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## Making Sex the Same: Ending the Unfair Treatment of Males in Family Law

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MAKING SEX THE SAME: ENDING THE UNFAIR  
TREATMENT OF MALES IN FAMILY LAW

*Myrisha S. Lewis\**

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## INTRODUCTION

As a matter of practice, many seemingly gender-neutral laws addressing the transmission of sexually transmitted disease, assisted reproduction,<sup>1</sup> and child support treat males unfairly. These laws impose parental obligations on males who have been forced into parenthood (through contraceptive fraud,<sup>2</sup> sexual assault, or statutory rape), in spite of Supreme Court decisions, which emphasize the values of privacy and autonomy in sexual relations and the decision whether to reproduce.<sup>3</sup> These same values of privacy and autonomy form the basis for state courts' decisions not to interfere with personal relations by aiding male victims of contraceptive fraud, who are victims of a sexual partner's "misrepresentation. . .[of] . . .sterility or use of some form of birth control."<sup>4</sup> By imposing child support obligations on male sexual assault and male statutory rape victims, courts disregard the complete absence of autonomy involved in these males' reproduction, as they never had the opportunity to decide whether to reproduce. On the other hand, when a person is infected by a sexually transmitted disease courts are willing to provide compensation to a victim who unwillingly acquires the disease, even though both male contraceptive fraud victims and individuals who have contracted sexually transmitted diseases often failed to take the same precaution.<sup>5</sup> In sum, privacy

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1. *What is Assisted Reproductive Technology?*, CTRS. FOR DISEASE CONTROL & PREVENTION <http://www.cdc.gov/art/> (last updated Aug. 1, 2012) ("[Assisted reproductive technology] includes all fertility treatments in which both eggs and sperm are handled. In general, ART 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 only to stimulate egg production without the intention of having eggs retrieved.").

2. Sally Sheldon, 'Sperm Bandits', *Birth Control Fraud and the Battle of the Sexes*, 21 *LEGAL STUD.* 460, 463 (2001). Contraceptive fraud, which will be explored in detail in the article, is also referred to as "birth control fraud" or "sperm banditry." *See id.* at 460-80.

3. *See, e.g.,* *Roe v. Wade*, 410 U.S. 113 (1973), *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

4. Sheldon, *supra* note 2, at 463.

5. *See* Matthew Seth Sarelson, *Toward a More Balanced Treatment of the Negligent Transmission of Sexually Transmitted Diseases and AIDS*, 12 *GEO. MASON LAW REV.* 481, 508 (2003) (discussing the difference in legal treatment of sexually transmitted disease transmission and unwanted pregnancy: "You cannot sue for 'wrongful birth' but you can sue for disease transmission; this is so even though the underlying facts constituting the wrongful birth or disease transmission are often identical. For example, in California, a father cannot sue the mother of his unwanted child on the grounds that she lied when she claimed to be using birth control pills. However, a man is liable if he negligently, or intentionally for that matter, fails to disclose he has genital herpes. In both cases one partner lied to the other, apparently in an effort to 'reassure' the partner that the sex would be 'safe.' Both plaintiffs were harmed—an unwanted child, an unwanted disease. Why the distinction?"); *see also infra* note 51.

and autonomy give way to public health concerns when a disease is transmitted, but courts yield to these same concepts when rejecting male contraceptive fraud claims and the claims of male sexual assault and statutory rape victims.

This article conducts a detailed exploration of the legal environment where male contraceptive fraud, sexual assault, and statutory rape victims are punished with child support liability, even though they are victims of deception or actual crimes. After addressing the consequences of sex or artificial insemination, with the exception of embryo disposition upon divorce and the complexities of the marital presumption in family law, this article offers three solutions to the mistreatment of males in family law:

- 1) A statute that compensates male victims of contraceptive fraud, sexual assault, and statutory rape for the use of their sperm, as if they had been sperm donors;
- 2) A revision of child support guidelines that results in a reduction or elimination of child support liability for victims of contraceptive fraud, sexual assault, and statutory rape;
- 3) A “just cause” exception for child support in cases of male statutory rape, contraceptive fraud, and sexual assault victims.

If implemented, these solutions would result in a legal environment where male contraceptive fraud, sexual assault, and statutory rape victims are not punished with child support liability, but instead receive compensation for the unauthorized use of their biological products.

These proposed statutory provisions also address the market-based and financial inconsistencies that occur as a result of state court decisions by creating compensatory regimes for victims of contraceptive fraud, sexual assault, and statutory rape. After fertilization,<sup>6</sup> the legal treatment of sperm and eggs shifts them from commodities to liabilities.<sup>7</sup> Eggs and sperm are worth money at the time they leave the host and before conception, but after they enter another’s body, these market-based concerns are no longer the primary consideration.<sup>8</sup> Thus, the biological market effectively ends upon fertilization.

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6. Fertilization is the successful entrance of a sperm into an egg, resulting in an embryo and ultimately, a child; see *How Your Baby Grows During Pregnancy*, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, <http://www.acog.org/~media/For%20Patients/faq156.pdf?dmc=1&ts=20120907T18032822> (last visited Sept. 7, 2012).

7. See Claudia Dreifus, *A Conversation with Debora Spar: An Economist Examines the Business of Fertility*, N.Y. TIMES, Feb. 28, 2006, <http://www.nytimes.com/2006/02/28/health/28conv.html?pagewanted=all>, for more information on the market for human eggs and sperm; see also Peggy Orenstein, *In Vitro We Trust*, N.Y. TIMES, July 20, 2008, <http://www.nytimes.com/2008/07/20/magazine/20wwIn-lede-t.html>. When sex results in the birth of a child, the parents are both liable for the support of the child, while anonymous sperm donors are generally absolved of liability. See generally Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Paternal Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 10 (2004).

8. See Dreifus, *supra* note 7.

After conception, even males who have become “involuntary sperm donors” through contraceptive fraud, sexual assault, or statutory rape, are not compensated for their bodies’ products and are punished with legal liability, mainly through the imposition of child support.<sup>9</sup> By harmonizing the legal treatment of sexual relations with that of assisted reproductive technology, the monetary aspects of sex,<sup>10</sup> and compensation for the donation of sperm and eggs, these related concepts will share a common legal foundation and resultant treatment.

### I. ARTICLE MODEL

The integral parts of reproduction are allotted a monetary value in the fertility market and are a source of income for donors before fertilization occurs. Yet, after a woman is pregnant with a fertilized egg, the male who provided the fertilizing sperm, either voluntarily or through fraud or assault, may be monetarily liable through the imposition of child support obligations. The word “may” is used in the preceding sentence because anonymous sperm donors who participate in assisted reproductive technology<sup>11</sup> escape child support liability, while male victims of contraceptive fraud, sexual assault, or statutory rape are legally required to support the child that results from the use of their sperm.<sup>12</sup> This is particularly shocking in light of state courts’ statements implying a right to avoid procreation.<sup>13</sup> Thus, this article examines how the

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9. The term “involuntary sperm ‘donors’” here refers to men who are victims of contraceptive fraud. Even though these men would be compensated for the use of their sperm had they donated it at a sperm bank, they are punished with child support liability for the use of their sperm through sex. The parallel term of “involuntary sperm ‘donor’” was used because later in this article, I will discuss the case of *S.F. v. ex rel. T.M.*, in which a female had sex with an unconscious man and later told him that it “saved her a trip to the sperm bank.” See discussion *infra* pp. 18, 22-23; see also Laura W. Morgan, *Child Support Fifty Years Later*, 42 FAM. L.Q. 365, 371-2 (2008) (“The courts have even gone so far as to hold a biological father liable for child support when he was the victim of sexual assault”).

