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Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support

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> The strictest law sometimes becomes the severest injustice.
>
> – Benjamin Franklin[1]

I. INTRODUCTION

When it comes to advocating for a change in the law, storytelling can be an extremely powerful tool.[2] After all, "[l]egal narratives transport readers to a world where the laws, though familiar, have an effect on people's lives that is altogether unknown" and, as such, "set the background against which writers can show readers the unseen consequences of laws."[3] For these reasons, this Article begins with three stories—true stories in fact—about three different men and the paths each took to fatherhood. It is unlikely that these men have ever crossed paths with one another. They live in different states and, further, became fathers in different years and under different circumstances. Nonetheless, the three men share a common connection. Before the nature of that connection is revealed, let me first recount the stories of S.F., Nathaniel, and Emile.

S.F. is an Alabama man, who in 1992 attended a party at the home of a female friend, T.M.[4] He arrived at the party intoxicated and shortly thereafter passed out in a bed at T.M.'s house.[5] The other partygoers eventually left for the evening, leaving S.F. in the sole care of T.M.[6] When S.F. awoke the next morning, he was surprised to find that all of his clothing—save his unbuttoned shirt—had been removed during the night.[7] Over the next few

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[1] CALVIN HELIN, DANCES WITH DEPENDENCY: OUT OF POVERTY THROUGH SELF-RELIANCE 93 (2008).

[2] *See* Linda H. Edwards, *Once Upon A Time in Law: Myth, Metaphor, and Authority,* 77 TENN. L. REV. 883, 886 (2009) ("We have known for some time that stories are among the primary ways of making sense of the world, including the world of law.").

[3] Benjamin L. Apt, *Aggadah, Legal Narrative, and the Law*, 73 OR. L. REV. 943, 957 (1994). For this reason, Professor Mary Coombs classifies such stories as a form of "outsider scholarship." Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 683 (1992).

[4] S.F. v. State *ex rel.* T.M., 695 So. 2d 1186, 1187 (Ala. Civ. App. 1996).

[5] *Id.*

[6] *Id.* at 1188.

[7] *Id.* at 1187.

months, T.M. would openly boast to several people about how she had engaged in sexual intercourse with S.F. while he was unconscious.[8] She would even go so far as to describe the evening as one that had "saved her a trip to the sperm bank."[9] T.M. gave birth to a child, and genetic testing confirmed that S.F. was the biological father.[10]

Nathaniel became a father in 1995 as a California teenager.[11] The mother of Nathaniel's child was named Ricci and was thirty-four at the time of conception.[12] Nathaniel, however, was merely fifteen.[13] Although Nathaniel admitted to having sex with Ricci voluntarily about five times, the fact that he was under sixteen years of age at the time made it legally impossible for him to consent to sexual intercourse.[14] In other words, under California law, Nathaniel was not only a new father, but also a victim of statutory rape.[15]

Emile is a Louisiana man who in 1983 was visiting his sick parents at the hospital—something he did quite regularly.[16] One evening, a nurse, Debra, offered to perform oral sex on Emile, but only if he wore a condom.[17] He accepted.[18] At the end of their sexual encounter, Debra agreed to dispose of the used condom.[19] Emile, however, never witnessed this disposal and thus could not say what Debra ultimately did with either the condom or its contents—Emile's sperm.[20] Nine months later she gave birth to a child, and genetic testing revealed a 99.9994% probability that

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[8] *Id.* at 1188.
[9] *Id.*
[10] *Id.* at 1186.
[11] Cnty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843, 843 (Ct. App. 1996).
[12] *Id.*
[13] *Id.*
[14] *Id.* at 843–44 n.1.
[15] *Id.* at 843.
[16] *See* State v. Frisard, 694 So. 2d 1032, 1035 (La. Ct. App. 1997) (stating that from mid-August until early September, Frisard spent every night visiting his parents).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

Emile was the father.[21] The two never had sexual intercourse, only the one instance of oral sex with a condom.[22]

What then is the common thread that runs through this story of three fathers? Well, if you guessed that all three men ultimately fathered children despite not having consented to the act that produced these children, you would be partially correct. They also share an additional similarity, one that many would find somewhat surprising: Courts ordered each man to pay child support for the resulting child.[23]

These stories are but three examples of men who have been forced into fatherhood *and* the attendant obligation to pay child support, despite not having consented to the act that led to insemination.[24] As such, these stories highlight a problem that exists in the current approach to adjudicating child support. Namely, the courts have focused exclusively on the child's interest in receiving support with the result that fathers are now strictly liable for any biological child, regardless of any wrongful conduct by the mother.[25] Indeed, courts have been unwilling to allow fathers to even *raise* consent as a defense to liability for child support given the overriding policy that children are entitled to financial support from both parents and, if the biological father is not liable, then the child would be left with only one supporting parent.[26]

Although others have pointed to the seemingly bizarre holdings in the above referenced cases,[27] these commentators have done so

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[21] *Id.*

[22] *Id.* at 1036.

