Sex and Statutory Uniformity: Harmonizing the Legal Treatment of Semen

Myrisha S. Lewis
William & Mary Law School, mslewis01@wm.edu
SEX AND STATUTORY UNIFORMITY:
HARMONIZING THE LEGAL TREATMENT OF
SEmen

Myrisha S. Lewis*

I. INTRODUCTION ............................................................................. 236
   A. Product.................................................................................... 241
   B. Method of Transmission/Distribution................................. 242
II. SEXUALLY TRANSMITTED DISEASES DUE TO
    SEXUAL CONTACT ...................................................................... 245
III. SEXUALLY TRANSMITTED DISEASES DUE TO
    ASSISTED REPRODUCTIVE TECHNOLOGY .......................... 251
IV. MODEL STATUTE IN THE SEXUALLY
    TRANSMITTED DISEASE CONTEXT ......................................... 251
V. LEFTOVER EMBRYOS DUE TO ASSISTED
    REPRODUCTIVE TECHNOLOGY ............................................. 253
   A. Frozen Embryo Disposition .................................................. 254
   B. Model Statute Governing Frozen Embryo Disposition .......... 261
VI. CHILD SUPPORT LIABILITY AS A RESULT OF SEX ............ 264
   A. Child Support Overview ..................................................... 264
   B. Contraceptive Fraud, Sexual Assault, and
      Statutory Rape in the Context of Parentage ...................... 267
      1. Contraceptive Fraud ......................................................... 268
      2. Brief Legal History and Stereotypes ................................. 269
      3. Biology ............................................................................. 271
      4. The Right Not to Procreate Simply Not
         Infringed Upon ................................................................ 272
      5. Attempts to Escape Child Support Liability .................... 273
      6. “But for” Causation Ruined by Birth Control
         Ineffectiveness and Medical Privacy ............................... 276
      7. Evidentiary Issues ............................................................ 277

* The views represented in this article are solely my own and do not
represent those of any employer. I would like to thank Carol Sanger and Calicia
Lewis for their help on my article throughout the process.
I. INTRODUCTION

A teaspoonful of semen and a few minutes are all that are required for the creation of a child or the transmission of a sexually transmitted disease.1 In addition to sexual intercourse (sex), assisted reproductive technology2 is also available as a method of conception and possible disease transmission. Sex,
assisted reproductive technology, and their results face non-uniform legal treatment. This Article will address, analyze, and propose solutions to the many incongruous treatments of sex-related and assisted reproductive technology-related consequences in family law. For example, privacy and autonomy give way to public health concerns when a state court compensates a plaintiff for the unwanted transmission of a sexually transmitted disease, but state courts state that they are guided by these same concepts of privacy and autonomy when they reject contraceptive fraud claims and the requests of other males for the abatement of child support when both unwanted sexually transmitted diseases and unwanted children are generally “transmitted” through the same act—unprotected sex.

Similarly, anonymous donors of eggs and sperm are legislatively exempt from child support obligations, whereas courts deem male requests to be compensated for contraceptive fraud as an attempt to escape a fatherly obligation even though either of the biological parents could finance that obligation. State court decisions, such as these, are not based on a desire to provide “adequate support” for the child but instead based on cultural stereotypes which focus on the outdated nuclear family, and attempt to sustain the male role of “provider” for the family, no matter the context.

Thus, the law inconsistently treats anonymous donors of eggs or sperm and those who have produced children through sex, whether voluntarily or involuntarily. This inconsistency also exists in the reproductive market, a market which effectively ends upon fertilization. The first commercial sperm bank in the

4. See Behr v. Redmond, 123 Cal. Rptr. 3d 97, 116 (Ct. App. 2011) discussed infra at 60-64 and in accompanying text.
5. See Barbara A. v. John G., 193 Cal. Rptr. 422, 431 (Ct. App. 1983); see also infra note 53.
6. See infra note 236.
7. See infra note 168.
8. For a discussion of child support, see infra notes 123–130 and accompanying text.
United States opened in 1970. Now, sperm and eggs are available from donors who are compensated at rates that range from $60–$75 for sperm donation (and up to $100 for men with graduate degrees) to $8,000 per egg donation to university hospitals and even up to $100,000 for the eggs of well-educated women. Vials of sperm sell for $250–$400 each, and eggs generally sell for $4,500. Thus, eggs and sperm are assets at the time they leave their producer, but once they enter another’s body through sex, the eggs and sperm are no longer an assets to the producer; rather, they become a liability to the producer, as indicated by the imposition of child support obligations.

The market ends upon fertilization because market-based structures cede to the “best interests of the child” standard—which mandates child support. However, as this Article will


10. See Martha M. Ertman, What’s Wrong with a Parenthood Market? A New and Improved Theory of Commodification, 82 N.C. L. Rev. 1, 14 (2003) (stating that sperm donors are compensated at $60 per donation); see also Spar, supra note 9, at 39 (“[Donors] contribute a fixed number of times over a relatively short period and receive around $75 per specimen.”).


13. Anyaegbunam, supra note 11 (noting that some agencies pay well over the prices recommended by the American Society for Reproductive Medicine in order to target females attending certain ivy league schools).

14. Spar, supra note 9, at 39. The typical cost of sperm is $300 and the typical cost of eggs is $4,500. Id. at 213.

15. For a discussion of child support, see infra notes 129–32 and accompanying text. See also infra notes 230–235 and accompanying text for a discussion of the absolution of child support liability for anonymous sperm donors.

show, the best interests of the child standard is ignored by artificial insemination statutes, which allow all anonymous donors, and some known donors, to escape child support liability.\footnote{See infra Part VII and VIII.}

In spite of the negative circumstances that can surround the creation of a child—fraud, contravention of artificial insemination statutes, and even criminal activity—courts find the child's best interest to be more important than those of a father who has involuntarily assumed parenthood through male contraceptive fraud, sexual assault, or statutory rape.\footnote{See infra notes 124–28 and Part VI.D.} Furthermore, husbands and “duped donors” sometimes receive more protection from unwanted parental obligations through state statutes than assault victims.\footnote{See infra Parts VI.B for a discussion of failed contraceptive fraud claims made by Sexual Assault victims as opposed to the successful contraceptive fraud claims of a male in the assisted reproduction context as discussed in Part VII.B., especially notes 274–5 and accompanying text.} This is particularly shocking in light of state courts’ implications of a strong right to avoid procreation.\footnote{See Melissa Boatman, Bringing Up Baby: Maryland Must Adopt an Equitable Framework for Resolving Frozen Embryo Disputes After Divorce, 37 U. BALT. L. REV. 285, 308 (2008) (“Courts generally have concluded that the right to avoid procreation outweighs the right to biological parenthood.”); see also Sorrel v. Henson, No. 02A01-9609-JV-00212, 1998 WL 886561, at *3 (Tenn. Ct. App. Dec. 18, 1998) (“Our own Tennessee Supreme Court has stated, ‘the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation.’” (quoting Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992)).}

The aforementioned inconsistencies in family law merit attention both at a societal level, because these inconsistencies are based on outdated stereotypes and images of the family,\footnote{See infra Part VI.B.2.} and at the level of legal tradition, because the identified inconsistencies in family law undermine the legal system's efforts
at consistency. Many scholars have argued for uniformity at
the level of constitutional law, federal law as a general matter,
and state law through the National Conference of Commissioners
on Uniform State Laws (formed in 1892). This Article goes
beyond prevailing scholarship on uniformity to specific
arguments on family law and adheres to the overall position that
uniformity within various legal specialties should also be the goal
of legislation. Family law, especially family law governing
reproduction, child support, and sexual acts, has both civil and
criminal components, which should operate symbiotically.

Due to these developments, the question this Article seeks to
answer is: “How and why is semen treated differently by the law
depending on its context?” After identifying how semen is treated
differently depending on the legal issue (e.g., child support
liability, transmission of sexually transmitted diseases, etc.) being resolved and noting that most of the
reasons for treating semen differently are not compelling, this
Article offers solutions that aim to harmonize the treatment of
semen in family law.

In order to answer this question and formulate solutions, this
Article will conduct a survey of the various categories of semen
transfer and the corresponding legal treatment. The reasoning of
this Article is built on the following model, which identifies the
various methods of semen transfer along with their biological and
legal results:


23. Id.

24. The terms “sexually transmitted disease” and “sexually transmitted infection” are used interchangeably in this Article because the term sexually transmitted disease or “disease” is still used in assorted court cases and legal articles. “Sexually transmitted diseases (“STDs”) are caused by infections that are passed from one person to another during sexual contact. These infections often do not cause any symptoms. Medically, infections are only called diseases when they cause symptoms. That is why STDs are also called ‘sexually transmitted infections.’ Sexually Transmitted Diseases (STDs), PLANNED PARENTHOOD, http://www.plannedparenthood.org/health-topics/stds-hiv-safer-sex-101.htm (last visited Oct. 1, 2012).
As a result of the aforementioned legal uncertainties and an analysis of the contexts focused on in the model above, in an attempt to harmonize law, this Article argues that males who are victims of contraceptive fraud, sexual assault, or statutory rape should not be liable for child support. Instead, they should be treated in the same manner that the law treats anonymous donors under the artificial insemination statute. Due to the reasoning of several state court decisions, this Article introduces model statutes in order to present a legislative embodiment of this argument. The model statutes also address evidentiary and non-disclosure issues that arise due to the private nature of sexual relations and the use of technology in assisted reproduction.

A. Product

Semen is a combination of spermatozoa (commonly and hereinafter referred to as “sperm”) and other secretions from the male reproductive organs such as the testis and prostate. Thus, this Article broadly refers to semen instead of sperm alone due to the mechanics of disease transmission, which are important to this Article’s scope.

25. See infra note 249 and accompanying text.

B. Method of Transmission/Distribution

Semen is a critical product in both reproduction and the spread of sexually transmitted diseases. In reproduction, the successful entrance of sperm into an egg (known as "fertilization") results in an embryo, then a fetus, and finally an infant. This is true for both sex and assisted reproduction.

According to the Centers for Disease Control and Prevention ("CDC"), the term "assisted reproductive technology" includes:

All fertility treatments in which both eggs and sperm are handled. In general, [assisted reproductive technology] procedures involve surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and returning them to the woman's body [as embryos] or donating them to another woman. They do NOT include treatments in which only sperm are handled (i.e., intrauterine—or artificial—insemination) or procedures in which a woman takes medicine


Some diseases, such as HIV infection, gonorrhea, chlamydia, and trichomoniasis, are transmitted when infected urethral or vaginal secretions contact mucosal surfaces (such as the male urethra, the vagina, or cervix). In contrast, genital ulcer diseases (such as genital herpes, syphilis, and chancroid) and human papillomavirus (HPV) infection are primarily transmitted through contact with infected skin or mucosal surfaces.


29. Id.

only to stimulate egg production without the intention of having eggs retrieved.31

In spite of the CDC’s specificity, this Article will use the term “assisted reproductive technology” in the way that it is commonly and not medically used, to refer to all of the aforementioned scenarios (artificial insemination, and stimulation of egg production).32 Assisted reproductive technology does not require the aid of a physician, although some states require physician involvement when determining whether a sperm donor is liable for child support.33

In \textit{in vitro fertilization}, the most commonly used form of assisted reproductive technology,34 a scientist aims to create a viable embryo for implantation.35 This process for \textit{in vitro fertilization} involves “the joining of a woman’s egg and a man’s sperm in a laboratory dish.”36 However, some embryos are left over and their disposition upon divorce creates additional legal complexities.37 The details and relevant impacts of such assisted reproductive technology will be addressed in the analysis of each case or concept.38

In addition to resulting in childbirth, both sex and assisted reproductive technology can facilitate the transmission of sexually transmitted diseases. For example, cases of “HIV-1 transmission through intravaginal insemination with unprocessed donor semen” have been reported, and the CDC warns that no procedure can remove HIV from semen.39

31. Assisted Reproductive Technology (ART), supra note 2.
32. Assisted Reproductive Technology (ART), supra note 2.
33. Presumably, it is this fact that influences certain state statutes, which exempt men from liability, to require that semen must be provided to a licensed physician; these are discussed infra notes 245–49.
34. Assisted Reproductive Technology (ART), supra note 2.
35. See supra notes 27–31 and accompanying text.
37. See infra Part V.
38. See infra Parts III, V.
39. Epidemiologic Notes and Reports HIV-1 Infection and Artificial
Nevertheless, attempts are made to screen out samples that could be harmful under "federal regulation[s], [that require that] all sperm must be kept in storage for at least six months while the donor is repeatedly tested for HIV, hepatitis, and other sexually transmitted diseases." 40 Outside of the laboratory, sexually transmitted diseases are most often transmitted in one of two ways: through contact with "infected body fluids, such as blood, vaginal secretions, or semen" or through contact with "infected skin or mucous membranes." 41 Some of the most common sexually transmitted diseases in the United States are chlamydia, HIV/AIDS, genital human papillomavirus infection ("HPV"), and genital herpes. 42 Most of these common diseases have been the subject of litigation and will resurface in the

---

40. SPAR, supra note 9, at 37–38. Other than this federal requirement, "[i]n the United States, . . . federal regulation is minimal, confined to a single piece of legislation (the Fertility Clinic Success Rate and Certification Act of 1992) without any means of enforcement." Id. at 34. For more on the state regulation of sperm banks, see Vanessa L. Pi, Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer, 16 DUKE J. GENDER L. & POL’Y 379, 384 (2009):

Individual states regulate aspects of the ART process related to sperm donation by licensing sperm banks, controlling the artificial insemination process, and determining parent legitimacy in these situations. Only twenty-four states have created regulatory legislation addressing the operations of sperm banks. Some states set forth specific requirements for artificial insemination. For example, a state can require that artificial insemination must be performed under the supervision of a licensed physician. Others set forth testing requirements and require licensing and registry of all sperm banks.