10. Some examples include child support and compensation for the transmission of disease

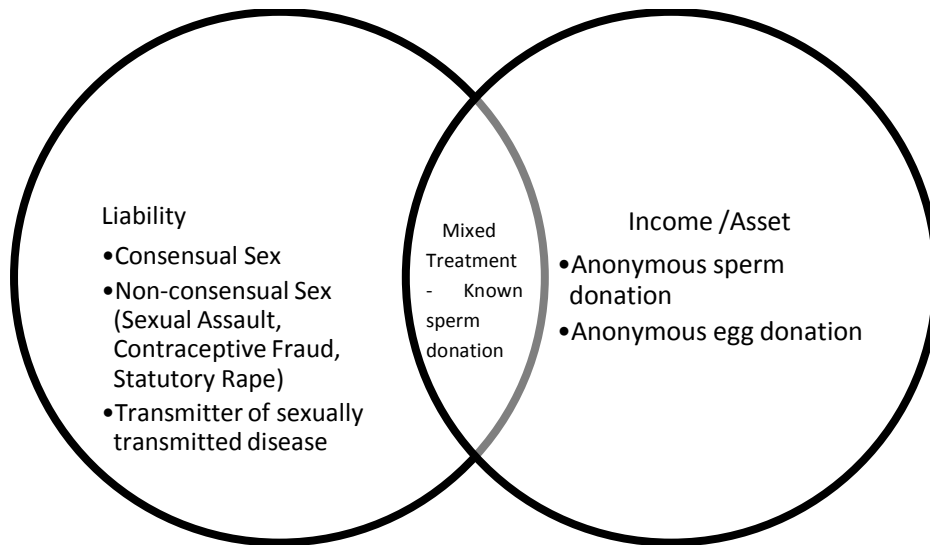
11. Assisted reproductive technology is generally the “[surgical] remov[al] of eggs from a woman’s ovaries, [the] combin[ation of] them with sperm in the laboratory, and [the subsequent] return[. . . of] them to the woman’s body [as embryos] or donat[ion of] them to another woman.” *What is Assisted Reproductive Technology?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/art/> (last updated Aug. 1, 2012). While the CDC does not use the term to apply to “treatments in which only sperm are handled (i.e., intrauterine—or artificial—insemination) or procedures in which a woman takes medicine only to stimulate egg production without the intention of having eggs retrieved,” in this article, the term will refer to intrauterine or artificial insemination. *Id.*

12. See discussion *infra* Part IV: Three Situations in which Males are Treated Unfairly in Family Law as Evidenced by Inconsistent Imposition of Child Support Liability.

13. 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) (“[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

results of sex or reproduction are treated differently depending on the location of the biological product within the “reproductive spheres” established below.<sup>14</sup> In some ways, this model operates as a family law “balance sheet” and shows the situations where sperm can be an asset and where it can be a liability.

Figure 1



By analyzing the legal treatment of sex, the model statutes discussed later attempt to harmonize the law and, therefore, eliminate these variant spheres.

## II. PRE-FERTILIZATION “FREE” MARKET VERSUS POST-FERTILIZATION STRICT LIABILITY

The fertility industry offers assisted reproductive technology, including sperm and eggs for purchase, for individuals facing difficulty in conceiving a child. Anonymous sperm donation is often an important aspect of assisted reproductive technology.<sup>15</sup> Artificial insemination statutes vary from state to

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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)).

14. See *infra* Figure 1.

15. See *Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/infertility/#16> (last updated Apr. 19, 2012), for a general overview of assisted reproductive technology. See, for example, Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES, Sept. 5, 2011, <http://www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all>; William Heisel,

state.<sup>16</sup> These statutes establish the lack of parental rights and obligations for egg and sperm donors and, combined with the marital presumption, identify when husbands are deemed to be fathers of the children conceived through artificial insemination.<sup>17</sup>

As of 2008, the fertility industry is a \$3 billion-per-year sector of the medical economy.<sup>18</sup> In addition, the fertility industry is characterized as a “self-regulated” industry.<sup>19</sup> There are federal regulations, but they are limited: “[f]ederal [regulations of] the health of donated tissue. . .require[e] that donors undergo certain tests for diseases like AIDS. . .[which] does not otherwise regulate the process in any significant way. It does not preclude the sale of eggs, sperm, or embryos.”<sup>20</sup> State regulations of the fertility industry also exist but are often not very restrictive beyond testing requirements for diseases.<sup>21</sup>

Now, sperm and eggs are available from donors who are compensated at rates that range from \$60-75 for sperm donation<sup>22</sup> (and up to \$100 for men with graduate degrees)<sup>23</sup> to \$8,000 for egg donors from university hospitals<sup>24</sup> and

*Registry May Track Egg, Sperm Donors*, L.A. TIMES, Jan. 3, 2008, <http://articles.latimes.com/2008/jan/03/local/me-eggs3>, for news accounts

16. See *Anonymous v. Anonymous*, 1991 WL 57753, at \*4 (N.Y.S. Jan. 18, 1991).

17. *Laura W.W. v. Peter W.W.*, 51 A.D.3d 211, 217 (N.Y.S. 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.” (citing *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])).

18. See Dreifus, *supra* note 7; Orenstein, *supra* note 7. Another source states that fertility is a \$3 billion to \$4 billion per year business. NAOMI L. CAHN, *TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION* 1 (2009); see generally DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION*, 40-41 (2006).

19. Orenstein, *supra* note 7.

20. CAHN, *supra* note 18, at 18-19.

21. See Vanessa L. Pi, *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer*, 16 DUKE J. GEN. LAW & POL’Y 379, 384 (2009) (discussing state regulation of sperm donation); see also Sarah Terman, *Marketing Motherhood: Rights and Responsibilities of Egg Donors in Assisted Reproductive Technology Agreements*, 3 NW. J. L. & SOC. POL’Y 167 (2008) (discussing state regulation of egg donation).

22. See Martha M. Ertman, *What’s Wrong with a Parenthood Market?*, 82 N.C. L. REV. 1, 14 (2003) (stating that sperm donors are compensated \$60 per donation); see also SPAR, *supra* note 18, at 39 (“[Donors] contribute a fixed number of times over a relatively short period and receive around \$75 per specimen”).

23. Jennifer Anyaegbunam, *Ivy League Women Get Offers for Their Eggs*, CNN HEALTH (Aug. 12, 2009), <http://thechart.blogs.cnn.com/2009/08/12/ivy-league-women-get-offers-for-their-eggs/>.

24. *Egg Donation: Compensation*, CORNELL UNIV. JOAN & SANFORD I. WEILL MED. COLL. <http://www.eggdonorcornell.com> (last visited Mar. 20, 2011); *Becoming an Egg Donor*, NYU LANGONE MED. CTR., <http://www.nyueggdonor.org/egg-donor-compensation>

even up to \$100,000 for the eggs of well-educated women.<sup>25</sup> Vials of sperm sell to prospective parents for \$250 to \$400 each, and eggs generally sell for \$4,500.<sup>26</sup> However, family law only compensates males for the use of their biological products if their sperm successfully fertilizes an egg under conditions created in a physician's office, not in the private arena.