[23] S.F. v. State *ex rel.* T.M., 695 So. 2d 1186, 1186 (Ala. Civ. App. 1996); County of San Luis Obispo v. Nathanial J., 57 Cal. Rptr. 2d 843, 843 (Ct. App. 1996); *Frisard*, 694 So. 2d at 1039–40.

[24] *See infra* Part III for additional cases.

[25] *See infra* notes 76–78 and accompanying text.

[26] *See, e.g.*, *In re* Paternity of Derek S.H., 642 N.W.2d 645, No. 01-0473, 2002 WL 265006, at *3 (Wis. Ct. App. Feb. 26, 2002) (unpublished table decision) (holding that lower court erred in submitting question of consent to jury).

[27] *See* 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) (noting that "statutory rape laws are not equally enforced against female offenders, nor have such laws been crafted to address male victimization"); Dana Johnson, Comment, *Child Support Obligations that Result from Male Sexual Victimization: An Examination of the Requirement of Support*, 25 N. ILL. U. L. REV. 515, 516 (2005)

largely in a "Ripley's Believe It or Not" fashion, expressing shock and wonder at the courts' rulings but offering no solutions or alternative approaches to this admittedly difficult issue. The purpose then of this Article is, first, to underscore these criticisms—that the current approach and its attendant justifications pose a grave injustice both to the men who are pressed into the obligations of fatherhood and also to society, which has an interest in protecting all citizens from sexual assault. More importantly, however, this Article offers a new objection and, on that basis, a proposed solution.

Specifically, the laws regulating artificial insemination seriously undermine the courts' justification that all children are entitled to support from both biological parents. In that context, a man, regardless of whether he is the sperm donor or the non-donor husband of the inseminated female, only becomes the legal father of an artificially inseminated child if he affirmatively consents. It is incongruous to allow exceptions for formal sperm donors yet wholesale deny similar protections for those who, although not in the setting of a sperm bank, never consented to the use of their sperm. Accordingly, this Article proposes a solution whereby courts adopt an approach similar (albeit narrower) to that used in artificial insemination cases to adjudicate child support claims against those men who were forced into fatherhood as a result of nonconsensual insemination.

To begin, Part II contains an overview of current law as it relates to the determination and enforcement of child support obligations. Part III, looking at the strict liability approach, discusses cases where the biological father was held liable for child support despite the fact that the child was conceived as a result of sexual assault. Next, Part IV offers a critique of the courts' use of strict liability when adjudicating the child support obligations of male victims of sexual assault, pointing out various flaws in this approach and the resulting injustices. Part V then discusses the

("[A]ddress[ing] the ways in which the law is inadequate to address male sexual victimization in the context of child support obligations."); Ellen London, Comment, *A Critique of the Strict Liability Standard for Determining Child Support in Cases of Male Victims of Sexual Assault and Statutory Rape*, 152 U. PA. L. REV. 1957, 1958 (2004) (arguing that "the use of strict liability has problematic implications for societal conceptions of gender").

laws relating to artificial insemination, where consent is very much a relevant consideration when determining child support obligations. Finally, this Article offers a proposed solution, whereby, just as it is with artificial insemination, consent would operate as an affirmative defense to child support obligations for those fathers whose parenthood arose as a result of sexual assault.

II. THE LAW OF CHILD SUPPORT: AN OVERVIEW

Society has long had an interest in establishing a child's paternity, an interest driven primarily "by the desire to provide support for children without making excessive demands on the public coffers and the hope of reducing the incidence of irresponsible procreative behavior."[28] In early common law, however, an illegitimate child was considered "filius nullius," the child of no one.[29] As such, not only could the child not inherit from either parent, but she also had a very limited right to support from her father.[30] Indeed, "the common law contained no obligation for maintenance of bastards until the enactment of the Elizabethan Poor Laws in the sixteenth century,"[31] which "authorized towns to sue nonsupporting fathers in order to reimburse public aid."[32] In contrast, the early American colonies, in what has been described as a "legal innovation," passed bastardy laws that affirmatively

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[28] Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity,* 13 CORNELL J.L. & PUB. POL'Y 29, 30 (2003).