Id. See also SPAR, supra note 9, at 211–12.


sections of the Article, which analyze liability for the transmission of sexually transmitted diseases.43

II. SEXUALLY TRANSMITTED DISEASES DUE TO SEXUAL CONTACT44

Legal actions are successful against partners who should have disclosed their sexually transmitted disease infection.45 In addition to recognizing successful tort claims for the transmission of diseases,46 some states even have statutes criminalizing the transmission of sexually transmitted diseases.47

43. See infra Parts II, III and IV.
44. This Article only analyzes civil liability resultant from the transmission of sexually transmitted diseases. This civil/tort-based approach does not address the transmission of an STD as evidence of criminal intent or crime. This civil analysis aids in comparing the civil child support liability with civil damages for the transmission of sexually transmitted diseases. For more information on criminal liability for the transmission of sexually transmitted diseases, see Jennifer Grishkin, Case Note, Knowingly Exposing Another to HIV: Smallwood v. State, 106 YALE L.J. 1617 (1997).
46. Matthew Seth Sarelson, Toward a More Balanced Treatment of the Negligent Transmission of Sexually Transmitted Diseases and AIDS, 12 GEO. MASON L. REV. 481 (2003). In both Florida and Alabama transmitting a sexually transmitted disease without the requisite disclosure is a misdemeanor: “Recent additions to the list of states that permit recovery in tort for STD liability include Alabama and Minnesota.” Id. at 481 n.2. “In Florida, for example, it is a first degree misdemeanor for any person who knows he has and can transmit genital herpes, Chlamydia, gonorrhea, syphilis, or HIV, among other named diseases, to other persons without informing his sexual partner of his infection prior to intercourse.” Id. at 487.
47. See id. (The majority of states require that persons infected with HIV or other sexually transmitted diseases disclose this fact to their partners). In addition to Alabama and Minnesota, it is a violation of criminal law to knowingly or intentionally transmit HIV/AIDS through sex—generally without informed consent or disclosure—in the following states: Alaska, Arkansas, California, Colorado (applicable only to prostitution), Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky (applicable only to prostitution), Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania (applicable only to prostitution), South Carolina, South Dakota, Tennessee, Utah (applicable only to prostitution), Virginia, Washington, West Virginia, Wisconsin (applicable only to serious sex crimes as a factor in sentencing). See Staff of Volume 13, State Statutes Dealing with HIV and AIDS: A
Yet, failing to disclose the non-usage of birth control is not an actionable offense and is not criminalized by state statutes. Sexually transmitted diseases such as herpes can be transmitted with "proper condom usage," just as pregnancy can occur even with the use of a condom. But, state courts are more sympathetic to the transmission of disease than unwanted pregnancy. These sympathetic state courts support a "public policy" which engages in governmental interference in order to compensate victims of the transmission of sexually transmitted diseases, but at the same time, these courts evoke a mantra when confronted with the claims of contraceptive fraud victims that believe that "as a matter of public policy the practice of birth control, if any, engaged in by two partners in a consensual sexual relationship is best left to the individuals involved, free from any governmental interference." This result is incongruous. Even if the courts adhere to the view that sexual activity involves risks, both sexually transmitted diseases and pregnancy are risks of sex and therefore, both of these results should be actionable. Thus, the state prioritizes the physical health of its citizens and in this context and ignores their emotional and economic health.

---

48. Oberman, supra note 45, at 891–92.
50. Condoms, PLANNED PARENTHOOD, http://www.plannedparenthood.org/health-topics/birth-control/condom-10187.htm (last visited Oct. 1, 2012) (Condoms have a two percent failure rate if they are always used correctly, and an eighteen percent failure rate if they are not always used correctly).
51. See Oberman, supra note 45.
selected priority, it is possible for the state to ensure that all of these aspects of health—emotional, economic, and physical—are preserved.

Admittedly, if a male victim were physically damaged due to sexual intercourse, he would likely be compensated. Physical damages are more analogous to the damages that result from the transmission of a sexually transmitted disease—sexually transmitted diseases often result in physical damages—thus, in this public health context, the legal treatment of these damages is more equal between the genders. As one state court admitted, albeit in a footnote:

Both parties raise the issue of equal protection under the law. We do not view our holding as raising that issue. A man who suffers physical injury as a result of his female partner's intentional misrepresentation will have the same right to seek at *1 (Tenn. Ct. App. Jan. 8, 1999). For more information, see also Adrienne D. Gross, A Man's Right to Choose: Searching for Remedies in the Face of Unplanned Fatherhood, 55 DRAKE L. REV. 1015, 1045–46 (2007).

54. See Barbara A., 193 Cal. Rptr. at 431 (“We do not think it should insulate from liability one sexual partner who by intentionally tortious conduct causes physical injury to the other. Public policy does not demand such protection for the right of privacy.” (internal citation omitted)).


56. See supra note 55 and accompanying text.
legal redress as does appellant [victim of contraceptive fraud] in the case at bench.57

Thus, the failure to disclose a sexually transmitted disease, the transmission of which can result in physical damages, can cost a defendant millions of dollars whereas failing to disclose the non-usage of birth control results in no liability for the defrauding party.58 Recently, in Behr v. Redmond, a defendant was ordered to pay his sexual partner $72,000 in future medical expenses and $1,575,600 in compensatory damages for the negligent transmission of genital herpes.59 The California Court of Appeal also upheld an award of $2.75 million in punitive damages.60 In sum, it can cost over $3 million to infect someone with herpes and nothing to render someone a parent against his will. Litigation like this shows that the effect of the law is to impose monetary penalties in order to deter the spread of sexually transmitted diseases but to offer no economic penalties to deter "unlawful" pregnancy through fraud, even though both harms involve substantial costs.61 Even under a deterrence theory, it is inconsistent to attempt to deter the spread of diseases and not pregnancy as both occur through the same

57. Barbara A., 193 Cal. Rptr. at 431 n.10 (The court engaged in subsequent equal protection and constitutional analysis).
58. Stephen K. v. Roni L., 105 Cal. App. 3d 640, 642 (1980)("Stephen further alleged that as a 'proximate result' of Roni's conduct he had become obligated to support the child financially, and had suffered "mental agony and distress all to his general damage in the amount of $ 100,000.00. Stephen also sought punitive damages of $100,000 against Roni for having acted 'with oppression, fraud, and malice' towards him.") However, the Court rejected Stephen's claims that Roni should be held liable. Id. at 641; see also Wallis v. Smith, 22 P.3d 686 (N.M. 2001)(where the court held that "the actions asserted here cannot be used to recoup the financial obligations of raising a child."). This would be less than the damages received by Ms. Redmond as "[i]t now costs an average middle-income American family $222,360 to raise a child from birth to 18." Lisa Belkin, The Cost of Raising a Child, http://parentingblogs.nytimes.com/2010/06/25/the-cost-of-raising-a-child/ (last visited Apr. 25, 2011).
60. Behr, 123 Cal. Rptr. 3d at 115.
61. Sarelson, supra note 46, at 508.
Sex and Statutory Uniformity

means—sexual contact. More importantly, the cases of contraceptive fraud resulting in a childbirth, that will be discussed herein, were cases in which sex occurred without a condom. Ms. Behr, the recipient of damages from the creator of Aussie Cosmetics, did not use a condom; however, a California state court saw her as more deserving of compensation than a man who was "duped" into not using a condom and is consequently liable for child support. Cases attempting to use successful legal actions for the transmission of sexually transmitted diseases as the basis for actions seeking compensation for the birth of a child have failed because courts distinguish the two situations. Courts generally rehash the many undesired effects of sex instead of explaining the reason for the decision, but one court noted that an appellant should be compensated for her infection with herpes because the disease is

62. See supra note 40–41; Sarelson, supra note 46, at 509.
63. Usually no condom was used in these cases. See Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Ct. App. 1980); Behr, 123 Cal. Rptr. 3d at 103; Wallis v. Smith, 22 P.3d 682, 683 (N.M. Ct. App. 2001); S.F. v. State ex rel. T.M., 695 So. 2d 1186, 1188 (Ala. Civ. App. 1997), which are all discussed infra.
64. See Behr, 123 Cal. Rptr. 3d at 103.
65. See Stephen K., 164 Cal. Rptr. at 619. "Duped" refers to the lack of honesty in a sexual relationship where one partner represents to another that he or she is using contraception when that is not the case.
67. In Wallis, the New Mexico Court of Appeals wrote “it is important to distinguish the factual allegations of this case from other kinds of related lawsuits, and thus underscore the limited reach of this opinion.” 22 P.3d at 683. The court then listed the kinds of legal actions that can result from failed sexual relations/relationships (sexually transmitted disease, medical complications due to pregnancy, unwanted pregnancy leading to abortion, expense of giving birth), and then told the reader that Wallis’ claim was for “compensatory damages for the ‘economic injury’ of supporting a normal, healthy child.” Id. This listing followed by the statement regarding compensation for the injury of supporting a healthy child was the full extent of the court's distinguishing (and explanation of) the differences between Wallis’ claim and other successful legal claims. See id.
In Kathleen K. v. Robert B., the court reasoned that “there is no child involved, and the public policy considerations with respect to parental obligations are absent.” 198 Cal. Rptr. 273, 275 (Ct. App. 1984).
“serious and (thus far) incurable.” Conversely, child support obligations end when a child reaches the age of majority or after college, whereas the costs and suffering of an incurable sexually transmitted disease will never end.

Beyond the factual differences between the two claims, the constitutional reasoning underlying successful transmission of sexually transmitted diseases actions parallels that of unsuccessful contraceptive fraud claims. In Stephen K. v. Roni L., a contraceptive fraud cause of action, the California Court of Appeal “conclude[d] that as a matter of public policy the practice of birth control, if any, engaged in by two partners in a consensual sexual relationship is best left to the individuals involved, free from any governmental interference.” This parallels the language of the Supreme Court decision, Eisenstadt v. Baird, which held that married and unmarried persons have the same right to contraception under the Equal Protection clause of the U.S. Constitution. In order to come to this conclusion, the Supreme Court reasoned that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Contraception is essential to the decision of whether to bear or beget a child in a sexual relationship. This same contraception can be instrumental in preventing the spread of sexually transmitted disease. If individuals can decide whether to bear or beget a child by exercising their constitutional right to contraception, and

---

68. Kathleen K., 198 Cal Rptr. at 276.
69. See infra Part VI.A and notes 123–130; see also Sarelson, supra note 46, at 484 n.13. For more information on HIV, see infra at note 55.
70. Stephen K., 164 Cal. Rptr. at 621.
71. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“We need not and do not, however, decide that important question in this case because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.”).
72. Id.
73. See supra notes 41 and 50.
diseases are transmitted the same way as children, then the two should not be treated in a legally different manner.74

III. SEXUALLY TRANSMITTED DISEASES DUE TO ASSISTED REPRODUCTIVE TECHNOLOGY

Theoretically, assisted reproductive technology can result in sexually transmitted diseases.75 However, searches failed to reveal cases in which an assisted reproductive technology patient brought legal action against a doctor or donor due to an infection with a sexually transmitted disease. It is, however, a violation to donate semen or eggs when one knows that he or she is infected with HIV/AIDS or another sexually transmitted disease in the following states: California, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Missouri, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, Virginia.76 Thus, if the transmission of a sexually transmitted disease occurred through artificial reproductive technology, it could be legally actionable.

IV. MODEL STATUTE IN THE SEXUALLY TRANSMITTED DISEASE CONTEXT

All of the model statutes proposed in this Article are based upon the principles of uniformity, fairness, and creating remedies for (what should be) legal wrongs. As will be explored below, strict liability is imposed upon males for the creation of a child through sex but not through artificial insemination.77 This first model statute will impose strict liability for the transmission of a sexually transmitted disease instead of only relying on criminal statutes to render a victim “whole.”78 While damages calculations are difficult to standardize, since child support statutes attempt

74. See supra notes 67–68; see also Sarelson, supra note 46, at 509.
75. See infra Part III.
77. See infra Parts VI, VII, VIII.
78. See infra for a discussion of model statutes imposing strict liability.
to provide “adequate” support for a child conceived through sex in a sort of “strict liability,” this statute will attempt to insure adequate medical care for the victims of a sexually transmitted disease. While this statute combines liability for incurable (e.g., herpes, HPV, and HIV/AIDS) and curable sexually transmitted diseases, the itemization of diseases in the statute makes it easier for states to determine which diseases they would like to target for civil liability.

This proposed statute will be modeled on the Alabama Code for the transmission of sexually transmitted diseases because the Alabama statute is a strict liability statute and presents a brief but comprehensive assessment of the various situations where sexually transmitted diseases, including but not limited to HIV (as many other state statutes do), would be transmitted.\textsuperscript{79} Alabama Code \$ 22-11A-21(c) states that “\textit{any} person afflicted with an STD who knowingly transmits, assumes the risk of transmitting, or does any act which will probably or likely transmit such disease to another person is guilty of a Class C misdemeanor.”\textsuperscript{80}

The above-cited Alabama statute is edited to automatically provide for compensatory damages and to leave punitive damages within the discretion of the judge or jury. This model statute includes a provision for an affirmative defense identical to that of a North Dakota Statute on the transmission of HIV/AIDS:

\begin{quote}
It is an affirmative defense to a prosecution under this section that if the transfer was by sexual activity, the sexual activity took place between consenting adults after full disclosure of the risk of such activity and with the use of an appropriate prophylactic device.\textsuperscript{81}
\end{quote}

\textsuperscript{79} For the text of state statutes covering the criminalization of HIV/AIDS (and often other sexually transmitted diseases), see \textit{HIV Criminalization supra} note 47.

\textsuperscript{80} \textit{Ala. Code} \$ 22-11A-21(c) (2011). Chancroid, Chlamydia trachomatis, Gonorrhea, HIV, and Syphilis are reportable sexually transmitted diseases under the Alabama State Board of Health’s regulations. \textit{Ala. Admin. Code} r. 420-4-1.03 (2012).

\textsuperscript{81} \textit{N.D. Cent. Code} \$ 12.1-20-17(3) (2011).
The final statute would read as follows (edits in italics):

(a) Any person afflicted with an STD a sexually transmitted disease, defined as herpes, human papillomavirus, or HIV [Chlamydia, gonorrhea, or syphilis may be added to the list for jurisdictions concerned with more sexually transmitted diseases], who knowingly transmits, assumes the risk of transmitting, or does any act which will probably or likely transmit actually transmits such disease to another person is guilty of a class C misdemeanor—liable to that person for compensatory damages and additionally is liable to that person for punitive damages if the court decides that the incident merits such compensation.\(^8\)

(b) It is an affirmative defense to a prosecution under this section that if the transfer was by sexual activity, the sexual activity took place between consenting adults after full disclosure of the risk of such activity and with the use of an appropriate prophylactic device.\(^8\)

The issue of consent is ignored because this is a strict liability statute and even if someone thought that their consent had been vitiated, it is unlikely that they would have consented with knowledge of the risk of sexually transmitted disease transmission.

V. LEFTOVER EMBRYOS DUE TO ASSISTED REPRODUCTIVE TECHNOLOGY

The right not to procreate\(^8\) is strongly preserved when courts are deciding the disposition of frozen embryos in the divorce.