### III. CHILD SUPPORT OVERVIEW

Family law's inconsistent treatment of certain males manifests mainly through the unfair imposition of child support obligations. 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."<sup>27</sup> In the present legal environment, if a male and female engage in sex that results in a child, regardless of the voluntariness or legality of the sexual intercourse, both parties are responsible for the child's support.<sup>28</sup> Every state has a child support program, for which the state receives assistance from the federal government in enforcement.<sup>29</sup> Furthermore, parents cannot bargain away child support through private contract because it belongs to the child, even though state law allows "anonymous" egg and sperm donors to do exactly that.<sup>30</sup> Of course, anonymous sperm donors are not truly anonymous, as sperm banks keep track of the sperm donation source, and some sperm banks even allow women to pick donors based on the donors' characteristics.<sup>31</sup> These men provided their sperm voluntarily, received compensation for it, and have no parental rights or obligations, while the victims of contraceptive fraud, sexual assault, or statutory rape provided their sperm involuntarily. It is worth noting that legal parentage does not only result in obligatory monetary outlays but also involves parental rights. While many males do not want child support liability, many females also do not want additional persons with parental rights or obligations

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(last visited Apr. 23, 2011) ("You will receive \$8,000 to compensate for your time, effort and inconvenience, which is paid in full by NYU School of Medicine.").

25. Anyaegbunam, *supra* note 23.

26. SPAR, *supra* note 18, at 39. The typical cost of sperm is \$300 and the typical cost of eggs is \$4,500. *Id.* at 213.

27. BLACK'S LAW DICTIONARY 257 (8th ed. 2004).

28. Ellen London, *A Critique of the Strict Liability Standard for Determining Child Support in Cases of Male Victims of Sexual Assault and Rape*, 152 U. PA. L. REV. 1957, 1958 (2004).

29. *See State and Tribal Child Support Agency Contacts*, OFFICE OF CHILD SUPPORT ENFORCEMENT <http://www.acf.hhs.gov/programs/cse/extinf.html> (last visited Apr. 1, 2011).

30. *See 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); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 130-31 (1989) (demonstrating minimization of children's rights).

31. One sperm bank that allows this donor selection is the California Cryobank. *See Selecting a Sperm Bank*, CAL. CRYOBANK, <http://www.cryobank.com/Why-Use-Us/Selecting-a-Sperm-Bank/> (last visited Feb. 2, 2012).



involved in their or their children's lives.<sup>32</sup> Thus, the historical basis for child support—the nuclear family—is no longer a reality or a desired ideal for many parents.<sup>33</sup>

The constitutional foundation of state judicial analysis of reproduction and sexually transmitted disease transmission is the right to privacy. The basis of this right, which is often referred to as procreational autonomy,<sup>34</sup> stems from landmark Supreme Court decisions that focus on personal autonomy in the reproductive sphere.<sup>35</sup> These decisions about reproduction and procreational autonomy *should* operate to equalize males and females, but their focus on female autonomy renders the general themes of individualism and autonomy for all persons, including men, unnoticed.

While state court decisions, Supreme Court decisions, and commentators often emphasize the rights of privacy and autonomy as constitutional rights, “[t]he Constitution does not explicitly mention any right of privacy. . . [however, since 1891] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist

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32. Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 486 (127 Cal. App. 4th 2005) (“Our Legislature has already spoken and has afforded to unmarried women a statutory right to bear children by artificial insemination (as well as a right of men to donate semen) without fear of a paternity claim, through provision of the semen to a licensed physician.” [ . . . ] The Legislature “has likewise provided men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support. Subdivision (b) states only one limitation on its application: the semen must be ‘provided to a licensed physician.’”).

33. See, e.g., Diana B. Elliott, *How Nuclear is the Nuclear Family?: Extended Family Investments in Children* (2008) (unpublished Ph.D. dissertation) *available at* <http://drum.lib.umd.edu/bitstream/1903/8753/1/umi-umd-5772.pdf> (“Our understanding of what a family is emerges from the Ozzie and Harriet era of the 1950s, but does not reflect the multiplicity of family forms in the United States today (Stacey 1996). As Judith Stacey (1996) eloquently writes, ‘The family is indeed dead, if what we mean by it is the modern family *system* in which units comprised of male breadwinner and female homemaker, married couples, and their offspring dominate the land. But its ghost, the ideology of the family, survives to haunt the consciousness of all those who refuse to confront it,’ (p. 49).”). See James R. Wetzel, *American Families: 75 Years of Change*, 132 MONTHLY LABOR REV. 4 (1990), *available at* <http://www.bls.gov/mlr/1990/03/art1full.pdf>, for additional information on the nuclear family.

34. See Christopher Bruno, *A Right to Decide Not to Be a Legal Father: Gonzales v. Carhart and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141, 150 (2008) (“Because a father has a right not to procreate, and because a declaration of legal paternity can cause emotional harm that burdens a father’s ability to define himself and his procreational realm, a declaration of legal paternity may violate the father’s right to procreational autonomy.”), for more information on procreational autonomy. See *Sorrel*, No. 02A01-9609-JV-00212 at \*3 (“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))), for a discussion of procreational autonomy in a state court case addressing contraceptive fraud.

35. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973),

under the Constitution.”<sup>36</sup> One of these zones of privacy is the sphere of reproduction.<sup>37</sup> It is for this reason that the Supreme Court “conclude[d in *Roe*] that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”<sup>38</sup> In *Eisenstadt v. Baird*, the Supreme Court also protected the right of privacy in the reproductive context. 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.”<sup>39</sup> This reasoning has inspired state courts to identify a “right to procreational autonomy,”<sup>40</sup> which is a re-characterization of the right to privacy identified in *Roe v. Wade* and *Eisenstadt v. Baird*. The right to procreational autonomy has been mentioned in several state courts’ decisions. For example, a Tennessee court deciding whether a contraceptive fraud victim should be liable for child support noted that “[o]ur 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.’”<sup>41</sup>

Yet, just as the right to abortion is subject to the limitations of state interests in regulation, the right to procreational autonomy is also subject to limitations. For example, courts note that a male’s right to avoid procreation is not infringed upon by contraceptive fraud.<sup>42</sup> Decisions state that male victims of contraceptive fraud still could have used contraception<sup>43</sup> in order to combat

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36. *Roe*, 410 U.S. at 176.

37. *See id.* at 152 (noting the many spheres of life that privacy entails).

38. *Id.* at 154.

39. *Eisenstadt*, 405 U.S. at 453.

40. *See Sorrel v. Henson*, No. 02A01-9609-JV-00212, 1998 WL 886561, at \*3 (Tenn. Ct. App. Dec. 18, 1998) (example of state court identification of procreational autonomy); *see, e.g.,* Charla M. Burill, *Obtaining Procreational Autonomy Through the Utilization of Default Rules in Embryo Cryopreservation Agreements: Indefinite Freezing Equals an Indefinite Solution*, 55 WAYNE L. REV. 1365, 1371 (2008).

41. *Sorrel*, 1998 WL 886561, at \*2 (citing *Davis v. Davis*, 842 S.W.2d 588 (Tenn.1992)).