[29] *See* HARI DEV KOHLI, LAW AND ILLEGITIMATE CHILD: FROM SASTRIK LAW TO STATUTORY LAW 11 (2003) ("The incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but his own body; for, being 'nullius filius,' he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.").

[30] *See* DOMESTIC RELATIONS: CASES AND PROBLEMS 229 (Homer H. Clark, Jr. & Ann Laquer Estin eds., 2005) [hereinafter DOMESTIC RELATIONS] ("It is also often asserted that illegitimate children had no right to support from their fathers, but historical research indicates that there were ecclesiastical remedies by which fathers could be and were ordered to support their illegitimate children.").

[31] MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 79 (1995).

[32] Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1037 (2007); *see also* FINEMAN, *supra* note 31, at 79–80 ("These laws, which imposed a duty of maintenance on mothers as well as fathers, were explicitly designed to relieve the parish of economic responsibility for children.").

required fathers to support their illegitimate children.[33] As Professor Daniel Hatcher describes, "[a]s early as 1808, courts began to order noncustodial parents to pay financial support [to mothers and children] . . . . By the 1930s, almost all states had such child support statutes."[34]

Shortly thereafter, the federal government became increasingly involved in the issue of child support. The first step was taken in 1950, when "an amendment to the Social Security Act require[ed] state welfare agencies to notify law enforcement officials when a family received Aid to Families with Dependent Children" (AFDC) on behalf of an abandoned or deserted child.[35] AFDC was "created to enable each state and jurisdiction to provide a minimum standard of living to needy dependent children and, in some cases, to their caretakers."[36] Subsequent amendments would increase the ability of these state agencies "to obtain the address and employment information of noncustodial parents and required states to create single government units to pursue child support on behalf of children receiving AFDC."[37]

A problem persisted, however, in these early attempts to assist needy children. Specifically, the statutes did not require the custodial parent seeking AFDC to cooperate with the state in pursuing child support against the noncustodial parent.[38] Without such a requirement, those mothers seeking benefits had little incentive to provide the information necessary for the government to identify nonpaying fathers, from whom the government could

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[33] FINEMAN, *supra* note 31, at 80; Drew D. Hansen, Note, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1144 (1999). As Professor Daniel Hatcher notes, the bastardy laws were in addition to "poor laws and criminal nonsupport laws." Hatcher, *supra* note 32, at 1038. Of course, child support obligations extended not only to illegitimate children, but to the children of divorce as well. *Id.* at 1036.

[34] Hatcher, *supra* note 32, at 1036; *see also* Donna Schuele, *Origins and Development of the Law of Parental Child Support*, 27 J. FAM. L. 807, 821, 834–35 (1988–1989) (discussing the history of child support laws).

[35] Hatcher, *supra* note 32, at 1041 (citing 42 U.S.C. § 602(a)(11) (1988) (repealed 1996)).

[36] SANDRA J. NEWMAN & ANN B. SCHNARE, SUBSIDIZING SHELTER: THE RELATIONSHIP BETWEEN WELFARE AND HOUSING ASSISTANCE 117 (1988).

[37] Hatcher, *supra* note 32, at 1041.

[38] *See* GWENDOLYN MINK, WELFARE'S END 59 (1998) ("[T]hough the 1967 [welfare amendments] required states to improve paternity establishment programs, it did not compel mothers to cooperate.").

then try to seek reimbursement. All that changed, however, in 1974 when Congress enacted Title IV-D of the Social Security Act, which "created a partnership between federal and state government" to collect child support.[39] This framework still exists today,[40] and a key provision of the law is that genetic mothers who are receiving benefits must cooperate "in good faith" in establishing paternity.[41]

Further changes came in 1996 when Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[42] which replaced AFDC with the Temporary Assistance to Needy Families (TANF) program.[43] This new program provides for the distribution of federal block grants to the states.[44] However, to receive these grants the state must implement a plan for child and spousal support enforcement and the plan must meet a number of requirements.[45] Among other requirements, the state must have in place expedited administrative and judicial procedures for establishing paternity, procedures for voluntary paternity acknowledgement, and the previous requirement that applicants not only cooperate in paternity adjudication but also assign to the state any child support they may be owed.[46]

The purpose of this assignment is to "recoup the government costs of welfare assistance."[47] After all, "[w]elfare is not free."[48] In

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[39] Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 345 n.85 (2005) (citing Social Services Amendment of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351–58 (1975)).

[40] Hatcher, *supra* note 32, at 1041.