\(^8\) See supra note 80.

\(^8\) N.D. CENT. CODE § 12.1-20-17(3) (2011). The addition of the affirmative defense of condom usage may preclude inclusion of the human papillomavirus as “... HPV can infect areas that are not covered by a condom—so condoms may not fully protect against HPV.” Genital HPV Infection - CDC Fact Sheet, CTRS. FOR DISEASE CONTROL & PREVENTION, 2 (Nov. 7, 2011), http://www.cdc.gov/std/hpv/HPV-Factsheet-Press-Aug-2012.pdf.

\(^8\) See Boatman, supra note 20, at 307 (“[C]ourts generally have concluded that the right to avoid procreation outweighs the right to biological parenthood.”); see also Sorrel v. Henson, No. 02A01-9609-JV-00212, 1998 WL 886561, at *3 (Tenn. Ct. App. Dec. 18, 1998) (“Our own Tennessee Supreme Court has stated, ‘the right of procreational autonomy is composed of two rights...”)
context, even though the biological fathers, who are known sperm donors of the embryos, obviously intended to create a child.85 The governance of frozen embryo disposition is similar to the governance of artificial insemination insofar as husbands are presumed to have consented to the insemination and creation of the embryos and the resultant legal fatherhood unless written consent is not obtained or the father’s consent is withdrawn.86 Yet, even though anonymous semen donors intended to create a child, they are absolved from the parental responsibility imposed on husbands and victims of birth control fraud, sexual assault, and statutory rape.87

A. Frozen Embryo Disposition

When deciding how to dispose of embryos upon divorce, contracts made during the marriage are often judicially overridden. In the case of In re Witten, the Iowa Supreme Court framed the question of embryo disposition as a matter of “who[m] will have decision-making authority with respect to the fertilized eggs.”88 Had these embryos been fetuses, Tamera, the wife, would have had full control over the future of the fetus; however, the fact that technology was used to create embryos that were not in her body at the time of divorce inevitably changed the court’s considerations.89 Assisted reproductive technology has created a tension between the old doctrine that focuses on a woman’s control of her own body and current technologies that do not

85. One law review comment phrases this in a more positive manner in the context of a contraceptive fraud case, L. Pamela P. v. Frank S., 449 N.E.2d 713 (N.Y. 1983), which found parental obligations for both biological parents: “This decision, which is still good law, seems counter to the rulings in the frozen embryo dispute cases in that it clearly does not give a parent, even one who is deceived into becoming a parent, the right not to be one.” Boatman, supra note 20, at 313.

86. See infra Part VIII and notes 249–250 for a discussion of the rebuttable marital presumption and the written consent requirement.

87. See discussion infra Parts VI.B., C., and D.

88. 672 N.W.2d 768, 776 (Iowa 2003).

89. See id. at 772 (Tamera Witten’s eggs were fertilized with the sperm of her then husband, Trip Witten).
require a woman's body for the creation of a child. A different lower court specifically applied the reasoning of *Roe v. Wade* and subsequent cases to embryo disposition only to be overturned by a higher court.

An instance where the tension between old doctrine and new technology is clearer is the determination of the fate of minors in the divorce context—the best interests of the child. In attempting to decide the fate of the *Witten* embryos, the Iowa Supreme Court noted that the best interests of the child standard that is normally used in child custody decisions was “simply not useful.” Later in this Article, it will be shown that the best interests of the child standard is also “simply not useful” in the known donor insemination, sexual assault, and statutory rape contexts.

Even though artificial insemination statutes require husbands' written consent to the procedure, as will be explained later, courts have held that husbands (and former husbands) are responsible for a child born into the marriage if it is not clear that their consent to the procedure was withdrawn. Yet, a simple “change of mind” is all that is necessary to revoke a prior agreement regarding embryo disposition. For example, after

---

90. Beyond the inconsistencies in the treatment of various forms of conception and results of sex and artificial insemination, there are inconsistencies within categories, such as Artificial Insemination, Frozen Embryos, etc. For example in Iowa, *Estate of Noah Joe Storm v. Northwest Iowa Hospital Corporation* notes that “an unborn child is a ‘covered person’ under an insurance policy . . . [but] a frozen embryo is not a ‘child’ for purposes of Iowa’s child custody laws.” No. C06-4070-DEO, 2006 WL 3487620, at *3 (N.D. Iowa Dec. 4, 2006).


93. *Witten*, 672 N.W.2d at 776.

94. See infra Parts VI, VII and VIII.

95. For a discussion of the liability of husbands whose wives are artificially inseminated, see infra Part VII.A.

96. See *Witten*, 672 N.W.2d at 778 (“If either partner has a change of mind about disposition decisions made in advance, that person's current objection would take precedence over the prior consent. If one of the partners rescinds an advance disposition decision and the other does not, the mutual consent
noting a change of mind, the *Witten* court specifically rejected the contract and held that the two parties had to come to an agreement themselves on the issue.97 Until then, the party who objected to any forced procreation would have to pay for the embryo storage costs.98 In this manner, while the court favored not compelling parenthood, it was careful not to order the embryos destroyed, meaning that in Iowa, theoretically, the right not to procreate has a cost.

However, other states have different approaches that uphold the right not to procreate but result in a different fate for the embryo.99 In a Texas case where the genetic material of the embryos came from both the husband and wife of a divorcing couple, the court upheld an original agreement which stated that any remaining embryos be destroyed upon divorce.100 Once again, the right of the party who did not want to procreate, in this case the semen donor, was upheld, and in Texas, it was without any perpetual cost. Similarly, where the woman wanted the custody of embryos containing both her and her husband's genetic material, the Superior Court of New Jersey's Appellate Division affirmed a lower court order mandating the destruction of the embryos.101 The court's reasoning was that a contract to procreate was against public policy.102

On the other hand, victims of contraceptive fraud, sexual assault, and statutory rape, in essence, have no control over whether they will be parents from the moment that their sperm joins an egg in a woman's body.103 This is the legal result of *Roe* principle would not be satisfied and the previously agreed-upon disposition decision could not be carried out.

97. *Id.* at 782–83.
98. *Id.* at 783.
99. See infra notes 100–102 and accompanying text.
102. *Id.* at 619.
103. See infra note 104 summarizing *Roe v. Wade*.
Sex and Statutory Uniformity

v. Wade and subsequent case law. Embryo disposition upon divorce is one arena of the law where the usual Roe-based biological considerations do not apply and where female autonomy does not outweigh procreational autonomy.

In many states, there is no predictable answer to the question of how to dispose of a frozen embryo. In order to become predictable, other states should follow the lead of Florida, New Hampshire, Texas, and Louisiana by creating a statute covering the disposition of frozen embryos although, in light of changing technologies, it is possible that these statutes will need to

104. See Roe, 410 U.S. at 164–65 (1973). The trimester analysis in Roe was as follows:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. For an overview of the abortion law following the Roe decision, see Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

Farther reaching was Planned Parenthood of Southeastern Pennsylvania v. Casey, which reaffirmed on the merits the Court's understanding in Roe v. Wade of the unique relationship between a pregnant woman and the fetus she is carrying. This relationship, Casey held, implicates so fundamental a dimension of liberty that the choice between carrying her pregnancy to term and terminating it is ultimately the pregnant woman's to make; only an especially weighty countervailing interest can justify the state's displacement of the woman by any other decisionmaker.


105. The term "procreational autonomy" was used in the Tennessee case Henson v. Sorrel: It is "composed of two rights of equal significance—the right to procreate and the right to avoid procreation." No. 02A01-9609-JV-00212, 1998 WL 886561, at *2 (Tenn. Ct. App. Dec. 18, 1998) (internal citation omitted); see also J.B. v. M.B., 783 A.2d 707, 714 (N.J. 2001); Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992).
undergo subsequent revisions. A statute is especially important because judicial decisions in the reproductive sphere

106. Kass v. Kass, 696 N.E.2d 174, 177 (N.Y. 1998) (“A handful of States—New York not among them—have adopted statutes touching on the disposition of stored embryos.”); see, e.g., FLA. STAT. ANN. § 742.17 (West 2011) (requiring couples to execute a written agreement providing for disposition in the event of death, divorce, or other unforeseen circumstances); LA. REV. STAT. ANN. §§ 9:121–9:133 (2011) (clarifying that a pre-zygote is considered a “judicial person” that must be implanted); N.H. REV. STAT. ANN. §§ 168-B:13–B:15, 168-B:18 (2011) (requiring couples to undergo medical exams and counseling and setting a fourteen-day limit for maintenance of ex utero pre-zygotes). There were no cases found where the Florida statute had been adjudicated in a manner that would inform an observer whether these written agreements are always enforceable. The Louisiana statute is as follows:

§ 123. Capacity
An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.

§ 129. Destruction
A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person. An in vitro fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation, is considered non-viable and is not considered a juridical person.

§ 130. Duties of donors
An in vitro fertilized human ovum is a juridical person which cannot be owned by the in vitro fertilization patients who owe it a high duty of care and prudent administration. If the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation in accordance with written procedures of the facility where it is housed or stored. The in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to receive the in vitro fertilized ovum. No compensation shall be paid or received by either couple to renounce parental rights. Constructive fulfillment of the statutory provisions for adoption in this state shall occur when a married couple executes a notarial act of adoption of the in vitro fertilized ovum and birth occurs.

§ 131. Judicial standard
In disputes arising between any parties regarding the in vitro fertilized ovum, the judicial standard for resolving such disputes is to be in the best interest of the in vitro fertilized ovum.
Sex and Statutory Uniformity

often mention "public policy."\textsuperscript{107} While public policy is an unclear but legitimate reason for making a decision, the law should be predictable,\textsuperscript{108} especially on an issue that is so fundamental to an

\footnotesize{LA. REV. STAT. ANN. §§ 9:123, 9:129–131 (2011). In the Louisiana statute, best interests of the child has simply been reformulated by replacing "child" with "in vitro fertilized ovum." § 9:131. Louisiana statutes seem to be a counter-argument to this Article's claim that procreational autonomy and the rights of semen donors are stronger in the frozen embryo context than in other reproductive contexts. According to Chief Judge Kaye's analysis in Kass v. Kass, the fertilized ova have to be implanted; however, men (or women) are still able to renounce their parental rights through Title 9, section 130. Kass, 696 N.E.2d 174. At the same time, the wording of section 130 of Title 9 of Louisiana's Revised Statute seems to assume an intact family unit and the renunciation of rights by the patients plural.}

\textsuperscript{107} Brenda Saiz, \textit{Tort Law: Tort Liability when Fraudulent Misrepresentation Regarding Birth Control Results in the Birth of a Healthy Child—Wallis v. Smith}, 32 N.M.L. Rev. 549, 553 (2002); see also Laura W.W. v. Peter W.W., 51 A.D.3d 211, 217 (N.Y. App. Div. 2008) ("Consistent with our State's strong presumption of legitimacy, as well as the compelling public policy of protecting children conceived via AID, we follow the lead of other jurisdictions that impose a rebuttable presumption of consent by the husband of a woman who conceives by AID, shifting the burden to the husband to rebut the presumption by clear and convincing evidence (see, e.g., In re Baby Doe, 291 SC at 391, 353 SE2d at 878; K. S. v G. S., 182 NJ Super 102, 109, 440 A2d 64, 68 [1981]; People v Sorensen, 68 Cal 2d 280, 283, 437 P2d 495, 497 [1968]. But see Jackson v Jackson, 137 Ohio App 3d 782, 795, 739 NE2d 1203, 1213 [2000] [burden on wife to prove consent by a preponderance of the evidence])."); State ex rel. H. v. P., 90 A.D.2d 434, 437 (N.Y. App. Div. 1982) ("The court, however, did direct the husband to submit to a blood test, inasmuch as such examination 'specifically is authorized by statute and is minimally intrusive.' We believe that because such test has the potential to bastardize the child without settling the issue of paternity it offends this State's public policy, which presumes the legitimacy of children born during wedlock, and, accordingly, reverse."); Anonymous v. Anonymous, 1991 WL 57753, at *18 (N.Y.S. 1991) ("Since I have found that there is a valid, ascertainable contract between the parties obligating the husband to provide financial support for the child, the only question which remains is whether such a contract is unenforceable as a matter of public policy or because DRL § 73 provides the exclusive remedy for assignment of the support obligation. The clear public policy of this state to insure support for all children whenever possible, would appear to support rather than invalidate the contract between the parties here."); Dunkin v. Boskey, 82 Cal. App. 4th 171, 190 (Cal. Ct. App. 2000); Brown v. Gadson, 680 S.E.2d 682, 683 (Ga. Ct. App. 2009)

\textsuperscript{108} Predictability is a concept that is valued in law-making. See, e.g., Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 240 (1970) ("We fully recognize that important policy considerations militate in favor of continuity and predictability in the law."); Ray D. Henson, \textit{Law and Peace: The Problem of Generalizations}, 45 A.B.A J. 1056, 1057 (1959) ("[T]oday's law should
individual—whether to procreate. Moreover, the statutes that do exist are not sufficient. It is unfair to impose such familial obligations or genetic relations after a divorce.\textsuperscript{109} It is easy to understand how a change of mind would occur upon divorce—during the marriage, the couple planned to have a family and a life together, but afterwards, this was no longer a mutual desire. This Texas statute serves as a model for other states because it codifies the preservation of the right not to procreate until the time of implantation that this Article will use as the foundation of a proposed model statute.\textsuperscript{110}

Introducing a theme that will be revisited throughout this Article, non-disclosure surfaces in nearly every form of reproduction. This non-disclosure further complicates embryo disposition in cases where one party was unaware that there were embryos or that assisted reproductive procedures were (still) in use. A statute helps to address the various issues that arise as a result of the use of assisted reproductive technology. In addition to preserving the right to procreate, Texas' statute provides for the disposition of frozen embryos upon divorce that allows for decision-making prior to a divorce and a codification of change of circumstances.\textsuperscript{111}

A Texas-style statute would be especially effective in addressing issues of marital non-disclosure. The underlying facts of a Massachusetts Supreme Court decision on the disposition of frozen embryos revealed that a wife had a pre-embryo (with the genetic material of both the husband and the wife) implanted without her husband's knowledge; he discovered the implantation upon receipt of a notice from his insurance company.\textsuperscript{112} Sometime after this failed implantation, the husband filed for divorce.\textsuperscript{113} Even though the consent forms signed by the husband and the wife stated that in case of divorce, the embryos would be returned to the wife for implantation, the

\begin{footnotes}
\footnote{Divorce is defined as "the legal dissolution of a marriage by a court." \textsc{Black's Law Dictionary} 220 (3d pocket ed. 2006).}
\footnote{\textsc{Tex. Fam. Code Ann.} § 160.706 (West 2011).}
\footnote{Id.}
\footnote{A.Z. v. B.Z., 725 N.E.2d 1051, 1053 (Mass. 2000).}
\footnote{Id.}
\end{footnotes}
court decided that there was a change in circumstances, a recurrent theme in these cases. For future uses, the previous Texas statute should be amended to prevent non-disclosure in marital situations, by requiring the permission of both spouses whose genetic material was being used. There should also be a requirement of spousal notification for artificial insemination until the marital presumption was removed.

