessful.[221] Although useful tools for advancing the rights of women in the context of reproductive autonomy in abortion cases, privacy rights have not been a blessing for men trying to assert similar reproductive autonomy arguments.[222]

B. *Equal Protection*

In addition to constitutional privacy rights, men have also attempted to escape liability for children unwillingly born to them by invoking the Equal Protection Clause.[223] Under equal protection, laws must not discriminate between different classes of individuals—such as between male and female.[224] It has been argued that child support statutes that impose obligations on men violate equal protection.[225] However, these

217. *L. Pamela P. II*, 443 N.Y.S.2d at 347–48.

218. *L. Pamela P. I*, 449 N.E.2d at 716.

219. *See L. Pamela P. III*, 451 N.Y.S.2d at 767 (believing inquiry of *Shelley v. Kraemer* to be "an impermissible invasion of 'the zone of privacy created by several fundamental constitutional guarantees'" (quoting Griswold v. Connecticut, 381 U.S. 479, 485 (1965))).

220. *See supra* Part IV.C.

221. *E.g.*, Coe v. County of Cook, 162 F.3d 491, 494 (7th Cir. 1998) (holding "the constitutional right of a woman to have an abortion without interference from the man who impregnated her" precludes recognition of *any* constitutional right of the man to interfere).

222. *Cf. Casey II*, 505 U.S. 833, 895–96, 898 (1992) (differentiating between rights of the father before and after childbirth and stating that the father had less interest in child before childbirth than the mother).

223. *See, e.g.*, Linda D. v. Fritz C., 687 P.2d 223 (Wash. Ct. App. 1984) (denying putative father's equal protection counterclaim in paternity action because support statute did not unconstitutionally discriminate on basis of gender).

224. *See* discussion *supra* Part II.B (discussing the possibility of gender discrimination in *Linda D.*).

225. *See* discussion *supra* Part III.

statutes place obligations on both genders.[226] Child support obligation statutes are found to be constitutional and therefore their obligations must be met, regardless of gender.[227]

Because parents are not a protected class, child support statutes only need to pass a rational basis test.[228] This allows states to use wide discretion in enacting child support laws, which can only be overturned "if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."[229] As long as there are facts that could justify the statutory discrimination, the statutes will not be challenged.[230] Therefore, the statutes do not violate a man's equal protection rights.[231]

In *Inez M. v. Nathan G.*,[232] an equal protection argument was used to invalidate a putative father's defense of fraudulent conception.[233] The court found this defense would "create a new and inferior category of out-of-wedlock child based upon the circumstances of conception and would subordinate the constitutional rights and other interests of the child to those of one of the parents."[234] The result would be harm to the child that far outweighs the benefit the putative father would only have a chance of receiving. Clearly, equal protection is not the best solution for the putative father.

VI. PHILLIPS V. IRONS AND THE STRANGE ISSUES IT PRESENTED

If constitutional claims are of no assistance to the putative father looking to rid himself of unwarranted liability and damages, then what is? Contract, fraudulent conception, and procedure-based claims have likewise failed.[235] The *Phillips* case has brought to the legal community's attention some rather interesting modes of recovery—some successful, most not.

In *Phillips*, the woman (Irons) secretly retained the man's (Phillips)

226. *See* discussion *supra* Part III.

227. Dorsey v. English, 390 A.2d 1133, 1138 (Md. Ct. App. 1978).

228. *Id.*

229. *Id.* (emphasis omitted). There is also a presumption that state lawmakers have acted within their constitutional limitations despite their laws actually resulting in some sort of inequality. *Id.*

230. *Id.*

231. *Id.*

232. Inez M. v. Nathan G., 451 N.Y.S.2d 607 (Fam. Ct. 1982).

233. *Id.* at 609.

234. *Id.*

235. *See* discussion *supra* Part II.

semen after engaging in oral sex and then used the semen to impregnate herself.[236] Vaginal penetration never occurred.[237] Phillips did not find out about the resulting child until almost two years later when Irons brought a paternity suit.[238] DNA tests were conducted, and it was concluded that Phillips was the father of the child.[239] In response to Irons's petition for paternity, Phillips filed three claims.[240] His claims for fraud and conversion of the sperm were dismissed,[241] but the case was remanded on the issue of intentional infliction of emotional distress that Phillips alleged Irons's actions had caused him.[242]

Phillips's dismissed claim for fraudulent conception was of a variety that has historically been attempted to no avail.[243] The claims for intentional infliction of emotional distress and conversion of his sperm property, however, are novel ones that should be looked into with greater detail. Both are innovative legal applications and provide a fresh perspective into the area of unplanned fatherhood rights.