[41] 42 U.S.C. § 654(29)(A) (2006); *see also* Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59, 65–66 (2006) (discussing congressional guidelines on paternity establishment techniques and enforcement of child support orders).

[42] Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

[43] *See* Kansas v. United States, 214 F.3d 1196, 1197 (10th Cir. 2000) ("The PRWORA, also known as 'welfare reform,' made sweeping changes in social policy relating to low-income people.").

[44] PRWORA § 401, 110 Stat. at 2113.

[45] *Id.* § 402.

[46] *See* 42 U.S.C. § 666(a) (2006) (listing requirements for state plans).

[47] Hatcher, *supra* note 32, at 1042; *see also* Carmen Solomon-Fears, *Child Support Provisions in the Deficit Reduction Act of 2005 (P.L. 109-171)*, *in* FAMILY STRUCTURE AND

fact, "[o]ut of the $105 billion in child support debt nationwide, the government claims half so it can seek to recoup the costs of welfare benefits provided to low-income families."[49] As a result, "[m]others, fathers, and children all become government debtors—the mothers and children owe their child support rights and the fathers owe the payments—until the welfare benefits are repaid in full."[50]

PRWORA has also put the federal government in a position to maintain greater oversight and control over states' participation in the IV-D program. For instance, a state receiving TANF grants must establish a Case Registry of all child support orders within that state.[51] Additionally, the law requires states to adopt the Uniform Interstate Family Support Act, which permits state agencies to send income withholding orders across state lines directly to employers.[52] Given that states must meet very specific requirements in order to receive federal block grants under TANF, it should come as little surprise that federal law now significantly shapes "[s]tate laws governing establishment of paternity for nonmarital children."[53]

One of the direct ways in which federal law has influenced state laws relating to child support is the way in which the federal government has offered incentives to the states to collect as much child support as possible. Specifically, every state now has in place a federally-funded child support enforcement program, designed to reward states with "incentive payments" relating to

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SUPPORT ISSUES 85, 87 (Anne E. Bennett ed., 2007) ("Assigned child support collections are not paid to families; rather, this revenue is kept by states and the federal government as partial reimbursement for welfare benefits.").

[48] Hatcher, *supra* note 32, at 1030.

[49] *Id.* In 2009, the latest year for which data has been reported, the amount climbed to $107 billion. *See* OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., FY 2009 PRELIMINARY REPORT (2010), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2010/reports/preliminary_report_fy2009/.

[50] Hatcher, *supra* note 32, at 1030.

[51] 42 U.S.C. § 654a(e) (2006); *see also* Carmen Solomon-Fears, *Child Support Enforcement: Program Basics*, *in* FAMILY STRUCTURE AND SUPPORT ISSUES, *supra* note 47, at 65, 68 ("The federal directories consist of information from the state directories and federal agencies, and are located in the Federal Parent Locator Service (FPLS).").

[52] 42 U.S.C. § 666(f) (2006); Kansas v. United States, 214 F.3d 1196, 1198 (10th Cir. 2000).

[53] DOMESTIC RELATIONS, *supra* note 30, at 262.

"establishment of paternities, establishment of child support orders, collections on current child support payments, collections on past-due child support [payments] (i.e., arrearages), and cost effectiveness."[54] Under this program, "states receive incentive payments of 6 [to] 10% of each dollar collected in arrearages and current amounts owing, as well as two-thirds of states' collection costs and 90% of computer costs."[55]

In addition, federal law has also expanded the penalties that states can impose against those parents who fail to meet their child support obligations. For instance, in 1984 Congress enacted the Child Support Enforcement Amendments (CSEA), which required "[s]tates to put teeth into their enforcement laws and strengthen their enforcement powers."[56] The CSEA compels states to: "(1) require employers to withhold child support from paychecks of delinquent parents for one month, (2) provide for the imposition of liens against the property of defaulting support obligors, and (3) deduct from federal and state income tax refunds unpaid support obligations."[57] PRWORA also increased the ways in which a state can seek to compel payment of child support. Specifically, "[w]hen a parent fails to pay child support, the PRWORA requires states to revoke passports, suspend professional and other licenses, place liens on property, and notify consumer credit reporting agencies."[58]

In thinking about the way in which the laws relating to child support adjudication and enforcement have developed, it is important to keep in mind that, despite this evolution, the policies

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[54] CARMEN SOLOMON-FEARS, PATERNITY ESTABLISHMENT: CHILD SUPPORT AND BEYOND 22 (Susan Boriotti & Donna Dennis eds., 2003); *see also* 42 U.S.C. § 658a(b)(6)(A)–(E) (2006) (establishing state performance levels for incentive payments).