B. Model Statute Governing Frozen Embryo Disposition

If technology is used to create a child, there is already an “outsider” both through the science and additional personnel involved and because there are statutes regulating the medical procedures and the health care providers. Technology is important because it reduces the courts’ concern over and dislike of intervention in the family unit; technology has already interfered with the family structure. If consent is required

114. Id. at 1054.
115. Id. at 1055–56.
116. See, for example, Michael H. v. Gerald D., 491 U.S. 110 (1989), discussed infra Part VI.A.
117. This is not referring to the ART that can occur without a physician.
118. Stephen K. v. Roni L., 105 Cal. App. 3d 640, 645 (Ct. App. 1980) (“Courts have long recognized a right of privacy in matters relating to marriage, family and sex.”). However, it appears this privacy is reduced once a physician is introduced into the process.
119. See Michael H., where the court held:

The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned.

491 U.S. at 119–20 (internal citations omitted) (internal quotation marks omitted). “Justice Powell stated . . . ‘Our decisions establish that the Constitution protects the “sanctity of the family” precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.’” Id. at 123–24 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1997) (plurality opinion)). Although the Supreme Court views the sanctity of the family as an important interest, once technology is added, the family is not so insular based on the concept of tradition as assisted reproductive technology was not so widespread in the past. Courts also recognize how complicated technology renders the family. See infra note 293 and accompanying text.
before an initial procedure, then consent should be required for any additional procedures. In addition, while this section generally focuses on the storage or destruction of frozen embryos, this consent-based framework should also apply to the possibility of donating a former couple's embryos to another family, as this would also violate a person's procreational autonomy. Thus, this Article proposes a model statute as follows (original additions in italics):

(a) If a marriage is dissolved before the placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record, kept by a licensed physician, that if assisted reproduction were to occur after divorce the former spouse would be a parent of the child.121

120. This scenario was addressed in Davis v. Davis, a Tennessee case mentioned in A.Z., 725 N.E.2d at 1053, in which the Tennessee Supreme Court ruled that the former wife's desire to donate the couple's embryos to a childless couple did not outweigh the former husband's right to procreational autonomy. 842 S.W.2d 588, 590 (Tenn. 1992). Davis is the source of the concept of procreational autonomy which is analyzed throughout this Article: "For the purposes of this litigation it is sufficient to note that, whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation." Id. at 601. In fact, "The Right of Procreational Autonomy" was the title of one of the sections of the opinion. Id. at 598. In 1992, the year that Davis was decided, the only state with a statute regarding embryo disposition was Louisiana. Id. at 590 n.1.

121. TEX. FAM. CODE ANN. § 160.706(a) (West 2011). A similar statute can be found in Washington state. See WASH. REV. CODE ANN. § 26.26.725 (West 2007). The Washington statute reads as follows:

(1) If a marriage . . . is dissolved before placement of eggs, sperm, or an embryo, the former spouse . . . is not a parent of the resulting child unless the former spouse . . . consented in a signed record that if assisted reproduction were to occur after a dissolution, the former spouse would . . . be a parent of the child.

(2) The consent of the former spouse . . . to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos.

Id. The Washington statute relied upon by a former wife in In re Marriage of Nash, read exactly the same as subsection (1) of section 160.706 of the Texas Family Code Annotated. See In re Marriage of Nash, No. 62553-5-I, 150 Wash. App. 1029, at *7 (Ct. App. June 1, 2009). The Washington Appellate Division ruled that a former wife could not keep pre-embryos that were composed of her
(b) The consent of a former spouse to assisted reproduction may be withdrawn by that individual in a record kept by a licensed physician at any time before the placement of eggs, sperm, or embryos.\textsuperscript{122}

(c) The consent of both spouses or genetic contributors must be obtained before every placement of embryos or the genetic material of one spouse into another.

(d) Before the disposition of any frozen embryos, the permission of anyone whose genetic material is within the frozen embryos must be obtained.

(e) In the case where the two (former) spouses are genetic contributors to a frozen embryo and both do not consent to the disposition of the embryo, the two will split the costs of continued storage.

\textit{i. or, alternatively, based on the legislature’s choice and state populace’s disposition, the words “the two will split the costs of continued storage” could be replaced with the embryo will be destroyed.”}

(f) If one spouse is the sole genetic contributor to the frozen embryo, that spouse shall have the sole power over the frozen embryo’s fate.

Fairness dictates that the spouses split the costs of the continued embryo storage, otherwise, a former spouse indifferent to the fate of the embryos could use embryo storage as a way to impose a cost upon the non-consenting spouse after their divorce. If the two undertook the embryo creation together and the genetic material of both of the former spouses is included, both former spouses should be responsible for the costs of safeguarding the embryo upon divorce. If, however, only one person’s genetic material is located in the embryos, then that person should have the power to destroy them. This is why there is no mention of divorce in subsection (f) as subsection (c) former husband’s sperm and a donor egg. \textit{Id.} Additionally, it emphasized that the initial donor agreement “expired six months after completion of the retrieval procedure.” \textit{Id.} Due to all of these factors, the former wife was not entitled to “any parental obligation or rights to the preembryos.” \textit{Id.}

\textsuperscript{122} TEX. FAM. CODE ANN. § 160.706(b) (West 2007).
provides that the permission of both spouses or genetic contributors will be obtained before implantation. Section (a) also requires consent for separation or divorce because embryos are not only commissioned in marriages, but also by unmarried persons. Even though subsection (c) covers anyone whose genetic material would be implicated, “separation” was added so as to leave room for the statute to apply to unmarried persons, although the term still has a marital tone. Also, the law of the state in which the embryos were created or are currently stored will apply. Since some states allow for the destruction of embryos and others do not, section (e) can either require the sharing of storage costs or the destruction of the embryo.

VI. CHILD SUPPORT LIABILITY AS A RESULT OF SEX

A. Child Support Overview

Child support is “[a] parent’s legal obligation to contribute to the economic maintenance and education of a child until the age of majority, the child’s emancipation before reaching majority, or the child’s completion of secondary education. The obligation is enforceable both civilly and criminally.” 123 Every state has a child support program for which it receives federal enforcement funding. 124 Furthermore, parents cannot, through private contract, bargain away child support because it belongs to the child. 125 If a male and female engage in a sexual act that results

123. BLACK’S LAW DICTIONARY 100 (3d pocket ed. 2006).
125. See, e.g., Budnick v. Silverman, 805 So. 2d 1112, 1113 (Fla. Dist. Ct. App. 2002), Bassett v. Saunders, 835 So. 2d 1198, 1201 (Fla. Dist. Ct. App. 2002). At the same time, children’s rights are sometimes minimized; see Michael H. v. Gerald D., 491 U.S. 110, 130–32 (1989) and its rejection of Victoria D.’s claims. However, whether these were Victoria’s claims is questionable as they were made at the very least by Victoria’s guardian ad litem. Id. It is unclear from the case if they were through the guardian ad litem.
in a child, both parties are responsible for the child's support. The word "sexual act" instead of "sex" is used because various scenarios exist where children have been conceived without sexual intercourse, but their parents are still responsible for their support. Additionally, the word "parent" in the previously cited definition does not mean "biological parent," but rather, "legal parent." The latter discussions of artificial insemination revisit the concept of "paternity by estoppel" which causes people "who promise support of a child at the time of conception by artificial insemination" to be responsible for child support.

---

Id. Victoria was born in May 1981, and the Supreme Court decided the case in 1989. Id. at 110.


128. Frisard, 694 So. 2d at 1040 (holding the male responsible for child support); see Post v. Caycedo, No. 23769, 2008 WL 142449, ¶ 1, 29 (Ohio Ct. App. Jan. 16, 2008). See generally Donald C. Hubin, Daddy Dilemmas: Untangling the Puzzles of Paternity, 13 CORNELL J.L. & PUB. POL'Y 29, 52-61 (2003); Laura W. Morgan, Child Support Fifty Years Later, 42 FAM. L.Q. 365, 371 (2008). This Article assumes sex is generally consensual; otherwise, it falls within the ambit of the later discussion of sexual assault or statutory rape.

129. See L. v. P., 880 N.Y.S.2d 874, slip op. at 12 (Fam. Ct. 2008) (The relevant holding was as follows: "Having weighed the testimony, character and temperament and sincerity of the parties involved and made inquiry into and examination of the facts and circumstances of the case and the surroundings, conditions and capacities of the persons involved in this proceeding, and having reflected upon the testimony and feelings expressed by the child; and having carefully and thoroughly considered the documents submitted into evidence, this Court finds that the Petitioner has established, by clear and convincing evidence, that the best interests of the child would not be served by granting the Respondent's application for DNA testing.").

130. Laura W. Morgan, Who's Your Daddy?: Parenthood for Purposes of Child Support, 31 FAM. ADVOC. 36, 37 (2009). "Recent cases have applied the theory of paternity by estoppel to heterosexual couples and same-sex partners who promise support of a child at the time of conception by artificial
Child support liability also comes with parental rights and while many males do not want child support liability, many females do not want their sperm donors to have parental rights or obligations which would result in the donors being involved in the women’s and children’s lives.\footnote{131} A single parent family is complicated enough, but the addition of an unwanted parent who is not in a relationship with the mother creates additional complexities in the family relationship, especially when the unwanted parent is below the age of majority.

In addition to genetics, child support liability results from the marital presumption. The United States Supreme Court case \textit{Michael H. v. Gerald D.} confirmed this observation.\footnote{132} In that case, Carole D. was married to Gerald D. and she had several adulterous affairs, one of which resulted in the birth of a child who was not related to her husband.\footnote{133} The biological father, Michael H., wanted recognition as a parent and visitation rights.\footnote{134} After several legal proceedings, the case arrived at the Supreme Court where the majority was greatly influenced by “tradition.”\footnote{135} The majority concluded that “[w]here, however, the child is born into an extant marital family, the natural father’s unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to

\begin{footnotes}
\footnote{131. See Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 486 (Ct. App. 2005):}
\footnote{132. 491 U.S. 110 (1989).}
\footnote{133. \textit{Id.} at 113–14.}
\footnote{134. \textit{Id.} at 114.}
\footnote{135. \textit{Id.} at 123–28.}
\end{footnotes}
the latter.” 136 Scalia’s majority opinion then suggested that Michael H.’s acquisition of legal parenthood was a legislative and not a constitutional matter. 137

B. Contraceptive Fraud, Sexual Assault, and Statutory Rape in the Context of Parentage

Men who are victims of birth control fraud, 138 statutory rape, or sexual assault should not be liable for child support. “Birth control fraud” and “contraceptive fraud” are synonymous broad terms that encompass the keeping of sperm the donor thought would be disposed, false allegations of contraceptive usage, and sterility. 139 In general, even if men or women are victims of

136. Id. at 129.
137. “It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.” Id. at 129–30. The model statute proposed in this Article only addresses the marital presumption in the context of artificial insemination.
138. “Birth control fraud” is also called “contraceptive fraud,” see supra note 2 and infra note 140.
139. See Gross, supra note 53; see also Philips v. Irons where it was “alleged that the Defendant obtained sperm from the Plaintiff via oral sex and had herself inseminated with the Plaintiff’s sperm.” No. 05 L 4910, 2006 WL 4472185, at *1 (Ill. Cir. April 18, 2006). Philips went to the Illinois Appellate District and was remanded in 2006 where the trial court found that denied the Motion for Summary Judgment on the intentional infliction of emotional distress claim. No. 1-03-3993, 2005 WL 4694579 (Ill. App. Feb. 22, 2005), remanded, No. 05 L 4910, 2006 WL 4472185 at *1, Apr. 18, 2006 (Ill. Cir. April 18, 2006). But, after the April 18, 2006 decision, no subsequent history of the case exists. Without a final disposition, the case does not merit a detailed discussion within the body of this Article.
The “keeping of sperm that one should not have” can result in “conversion” claims as in Philips v. Irons, but this was unsuccessful: “His claims for fraud and conversion of the sperm were dismissed, but the case was remanded on the issue of intentional infliction of emotional distress that Phillips alleged Irons's actions had caused him.” Adrienne D. Gross, A Man’s Right to Choose: Searching for Remedies in the Face of Unplanned Fatherhood, 55 Drake L. Rev. 1015, 1045–46 (2007).
The essence of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held. Plaintiff is unable to satisfy the second element needed to state a claim for conversion. In light of the foregoing, the third and fourth elements of conversion need not be addressed. Philips, 2005 WL 4694579 at *6. I am including the retention of sperm that the donor intended to be disposed of as part of the term “contraceptive fraud”
contraceptive fraud, they are liable for the consequences.\textsuperscript{140} Instead of adopting a tort- or contract-based approach to these male victims as other commentators have done, this Article suggests that they should be treated like anonymous donors under the artificial insemination statutes.\textsuperscript{141} The treatment of these victims as anonymous donors reduces the prevalence of outdated stereotypes in law, ends civil court preemption of criminal courts, prevents the state from tacitly sanctioning fraud in parentage, and ends a system of transfers from victims to various levels of government. In addition to arguing that these victims should be treated in the same manner as anonymous donors under artificial insemination statutes, inspired by the reasoning of several state court decisions, this Article also proposes a statute.

1. Contraceptive Fraud

The underlying reasons for rejecting contraceptive fraud claims, ignoring evidentiary and legal difficulties, are often illegitimate and based on cultural stereotypes. In order to further understand these stereotypes, this Article presents a brief overview of past paternity statutes before outlining how this differs from the situation in contemporary America. This section is then split into discussions of the specific reasons that courts use to deny such contraceptive-fraud claims.

\begin{footnotesize}
\begin{footnotes}

\end{footnotes}
\end{footnotesize}
2. Brief Legal History and Stereotypes

Child support has been present for centuries although its foundation has evolved. For example, a perusal of an 1892–1893 Atlantic Reporter issue reveals that over 100 years ago, “[t]he object of [child support was] to compel the defendant to indemnify the public and the mother of the child against expenses.”142 These pre-suffrage acts protected women from the harms of single motherhood. Similarly, and fairly, child support statutes ensure that one person, the mother, does not have to shoulder the entire burden of supporting a child who was conceived by two people.