A. *Intentional Infliction of Emotional Distress*

Phillips claimed that Irons's conduct was "extreme and outrageous" when she lied about not being able to conceive, but then intentionally engaged in sexual activities so that she could artificially inseminate herself.[244] He asserted that Irons "'intended to inflict emotional distress on [Phillips] or knew there was high probability that her conduct would do

236. Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579, at *1 (Ill. App. Ct. Feb. 23, 2005) (stating defendant "'intentionally engaged in oral sex with [plaintiff] so that she could harvest [his] semen and artificially inseminate herself'" and "'did artificially inseminate herself'"). Artificial insemination is possible without the aid of a physician. Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535 (Ct. App. 1986) ("It is true that nothing inherent in artificial insemination requires the involvement of a physician.").

237. *Phillips*, 2005 WL 4694579, at *1.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at *5–6; *see supra* Part II.A (describing other claims of fraud); *infra* Part VI.B. (discussing conversion arguments with specific attention to the current case).

242. *Phillips*, 2005 WL 4694579, at *5, 6; *see infra* Part VI.A (discussing intentional infliction of emotional distress in greater detail with emphasis on the current case).

243. *Phillips*, 2005 WL 4694579, at *5; *see supra* Part II.A (describing other claims of fraud).

244. *Phillips*, 2005 WL 4694579, at *2.

so.'"[245] As a physician, he claimed, Irons was fully aware of how her body worked, the fact that her mouth was a "suitable environment to house live sperm," and how to perform artificial insemination.[246] Due to her awareness of Phillips's likely reaction, Irons should have known that filing for paternity after such an insemination would "shock [Phillips] and inflict severe emotional distress."[247]

In order to state a cause of action for intentional infliction of emotional distress (IIED) in Illinois, three elements are needed:

> (1) the conduct involved must be truly extreme and outrageous;
>
> (2) the actor must either intend that his or her conduct inflict severe emotional distress, or know that there is at least a high probability that it will cause severe emotional distress; and
>
> (3) the conduct must, in fact, cause severe emotional distress.[248]

Furthermore, complaints that state an action for IIED need to be more specific and detailed than normal tort pleadings.[249]

In *Phillips*, the first element of outrageous conduct was possibly present.[250] No reasonable person could have been expected to believe that oral sex could result in pregnancy.[251] By using the sperm and her medical knowledge in such a deliberately deceitful and misleading manner, Irons was arguably acting in an extreme and outrageous manner.[252] As to the

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at *3 (citing Feltmeier v. Feltmeier, 798 N.E.2d 75, 80 (Ill. 2003)). In Iowa, the elements for IIED are: "(1) Outrageous conduct by the defendant; (2) The defendant's intentional causing, or reckless disregard of the probability of causing emotional distress; (3) Plaintiff suffering severe or extreme emotional distress; and (4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct." Vinson v. Linn-Mar Cmty. Sch. Dist., 360 N.W.2d 108, 118 (Iowa 1984). These elements are essentially the same as in Illinois, although Illinois's third element is split into two separate elements—actual distress and causation.

249. *Phillips*, 2005 WL 4694579, at *3 (citing Welsh v. Commonwealth Edison Co., 713 N.E.2d 679 (Ill. Ct. App. 1999)).

250. *Id.* ("Under these facts, it is cognizable that if an average member of the parties' community were told of these circumstances, a reasonable response could be, 'outrageous!'").