[55] Jennifer Goulah, Comment, *The Cart Before the Horse: Michigan Jumps the Gun in Jailing Deadbeat Dads*, 83 U. DET. MERCY L. REV. 479, 485 (2006).

[56] Laura W. Morgan, *Child Support Fifty Years Later*, 42 FAM. L.Q. 365, 367 (2008) (citing Pub. L. No. 98-378, 98 Stat. 1305 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.)).

[57] *Id.*; *see also* Steven B. Garasky, *Wage Withholding: Its Effect on Monthly Child Support Payments and Its Potential for Making Child Support a Reliable Source of Income*, *in* REDEFINING FAMILY POLICY: IMPLICATIONS FOR THE 21ST CENTURY 225, 227 (Joyce M. Mercier et al eds., 2000) ("Wage withholding has become the primary tool for enforcing child support orders.").

[58] Kansas v. United States, 214 F.3d 1196, 1198 (10th Cir. 2000).

driving these enforcement mechanisms have remained the same.[59] Thus, to fully understand the nature of child support obligations, one must not only look to the governing statutes, but also specific underlying policies: (1) the best interest of the child and (2) the preservation of public funds.[60] The remainder of this Part discusses each of these motivating influences more fully.

First, when it comes to children, "[i]t is usually in the best interests of a child and society to have at least two adults financially responsible for the child's support."[61] Of course, not only is such support in the child's best interest, but in society's as well. As Professor Donald C. Hubin explains:

> There is a social interest in children's well-being. Insofar as one of the objectives of a society is to "promote the common good," children's well-being is, *ipso facto*, a societal interest. Furthermore, for a society to flourish through time, its children must be raised with love, care[,] and sufficient material resources for them to flourish as individuals. The societal costs of children who are raised in abject poverty without the guidance of loving, involved parents are high.[62]

Of course, just because society has an interest in a child's well-being does not necessarily mean that the duty of support should fall on the child's parents. We could, for example, craft a legal system in which the whole community shares these obligations.[63]

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[59] Hatcher, *supra* note 32, at 1032 ("The current child support system developed from competing interests and purposes, a mixture of common law, divorce codes, state poor laws, bastardy acts, and criminal nonsupport statues [sic]. From this history emerged the two primary interests in child support.").

[60] *Id.*

[61] Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 991 (2009); Johnson, *supra* note 27, at 529 ("This policy of private support is based on the theory that the best interests of a child are served by receiving support from both of his biological parents.").

[62] Hubin, *supra* note 28, at 44.

[63] *See, e.g.*, D. MARIANNE BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE INTERNATIONAL FAMILY LAW 589 (giving examples of "communities where communal child-rearing is the norm").

American law, however, has declined to adopt such an approach.[64] Instead, child support law is premised on the "widely held belief that parents are morally and socially obligated to support their children."[65] As Sir William Blackstone explained, parents "would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish."[66] After all, the child and his attendant needs would not even exist but for the actions (which are generally voluntary) of the parents.[67] Further, the law charges adults with full knowledge of where babies come from: "Because a woman and a man voluntarily have sex, and that sex could result in a pregnancy, that woman and man are responsible for the child."[68] For these reasons, it is generally accepted that "[a] child's right to support is owed by the parents, not the state."[69]

The final reason the law refuses to place such responsibility on the greater community is, as noted earlier, the policy of reducing demands on public funds.[70] For instance, one of the primary objectives of early bastardy acts was "to protect the public from the burden of maintaining illegitimate children."[71] Nonetheless, as Professor Hatcher notes, the state's desire to provide for its citizens in need does create a tension "between the societal

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[64] *See* Anne Corden & Daniel R. Meyer, *Child Support Policy Regimes in the United States, United Kingdom, and Other Countries: Similar Issues, Different Approaches*, 21 FOCUS 72, 75 (2000) ("In all [European countries and the United States], parents who are or were married to each other are legally obliged to support their children. In the case of unmarried parents, once paternity is established, the father must also provide financial support.").

[65] Maureen R. Waller & Walter Plotnick, *Effective Child Support Policy for Low-Income Single Parents*, *in* FOCUS ON SINGLE-PARENT FAMILIES: PAST, PRESENT, AND FUTURE 271, 271 (Annice D. Yarber & Paul M. Sharp eds., 2010).

[66] 1 WILLIAM BLACKSTONE, COMMENTARIES *447.

[67] *See* Hubin, *supra* note 28, at 65 ("Typically, fathers and mothers share moral responsibility for the existence of their children—they voluntarily engage in actions that they know, or should know, might cause pregnancy.").