While it is true that women sacrifice more biologically, contemporary pregnancy is a more autonomous undertaking, and women have more control over whether to make this sacrifice.143 A New York state court decision noted that while “bastardizing” the child used to be a worry, “the present social and demographic situation is entirely different.”144 Instead, the rise of sperm banks and single professional mothers shows that motherhood is an opportunity that women embrace, without waiting for men whose support used to be deemed integral.145 In fact, “[e]specially in urban centers such as New York, single motherhood is a common occurrence and often a source of pride and empowerment rather than of stigma and deprivation.”146 The number of births to single mothers has increased over the years since the late 1970s and 1980s.147 This voluntary and often independent assumption of parenthood is unaccounted for in statutes that impose child

143. Katharine K. Baker, Bargaining or Biology?: The Future of Paternity Law and Parental Status, 14 CORNELL J.L. & PUB. POL’Y 1, 67 (2004) (“A biological father gives his sperm. A gestational mother gives: her egg [usually], her liver, her bladder, her iron supply, her pulmonary system, her digestive system, the elasticity of her skin and often her psychological well-being.” (citations omitted)).
145. See id.
146. Id.
147. Id. (“The last decade has shown an enormous rise in births to single mothers.”)
support liability on men even if they did not voluntarily assume parenthood. This Article’s argument on the treatment of contraceptive fraud, sexual assault, and statutory rape victims is based on the premise that “[a] woman shouldn’t be allowed to lie about something as crucial as birth control and then hold the father [liable] for a lifetime of child support.” By analogy, this reasoning is similarly applicable for sexual assault and statutory rape victims.

It is against this backdrop of protecting women, along with evidentiary issues, privacy concerns, and a lack of birth control effectiveness that contraceptive fraud claims are rejected. Men have tried to successfully litigate tort-based and contract-based claims, but these claims have failed. Arguments based on equal protection have also failed. The concerns of state courts that prevent successful claims for contraceptive fraud are myriad and mostly unreasonable. This Article summarizes these claims and

148. Sheryl McCarthy, A Couple's Deal to Use Birth Control is a Deal, Newsday, Nov. 30, 1998, at A34.

149. Gross, supra note 53, at 1019 (“Tort-based claims have been a common route for men in these cases; however, this route seems to have led nowhere. A few have even tried using contract law and rules of civil procedure to recover. Another route for the deceived father to get his case heard has been through claims arising under the Constitution. . . .” (citations omitted); see also Wallis v. Smith, 22 P.3d 682, 683 (N.M. Ct. App. 2001) (“Wallis sued Smith for money damages, asserting four causes of action—fraud, breach of contract, conversion, and prima facie tort—that the district court dismissed for failure to state a claim upon which relief may be granted.”); 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. . . .”).

150. Dubay v. Wells, 506 F.3d 422, 431 (6th Cir. 2007) (“Accordingly, we find that Dubay has raised no viable equal protection challenge to the Michigan Paternity Act.”); see also Barbara A. v. John G., 193 Cal. Rptr. 422, 430 n.10 (Ct. App. 1983) (“Both parties raise the issue of equal protection under the law. We do not view our holding as raising that issue. A man who suffers physical injury as a result of his female partner's intentional misrepresentation will have the same right to seek legal redress as does appellant in the case at bench. Furthermore, although the different treatment of men and women must be examined with strict scrutiny, such treatment may be justified where men and women are not similarly situated. Since it is obvious that men and women are not similarly situated with regard to the risk of pregnancy, any difference in treatment of them which may be perceived in our holding is justified.” (internal citations omitted)).
does not delve into each case individually because contraceptive fraud cases often refer to each other.\footnote{151}

3. Biology

Due to the well-known case, \textit{Roe v. Wade}, women have a limited right to abortion subject to time and other constraints.\footnote{152} While women have a right to abortion, courts reject the idea that a right to disclaim fatherhood would be analogous to a woman's abortion right because (a) men and women vary biologically and (b) the child already exists at the time a father would attempt to disclaim his child support obligation.\footnote{153} Thus, an attempt to equalize men and women through an analogy to the \textit{Roe} framework fails because the attempt to disclaim parental rights occurs after the third trimester has started \textit{and} ended.\footnote{154} In addition, disclaiming parental obligations is not analogous to the regulation of frozen embryo disposition upon divorce because these dispositions occur well before the \textit{Roe} clock starts ticking.\footnote{155} At the same time, the disclaiming of fatherhood need not occur after the child is born. Instead, a father should be able to disclaim parenthood within the first or second trimester or upon being notified of his unintended fatherhood. In terms of solutions, this ability to disclaim fatherhood within the terms of the


\footnotetext{152}{ \textit{Roe v. Wade}, 410 U.S. 113, 132 (1973). This holding was "modified" by \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, 505 U.S. 833, 837 (1992), which altered the trimester approach into an undue burden standard. For a greater discussion of \textit{Roe} and \textit{Casey}, see supra note 104 and accompanying text.}

\footnotetext{153}{ \textit{See Dubay}, 506 F.3d at 430; \textit{see also Sorrel v. Henson}, No. 02A01-9609-JV-00212, 1998 WL 886561, at *4 (Tenn. Ct. App. Dec. 18, 1998) ("... Henson's characterization of the woman's right to abortion as stemming from 'statutory authority' is incorrect. The differing treatment accorded men and women after conception and during pregnancy does not stem from state law, but from the operation of nature, i.e. biology, and from the woman's unique constitutionally protected right to choose either childbirth or abortion.").}

\footnotetext{154}{ \textit{See Roe}, 410 U.S. 113; \textit{see also supra} note 104 and accompanying text.}

\footnotetext{155}{ \textit{See Roe}, 410 U.S. at 113 and 163–64.}
abortion framework is an extreme measure. As an alternative, this Article presents the more easily codified treatment of victimized males as anonymous sperm donors. Even though the legal result—no parental obligations—is the same whether males have the right to disclaim paternity within the Roe framework or to be relieved of paternal obligations through a statute, in terms of the method of obtaining the result, this method would likely be more successful as a matter of legislative and societal appeal because it is more targeted.

4. The Right Not to Procreate Simply Not Infringed Upon

Courts also note that a man’s right not to procreate is not infringed upon by contraceptive fraud. Decisions state that male victims of contraceptive fraud still could have used contraception in order to combat one of the “natural results of consensual sexual intercourse”—childbirth. Conversely, when plaintiffs claim that their partners failed to disclose herpes, HIV/AIDS, or other sexually transmitted diseases, the courts do not investigate the plaintiffs’ use of condoms. Instead, their injuries are generally deemed actionable even though both STDs and pregnancy are the “natural results” of sex. Yet, as mentioned before, state courts’ position that physical damages are actionable for males and females and the fact that sexually transmitted diseases often result in physical damages does not render this argument less compelling than arguments based on

156. See supra note 104, 153–55 and accompanying text.
158. Wallis v. Smith, 22 P.3d 682, 683 (N.M. 2001)
160. See supra Part II.
162. See supra note 55.
gender equality or changing social norms and outdated foundations for the concept of child support.

5. Attempts to Escape Child Support Liability

A major reason for the rejection of contraceptive fraud claims is that courts view these claims as attempts to reduce or "adjust[] a natural parent's obligation to pay child support." But, while the courts proffer the standard of best interests of the child, the courts' interpretations of the best interests of the child standard are conflated with those of the mother. In these conflation cases, the court assumes that if the male is no longer parentally responsible, then the child will not receive half of his or her support. It is not true that the child will necessarily receive less support just because the mother has to support the child on her own. This is because child support is an income-based calculation, meaning that the children of wealthier parents receive more money than those of poorer parents. Because child support is not a fixed allocation of money for each child regardless of economic situation, a parent who disregards the procreative autonomy of another could use more of their income to support their child than the law would usually prescribe.

The concept of adequate child support is based on outdated social and demographic norms, as noticed in the aforementioned Anonymous v. Anonymous case, including dual-parent homes.

164. See supra note 18.
166. Id. at 673.

"Lastly, discriminatory classifications between genders under state law are permissible if substantially related to achieving an important governmental objective. Tennessee's interest in ensuring that children receive adequate support is such an
A dual-parent notion of adequate child support is also less necessary in a world where all children do not receive the support of two parents because their mothers do not want the assistance or involvement of a father or the state. In addition to no longer being the standard family structure, the nuclear family is no longer desired by many women who intend and want to raise a child on their own. Because the child support standard may wrongly assume that mothers want or need the support of the child's biological father, it would not be contrary to the concept of adequate child support to mandate compensation to male victims of contraceptive fraud; the child does not need two parents for adequate support.

Contrary to the prevailing judicial reasoning, the mother's situation and the child's situation should not be conflated. First, the state does not monitor the custodial parent's spending and therefore has no assurance that the proper percentage of support is being spent on the child by the custodial parent unless there is a visible defect in the child's care. Secondly, instead of having the full support of the father, the mother could use more of her discretionary funds on the child, as she would have to do if she had used an anonymous sperm donor.

important governmental objective, and the imposition of support obligations upon biological fathers, including married or unmarried fathers, is substantially related to the achievement of this objective. (concluding that the requirement that all fathers pay child support, regardless of whether they were "willing and intentional fathers," is related to the compelling governmental interest of preserving the welfare of children). Accordingly, any discriminatory effect is constitutionally permissible, and Tennessee's paternity statutes do not violate the Fourteenth Amendment's right to equal protection.

Id. at *4 (internal citations omitted).

169. See Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 786 (Ct. App. 2003) ("Meanwhile, Susan went to the same fertility clinic with the intent of purchasing genetic material from 'two strangers who would contractually sign away their rights' so that 'there would be no paternity case against her, ever.'").

170. See generally id.
Furthermore, the mother’s money is not the child’s. The best interests of the child cannot fully and fairly be determined in a manner where somehow all of the mother’s income is imputed to the child. While courts write “to allow one parent to utilize a plenary action to deflect the statutory obligation onto the other would render [the statute] nugatory,” the decisions in contraceptive fraud cases render victims’ rights and fraud statutes similarly nugatory.\(^{171}\) Courts also worry that such “claims like [a contraceptive fraud victim’s], if successful, could result in the denial of support to innocent children whom the [child support statute] was designed to protect.”\(^{172}\) This worry is unnecessary for several reasons. First, the support laws no longer support all children who reside with one parent, such as the children of anonymous artificial insemination.\(^{173}\) Furthermore, due to the changed role of women in society since child support laws were first promulgated, women no longer need or in many cases, as noted above, no longer want the support of a biological father. These women can more than adequately support their children and definitely should do so when contraceptive fraud was involved in the conception of the child. Instead of 17% of the father’s income going to the child—as required by one state’s child support guidelines—it is possible that a court order could result in 25% of support coming from the mother, the defrauder, and 8% coming from the father, the victim.\(^{174}\) Thus, the usual percentage contribution from the


\(^{173}\) See discussion infra Part VII and VIII of anonymous donor statutes and the legal treatment of known donor insemination.


[The state] court multiplies the adjusted gross income by the standard guideline percentage for the number of children. These percentages are:

- 17% for one child,
- 25% for two children,
- 29% for three children,
- 31% for four children, and
father would be reduced. As the crime was the proximate cause of support, and the provisions for child support do not provide equal, fixed support amounts for all children, forcing a criminal mother to provide a larger percentage of the child’s support would still ensure adequate support for the child. Admittedly, this attempt to numerically manipulate adequate support becomes more difficult in the case of poorer mothers, but poorer mothers receive state aid.

6. “But for” Causation Ruined by Birth Control Ineffectiveness and Medical Privacy

Birth control imperfections ruin tort-based claims. Due to the unavoidable failure rate of contraception, “it cannot be said that but for the misrepresentation of contraception usage, pregnancy would not have occurred.” What is more shocking is that courts use the lack of effectiveness of birth control to justify women’s fraud: “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. Although slight, there is some statistical probability of conception.” While the courts are implying that there is a causation error between one and three percent as to whether a partner’s use of contraception is effective, most scientific methods and even liability standards (e.g., “preponderance of the evidence” and “beyond a reasonable doubt”) are imperfect.

at least 35% for five or more children.

A share of child care, medical, and educational expenses is added to the percentage amount [that the noncustodial parent must pay].


175. See Gross, supra note 53, at 1022.
179. See id.
180. BLACK'S LAW DICTIONARY 556, 594 (3d pocket ed. 2006).
Someone who essentially defrauds another certainly should not be excused from the disclosure required in the sexually transmitted disease context simply because a child could result from sex notwithstanding contraception. It is one thing to accidentally father a child when the precautions you and your partner agreed to failed; it is another to father a child when there were no precautions at all because essentially, your private contractual agreement on autonomy has been ignored which has rendered your right to procreative autonomy irrelevant.