251. *Id.*

252. *Id.*

second element, Irons knew there was at least a high probability that using her medical knowledge to impregnate herself with Phillips's sperm—a feat he thought impossible—would inflict severe emotional distress on Phillips.[253] From her knowledge of Phillips's desires and beliefs, it could reasonably be inferred Irons knew deceiving Phillips into fathering her child in this manner would cause him severe emotional distress.[254] Lastly, it must be determined that the conduct did, in fact, cause severe emotional distress.[255] Phillips was able to successfully illustrate the severe effects that Irons's actions had on him.[256] He suffered nausea, loss of appetite, difficulty sleeping, and interferences with his professional obligations and personal activities.[257] Irons argued that these symptoms were not severe enough, but the court held otherwise.[258]

After reviewing the issue of IIED, the Illinois Appellate Court held that the circuit court had erred in dismissing Phillips's IIED complaint.[259] Because all of the elements could reasonably be present, the claim should not have been dismissed.[260] The issue was reversed and remanded for further fact finding.[261]

Other jurisdictions have also encountered IIED claims presented in fraudulent conception contexts. In *Welzenbach*, an IIED claim was brought forward along with the other claims.[262] The lower court found the plaintiff had "conditionally set forth the requisite elements" for IIED.[263] Just because the elements were found, however, did not mean the claim

253. *Id.* at *4.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* ("[I]n 'Illinois, unlike some other jurisdictions, physical injury or disability is not required to accompany, or result from, the psychic trauma.'" (quoting McCaskill v. Barr, 414 N.E.2d 1327 (1980))).

259. *Id.* at *5 ("Whether plaintiff will prevail on the elements of his claim for IIED is a quintessential question of fact to be resolved by the trier of fact.").

260. *Id.*

261. *Id.* at *6. A subsequent motion for summary judgment by Irons on the issue of IIED was denied because the court found there were still questions of fact that existed. Phillips v. Irons, No. 05 L 4910, 2006 WL 4472185 (Ill. Cir. Ct. Cook County, Apr. 18, 2006) (Trial Order).

262. Welzenbach v. Powers, 660 A.2d 1133, 1134 (N.H. 1995).

263. *Id.* at 1135. *But see* Henson v. Sorrell, No. 02A01-9711-CV-00291, 1999 WL 5630, at *6 (Tenn. Ct. App. June 28, 1999) (agreeing with the district court that plaintiff had failed to prove the elements for IIED).

was necessarily actionable.[264] Public policy once again was invoked to prevent the plaintiff from recovering on this claim, despite the finding of its prerequisite elements.[265] "Actions at law such as the plaintiff's plainly must fail when held up to the measuring stick of public policy."[266] Will Phillips's claim prove to be successful and open the door of recovery to men who have been scammed by deceitful women?

B. *The Property Interests in Sperm*

Intentional Infliction of Emotional Distress was not the only unique claim that Phillips attempted. He also claimed that Irons committed the tort of conversion when she "took his 'semen, sperm, and genetic material without his permission, for the purpose of conceiving a child.'"[267] Conversion is a tort that deprives a person of his property "permanently or for an indefinite time" without authorization.[268] The elements of a claim for conversion in Illinois are: "(1) [plaintiff's] right in the property; (2) [plaintiff's] right to immediate, absolute, and unconditional possession of the property; (3) defendant's unauthorized and wrongful assumption of control, dominion, or ownership over the property; and (4) [plaintiff's] demand for possession.[269]

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264. *Welzenbach*, 660 A.2d at 1135.

265. *Id.* ("'Where there exist compelling public policy reasons, a person injured by the negligence of another is in some instances barred from recovery altogether.'" (quoting Estate of Cargill v. City of Rochester, 406 A.2d 704, 706 (N.H. 1979))).

266. *Welzenbach*, 660 A.2d at 1135.

267. Phillips v. Irons, No. 01L14237, 2005 WL 4694579, at *5 (Ill. App. Ct. Feb. 23, 2005); *see also* Judith D. Fischer, *Walling Claims In or Out: Misappropriation of Human Gametic Material and the Tort of Conversion*, 8 TEX. J. WOMEN & L. 143, 154–65 (1999) (illustrating treatment of conversion of semen and eggs and the public policies surrounding the issues).

268. *In re* Thebus, 483 N.E.2d 1258, 1260 (Ill. 1985). In Iowa, conversion is defined as "the wrongful control or dominion over another's property contrary to that person's possessory right to the property." Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 593 (Iowa 1999).