42. *See, e.g.,* *L. Pamela P. v. Frank S.*, 449 N.E.2d 713 (N.Y. 1983); *Sorrel*, 1998 WL 886561 at \*3 (“Other related cases from other jurisdictions have generally dealt with instances wherein either the mother misrepresented to the putative father that she was practicing birth control, or the putative father offered to pay for an abortion. Each such case, however, supports the conclusion that paternity actions do not deprive a putative father of his Fourteenth Amendment right to procreational autonomy simply because he did not “consent” to childbirth” (citing *Beard v. Skipper*, 182 Mich.App. 352, 451 N.W.2d 614, 615 (Mich.App.1990) (quoting *L. Pamela P.* and holding, ‘We see no reason why Michigan should decide this issue differently’); *Faske v. Bonanno*, 137 Mich.App. 202, 357 N.W.2d 860, 861 (Mich.App.1984); *Linda D. v. Fritz C.*, 38 Wash.App. 288, 687 P.2d 223, 228 (Wash.App.1984) (citing *L. Pamela P.* and holding that the constitutionally protected right of privacy does not ‘encompass the right of one parent to avoid a child support obligation where the other parent’s choice regarding procreation is not fully respected’) *Erwin L.D. v. Myla Jean L.*, 41 Ark.App. 16, 847 S.W.2d 45, 47 (Ark.App.1993))).

43. *Wallis v. Smith*, 22 P.3d 682, 683 (N.M. Ct. App. 2001).

one of the “natural results of consensual sexual intercourse”—childbirth.<sup>44</sup> These decisions further state that 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.”<sup>45</sup> In this way, courts are recognizing that both males and females have the right to use contraception, as guaranteed to all married or single persons,<sup>46</sup> but if a person decides to not use contraception due to the representations of his or her sexual partner, state courts decided that this does not rise to the level of a constitutional violation.

Courts permit successful legal actions against partners who transmit sexually transmitted diseases, but not against partners who engage in the same act of unprotected sex to dupe someone into becoming a parent against his will.<sup>47</sup> 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.”<sup>48</sup> This public policy characterization parallels the language of the aforementioned Supreme Court decision, *Eisenstadt v. Baird*,<sup>49</sup> which held that married and unmarried persons had the same right to contraception under the Equal Protection clause of the U.S. Constitution because the right to privacy freed individuals from governmental interference into matters such as “the decision whether to bear or beget a child.”<sup>50</sup>

Contraception enables the individual to control, to a certain extent, whether a sexual relationship will result in a child. Condoms, one form of commonly used contraception, aid in preventing the spread of sexually transmitted diseases.<sup>51</sup> If individuals can decide whether to bear or beget a child through contraceptives, and diseases are transmitted and prevented in the same manner as children, then disease transmission and unwanted parenthood should not be treated in a legally different manner; causes of action for both should be

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

45. *L. Pamela P.*, 449 N.E.2d at 713, 716. In this case, 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 of Appeals of New York rejected this argument. *Id.*

46. *Eisenstadt v. Baird*, 405 U.S. 438, 438 (1972)

47. Michelle Oberman, *Sex, Lies, and the Duty to Disclose*, 47 ARIZ. L. REV. 871, 892 (2005).

48. *Stephen K.*, 164 Cal. Rptr. at 621.

49. *Eisenstadt*, 405 U.S. at 453.

50. *Id.* (“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.”)

51. See *Behr v. Redmond*, 123 Cal. Rptr. 3d 97 111 (Cal. App. 4 Dist. 2011); *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. 1997), for examples of cases in which no condoms were used.

successful.<sup>52</sup> Instead, decisions state that male victims of contraceptive fraud still could have used contraception in order to prevent conception.<sup>53</sup>

It is incongruous to support a “public policy” that opposes the transmission of sexually transmitted diseases but simultaneously asserts 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.”<sup>54</sup> Both sexually transmitted diseases and pregnancy are risks of sex, so both of these results should be actionable. In some ways, courts have selected the cause of action that has less need of protection. Even though awards for the transmission of sexually transmitted diseases include compensatory damages,<sup>55</sup> the medications for sexually transmitted disease treatment are generally covered by insurance or available at low-cost providers, such as Planned Parenthood.<sup>56</sup> On the other hand, there is no aid available for child support payments; child support is an individual undertaking, excluding the provision of governmental support for the economically disadvantaged.<sup>57</sup> Today’s social context where the nuclear family is disappearing renders this suggested “obligation” weaker.

An example that highlights the financial disparity between the legal treatment of sexually transmitted disease transmission and childbirth is a California judgment for the transmission of herpes. Recently, a defendant was ordered by the California Court of Appeal to pay his sexual partner \$72,000 in future prescription medication expenses, \$1,575,600 in compensatory damages for the negligent transmission of genital herpes,<sup>58</sup> and \$2.75 million in punitive

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52. See Matthew Seth Sarelson, *Toward a More Balanced Treatment of the Negligent Transmission of Sexually Transmitted Diseases and AIDS*, 12 GEO. MASON L. REV. 481, 509 (2003); see also Oberman, *supra* note 47, at 892.

53. *Wallis*, 22 P.3d at 685; see also *Stephen K.*, 164 Cal. Rptr. at 621.

54. *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 378 (1983) (quoting *Stephen K. v. Roni L.*, 105 Cal. App. 3d 640, 645 (Cal. Ct. App. 1980)).

55. See, e.g. *Behr v. Redmond*, 123 Cal. Rptr. 3d 97 111 (Cal. App. 4 Dist. 2011); *Duke v. Housen*, 589 P.2d 334, 340 (Wyo. 1979) (summarizing tortious actions in other states for the transmission of diseases).

56. See *Health Info & Services*, PLANNED PARENTHOOD, <http://plannedparenthood.org/health-center/> (last visited July 25, 2012) (stating that local Planned Parenthood health centers provide STD testing, treatment, and vaccines); see, e.g., *Richmond Health Center – Richmond, VA*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/> (enter “Richmond Health Center” in “site search” bar, select first result).

57. See Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 620 (2009) (“The Temporary Assistance for Needy Families (TANF) program requires states to seek to establish the paternity of children born to unmarried mothers for purposes of imposing child support obligations on the men. If states do not meet federally-mandated paternity establishment goals, they will lose TANF funds, and states with paternity establishment rates above 50% receive incentive payments that increase as the rate increases.”).

58. *Behr*, 123 Cal. Rptr. 3d at 113, 116.

damages.<sup>59</sup> Thus, it can cost a defendant over \$3 million to infect a sexual partner with a disease and nothing to convert a male into an involuntary parent even though the “cost of raising a child from birth to age 18 for a middle-income, two-parent family averaged \$226,920 last year (not including college), according to the U.S. Department of Agriculture.”<sup>60</sup>

#### IV. THREE SITUATIONS IN WHICH MALES ARE TREATED UNFAIRLY IN FAMILY LAW AS EVIDENCED BY INCONSISTENT IMPOSITION OF CHILD SUPPORT LIABILITY

##### A. Contraceptive Fraud

Contraceptive fraud, the least legally successful claim of those analyzed in this article, is the first situation meriting a reduction or elimination of child support obligations. A major reason for the rejection of contraceptive fraud claims is that courts view these contraceptive fraud claims as attempts to reduce or “[adjust] a natural parent’s obligation to pay child support.”<sup>61</sup> Admittedly, enacting a law reducing or eliminating child support obligations for male victims of sexual assault, statutory rape, and contraceptive fraud would create an opportunity for males to use the law as a means of avoiding child support obligations. This opportunity would be most attractive to men who had unprotected sex without any deception because they would be able to more easily argue for contraceptive fraud. There would be resultant evidentiary difficulties if such a law existed; 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.”<sup>62</sup> Yet, the law limits its own application because it is generally difficult to find evidence of contraceptive fraud in a sexual relationship.<sup>63</sup> The only evidence would likely be a “confession” from a female. This is indeed possible because there has been a recorded case of a woman who has admitted that she defrauded the contraceptive fraud victim.<sup>64</sup> A contraceptive fraud statute could encourage more males who have been defrauded to pursue legal remedies. Even if a partner’s declarations about birth control cannot be proven, when female

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59. *Id.* at 115.