7. Evidentiary Issues

Even if there was a law that absolved men from support obligations or reduced their child support obligations in cases of contraceptive fraud, as would ideally occur, there would be evidentiary difficulties. For example, if there was a law requiring disclosure, then every “man could claim that his partner led him to believe that she was taking oral contraceptives and therefore breached her duty to disclose that she was not using contraception.” This is indeed possible in cases where the only proof is statements between the two partners; however, some female defendants admit that they defrauded the contraceptive fraud victim. Beyond the evidentiary concerns, the problem is that there is no self-help available here: “It would not be practical for laypeople to investigate whether their partners are taking the pill or had surgery to prevent conception. Laws protecting patient confidentiality prohibit doctors from responding to inquiries about contraception and fertility from a patient’s partner.” Thus, even if a partner’s declarations about birth control cannot be proven, when female defendants admit

181. See supra notes 46 and 49 and accompanying text.
182. Oberman, supra note 45, at 918.
184. Oberman, supra note 45, at 910.
that they were taking birth control and then stopped, courts should rule in favor of contraceptive fraud victims.185

Yet, echoing the theme of uncommon treatment, the evidentiary issues surrounding the transmission of sexually transmitted diseases do not impede victims’ pursuit of damages.186 Even though the plaintiff in a sexually transmitted disease action would have the disease at issue, how would one prevent an infected plaintiff from saying that one partner infected him or her when it was someone else? Yet questions like this do not affect the courts’ abilities to support a cause of action for the transmission of a sexually transmitted disease.187 This is analogous to the proof difficulties that arise in the contraceptive fraud context, since one cannot ask his or her partner's doctor about their medication, fertility, or infection with sexually transmitted diseases.188

8. Individualism and State Action

By not punishing the female perpetrators of birth control fraud, courts implicitly deem these fraudulent activities to be acceptable. This gives the impression that courts sanction birth control fraud. Courts rebut this impression by noting that the male plaintiffs could have used their own contraception.189 Hence, statements such as a “respondent’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.”190

186. See Sarelson, supra note 46, at 487.
187. See id. 498–500.
188. Oberman, supra note 45, at 910.
189. For a discussion, see Oberman, supra note 45, at 909–17.
190. L. Pamela P. v. Frank S., 449 N.E.2d 713, 716 (N.Y. 1983). In L. Pamela P., a contraceptive fraud victim argued that the “deliberate misrepresentation of the mother concerning her use of contraception” served as a defense to his child support obligation. Id. at 714. The Court rejected this argument. Id.
However, courts are not adamantly opposed to the protection of legal rights that have not been protected by private actors. For example, the Supreme Court of New Mexico found that a couple could be compensated in tort for a failed tubal ligation that resulted in the birth of an unplanned child. Tubal ligations are a form of contraception, and here a private actor did not respect this woman's entitlement to avoid procreation. While this action differs from "other" contraceptive fraud cases because this is not a case between a provider of semen and a woman, under state court reasoning, this is still an attempt to avoid child support liability. Even though the married couple here is not requesting to be relieved of their child support obligation, they are requesting damages, just as male victims of contraceptive fraud have done. Yet, the New Mexico court did not deem this to be an attempt to avoid one's parental obligation. Instead, the court held:

[T]hat the Mendezes' interest in the financial security of their family was a legally protected interest which was invaded by Lovelace's negligent failure properly to perform Maria's sterilization operation (if proved at trial), and that this invasion was an injury entitling them to recover damages in the form of the reasonable expenses to raise Joseph to majority.

192. "A tubal ligation—also known as having your tubes tied or tubal sterilization—is a type of permanent birth control. During a tubal ligation, the fallopian tubes are cut or blocked to permanently prevent pregnancy. A tubal ligation disrupts the movement of the egg to the uterus for fertilization and blocks sperm from traveling up the fallopian tubes to the egg." Tubal Ligation: Definition, MAYO CLINIC http://www.mayoclinic.com/health/tubal-ligation/ MY01000 (last visited Oct. 5, 2012).
193. See supra Part VI.B.
194. Mendez, 805 P.2d at 612.
195. Id. (The New Mexico Supreme Court found the calculation of damages to be a difficult activity and remanded the case for these calculations along with the adjudication of other procedural issues). Other states have also recognized such a cause of action.; see Provencio v. Wenrich, 261 P.3d 1089, 1092 (N.M. 2011) ("New Mexico, California, Oregon, and Wisconsin . . . permit full recovery for child-rearing costs without a potential offset to the doctor.").
There is a lack of uniformity in the law here because just as birth control and condoms are not 100% effective, obviously sterilization is not either. However, if a private actor who fails to recognize a person’s right to procreate is a physician—the same person who would write a hormonal birth control prescription—then a court will find a cognizable claim for damages. A contraceptive defrauder should not be exempt from breaking the law just because she is a mother and not a physician. But this is exactly what courts do when they find that a physician’s disrespect for a person’s preferred contraception bars a claim for the damages. California courts, for example, regard the factual circumstances underlying a “defrauded” plaintiff’s claims as an “otherwise entirely private matter” for which the state “has minimal if any interest.”\(^\text{196}\) However, courts should be interested in any private matters with such broad public implications, whether they are muggings, Ponzi schemes, or the loss of over 17% of one’s income for eighteen to twenty-one years due to contraceptive fraud.

C. Sexual Assault

In *S.F. v. ex rel. T.M.*, an Alabama case in which a woman had nonconsensual sex with an intoxicated, unconscious man several times resulting in the birth of a child.\(^\text{197}\) First, the unconscious man was held liable for child support.\(^\text{198}\) The fact that this man was held liable for the results of a rape should merit outrage—both judicial and social. Had this been a woman, there would be no question that this was a terrible violation of autonomy and physical well-being. Second, this male rape victim pled to the courts for equitable treatment: “He further contended that the court, acting in equity, could abate any child support payments due because of what he alleged to be T.M.’s sexual assault upon him.”\(^\text{199}\) Equity is supposed to result in fairness, but discussions in the contraceptive fraud, paternity by estoppel, and

198. *Id.* at 1187.
199. *Id.*
artificial insemination contexts reveal that equity is generally only used to impose parental obligations, not to remove them.\textsuperscript{200} Equity is one-sided in family law when it is applied to parental obligations. Equity is already a subjective concept and its inability to help victims of sexual crimes should alarm not only proponents of victims' rights but also legislators. The legal system should not support the further victimization of sexual assault victims by forcing them to be legally responsible for the results of an illegal act.

Voluntary action should be required for parenthood.\textsuperscript{201} S.F., the victim in the Alabama sexual assault case, argued that Alabama's artificial insemination statute required voluntary action by the biological father in order to impose the rights and obligations of parenthood.\textsuperscript{202} Procedurally, however, he did not raise this issue in the trial court, so it was not considered on appeal.\textsuperscript{203} Even though we do not know how the courts would have ruled on this issue, this Article proposes a model statute that reduces the reliance of these sexual assault victims on (unreliable) equity for a legal result, which would respect the trauma that they have experienced. This model statute will seek to achieve the same results for sexual assault victims as the law creates through artificial insemination statutes for anonymous donors. Using the artificial insemination statutes for anonymous donors as a guide avoids judicial consideration of a major obstacle facing male assault victims—the best interests of the child standard.\textsuperscript{204} Statutes that allow anonymous donors to escape parental obligations and rights inherently reject current

\begin{footnotesize}
\begin{enumerate}
\item[200.] Inez M. v. Nathan G., 451 N.Y.S.2d 607, 611 (Fam. Ct. 1982) ("Equity has long lamented that the law cannot remedy all ills. Recognition of the limits of effective legal action does not mean that the law approves conduct deemed beyond its reach.").
\item[201.] See S.F. v. State ex rel. T.M., 695 So. 2d 1186, 1188 (Ga. 1997); see also Ruth Jones, Inequality from Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting from Their Victimization?, 36 GA. L. REV. 411, 418 (2002); see infra Part VI.D.
\item[202.] S.F., 695 So. 2d at 1188.
\item[203.] Id.
\item[204.] Id. at 1189 ("[T]he interests of the child are our paramount concern and take precedent over the interests of the other parties involved.").
\end{enumerate}
\end{footnotesize}
state judiciary interpretations of the best interests of the child standard as discussed earlier.205

The claims of sexual assault victims are more compelling than the “usual” contraceptive fraud victims both inherently and “evidentiarily.” In S.F. v. State ex rel. T.M., a friend of the male victim,

tested that approximately two months later he had had a conversation with T.M. in which she told him that she had had sex with S.F. while he was passed out and that it had ‘saved her a trip to the sperm bank.’ S.F. presented testimony from two other witnesses who testified that they had heard T.M. brag about having sex with S.F. while he was passed out.206

It is clear from the testimony that S.F. did not consent to the sex that “saved [T.M.] a trip to the sperm bank.”207 T.M. assaulted a man in order to obtain something that could be legally and commercially obtained.208 And under a standard of best interests of the child, where the mother’s economic well-being is conflated with the child’s, she surely should not be able to profit from this assault through child support payments.

In S.F., the court “note[d] that the father could have filed criminal charges against the mother.”209 However, criminal charges cannot compensate or render financially whole the male assault victim who still has the obligation to support an unwanted child until at least the age of majority.210 Also, it is possible that these criminal proceedings would not even be within the ambit of the often-present best interests of the child standard. The law seems to put a preference on dual-parent families or at least support from two parents, but it would not be in the best interest of the child to have one parent in jail.211

---

205. See supra notes 93–94 and accompanying text.
206. S.F., 695 So. 2d at 1188.
207. Id.
208. See supra notes 9–14 and accompanying text.
209. S.F., 695 So. 2d at 1189.
210. See supra note 123 and accompanying text for definition of child support.
211. See, e.g., S.F., 695 So. 2d at 1189 ("[The] father’s recourse under the law as to the mother of the child in this matter, was to file criminal charges against her. To penalize this child for the mother’s actions would run contrary
Under the logic employed by courts, where the best interests of the child are conflated with the mother's, the result would be that the custodial mother could not even go to jail. Of course, this is not to argue that mothers should be free from jail terms due to the best interests of the child, but only to show how the best interests of the child standard cannot actually reign supreme. Furthermore, “a biological father who fails to pay child support to his child’s mother faces the possibility of incarceration, which is perhaps the ultimate deprivation of liberty.”212 If a father can face jail for non-payment of child support, then financial liability for what should be a crime pales in comparison.

D. Statutory Rape

If underage victims cannot even consent to sex, they should not be able to consent to parenthood.213 Instead, currently, underage victims' inability to consent for criminal purposes leads to civil liability, even though there are two children's best interests to consider when statutory rape occurs.214 As a general matter, courts deem children to be a class deserving of more legal protection, which is why children’s best interests can outweigh the best interests of adults. But, the best interests of a newborn should not outweigh the best interests of a child rape victim; the line drawing is arbitrary, as both the biological father and the newborn are children.


213. E. Gary Spitko, The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-parenting of Her Child, 48 ARIZ. L. REV. 97, 116 (2006) (“The theory behind statutory rape is that a minor cannot legally consent to sex because of [his or] her young age. Among the important purposes of statutory rape laws is the prevention of teenage pregnancy.”) (footnote omitted).

Treating statutory rape victims in the same manner as anonymous donors in artificial insemination statutes ends the second-guessing of criminal decisions by family court judges. This uniform treatment also reduces the inconsistent application of the best interests of the child standard. Through statutes absolving anonymous donors of legal liability, states ignore the existence of an additional biological father who could pay support and who obviously donated his semen to create a child. A statutory rape victim did not intend to create a child and could not criminally consent to the act that resulted in the birth of the child, and therefore, the victim should not be liable for a child support obligation. Other commentators have noticed that the era's social norms affected the creation of statutory rape laws—similar to those on child support—"[s]pecifically, statutory rape laws are being enforced according to cultural stereotypes of women as sexual victims and men as sexual aggressors."

These stereotypes reduce sympathy for male victims and lead to judicial decisions that include statements, such as "[t]he law should not except Nathaniel J. from this responsibility because he is not an innocent victim of Jones's criminal acts. After discussing the matter, he and Jones decided to have sexual relations. They had sexual intercourse approximately five times over a two week period." Nathaniel J.'s "decision" to have sex with a thirty-four year old woman, an activity that he could not legally consent to, in no way renders him any less of a victim of a

215. See infra notes 210, 216–218 and accompanying text.
216. Baker, supra note 141, at 10 ("Most states have statutes divesting a man who voluntarily sells or donates his sperm of all parental rights and obligations, as long as the insemination using his sperm is performed by a licensed medical professional.").
217. For more information on statutory rape victims, see Jones, supra note 201, at 412–13. For decisions, see County of San Luis Obispo v. Nathaniel J., 57 Cal Rptr. 2d 843 (Ct. App. 1996) and infra notes 220–41 and accompanying text.
218. Jones, supra note 201, at 412; see London, supra note 126, at 1974–75 ("Ruth Jones explains that statutory rape laws were drafted—and are enforced—in light of the female experience...[and] Jones analyzes the failings of the strict liability in the context of equality, primarily arguing that 'while young men and young women are dissimilar in their ability to become pregnant, they are similar in their need for protection by statutory rape laws.'").
219. Nathaniel J., 57 Cal. Rptr. 2d at 845 (emphasis added).
crime. First, Nathaniel J. could not legally consent to the act, and second, had he been a female victim of statutory rape, it is doubtful that a court would say she was not an “innocent victim.” And if a civil court would deem any sort of statutory rape victim not to be an innocent victim, regardless of the victim’s gender, this pronouncement chips at a core principle of the American justice system—due process. There is no record of this judge examining all of the evidence of this case and relying upon expert testimony so as to determine this victim’s mental state. If anonymous donors do not have support liability then neither should victims of statutory rape, and judges should not be able to undermine criminal statutory rape laws.

Similarly, the same conflation of the child’s and the mother’s financial situation arises in the statutory rape context. In determining that a statutory rape victim was liable for child support, the Court of Appeals of Wisconsin wrote, “[e]ven assuming that L.H. criminally assaulted appellant, child support is paid to benefit the child, not the custodial parent. The custodial parent receives support payments in trust to be used for the child’s welfare.” This statement on the idea underlying the distribution of child support from mothers to children reveals a flaw of child support in fraud and assault cases: the state is trusting a woman, who defrauded or criminally assaulted someone and then subsequently insisted upon obtaining support from that victim, with trusteeship over a minor’s care. If the state wanted to ensure that the children actually received this

222. In re Paternity of J.L.H., 441 N.W.2d 273, 276 (Wis. Ct. App. 1989) (citing Francken v. State, 209 N.W. 766, 772 (Wis. 1926)). In re Paternity of J.L.H. and its reasoning of child support being “in trust” was also used in a Court of Appeals of Minnesota case. See Jevning v. Cichos, 499 N.W.2d 515, 517 (Minn. Ct. App. 1993). But see Alice D. v. William M., 450 N.Y.S.2d 350, 354 (Civ. Ct. 1982) (While upholding a woman’s recovery for an abortion, the Court wrote “[w]hile it is true that the alternative methods of birth control which the claimant would have used had she not relied upon the defendant’s misrepresentation are not one hundred percent effective, these methods are far superior to sexual intercourse without the use of any contraception. Therefore the remote chance the pregnancy might have resulted in any event is not sufficient to deny the claimant recovery.”).
money, perhaps the state should actually create a trust, where a criminal mother is not the primary person responsible for outlays of support money.