269. Stathis v. Geldermann, Inc., 692 N.E.2d 798, 806–07 (Ill. App. Ct. 1998) (citing Ruiz v. Wolf, 621 N.E.2d 67, 69 (Ill. App. Ct. 1993); Seymour v. Williams, 618 N.E.2d 966, 972 (Ill. App. Ct. 1993))). In Iowa, the elements of conversion are: (1) ownership by the plaintiff or other possessory right in the plaintiff greater than that of the defendant; (2) exercise of dominion or control over chattels by defendant inconsistent with, and in derogation of, plaintiff's possessory rights thereto; and (3) damage to plaintiff. *In re* Estate of Bearbower, 426 N.W.2d 392, 394 n.1 (Iowa 1988) (citations omitted). Unlike the Illinois elements, Iowa conversion focuses on damage to the plaintiff rather than a demand for possession.

The court in *Phillips* did not find these elements to be satisfied by the facts of the case.[270] Although there has been recognition of property rights in materials that come from the human body,[271] and in sperm specifically,[272] Phillips could not show that he had the "right to immediate, absolute, and unconditional possession' of his sperm."[273] After discarding his sperm, Phillips had no intention of getting it back.[274] Because he was not claiming to desire the return of his sperm after engaging in oral sex, the second element of conversion was not met, and he was precluded from any right to recovery on the basis of conversion.[275] The failure to find even one element is enough to dismiss the claim. As such, the court affirmed the trial court's dismissal of Phillips's conversion claim.[276]

Interestingly, Irons's response to Phillips's conversion claim was that the sperm was a "gift."[277] Had he not intended that the sperm be a gift for Irons, Phillips "would have used a condom and kept it and its contents."[278] As a gift, Irons was free to do whatever she wanted with the sperm—including inseminate herself.[279] As a result of this gift, Phillips subjected himself to legal liability for the child that his sperm created.[280]

If for some reason the elements for conversion would have been met, there are other possible defenses besides Irons's gift theory. For one thing, consent is a defense to conversion.[281] Clearly, Phillips consented to the oral sex with Irons. Consequently, there could have been no conversion of his

270. *Phillips*, 2005 WL 4694579, at *6.

271. *Id.* (citing Kurchener v. State Farm Fire & Cas. Co., 858 So. 2d 1220 (Fla. Ct. App. 2003); York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989)); Moore v. Regents of Univ. of Cal., 51 Cal. 3d 120 (1989); Hecht v. Superior Ct., 16 Cal. App. 4th 836 (Ct. App. 1993).

272. *See* Fischer, *supra* note 267, at 148 (stating that sperm is alienable—a trait that is a characteristic of property).

273. *Phillips*, 2005 WL 4694579, at *6.

274. *See id.* ("Plaintiff presumably intended . . . that defendant discard his sperm, not return it to him.").

275. *Id.*

276. *Id.*; *see also* Henson v. Sorrell, No. 02A01-9711-CV-00291, 1999 WL 5630, at *3 (Tenn. Ct. App. June 28, 1999) (failing to find act of conversion).

277. *See Phillips*, 2005 WL 4694579, at *5 ("[I]t was a gift—an absolute and irrevocable transfer of title to property from a donor to a donee.").

278. *Id.*

279. *See id.* at *6 (stating plaintiff had no immediate possessory right to the semen).

280. *See id.* (denying conversion and fraudulent misrepresentation counterclaims in paternity action).

281. *See* RESTATEMENT (SECOND) OF TORTS § 252 (1965).

sperm. Some men have tried to claim that misrepresentation of birth control usage invalidates the consent defense to conversion of sperm, but to no avail.[282] This argument is similar to those made in battery cases in which one partner's concealment of a sexually transmitted disease vitiates the other partner's consent to sexual intercourse.[283]

Another possible defense to conversion claims is abandonment.[284] Abandonment can be easy to find.[285] Irons could have argued that during the sexual act, Phillips abandoned his sperm and therefore rid himself of any property interest in it. This is similar to viewing the sexual act as a transaction in which "[the father] incidentally abandoned his semen."[286] In *Henson v. Sorrell*,[287] the court implicitly found abandonment of the sperm by denying the conversion claim because the parties failed to enter into an agreement regarding the disposal of the semen.[288] One author interpreted the holding in *Henson* to mean that "Henson did not expect to retain control over the semen and had abandoned it."[289]