60. Jessica Dickler, *The Rising Cost of Raising a Child*, CNN MONEY (Sept. 21, 2011), [http://money.cnn.com/2011/09/21/pf/cost\\_raising\\_child/index.htm](http://money.cnn.com/2011/09/21/pf/cost_raising_child/index.htm).

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

62. Oberman, *supra* note 47, at 918.

63. See Bryn Ann Poland, *He Said, She Said: Diverging Views in the Emerging Field of Father’s Rights*, 46 WASHBURN L.J. 163, 173 (2006) (“The intimate nature of the act usually provides no witnesses or other tangible evidence to prove whether a misrepresentation was made or, if it was, whether the other party relied on it when engaging in sexual conduct. Moreover, recognition of tort principles would potentially create an incentive for abortion.”).

64. *Sorrel v. Henson*, No. 02A01-9609-JV-00212, 1998 WL 886561, at \*1 (Tenn. Ct. App. Dec. 18, 1998) (“Sorrell admits that she did not inform Henson about stopping the birth control pills, and the parties did not engage in any alternative form of birth control.”).

defendants admit that they were taking birth control and then stopped, courts should rule in favor of contraceptive fraud victims.<sup>65</sup> Thus, although a statute that would reduce or eliminate child support liability for contraceptive fraud victims appears extreme, its applicability would be very limited.

### B. Sexual Assault

A second situation meriting an elimination or reduction in child support is the sexual assault of a man that results in a pregnancy and subsequent childbirth. An example of male sexual assault resulting in parental obligations is *S.F. v. ex rel. T.M.*, an Alabama case in which a woman had non-consensual sex with an intoxicated, unconscious man several times, resulting in her pregnancy and the birth of a child.<sup>66</sup> This male victim, who was unconscious at the time of conception, was held liable for child support.<sup>67</sup> The sexual assault of an intoxicated, unconscious woman would undoubtedly immediately result in an outcry for justice. Such a woman would face less scrutiny for not wanting to take care of a child that would result from such an assault, if the child were ever born.<sup>68</sup>

In this sphere of female sympathy, S.F., the male rape victim, unsuccessfully pled to the courts for equitable treatment. S.F. “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.”<sup>69</sup> This claim was rejected and illustrates why a statute is necessary to equitably abate child support and reduce the reliance upon judicial independence.

### C. Statutory Rape

The third situation with unfair child support obligations is statutory rape. As underage victims<sup>70</sup> cannot legally consent to sex, the logical result should be that male statutory rape victims cannot unwillingly become legal parents with child support obligations.<sup>71</sup> Instead, the opposite occurs and statutory rapes serve as a predicate for civil liability in the form of child support payments.<sup>72</sup>

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65. *Id.*

66. *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186, 1188 (Ala. 1997).

67. *Id.* at 1187, 1190.

68. 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, 412 (2002) (“Specifically, statutory rape laws are being enforced according to cultural stereotypes of women as sexual victims and men as sexual aggressors.”).

69. *S.F.*, 695 So. 2d. at 1187.

70. I use the word “victims” to place an emphasis on unwilling males as it is clear that underage persons can be parents as evidenced by young pregnant women. Yet, these women have some control over the imposition of biological and legal parenthood through the previously discussed right to abortion.

71. 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

Other commentators have noticed that gender-based stereotypes influence the enforcement of statutory rape laws: “[s]pecifically, statutory rape laws are enforced according to cultural stereotypes of women as sexual victims and men as sexual aggressors.”<sup>73</sup> The inexistence of judicial decisions that eliminate child support obligations for male statutory rape victims also reveals that such stereotypes exist; this is evidenced by the reasoning used in state court decisions.<sup>74</sup> This cultural stereotype may account for the reluctance of courts to distinguish the claims of contraceptive fraud, sexual assault, and statutory rape victims from those who voluntarily fathered a child and simply do not want to pay. Courts’ and state legislatures’ failure to differentiate between *all males* and *victimized males* enforces gender inequity in society.

These aforementioned cultural 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* [emphasis added] of Jones’s criminal acts. After discussing the matter, he and Jones *decided* [emphasis added] to have sexual intercourse. They had sexual intercourse approximately five times over a two week period.”<sup>75</sup>

The family court judge here mischaracterized the situation, as evidenced by the judicial decision’s word choice. Most notably, the court states that this child, Nathaniel J., “decided” to have sex with a thirty-four-year-old woman, even though the law does not recognize Nathaniel J.’s ability to make the decision.<sup>76</sup> Even if the judge thinks that Nathaniel J. “decided” to consent to this crime which was committed *on him*, this is an individual, independent determination that should not be recognized by the judicial system. Additionally, had Nathaniel J. been a female victim of statutory rape, it is doubtful that a court would decide that he was not an “innocent victim” or mention his role in his own victimization.

When assessing the claims of male statutory rape victims, state courts forget that Justice Blackmun’s observation in *Roe v. Wade* could apply to male statutory rape victims too: “Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be

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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.”).

72. See generally *infra* Part V.B.iii.

73. Jones, *supra* note 68, at 412; see also London, *supra* note 28, at 1974, 1975 (“Ruth Jones explains that statutory rape laws were drafted—and are enforced—in light of the female experience. . . 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.’”).

74. See e.g., *Cnty. of San Luis Obispo v. Nathaniel J.*, 50 Cal. App. 4th 843, 844 (Cal. Ct. App. 1996).

75. *Id.*

76. *Id.* at 843-45. For more information on statutory rape, see *infra* Part V.B.iii.

imminent.”<sup>77</sup> Paternity, or additional offspring, may force a distressful life and future upon the male statutory rape victim. Beyond the obvious financial and emotional burden of raising a child at any age, “[p]sychologically, [child] fathers are [especially] not necessarily ready to take a step toward parenthood.”<sup>78</sup> By absolving male statutory rape victims of child support obligations, the legal system acts to prevent further victimization of the child.

Moreover, the assumption that a reduction in the father’s support obligation directly correlates to a reduction in the child’s support, which is also addressed in contraceptive fraud cases, 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 [the] 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.”<sup>79</sup> The decision to focus on the second, newborn child as opposed to the victimized child is arbitrary and contrary to protection of victims of statutory rape. If voluntary anonymous donors are statutorily absolved of child support liability, then victims of statutory rape should also be statutorily absolved of child support liability.

#### V. POSSIBLE SOLUTIONS TO THE UNFAIR TREATMENT OF MALE SEXUAL ASSAULT, CONTRACEPTIVE FRAUD, AND STATUTORY RAPE VICTIMS

Current child support guidelines need to be revised or judicial exceptions to the guidelines recognized, in order to end the unfair treatment of male contraceptive fraud, sexual assault, and statutory rape victims. This belief is founded on a disagreement with state court views of child support. As an initial matter, there are certain cases in which a natural parent should not be “obligated” to pay child support due to a criminal matter (sexual assault, statutory rape) or contraceptive fraud. Furthermore, anonymous donors are “natural parents” who, if an “obligation” were justified, should be subject to the same obligations as a natural parent who was involuntarily such a parent. However, state law often absolves these “natural parents” of any obligation to pay child support even though they willingly parented a child.

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77. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

78. Annie Devault, *Young Fathers Research Cluster Executive Summary: Father Involvement Community Research Forum Spring 2006*, FATHER’S INVOLVEMENT RESEARCH ALLIANCE, [http://fira.ca/cms/documents/50/Young\\_Fathers.pdf](http://fira.ca/cms/documents/50/Young_Fathers.pdf) (last visited Jan. 30, 2012).