1. Transfers

Statutory rape victims should not be forced to participate in a system of transfers from victims to various levels of government. As has been alluded to earlier in the Article, poorer women who do not have dual incomes to provide all of the necessary support to their families have governmental aid through welfare programs to support them. This governmental aid imposes additional burdens on crime victims and additional tacit state support for the further victimization of statutory rape victims. For example, Nathaniel J., already a victim of a crime, was sued by the San Luis Obispo County District Attorney’s office for child support and welfare reimbursement. Even though, under current statutes, as a biological father, Nathaniel J. would be required to support his child, Nathaniel J. argued “exacting child support from a victim of statutory rape violates public policy.” His claim was rejected. In effect, the state’s message was that Nathaniel J. was indeed a victim, but his needs did not come before the needs of the state or the child he unwillingly fathered. Similarly, the state in some ways sympathized with

223. See, e.g., Jones, supra note 201, at 411, 449–50.
224. Id. at 456–57.
225. Nathaniel J., 57 Cal. Rptr. 2d at 844.
226. Id. Nathaniel J. also argued that a California constitutional provision providing that “all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer” applied to him. Id. at 844 (quoting Cal. Const., art. I, § 28(b)). This argument was rejected by the Court of Appeal in favor of California child support law. Id.
227. Id.
228. Id. at 844–45. Some courts focus their analysis on the rights of the newborn child to bring an action. See, e.g., Linda D. v. Fritz C., 687 P.2d 223, 227 (Wash. Ct. App. 1984) (“The UPA, however, gives the child the right to bring an action for back support, and requires that the child be made a party to the paternity and child support action when instituted by the natural mother.” (citing Nettles v. Beckley, 648 P.2d 508 (Wash. Ct. App. 1982))). However, this rationale does not ruin this Article’s argument because children are still not allowed to institute these actions against their anonymous sperm donor fathers.
Nathaniel J.'s position by not enforcing a child support order until Nathaniel J. was an adult who would be able to pay the support obligation. Nevertheless, Nathaniel J.'s child support obligation was simply postponed; it continued to accrue through the age of eighteen and beyond. This Article's model statute would completely eliminate liability for children like Nathaniel J.

Outside of California, many other states hold statutory rape victims liable for child support. In Minnesota, the county and a female statutory rapist sued the child victim and won, forcing the victim to pay child support. Also, in Kansas, a lower court required a statutory rape victim to reimburse the Department of Social and Rehabilitation $7,000; the state continued the argument that a child's age has nothing to do with the question of biological fatherhood. If the purpose of statutory rape laws is to protect children from being exploited by adults, there is a flaw in this application and the system of transfers shows that the laws are failing to meet this purpose. Instead of protecting statutory rape victims, these decisions forcing statutory rape victims to be liable for child support and to reimburse various levels of government only serve to continue exploiting the victims long after the crime was committed.

229. Nathaniel J., 57 Cal. Rptr. 2d at 846 (quoting District Attorney's statement at July 19, 1995: "[O]ur office is seeking to establish paternity. We are not seeking a child support order . . . until such time as the minor becomes an adult and is able to pay support." (internal quotation marks omitted)).


231. State ex rel. Hermesmann v. Seyer, 847 P.2d 1273, 1280 (Kan. 1993) ("When questioned in oral argument about the policy of SRS in seeking a judgment in excess of $7,000, counsel replied with the surprising statement that SRS had no intention of ever attempting to collect its judgment. Under such circumstances, the reason for seeking that portion of the judgment still eludes us.")

2. Treatment of Female Statutory Rape Victims as Precedent for the Elimination of Support Obligations

In *DCSE/Esther M.C. v. Mary L.*, a female incest victim was excused from child support liability, which provides a basis for an excusal of statutory rape victims from child support liability.\(^{233}\) In that case, the Delaware code included a provision stating that "[n]o person shall be required to support another while he has just cause for failing or refusing to do so,"\(^{234}\) and the Delaware court decided that rape or incest qualified as "just cause."\(^{235}\) However, even if other states do not have a statutory provision providing for child support exceptions, a just cause exception permits another avenue for state courts to have discretionary authority in order to impose principles of equity.\(^{236}\) This would be a progressive initial step. The family court judge then distinguished this case from other cases involving male statutory rape victims such as *State ex rel. Hermesmann v. Seyer*,\(^{237}\) by stating that the courts in other cases did not inquire into whether the statutory rape was voluntary.\(^{238}\) The court then stated the following rule:

To the contrary, in each of the cases, the respective Court appeared to infer from the factual assertions that the sexual intercourse was voluntary. Where voluntary intercourse results in parenthood, then for purposes of child support, the

---

234. Id. at *2 (quoting DEL CODE ANN. tit. 13, § 506 (1994)).
235. Id. at *3. For a discussion of this case, see Jones, *supra* note 201, at 417–18.
236. Jones, *supra* note 201, at 447 ("Most child support laws have a general exemption that permits courts to exclude some parents from child support obligations in the interest of justice. However, given the difficulty in actually recovering support for children, courts have been extremely reluctant to excuse parents from their child support obligations. Typically, states have only permitted an exception for child support enforcement in circumstances where the parent lacks the ability to pay or when pursuit of support could endanger the mother, such as when the mother has been the victim of forcible rape or domestic violence." (citations omitted)).
parenthood is voluntary. A parent's duty to support the child flows directly from his voluntary parenthood.239

As a result, the case was remanded in order to determine whether actual consent—not legal consent—was present.240 While this seems to be an inferior alternative, it seems that had the other state courts truly inquired into whether this intercourse was voluntary, it is possible that some statutory rape victims could be saved from the unfair imposition of child support liability.

If legislatures want to pursue the alternative of judicial determination of victims' innocence and mental capacity to consent, these courts could conduct evidentiary hearings with psychiatrists, medical experts, and witnesses. This alternative is not preferable because statutory rape victims cannot consent to parenthood when there is a statute stating that the child cannot consent to the sexual act that would result in parenthood. However, if this alternative were codified, this statute would address the lack of process that arises when civil court judges decide if children were innocent victims. Furthermore, victims in states without unreasonably proactive judges may be able to take advantage of codified equity. With the alternative approach, perhaps a few statutory rape victims would be excused from liability if courts determined that they were indeed exploited.241

E. Model Statute Addressing Involuntary Reproduction

The Texas artificial insemination statute is adapted here so as to legally mandate that the treatment of contraceptive fraud victims, statutory rape victims, and sexual assault victims be the same as that of anonymous sperm donors. Simply and concisely, Texas code provides that "[a] donor is not a parent of a child conceived by means of assisted reproduction."242 For states that

239. Id; see also Seyer, 847 P.2d at 1278 (concluding that consent to sexual activity is irrelevant when making determinations regarding the payment of child support).
241. For more on exploitation, see Franklin, supra note 232.
refuse to create a new statute for statutory rape victims, a just cause exception could be added to the child support statute. Otherwise, states should adopt the following edited Texas artificial insemination statute (edits in italics):

(a) A donor male is not a parent of a child conceived by means of assisted involuntary reproduction.243

(b) “Involuntary” reproduction means any action

(i) That would be classified as statutory rape meaning that any pleadings to lesser charges do not affect the applicability of this statute

(ii) In which a female mother states that she is using hormonal contraception and in reliance, the male has unprotected sex with her

(iii) That would be classified as a sexual assault under criminal code

(c) As a result of this lack of parenthood, males covered under section (b) will not have parental obligations and will be treated as anonymous donors.

This Article limits section (b)(ii) only to hormonal birth control fraud due to the low probability that it would fail if used properly, as compared to other methods of contraception; the goal of the statute is to compensate those who were duped into using no contraception, not those whose contraception failed.244

VII. CHILD SUPPORT LIABILITY FOR ANONYMOUS DONATION OF SPERM

Anonymous sperm donors are generally statutorily absolved of the duty to support the children that they genetically father,

243. Id.

244. See supra note 58 for a discussion of Stephen K. See also Comparing Effectiveness of Birth Control Methods, PLANNED PARENTHOOD, http://www.plannedparenthood.org/health-topics/birth-control/birth-control-effectiveness-chart-22710.htm (last visited Sept. 30, 2012). The following result in 2 to 9 pregnancies out of 100 per year: Shot (Depo-Provera), Pill, Ring, Patch. Id. These methods would be acceptable under the model statute. The following result in 15 to 24 pregnancies out of 100 per year and are not acceptable methods of contraception under the model statute: Male Condom, Diaphram, Female Condom, Cervical Cap, Sponge, Fertility-Awareness Based Methods. Id.
even though they obviously intended the samples to result in a child.\textsuperscript{245} In contrast, equity is used to impose liability on husbands whose statutorily required written consent or other requirements were not fulfilled, although the child is not related to the husband.\textsuperscript{246} Artificial insemination statutes vary from state to state.\textsuperscript{247} Most states have artificial insemination statutes, although some, like Maine, do not.\textsuperscript{248} "The majority of states . . . have enacted statutes concerning artificial insemination [that] state that the husband of a married woman bears all rights and obligations of paternity as to any child conceived by artificial insemination, whether the sperm used was his own or a donor's."\textsuperscript{249} Statutory requirements are often ignored

\textsuperscript{245} See Baker, \textit{supra} note 141, at 10 ("Most states have statutes divesting a man who voluntarily sells or donates his sperm of all parental rights and obligations, as long as the insemination using his sperm is performed by a licensed medical professional.").

\textsuperscript{246} See Laura WW. v. Peter WW., 856 N.Y.S.2d 258, 262 (App. Div. 2008) ("Certainly, situations will arise where not all of these statutory conditions are present, yet equity and reason require a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child [such as in a case similar to one that] 'not[ed] the statute does not provide a result where AID [artificial insemination donation] is performed by someone other than a 'duly authorized' 'physician,' but that status of the medical professional should not impact the legitimacy of child'").


\textsuperscript{248} See \textit{In re Guardianship of I.H.}, 834 A.2d 922, 924 (Me. 2003) ("Maine has neither statutes nor case law regarding anonymous sperm donors.").

\textsuperscript{249} \textit{In the Interest of K.M.H.}, 169 P.3d 1025, 1033-4 (Kan. 2007):

The majority of states that have enacted statutes concerning artificial insemination state that the husband of a married woman bears all rights and obligations of paternity as to any child conceived by artificial insemination, whether the sperm used was his own or a donor's. \textit{See, e.g.}, ALA. CODE § 26-17-21(a) (1992) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."); \textit{see also} CAL. FAM. CODE § 7613(a) (West 2004) (same); COLO. REV. STAT. § 19-4-106(1) (West 2005) (same); ILL. COMP. STAT. ch. 750 40/3(a) (West 1999) (same); MINN. STATE § 257.56 Subd. 1 (2007); MO. REV. STAT. 210.824(1) (2000) (same); MONT. CODE ANN. § 40-6-106(1) (2005); NEV. REV. STAT. § 126.061(1) (2005) (same); N.J. STAT. ANN. § 9:17-44(a) (2002) (same);
in this arena due to equity and a "rebuttable marital presumption."250 Because equity is one-sided in the anonymous sperm donation and contraceptive fraud contexts, although statutes relieve anonymous sperm donors of support obligations, this Article argues that these statutes should be amended so as to apply to discernible victims of contraceptive fraud, statutory rape, and sexual assault, as evidenced in the model statute.

A. Liability for Husbands Whose Wives are Artificially Inseminated by Anonymous Donors

While the men who anonymously donate sperm are generally not responsible for parental support, husbands whose wives are inseminated with these anonymous sperm samples are required to support the child, even if statutory writing requirements were not followed.251 Ignoring these writing requirements leads to inconsistency in the treatment of semen in the law of reproduction and disease transmission and also in the interpretation of statutory law. The writing requirements are not always ignored, such as in a New York divorce action where the

N.M. STAT. ANN. § 40-11-6(A) (Michie 2006) (same); OHIO REV. CODE ANN. § 3111.95(A) (Anderson 2003) (similar); WIS. STAT. § 891.40(1) (2005-06) (same). Further, several of these states' statutes provide that a donor of semen used to inseminate a married woman will not be treated in law as the father of any child conceived, if he is not the woman's husband. See, e.g., ALA. CODE § 26-17-21(b) (1992) ("The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."); MINN. STAT. § 257.56 Subd. 2 (2007) (same); MO. REV. STAT. § 210.824(2) (2000) (same); MONT. CODE ANN. § 40-6-106(2) (2005) (same); NEV. REV. STAT. § 126.061(2) (2005) (same). One court has observed that these two rules protect the expectations of the married couple, the best interests of the child, and the expectations of the donor. See People v. Sorensen, 68 Cal. 2d 280, 284–88, 66 Cal. Rptr. 7, 437 P.2d 495 (1968).

250. Laura WW., 856 N.Y.S.2d at 263. "Consistent with our State's strong presumption of legitimacy, as well as the compelling public policy of protecting children conceived via AID, we follow the lead of other jurisdictions that impose a rebuttable presumption of consent by the husband of a woman who conceives by AID, shifting the burden to the husband to rebut the presumption by clear and convincing evidence." Id. (internal citations omitted).

court ruled that since the husband’s consent to the artificial insemination was not obtained in writing, he was not liable for the care of the child under the statute. But even after such statutorily accurate decisions, the New York court noted that,

[c]ertainly, situations will arise where not all of these statutory conditions are present, yet equity and reason require a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child.

This statement alludes to the many inconsistencies in the treatment of sperm in the assisted reproduction context. Equity can be used to override a statute which reduces the predictability of the law. The overriding of a statute by equity also gives rise to the query of why equity can impose liability on an unrelated parent whose child was created through artificial insemination but not relieve a statutory or adult rape victim of liability. The omnipresent best interests of the child standard arises here, and the previously mentioned New York court noted that “the best interests of children and society are served by recognizing that parental responsibility may be imposed based on conduct evincing actual consent to the artificial insemination procedure.” New York and other states have created a “rebuttable presumption of consent by the husband of a woman who conceives by AID, shifting the burden to the husband to rebut the presumption by clear and convincing evidence.” Courts justify this presumption not only with equity but with

252. Laura WW., 856 N.Y.S.2d at 261, 263; see also Anonymous v. Anonymous, 1991 WL 57753 at *19 (NY Sup. Jan. 18, 1991) (The husband’s stipulation not to support the child is specifically mentioned not only because it was a part of the facts of the case but also because in another New York case, a husband stipulated in a divorce decree to support a child and then contested the imposition of liability. His arguments were rejected because he had previously consented to supporting the child.).

253. Laura WW., 856 N.Y.S.2d at 262 (citing Letter from Div. of Human Rights, Bill Jacket, L. 1974, ch. 303, at 9 (“noting the statute does not provide a result where AID is performed by someone other than a ‘duly authorized’ physician, but that status of the medical professional should not impact legitimacy of child”)).