Even if Phillips had succeeded on his conversion claim, would elimination of child support have been the right form of recovery? By seeking elimination, or even reduction of child support, Phillips was seeking a remedy against the child—the person whom the child support was meant to benefit. The true person from whom he should recover would be the mother, Irons. Anytime a father tries to eliminate or reduce child support payments due to an alleged conversion by the mother, he is "seeking a remedy against the wrong person."[290] One suggestion that would allow for conversion claims, but recognize that the tort remedy is against the mother and not the child, would be to allow the claim, while restricting the damages to those related directly to the pregnancy and child

282. Fischer, *supra* note 267, at 155 (citing Bruce Daniels, *Judge Tosses Man's Suit Over Ex-Lover's Pregnancy*, ALBUQUERQUE J., Feb. 3, 1999, at A1).

283. *Id.* (citations omitted); *see also* Murray & Winslett, *supra* note 43, at 781–83 (discussing court treatment of tort liability in herpes cases).

284. Fischer, *supra* note 267, at 155 (citations omitted).

285. *Id.* at 158.

286. *Id.* at 155.

287. Henson v. Sorrell, No. 02A01-9711-CV-00291, 1999 WL 5630 (Tenn. Ct. App. Jan. 8, 1999).

288. *Id.* at *3.

289. Fischer, *supra* note 267, at 159. The author contrasted this to fertility patients—who expect to retain control over their eggs and embryos for a very specific use—implantation in themselves. *Id.*

290. *Id.* at 158. The author of this article would like to see the tort of conversion declared inapplicable for policy reasons. *Id.* at 164.

birth, thereby leaving the father's child support obligation untouched.[291]

Had he been a sperm donor in the traditional sense rather than gratuitously giving his sperm, Phillips would have had no liability for the child born from his sperm. Most states have statutes that protect sperm donors from facing the obligations of parenthood by excusing the donor from all rights and interests with respect to children born as a result of the donation.[292] These statutes generally apply to both known and unknown consenting donors.[293] Public policy favoring sperm donation dictates that these consensual donors should be encouraged to donate by shielding them from liability for the children born from their donation.

VII. CONCLUSION

Historically, it has been the woman who has fought for equal standing in the realm of basic human rights. Now, the rights that are being sought are more complex, and the tables have turned in terms of the person seeking the rights. Now it is the man whose rights are in danger. It is the man who is left without protection from the loss of his rights. While he does have the right to not be a father, this right is often breached through forces outside of his control. As a result, he is left paying the consequences for a child he had no intentions of creating in the first place.

The reason for this almost absolute refusal to enforce a man's right to not be a father involves forces that are in direct opposition to this right—a woman's right to her bodily integrity and the child's best interests. Try as they may, men simply cannot overcome these barriers. Even though a man has a constitutionally protected right to avoid procreation, this right must make way for compelling state interests. As a result, men's rights in these areas rarely come to fruition.

In matters dealing with abortion and a woman's refusal to obtain one at the request of the unwilling father, the woman's bodily integrity supercedes the man's procreational rights. This goes both ways—a man cannot force a woman to have an abortion and cannot force a woman to *not* have an abortion. As has been made evident by case law, courts are reluctant to give men this power over a woman's body. As the saying goes, "Her body—her choice." One must keep in mind that this is not because we have a sexist society that favors women. The history of our society

291. *Id.*

292. *See, e.g.*, OR. REV. STAT. ANN. § 109.239(1) (West 2007).

293. *See, e.g.*, McIntyre v. Crouch, 780 P.2d 239, 243 (Or. Ct. App. 1989) (interpreting the scope of Oregon's donor statute).

provides proof that is not the case, but rather it is due to the involvement of a woman's bodily integrity that gives her the power to make the choices of what to do during pregnancy. If a man were the one carrying the child, the tables would be turned. But as it is, there are greater powers present than just a man's desire to *not* be a father that must be weighed against his rights.

An even more compelling interest that supersedes men's rights not to be a father is the best interests of the child. In attempting to assess men's rights when they have been wronged by women, sometimes we forget that the man is not the only victim. Although a man's rights may have been violated, there is a viable life with its own rights[294] that we must not forget to take into consideration.