79. *J.J.G. v. L.H.*, 149 Wis. 2d 349, 352, 441 N.W.2d 273, 276 (Wis. App. 1989) (citing *Francken v. State*, 190 Wis. 424, 441, 209 N.W. 766, 772 (1926)); see *Jevning v. Chicos*, 499 N.W. 515, 517 (Minn. Ct. App. 1993)). Some cases hold the opposite. See *Alice D. v. William M.*, 450 N.Y.S.2d 350, 354 (1982) (upholding a woman’s recovery for an abortion: “[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.”).



*A. Compensation to Male Victims for the Use of their Biological Material*

As noted in Figure 1 and the introductory discussion of the fertility industry, sperm is an asset, at least when offered to a commercial entity offering reproductive assistance. Anecdotally, the sexual assault context offers the clearest example of why male victims of contraceptive fraud, sexual assault, and statutory rape should, at least, be compensated for the nonconsensual use of their sperm, by revealing some of the reasoning involved in these situations preceding liability. In *S.F. v. State ex rel. T.M.*, the case introduced in section IV, a friend of the male victim who

testified 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.<sup>80</sup>

It is clear from the testimony that S.F., the male sexual assault victim, did not consent to the sex that “saved [T.M.] a trip to the sperm bank.”<sup>81</sup> Building upon this example, as an initial matter, S.F. is entitled to a compensatory outlay of money which would range between (a) the amount of money that he would have received at the sperm bank for the donation and (b) the market price in his area for a vial of sperm. I created a model statute to compensate these victims not only inspired by fairness, but also because the property-based concept of conversion is not available for a tort claim.<sup>82</sup> A statutory embodiment of this compensatory concept, as follows, would be very simple when added to the civil code of a state:

- §1. Compensation for the unauthorized use of biological products
  - a. Men whose semen is obtained through misrepresentations of sterility or the use of birth control, through statutory rape, or through sexual assault are entitled to compensation for the use of their biological products.
  - b. This compensation will be the highest of either

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80. *S.F. v. State ex rel. T.M.*, 695 So.2d 1186, 1188 (Ala. 1996).

81. *Id.*

82. *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.”); *Sorrel v. Henson*, No. 02A01-9609-JV-00212, 1998 WL 886561, at \*3 (Tenn. Ct. App. Dec. 18, 1998) (“The conversion claim likewise fails for lack of proof of any agreement regarding the disposal of the semen.”); *see also Phillips v. Irons*, No. 05 L 4910, 2006 WL 4472185 (Ill. Cir. Apr. 18 2006) (“[The plaintiff] alleged that the Defendant obtained sperm from the Plaintiff via oral sex and had herself inseminated with the Plaintiff’s sperm.”).

- i. the amount of money that the male would have received for his sperm at a local donation center; or
- ii. the market price in his geographic location for a vial of sperm.

*B. A Revision of Child Support Guidelines that Result in Reduction or Elimination of Child Support Liability*

While courts are willing to punish men for crimes like statutory rape without hesitation, courts and prosecutors are much more reluctant to punish women for the same crimes.<sup>83</sup> For example, “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.”<sup>84</sup> Holding women financially liable for their crimes that result in childbirth, through the imposition of additional child support liability, equalizes the treatment of males and females, especially since courts are not sentencing these women to time in prison.<sup>85</sup> The imposition of financial liability on women, the historical victim in family law, recognizes that both males and females play important roles in the abandonment of children, and that men are no longer the only aggressors as previously thought.

i. Child Support Reduction or Elimination when Male Parentage is a Result of Contraceptive Fraud

A reduction or elimination of the amount of child support that a non-custodial parent should pay is an appropriate response to an act that should be a crime and is an action that does not reduce the support of the child. First, the “best interests of the child” standard, a family law standard which underlies

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83. See Jones, *supra* note 68, at 112 (“Specifically, statutory rape laws are being enforced according to cultural stereotypes of women as sexual victims and men as sexual aggressors.”); see also *id.* at 433 (“By enacting gender-neutral statutory rape laws, legislators have ensured that both men and women can be prosecuted for committing the offense of statutory rape. However, although an increasing number of women have been prosecuted for statutory rape, there are continuing allegations that women are not treated the same as male offenders. Specifically, there are allegations that authorities fail to perceive the sexual relationship between an adult woman and a male adolescent as statutory rape, that women are not prosecuted as often as men, and that women do not receive similar sentences. For example, the Ventura County District Attorney’s web page, which describes statutory rape as a gender-neutral crime, only discusses enforcement against men and gives the purpose of enforcement as prevention of teenage pregnancy.”).

84. Bruno, *supra* note 34, at 159.

85. See, e.g., *S.F.*, 695 So. 2d at 1189 (“We find S. F.’s argument to be without merit. The child is an innocent party, and it is the child’s interests and welfare that we look to under the Alabama Uniform Parentage Act. The purpose of this act is to provide for the general welfare of the child; any wrongful conduct on the part of the mother should not alter the father’s duty to provide support for the child. We note that the father could have filed criminal charges against the mother.” [emphasis added] (citing § 13A-6-65, Ala. Code 1975.)).

child support provisions, is not reduced by the reallocation of child support income.<sup>86</sup> Practically, courts conflate the child's best interests with the mother's, by assuming that if a male is no longer parentally responsible, then the child will not receive half of his or her support;<sup>87</sup> this is not the case. As child support is an income-based calculation, not a reimbursement calculation that ensures the allocation of fifty percent of a child's *actual* expenses to each parent, courts' characterization of the removal of male support as a loss to the child is not practical.<sup>88</sup> Instead of apportioning the child's actual expenses between the two parents in an equal manner, the courts should view child support as a mechanism for ensuring that the best interests of the child are addressed, while also realizing that a re-apportionment of responsibility would mean that women responsible for contraceptive fraud, statutory rape, or sexual assault would use more of their actual income to provide for the child. Because child support is not a fixed allocation of money for each child, regardless of economic situation, but rather a percentage-based allocation, a parent who disregards the procreative autonomy of another could use more of their income

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86. See generally Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. AND FAM. STUD. 337 (2008) (regarding the "best interests of the child" standard).

87. This conclusion stems from state court refusals to reduce or mitigate the child support obligations of male contraceptive fraud victims. See e.g. *Wallis*, 22 P.3d at 684 ("Placing a duty of support on each parent has the added benefit of insulating the state from the possibility of bearing the financial burden for a child. In our view, it is difficult to harmonize the legislative concern for the child, reflected in the immutable duty of parental support, with Wallis's effort in this lawsuit to shift financial responsibility for his child solely to the mother."); see also *Hughes v. Hutt*, 455 A.2d 623, 625 (Pa. 1983) ("The only issues which are to be considered in a support action continue to be the needs of the child and the means of both parents. Indeed, the possibility of fabricated accusations, the less than certain effectiveness of birth control methods, and the fact that claims like appellant's, if successful, could result in the denial of support to innocent children whom the Support Law was designed to protect, all illustrate that allegations of a mother's failure to use birth control have absolutely no place in a proceeding to determine child support." (citing *Conway v. Dana*, 456 Pa. 536, 540, 318 A.2d 324, 326 (1974))); *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618, 620 (Cal. Ct. App. 1980) ("We are in effect asked to attach tortious liability to the natural results of consensual sexual intercourse. Stephen's claim is one of an alleged wrong to him personally and alone. Procedurally and technically it is separate and apart from any issue of either parent's obligation to raise and support the child."); *L. Pamela P. v. Frank S.*, 462 N.Y.S.2d 819, 820 (Ct. App. N.Y. 1983) ("We agree with the Appellate Division that the mother's alleged deceit has no bearing upon a father's obligation to support his child or upon the manner in which the parents' respective support obligations are determined. The order of the Appellate Division should therefore be affirmed.").

88. Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 673 (2002); see *Douglas R. v. Suzanne M.*, 487 N.Y.S.2d 244, 245 (N.Y. App. Div. 1985) ("to allow one parent to utilize a plenary action to deflect the statutory obligation onto the other would render [. . . the statute] nugatory"); see also *Hughes*, 455 A.2d at 625 ("claims like appellant's [a contraceptive fraud victim's], if successful, could result in the denial of support to innocent children whom the Support Law [child support statute] was designed to protect.").

to support the child than the law would usually prescribe.<sup>89</sup> For example, instead of seventeen percent of the father's income going to the child's custodial parent for the child's care (as required by New York's child support guidelines),<sup>90</sup> a revised statute (as will be presented in Subsection D of this Section, entitled "A Model Statute Combining the Latter Two Solutions"), would change the guidelines so that the standard parental percentage contribution would be reduced in exceptional cases, such as those involving contraceptive fraud, sexual assault, and statutory rape. Similarly, a court order or statute could reduce the amount of the father's income going to the child with the "loss" of support funding being composed of the mother's income.<sup>91</sup> Thus, child support statutes would now include an additional provision allowing for the reduction of the usual percentage contribution from the father.

ii. Child Support Reduction or Elimination When Male Parentage is a Result of Sexual Assault

A criminal mother should not be able to "profit" from sexual assault and the theft of a male's sperm through child support payments from her victim, which have the impact of reducing the burden on the mother of providing for the child. Even though the child support payments are for the child, the mother benefits from child support because she has to use less of her income to support the child. Instead, the burden of raising a child, one which she undertook herself, is one for which she should be solely responsible. Thus, the percentage of the non-custodial parent's contribution should be reduced, or eliminated, and the criminal mother should use more of her disposable income to support the child.

iii. Child Support Reduction or Elimination When Male Parentage is a Result of Statutory Rape

Treating statutory rape victims in the same manner as anonymous donors in artificial insemination statutes ends the second-guessing of criminal law by family court judges. A statutory rape victim did not intend to create a child and, under criminal law, could not consent to the act that resulted in the birth of the child; as a result, he should not be liable for resultant child support outlays from an illegal act.<sup>92</sup>

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89. See, e.g., Child Support Guidelines, THE COMMONWEALTH OF MASS.: ADMIN. OFFICE OF THE TRIAL COURT (Jan. 1, 2009), available at <http://www.mass.gov/courts/childsupport/guidelines.pdf>.

90. See *Child Support Services*, N.Y. STATE DIV. OF CHILD SUPPORT ENFORCEMENT, [https://www.childsupport.ny.gov/dcse/child\\_support\\_services.html#supportEstab](https://www.childsupport.ny.gov/dcse/child_support_services.html#supportEstab) (last visited Apr. 25, 2011).

91. *Id.*

92. See generally Jones, *supra* note 68, at 412; see e.g. *County of San Luis Obispo v. Nathaniel J.*, 50 Cal.App.4th 842 (Cal.Ct.App. 1996).

Statutory rape victims should not be forced to participate in a system of transfers from victims to various levels of government. While some women who decide to birth a child are financially well-off, women whose income is below a certain financial threshold are eligible to receive aid through governmental welfare programs to support them.<sup>93</sup> These governmental welfare programs have additional components which impose additional burdens on crime victims and imply tacit support for the further victimization of statutory rape victims.<sup>94</sup> Nathaniel J., already a victim of a crime, was sued by the San Luis Obispo County District Attorney's office for child support and for welfare reimbursement.<sup>95</sup> This reimbursement would benefit the county, not Nathaniel J.'s biological child whose financial support had already been provided by the state. The state should not seek reimbursement from someone that its laws were supposed to protect. Nathaniel J.'s attorney made a similar argument by asserting that "exacting child support from a victim of statutory rape violates public policy."<sup>96</sup> This claim was rejected by the California Court of Appeal.<sup>97</sup>

In effect, the county's message is that Nathaniel J. is indeed a victim, but his needs do not supersede the state's financial health or the mandated support guidelines benefitting the child he involuntarily, both factually and legally, created.<sup>98</sup> At the same time, the county revealed a quasi-sympathy with

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93. See, e.g., Jones, *supra* note 68, at 412-5, 449-50.

94. See Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN'S L.J. 367, 368-9 (2000) ("In an attempt to enforce child support, PRWORA [the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 which eliminated Aid to Families with Dependent Children (AFDC) and replaced it with Temporary Aid for Needy Families (TANF).] [citation omitted] requires that mothers who seek public assistance cooperate in establishing paternity and child support. This is often referred to as the "cooperation requirement." In other words, a mother who seeks public assistance is required to supply information about the father and appear at interviews, hearings, and legal proceedings to establish paternity. Furthermore, both mother and child must submit to genetic testing ordered by a court or an administrative agency. Failure to cooperate means a reduction in family benefits by at least 25%. In Wisconsin, failure to cooperate results in a complete loss of cash assistance. An exception to child support enforcement exists when the mother has "good cause" for not seeking child support.").

95. *Nathaniel J.*, 50 Cal. App. 4th at 844.

96. *Id.* at 844. 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, but this argument was rejected by the Court of Appeal in favor of California child support law. *Id.*

97. *Id.*

98. Some courts focus their analysis on the rights of the newborn child to bring an action. See, e.g., *Linda D. and Baby Boy D.-C 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*, 32 Wash. App. 606, 609, 648 P.2d 508 (1982))). However, this does not ruin my argument because children are still not allowed to institute these actions against their anonymous sperm donor fathers.

Nathaniel J.'s position by deliberately not seeking enforcement of the child support order until Nathaniel J. was an adult.<sup>99</sup> The county's position is quasi-sympathetic because Nathaniel J. is not absolved of the child support obligations that accrue during his childhood but is instead being given a grace period, which he only obtained through litigation.<sup>100</sup> Otherwise, Nathaniel J. would likely be forced to be a biological father, student, and minimum-wage employee with all of his money going to support a child not much younger than him. Or, perhaps Nathaniel J.'s parents would have had to pay the support obligation on his behalf, which would add additional actors to this system of transfers.

My model statute *completely* eliminates liability for children like Nathaniel J. because even a reprieve on child support liability until the age of majority is not particularly helpful; the U.S. Census Bureau in 1999 estimated that the annual earnings of a worker with only a high school degree are \$25,900.<sup>101</sup> This calculation was completed before the 2007-08 recession, which rendered it *even* more difficult for *college-educated* adults to obtain jobs.<sup>102</sup> It is also commonly known that young parents often feel compelled to take care of their children instead of pursuing higher education. Therefore, Nathaniel J.'s future earning capacity may be impacted by his present child support obligations.

Outside of California, other states hold statutory rape victims liable for child support. In Minnesota, a female statutory rapist sued the child victim and won, forcing the statutory rape victim to pay child support.<sup>103</sup> In Kansas, a lower court required a statutory rape victim to reimburse the Department of Social and Rehabilitation Services \$7,000, but in an enforcement pattern similar to that of the California government, the Kansas Social and Rehabilitation Services (now the Department for Children and Families)<sup>104</sup> actively planned to never collect the \$7,000 award.<sup>105</sup> The state of Kansas, like

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99. *Nathaniel J.*, 50 Cal. App. 4th at 846 (“[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.”).