[68] Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 664 (2008).

[69] City of San Francisco v. Garnett, 82 Cal. Rptr. 2d 924, 928 (Ct. App. 1999).

[70] *See supra* notes 28, 47–50 and accompanying text.

[71] Fiege v. Boehm, 123 A.2d 316, 321 (Md. 1956) (discussing the Maryland Bastardy Act); *see also In re* Wheeler, 8 P. 276, 278 (Kan. 1885) ("To compel him to assist in the maintenance of the fruit of his immoral act, and to indemnify the public against the burden of supporting the child, is the purpose of the proceeding in bastardy.").

interest in supporting children and the simultaneous interest in protecting society from the burden of supporting children."[72] This tension is what ultimately led to the current statutory framework addressing child support obligations. Namely, a parent can obtain support from the state, but in exchange, must cooperate in the state's attempt to recoup those costs from the other parent.[73] Although the current system has certainly been criticized in its overall effectiveness, the underlying goal is to simultaneously "provide assistance to needy families" and "encourage the formation and maintenance of two-parent families,"[74] while also recouping welfare costs.[75]

III. APPLICATION OF THE STRICT LIABILITY STANDARD: MALE VICTIMS OF SEXUAL ASSAULT

As discussed above, the fact that it is typically in children's best interest to receive financial support from mothers as well as fathers serves as the basis for much of the law relating to child support. As Professor Hubin describes: "The obligation to financially support a child is one of the elements in the 'normative bundle' of paternity—the bundle of rights and responsibilities typically associated with this concept."[76] So strong is this precept that courts will hold a father liable for child support even in the face of wrongful conduct by the mother. As one court succinctly put it: "The mother's alleged fault or wrongful conduct is irrelevant."[77] Thus, child support is

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[72] Hatcher, *supra* note 32, at 1035.

[73] *See supra* note 41 and accompanying text.

[74] 42 U.S.C. § 601(a) (2006). Other goals listed in the statute include: ending "the dependence of needy parents on government benefits by promoting job preparation, work, and marriage"; preventing and reducing "the incidence of out-of-wedlock pregnancies[;] and establish[ing] annual numerical goals for preventing and reducing the incidence of these pregnancies." *Id.*

[75] *See* Hatcher, *supra* note 32, at 1086 ("Two of the primary purposes of the TANF welfare program are encouraging the 'formation and maintenance' of two-parent families and helping families to achieve economic self-sufficiency. However, welfare cost recovery—also a centerpiece of welfare policy—undermines both TANF goals.").

[76] *See* Hubin, *supra* note 28, at 61.

[77] State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1279 (Kan. 1993) (quoting Weinberg v. Omar E., 482 N.Y.S.2d 540, 541 (1984)); *see also* S.F. v. State *ex rel.* T.M., 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996) ("[A]ny wrongful conduct on the part of the mother should not alter the father's duty to provide support for the child.").

essentially a form of strict liability justified because "the child is an innocent party, and . . . the child's interests and welfare" are what the court must look to in adjudicating support.[78]

To see this principle in action, consider the issue of paternity fraud,[79] whereby a mother secures child support payments from a man after intentionally lying to him and telling him that he is the child's father.[80] Despite this deception and the resulting financial burden, these "fathers," even after learning that they are not the child's biological parent, are nonetheless often ordered to continue paying child support on the basis that doing so is in the child's best interest.[81] Thus, if open misrepresentation of paternity by the

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[78] Hubin, *supra* note 28, at 55 (quoting *S.F.*, 695 So. 2d at 1189).

[79] Professor Melanie Jacobs, who has written extensively on the subject of paternity fraud, offers the following explanation of the term: "[W]ith the improvement of DNA testing, a growing number of men who previously thought they had a biological connection to a child they have helped to raise and/or for whom they were adjudicated father have learned that they are not biologically related to their children." Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity,* 38 ARIZ. ST. L.J. 809, 837 (2006).

[80] Although this extreme example of maternal misconduct is used here to highlight just how strict liability can be for child support, paternity fraud claims may not always involve intentional deception by a mother. As Professor Jacobs explains:

> Though used by courts, legislatures, newspersons, and others, at its core the term [paternity fraud] embraces an often-incorrect assumption: a devious and fraudulent act by the child's mother. In paternity fraud cases, the legal father typically portrays the mother as a scheming Jezebel who set out to trick, dupe, and deceive the man she falsely named as the child's father. And many people reading articles about "duped dads" feel sympathy for a man who was so wronged. But the scheming Jezebel scenario . . . is not always true. A pregnant woman having an extramarital affair, for instance, may not know which man is the biological father. If her marriage is back on track, she may not wish to rock the boat and damage her family further by revealing the affair. In the paternity context, some women may not know which man is the biological father of their child but must name a man in order to qualify for governmental benefits. The issue is much more complicated than a bad girl, good guy scenario.

Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 196 (2004).

[81] For example, the Supreme Court of Vermont, in denying one father's request for paternity disestablishment, pointed to the "many jurisdictions holding that the financial and emotional welfare of the child, and the preservation of an established parent–child relationship, must remain paramount." Godin v. Godin, 725 A.2d 904, 910 (Vt. 1998). Following those cases, the court ruled that "absent a clear and convincing showing that it would serve the best interests of the child, a prior adjudication of paternity is conclusive." *Id.*; *see also* Michael K.T. v. Tina L.T., 387 S.E.2d 866, 871 (W. Va. 1989*)* ("Even if blood test evidence excludes paternity in a given case, the trial judge should refuse to permit blood test evidence which would disprove paternity when the individual attempting to

mother offers little defense to child support liability, one can imagine how limited a defense is available to a man who *is* the biological father. In that case, "[s]o long as a man engages in an intimate sexual act resulting in his depositing of his sperm with a woman who then becomes pregnant, he is liable for child support."[82]

At first glance, such a standard seems eminently reasonable. Few would argue with the proposition that if a man voluntarily has sex with a woman and a child results, then he should be liable for child support. The problem with the current approach, however, is that the standard is so strict that even those men who never consented to the sexual act that caused the pregnancy are nonetheless liable for support. As one commentator describes, "[w]hile courts have declared that child support obligations are dependent on voluntary parenthood, they are often reluctant to look to consent for guidance."[83] Professor Hubin goes even further, pointing out that, under contemporary legal standards, it has become a "settled approach" that "genetic relationships establish legal paternity regardless of whether the genetic fathers gave legal consent, or were capable of giving legal consent, to an act of sexual intercourse that resulted in the pregnancies."[84]

The purpose of this Part, then, is to illustrate the degree to which courts routinely reject consent as a defense to child support obligations. In so doing, the Part will look to two categories of child support cases in which this issue arises: (1) cases involving a minor who became a father as a result of being statutorily raped and (2) cases where a woman used a man's sperm to impregnate herself without his consent.

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disestablish paternity has held himself out to be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child.").

[82] Laura Wish Morgan, *It's Ten O'Clock: Do You Know Where Your Sperm Are? Toward a Strict Liability Theory of Parentage*, SUPPORT GUIDELINES (Jan. 1, 2002, 9:12 PM), http://www.childsupportguidelines.com/articles/art199903.html.

[83] Johnson, *supra* note 27, at 535.

[84] Hubin, *supra* note 28, at 55.

A. STATUTORY RAPE

State legislatures, understanding that most adolescents lack full emotional, mental, and physical maturity, are rightly concerned with protecting teens from "unequal, manipulative, or predatory relationships."[85] One of the primary ways in which legislatures attempt to accomplish this goal is through statutory rape laws, which in essence, criminalize sexual activity with a child younger than the statutorily defined age of consent.[86] Thus, age of consent laws, which vary by state, lay out the minimum age at which a person can legally consent to engage in a sexual act.[87] In most instances,[88] engaging in a sexual act with someone below the age of consent is a criminal act, given that the child was incapable of legally consenting.[89] As one commentator describes: "The law conceives of the younger partner as categorically incompetent to say either yes or no to sex. Because she is by definition powerless both personally and legally to resist or to voluntarily relinquish her 'virtue,' the state, which sees its interest in guarding that virtue, resists for her."[90] In most states, the offense of statutory rape is a felony.[91]

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[85] CAROLYN COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 2 (2004).

[86] ROBERT L. MADDEX, ENCYCLOPEDIA OF SEXUAL BEHAVIOR AND THE LAW 274–75 (2006).

[87] *Id.* at 275; *see also* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 334 (2003) ("At its most basic, statutory rape is the carnal knowledge of a person who is deemed underage as proscribed by statute and who is therefore presumed to be incapable of consenting to sexual activity." (footnotes omitted)).

[88] One notable exception involves a married couple. *See generally* Kelly C. Connerton, *The Resurgence of the Marital Rape Exemption: The Victimization of Teens by Their Statutory Rapists*, 61 ALB. L. REV. 237, 251 (1997) (examining the history of the marital rape exemption and how the exemption "continues to excuse the rape of young women and make the prosecution of marital rapists under state statutory rape laws impossible").