254. Id. at 262–63 (quoting In re Parentage of M.J., 787 N.E.2d 144, 152 (Ill. 2003)).

255. Id. at 263; see supra note 250.
“evidence that medical personnel who conduct AID [artificial insemination donation] procedures are not always aware of statutory consent requirements.”256 This goes beyond the often-quoted criminal doctrine “ignorance of the law is no excuse” and imposes someone else’s ignorance, the medical professional’s, onto the unwilling husband. It is for this reason that this Article’s model statute will not allow for rebuttable presumptions of consent because it is unfair to place someone’s future obligations in the hands of an unrelated third-party. A physician should give the husband who attends his wife’s artificial insemination a form that states that he will be liable for these inseminations if he continues to attend or explicitly consent to them. To surprise him with child support later is unfair.

Similarly, it seems that the evidentiary concerns of birth control fraud cases should re-enter in anonymous insemination cases. Even with a rebuttable presumption in birth control fraud cases, courts cite the lack of proof that a statement was ever made regarding contraceptive use as a reason for the rejection of the defendants’ claims.257 The facts of one case found that where it was undisputed that the husband was aware that his wife was using artificial insemination in order to get pregnant and he never informed her that he would not accept such a child as his own, the husband was liable.258 However, when awareness of the wife’s undertaking of artificial insemination is disputed or the husband alleges that he said he would not accept such a child as his own, evidentiary issues re-arise. Courts should avoid trying to determine oral representations or intentions of those involved in a failing marriage without proof. If courts accept oral representations, then the legislature should codify the sufficiency of oral representations, if that is desired, and require third party witnesses, preferably an unrelated third party.259 In this way,

256. Laura WW., 856 N.Y.S.2d at 263.
258. See Laura WW., 856 N.Y.S.2d at 263.
259. Such a solution would still allow for the situation presented in R.S. v. R.S. in which the overturning of the statute is less blatant and where equity and estoppel appear to be more warranted:

[And a husband who with his wife orally consents to the treating physician that his wife be heterologously inseminated for the purpose
evidentiary issues surrounding artificial insemination are slightly less insurmountable than those associated with contraceptive fraud as it is more likely that there are third party witnesses when technology is involved in conception.

Fraud also reappears in the marital artificial insemination context, and for this reason, equitable principles should either be codified or inapplicable. In one case where the wife inseminated herself without the husband's consent but led her husband to believe that the child was "conceived naturally," the husband was held blameless and did not have to support the child, thus, eliminating the marital presumption. In that case, however, the husband moved out of the marital residence nearly a year later. This Article's frozen embryo and artificial insemination statutes attempt to prevent such cases of non-disclosure.

If anonymous sperm donors have a right of procreational autonomy, then those whose statutorily required consent was not obtained should also not be forced to provide financial support for a child.

VIII. CHILD SUPPORT LIABILITY FOR KNOWN SPERM DONORS

While anonymous donors receive legal protection against child support liability, if a known donor and a mother agree in a contract to relieve the man of child support or parental liability, it is generally deemed void, even though providing sperm to a sperm bank or an acquaintance are both private actions. It is unfair to treat anonymous sperm donors any

of producing a child of their own is estopped to deny that he is the father of the child, and he has impliedly agreed to support the child and act as its father.

261. Id.
262. Id. at 1257.
263. Id. at 1254.
264. See infra Part VIII.C.
265. See supra note 245 and accompanying text.
266. See Bassett v. Saunders, 835 So. 2d 1198–99 (Fla. Dist. Ct. App. 2002) ("Although the mother refers to this agreement as a 'sperm donor' agreement,
differently from known sperm donors, but courts worry that it is just as easy to allege that one presented sperm for donation when sexual intercourse was the cause of a pregnancy, just as an alleged birth control fraud victim could state that the mother made indeterminable representations.267

A. Overview of State Statutes

While equity changes statutory requirements when it comes to male parental responsibility for a child created through artificial insemination during a marriage,268 equity generally does not allow a known donor who has entered into a contract (orally or written) to escape liability.269 There is, however, at least one instance where it has.270 The artificial insemination statute must be followed for anonymous sperm donors but not for known sperm donation.271 Some states, like Florida, respect the contracts of known sperm donors regarding child support liability in the context of artificial insemination while others do not.272 But when states do not respect these contracts, they use equity,
not to relieve donors of child support liability, but to determine whether to impose parental rights of child support and visitation.\textsuperscript{273} A statute would render judicial reliance on equity less likely in deciding whether to impose or remove child support liability.

B. Fraud in Known Donor Artificial Inseminations

Courts are more sympathetic to insemination fraud than contraceptive fraud.\textsuperscript{274} In one intriguing Delaware case, a woman alleged that she was pregnant with a man's child and that she had cystic fibrosis.\textsuperscript{275} As a result, she alleged that:

[S]he needed a sperm sample for genetic testing to determine if Father was a carrier for cystic fibrosis. Father agreed to provide a sample for that purpose. Mother later requested a second sperm sample after telling Father there was blood in his semen which required another test. Father provided the sample for the purpose of testing on February 8, 2008. He drove Mother to the hospital that day believing he had blood in his semen.\textsuperscript{276}

Even though under the usual estoppel principles, driving a prospective mother to the hospital for an insemination could

\textsuperscript{273} See the analysis of other cases in \textit{Dunkin v. Boskey}, 98 Cal. Rptr. 2d 44, 56–57 (Ct. App. 2000):

\textit{In Interest of R.C.}, 775 P.2d 27, 34–35 (Colo. 1989) (in which an artificial insemination agreement between an 'unmarried recipient' and a 'known donor' to treat the latter as the father of the conceived child, and the subsequent conduct of the donor, were found 'relevant to preserving the donor's parental rights' despite a statute—similar to § 7613—precluding the assertion of parental rights and obligations by donors’); \textit{C.M. v. C.C.} 152 N.J. Super. 160, 167–68 (1977) (where the court concluded that the semen donor's 'consent and active participation' in the artificial insemination procedure evinced an intent 'to assume the responsibilities of parenthood.’).

\textsuperscript{274} Compare supra notes 144–51 and Part VI.B generally (there are no acceptances of male contraceptive fraud claims in the sex context), with infra notes 277–79 (there is at least one acceptance of male fraud claims in the insemination context).


\textsuperscript{276} \textit{Id.}
constitute consent, the Delaware Family Court found that under these circumstances, which included the absence of a written record, the father was not liable for support. But how is this different from contraceptive fraud? Other than the fact that different methods of reproduction were used, in both cases, the man willingly “gave” his sperm sample under a pretext. If most state courts are like this one court, then courts are more inclined to support the removal of child support liability due to fraud when artificial reproduction is used than they are when sex is the method of reproduction. While the fraud is clearer and arguably easier to discover when insemination is the medium through which it occurs, both cases should be actionable.

C. Model Statute Governing Childbirth as a Result of Artificial Insemination

State statutes in the known donor context contribute to uncertainties that should be addressed by a single, harmonizing statute. One California case noted, “[i]n essence, therefore, [this] statutory scheme creates three classes of parents: mothers, fathers who are presumed fathers, and fathers who are not presumed fathers.” The category of “fathers who are presumed fathers” includes husbands and sometimes known sperm donors. The category of “fathers who are not presumed fathers” includes anonymous sperm donors, soon to be divorced fathers.

277. Id; see RA v. CA-H., No. CN08–05726, 2010 WL 2696094, at *3 (Del. May 3, 2010) (“Although genetic testing confirmed that he is the biological father, Mr. A argued that he was not C’s legal father because Mother had fraudulently procured his sperm sample and used the sample in her assisted reproduction procedures without his written consent.”).

278. See supra notes 275–77 for a discussion of the success of one defrauded male in a legal environment where contraceptive fraud claims generally fail when sex is involved as discussed in Part VI.


280. Id.

281. Ferguson v. McKiernan, 855 A.2d 121, 123 (Pa. Super. Ct. 2004). In Ferguson, the court found that, “[t]he oral agreement between the parties that appellant would donate his sperm in exchange for being released from any obligation for any child conceived, on its face, constitutes a valid contract. Based on legal, equitable, and moral principles, however, it is not enforceable.”
Sex and Statutory Uniformity

and some known sperm donors. This Article's proposed model statute merges the two categories of fathers and equalizes the treatment of semen in the context of familial obligations.

This model statute makes some additions to current statutes. The model is a modified version of the Illinois Parentage Act, and is used because an Illinois state court judge admitted that:

In its current form, the Illinois Parentage Act fails to address the full spectrum of legal problems facing children born as a result of artificial insemination and other modern methods of assisted reproduction. The rapid evolution of assisted reproduction technology will continue to produce legal problems similar to those presented in this case. We urge the Illinois legislature to enact laws that are responsive to these problems in order to safeguard the interests of children born as a result of assisted reproductive technology.

The original Illinois statute is in normal font, and the edits are italicized or indicated by the use of strikethroughs.

§ 1. This Act may be cited as the Illinois [adapt based on jurisdiction] Parentage Act.

§ 2. Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife marriage or civil union so requesting and consenting to the use of such technique.

§ 3. (a) If, under the supervision of a licensed physician who is not one of the possible biological or legal parents and with the consent of her husband [partner as recognized by state legal

Id. This was even though she named her husband on the birth certificate, but he had “left the marital home two years before the IVF was performed and filed for divorce and the very day the procedure was performed . . . .” Id. In other words, “where there is an intact family or marriage to preserve, the presumption applies; if there is no marriage to protect that the presumption is not applicable.” Id.  

282. 750 ILL. COMP. STAT. ANN. 40/1 to /3 (West, Westlaw through 2012 Reg. Sess.).  
284. 750 ILL. COMP. STAT. ANN. 40/1 to /3.  
285. Id. at 40/1.  
286. Id. at 40/2.
statute on same-sex union or marriage], a wife is inseminated artificially with semen donated by a man not her husband [partner as recognized by state legal statute on same-sex union or marriage], the husband [partner as recognized by state legal statute on same-sex union or marriage] shall be treated in law as if he were the natural father parent of a child thereby conceived. The husband’s [partner’s as recognized by state legal statute on same-sex union or marriage], consent must be in writing executed and acknowledged by both the husband and wife parties to the marriage or union or both donors of genetic material, if known. The physician who is to perform the technique shall certify their signatures and the date of the insemination, and file the husband’s [partner’s as recognized by state legal statute on same-sex union or marriage or donor’s] consent in the medical record where it shall be kept confidential and held by the patient’s physician. The consent shall also be held confidential in the city or county records office. In the event of a dispute over paternity, the appropriate county records office will be contacted and a confidential search will be conducted for the insemination consent. If one is not found, then the sperm donor or spouse will not be held liable, regardless of estoppel. However, the physician’s failure to do so shall not affect the legal relationship between father and child.

All papers and records pertaining to the insemination, whether part of the permanent medical record held by the physician or not, are subject to inspection only upon an order of the court for good cause shown.287

(b) The anonymous donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife shall be treated in law as if he were not the natural father of a child thereby conceived. If a known donor of semen contracts to donate his specimen to a prospective mother, that contract will also be filed with the appropriate city or county records office. In the event of a dispute over paternity, the appropriate county records office will be contacted and a confidential search will be conducted for the insemination consent. If one is not found, then the sperm donor will not be held liable, regardless of estoppel principles.288

287. Id. at 403.
288. Id.
It is clear that current statutes, which provide for written consent and specifically refer to physicians, are not sufficient. One state court noted that physicians were not always aware of the legal requirements of artificial insemination. Physicians should be required to file this written consent form with a court or county records office, so as to add an additional formal level to the artificial insemination process. This also adds a possible legal liability on physicians for their positions as intermediaries in the parent-child relationship and adds an additional procedural requirement that could help eliminate the need for reliance upon estoppel. The Illinois law also requires that the semen donation be provided to a licensed physician. This provision will be kept because it helps to prohibit evidentiary issues and creates proof of parties' intentions. The provision on the licensed physician requirement was modified to include a "licensed physician who is not one of the possible biological or legal parents" so as to avoid situations where the statute does not apply because the prospective parent is his or herself a physician.

IX. CONCLUSION

The dominant themes in the regulation of semen are sparse evidence, privacy, non-disclosure, liability, inconsistency, fraud, and fairness. Inconsistency exists in the following contexts:

289. See supra notes 245–49 and accompanying text.
291. 750 ILL. COMP. STAT. ANN. 40/3.
292. See P.D. v. S.K., No. U-2725-07, 2007 WL 4180640, at *1 (N.Y. Fam. Ct. Nov. 16, 2007). In P.D., "[t]he respondent provided his sperm to the petitioner who was inseminated by her same sex partner, also a physician... [The physician] allowed his name to be put on the child's birth certificate," and the court found that he could not deny paternity. Id. at *1–2. Therefore, it is possible that there could be a case in which the sperm donor to a known physician would not have allowed his name to be placed on the birth certificate, increasing the difficulty in gathering evidence to establish paternity.
(i) child support liability for anonymous sperm donors as opposed to known sperm donors;

(ii) damages calculations in reproductive fraud as opposed to damages for fraud in the transmission of disease;

(iii) parental liability for married men versus anonymous sperm donors versus sexual assault victims (including statutory rape victims) versus contraceptive fraud victims; and

(iv) support liability in divorce as opposed to support liability from contracts between unmarried persons.

This Article aimed to identify these inconsistencies and proposed statutes that addressed them in a holistic fashion based on the concepts of fairness and uniformity. Fairness is a concept that aims to rid the law of outdated stereotypes and to render the state of the law more similar to the state of society. This is especially important since many of these statutes were crafted long ago. While the Constitution is flexible, state statutes are not so flexible, and they cannot keep up with technology. Uniformity within the specialty of family law recognizes that consistency within a specialty contributes to the legislature’s original goals of protecting rape and sexual assault victims, ensuring adequate support for children, and treating those who reproduce using assisted reproductive technology in a similar manner as those who reproduce using sex. One judge has summarized the problem this Article attempts to tackle:

Marvelous advances in assisted reproductive technologies ("ART") have joined with rapidly evolving social structures so as to implode many traditional legal assumptions about parentage, custody, and responsibility for children. Such assumptions, formed when the only means of reproduction was that designed by nature, have proven too brittle to fit around the myriad new combinations of sperm and egg, on the one hand, and of married, unmarried, opposite-sex and same-sex partnerships on the other. The pace of all this change has
resulted in a crazy quilt of legal theories, statutes, and decisional law.\textsuperscript{293}

In sum, this Article has tried to render the "quilt" a little less crazy by imposing uniformity on the treatment of semen and in some ways, the treatment of males, in family law.