Sometimes we have to sacrifice our personal liberties in order to provide for the best interests of society as a whole. Sufficiently compelling state interests must prevail. The support of a child has intimate ties to the state and therefore is a very compelling cause. Although he may have suffered some damages—both monetary and emotional—the father has not lost everything. The impact will only stretch out for, at most, eighteen years of paying child support. But the damages to a child who does not receive the appropriate amount of support are far more freedom-restricting and life-changing.

Davis and other preembryo disposition cases have added a new twist to the story. [295] There are two important factors missing from such scenarios—a woman's bodily integrity and the best interests of a child. As a result, courts have been more willing to rule in favor of the man's procreational rights. Although some argue preembryos should be afforded the same rights as a fetus, courts have consistently held they are not viable forms of life and, therefore, are not entitled to the same protections as a viable fetus. As technology progresses, perhaps we will reach a time when pregnancy becomes an impersonal act.[296] With the separation of bodily

294. Arguments involving preembryos tend to support a theory that the preembryos are not a "viable" life form and thus would provide an exception in this instance. *See supra* Part IV.C (detailing preembryo argument and theory).

295. *See supra* Part IV.C.

296. For one law professor's views on this, see Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 303–19 (1990). This article provides an insight into changes in reproduction technology and methods and how those changes can impact the law. *Id.* at 297. The author feels that "[b]y embracing the emerging opportunities provided by advancing technology, the law would enhance individual freedom, fulfillment and responsibility." *Id.* at 303. The author's main contention is that

integrity and pregnancy, men will most assuredly find themselves freer to exercise their constitutional right to avoid procreation.

As mentioned earlier, the changing composition of the Supreme Court could also affect father's rights in this area—should a pertinent case make it to the Supreme Court.[297] A recent case, similar to the fraudulent misrepresentation of fertility cases previously discussed,[298] has garnered much attention. The case was filed in 2006 in the Eastern District of Michigan, and subsequently was dismissed just a few months later in July.[299] In the case, the plaintiff, Dubay, had been ordered to pay child support for an unwanted child conceived after being told by the woman she was using birth control and was infertile.[300] He contended the Michigan paternity statute violated the Equal Protection Clause by not acknowledging his right to choose to be a father.[301] Even though the case was dismissed, Dubay planned on appealing the dismissal.[302]

However, many of the controversial areas that could expand fathers' rights also involve the suppression of women's and children's rights and could undo a great deal of civil rights work that has been accomplished in this country.[303] As a result, courts will likely be reluctant to make any changes. And, in the event a change is made, a backlash by feminist groups would be certain.

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parenthood should be based on intent, rather than through biology. *Id.* at 322–27.

297. *See supra* Part IV.D.

298. *See supra* Part II.

299. Dubay v. Wells, 442 F. Supp. 2d 404, 406 (E.D. Mich. 2006) (dismissing the suit as being "frivolous, unreasonable, and without foundation").

300. *Id.*

301. *Id.* at 405–06. However, "[s]tate courts have ruled in the past that any inequity experienced by men such as Dubay is outweighed by society's interest in ensuring that children get financial support from two parents." David Crary & Darryl Q. Tucker, *Opting Out of Fatherhood?*, SAGINAW NEWS, Mar. 9, 2006, at A2.

302. *See* Erin Alberty, *Attorney: Reluctant Dad Has Options,* SAGINAW NEWS, July 20, 2006, at A9 (quoting Dubay's attorney as saying, "'I don't understand how a lawsuit can be so frivolous when it garners national and international attention, when my office has been contacted by hundreds . . . of people who support us . . . . If it's frivolous, why did the attorney general have to have a press conference when they got involved?'").

303. *See generally* Kim Gandy, *Viewpoint: Father's Rights . . . and Wrongs*, NAT'L NOW TIMES, Summer 2006, http://www.now.org/nnt/summer-2006/viewpoint.html (giving a feminist perspective on the Dubay case and the issues it presents).

Men's rights must be balanced with the rights of society as a whole and, at this time, the best balance is achieved by promoting the interests of the child over those of the parents. Men must take all precautions necessary to avoid facing the liability of an unanticipated child being brought into their lives, just as women should. In order to avoid this problem completely, men should be able to fully trust their sexual partners before engaging in any sexual activity and should take their own preventative measures, such as providing their own contraception. Until there is a radical change in the conception process as we know it, men's reproductive rights will continue to be suppressed in order to provide for the greater good.

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