100. *Id.*

101. Jennifer Cheeseman Day & Eric C. Newburger, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings*, U.S. CENSUS BUREAU 2 (July 2002), available at <http://www.census.gov/prod/2002pubs/p23-210.pdf>.

102. See Alan B. Krueger, *The Job Market for College Graduates*, *ECONOMIX* (Dec. 8, 2008), <http://economix.blogs.nytimes.com/2008/12/08/the-job-market-for-college-graduates/>.

103. *Jevning v. Cichos*, 499 N.W. 2d 515, 515 (Minn. App. 1993).

104. KANSAS DEPARTMENT FOR CHILDREN AND FAMILIES, <http://www.dcf.ks.gov/Pages/default.aspx> (last visited Aug. 16, 2012).

105. *State ex. Rel. Hermesmann v. Seyer*, 847 P.2d 1273, 1280 (“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 these circumstances, the reason for seeking that portion of the judgment still eludes us.”).

other states, successfully contended that the child father's age is unrelated to the question of biological fatherhood. If the purpose of statutory rape laws is to protect children from being exploited by adults, then there is a serious flaw in the application of these laws.

*C. "Just Cause" Exception for Statutory Rape Victims*

Adding a "just cause" exception to state law would be another way that child support obligations could be eliminated for male victims. This is the least drastic of the solutions in this paper because it focuses on child victims. A Delaware case where a female incest victim was excused from child support liability highlights an alternative, equitable method of excusing statutory rape victims from child support liability. In *DCSE/Esther M.C. v. Mary L.*, the Delaware Family Court analyzed the Delaware code, which included a provision stating "[n]o person shall be required to support another while he has just cause for failing or refusing to do so."<sup>106</sup> The Delaware Family Court held that rape or incest qualified as "just cause."<sup>107</sup> A "just cause" exception would be less drastic than providing a blanket exception for all contraceptive fraud, sexual assault, and statutory rape. The addition of a "just cause" exception gives state courts specific authority to impose principles of equity.<sup>108</sup>

The Delaware Family Court qualified the "just cause" exception with an inquiry into the voluntariness of the sexual intercourse that formed the basis for statutory rape. After distinguishing the *DCSE/Esther M.C. v. Mary L.* case from other states' cases involving male statutory rape victims, the court 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 parenthood is voluntary. A parent's duty to support the child flows directly from his voluntary parenthood.<sup>109</sup>

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106. *DCSE/Esther M.C. v. Mary L.*, No. 38812., 1994 WL 811732, at \*2-3 (Del. Fam. Ct. 1994). See also Jones, *supra* note 68, at 417-18 (discussing *DCSE/Esther M.C. v. Mary L.*).

107. *DCSE/Esther M.C.*, 1994 WL 811732 at \*3.

108. Jones, *supra* note 68, 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.").

109. *DCSE/Esther M.C.*, 1994 WL 811732 at \*3; see also *State ex re. Hermesmann v. Seyer*, 847 P.2d 1273, 1276 (Kan. 1993).

As a result, the case was remanded in order to determine whether actual consent, not legal consent, was present.<sup>110</sup> This is a procedural step that undermines statutory rape laws, which do not allow for consent by underage individuals, which would create an additional inconsistency in family law; as such, I would not include such a provision as an accompaniment to the “just cause” exception. Adding a “just cause” exception to the law in states where judges do not undertake such autonomous inquiries into the merits of a victim’s case, however, could allow some victims to escape the unfortunate imposition of child support liability.

*D. A Model Statute Combining the Latter Two Solutions*

This model statute adds language to an existing state statute. I included the original statute here and added the suggested changes based on this paper’s findings. The original statute is in normal font, and the edits are italicized.<sup>111</sup>

. . . §1 (a) 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.<sup>112</sup>

(b) *If a male child is deemed to be the victim of statutory rape, he shall be treated in law as if he were not the natural father of a child conceived. If a male is the victim of a sexual assault, he shall be treated in law as if he were not the natural father of a child conceived. If a male has failed to use contraception due to the misrepresentations of his sexual partner, then he shall be treated in law as if he were not the natural father of a child conceived.*

The alternative to the last sentence of §1(b) addressing contraceptive fraud is a provision that reduces, not eliminates, the child support liability of male:

*If a male has failed to use contraception due to the misrepresentations of his sexual partner, then his statutory child support liability shall be half of the current child support allocation.*

Therefore, a statute reducing child support liability or absolving male contraceptive fraud, statutory rape, and sexual assault victims of child support liability would parallel the current statutory language for anonymous sperm donation. Additionally, addressing all four situations (anonymous sperm donation, statutory rape, contraceptive fraud, and sexual assault) in the same statute enables the public to see why these four situations should be treated similarly.

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110. *DCSE/Esther M.C.*, 1994 WL 811732 at \*3.

111. 750 ILL. COMP. STAT. ANN. 40/3 (2010).

112. *Id.*



## CONCLUSION

This article has analyzed three possible legal methods of compensating male victims of contraceptive fraud, sexual assault, and statutory rape: compensation for the use of biological products, reduction or elimination of child support liability, and a “just cause exception”. Admittedly, these male victims differ in terms of victimization from a societal perspective. That difference matters because even judges, who should be impartial, make determinations about the innocence of males in a situation that would spark an outrage if women were the victims. Because of the stereotype of women as victims and males as aggressors, in a hypothetical implementation timeline, it is most likely that a “just cause” provision would be first introduced and followed by a simple compensatory statute based on the value of biological products, as these are the most conservative suggestions of the article. Unfortunately, this “just cause” exception is also the easiest for a court to ignore.

Men who are victims of birth control fraud,<sup>113</sup> statutory rape, or sexual assault should not be liable for child support and should instead be treated like anonymous donors under artificial insemination statutes who receive compensation for their biological products as a part of a \$3 billion per year industry.<sup>114</sup> Granted, the economic aspects of reproduction are not novel. For example, when the world was dominated by agricultural economies, children were regarded as an additional labor source. Now, the fertility industry and state governments profit from a person’s desire to be a parent, and through reimbursements from statutory rape victims to the state and tax revenues from the largely unregulated fertility industry. Inserting compensatory and reallocation provisions into family law only recognizes the contemporary realities of the fertility market’s impact on the community. The treatment of male contraceptive fraud, statutory rape, and sexual assault victims as anonymous donors reduces the prevalence of gender-based stereotypes in law, prevents unhindered civil court dismissal of criminal law, prevents the state from tacitly sanctioning fraud in parentage, and ends a system of transfers from the victims whose laws the state aimed to protect to state and local governmental bodies.

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113. “Birth control fraud” is also called “contraceptive fraud.” See Sheldon, *supra* note 2, at 460–80; see also Phillips v. Irons, No. 05 L 4910, 2006 WL 4472185 (Ill. Cir. Apr. 18, 2006); Adrienne D. Gross, *A Man’s Right to Choose: Searching for Remedies in the Face of Unplanned Fatherhood*, 55 DRAKE L. REV. 1015, 1046 (2007) (discussing Phillips v. Irons: “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.”).

114. See Dreifus, *supra* note 7; Orenstein, *supra* note 7; see also CAHN, *supra* note 18, at 1; see generally SPAR, *supra* note 18.