[89] MADDEX, supra note 86, at 275.

[90] JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 71 (2002). Interestingly enough, the original impetus behind statutory rape laws was the property interest that fathers had in their daughters' chastity. *See* MARY E. ODOM, DELINQUENT DAUGHTERS: PROTECTING AND POLICING AGAINST ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920, at 71 (1995) ("They saw the law as a tool to be used not so much to protect women from sexual harm as to protect the interests of fathers, future husbands, and the state.").

[91] Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 225 (2008).

Aside from the criminal penalty, however, there arises the question of whether a male victim of statutory rape should be liable for child support payments should the rape result in a child. Unfortunately, this issue arises somewhat frequently. Indeed, there are "numerous cases in which an adult woman became pregnant as a result of sexual relations she initiated with a minor child."[92] Nonetheless, despite the number of times this question has arisen, every single court has answered it in the affirmative—holding that, yes, the minor father is liable.[93] To understand the courts' rationale, consider again the story of Nathaniel, mentioned at the beginning of this article.

In that case, Nathaniel, who was fifteen at the time, and the mother Ricci Jones, who was thirty-four, engaged in sexual intercourse, which Nathaniel described as "a mutually agreeable act."[94] Nonetheless, by having sexual relations with Nathaniel, Jones violated California law, which states that "[a]ny person over the age of [twenty-one] years who engages in an act of unlawful sexual intercourse with a minor who is under [sixteen] years of age is guilty of either a misdemeanor or a felony."[95] As a result, Jones was prosecuted and convicted of statutory rape.[96] Subsequently, however, the district attorney's office brought an action against Nathaniel, seeking child support and welfare reimbursement.[97] After the trial court reserved an order of child support, Nathaniel appealed, arguing that "exacting child support from a victim of statutory rape violates public policy" in that "public policy protects [minors] from the effects of sexual exploitation by [adults]."[98]

The court, however, flatly rejected Nathaniel's arguments. The court began its analysis by noting that "California law provides

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[92] Hubin, *supra* note 28, at 51; *see also id.* at n.93 (listing cases); Jones, *supra* note 27, at 416 n.23 (same).

[93] *See* Jones, *supra* note 27, at 412.

[94] Cnty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843, 843–44 (Ct. App. 1996).

[95] *Id.* at 843 n.1 (quoting Cal. Penal Code § 261.5(d)).

[96] *Id.* at 844 ("The San Luis Obispo County prosecutor prosecuted Jones and obtained a conviction of unlawful sexual intercourse with a minor.").

[97] *Id.*

[98] *Id.* Further, Nathaniel argued that "the reserved child support order 'is exactly the exploitation which the Legislature intended to prevent' because it inflicts economic loss on a crime victim." *Id.*

that every child has a right to support from both parents."[99] The court then refused to release Nathaniel from liability because, as the court concluded, "he is not an innocent victim of Jones's criminal acts."[100] Indeed, the court noted that " '[t]here is an important distinction between a party who is injured through no fault of his or her own and an injured party who willingly participated in the offense about which a complaint is made.' "[101] The court placed Nathaniel in the latter category given that he voluntarily engaged in sexual intercourse with Jones: "It does not necessarily follow that a minor over the age of [fourteen] who voluntarily engages in sexual intercourse is a victim of sexual abuse."[102] Paradoxically, then, the court held that Nathaniel was liable for child support because he voluntarily engaged in sexual intercourse despite the fact he was a minor at the time of conception and, thus, legally could not consent to sexual relations.

The *Nathaniel* case is no anomaly; indeed, every court to consider the issue of whether a male victim of statutory rape is liable for child support has reached the same conclusion, using the same reasoning.[103] For instance, in holding that the father was liable for child support, despite the fact that he was only fourteen years of age at the time of conception, the Court of Appeals of Michigan in *L.M.E. v. A.R.S.* stated as follows: "[the father] participated in the act of sexual intercourse that resulted in the conception of [the child] . . . [and] is not absolved from the responsibility to support the child because [the mother] was *technically* committing an act of criminal sexual conduct."[104] Likewise, the Supreme Court of Kansas in *State ex rel. Hermesmann v. Seyer* held that the father, who was only twelve

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[99] *Id.*

[100] *Id.* Specifically, the court noted that "[a]fter discussing the matter, he and Jones decided to have sexual relations. They had sexual intercourse approximately five times over a two week period." *Id.*

[101] *Id.* (quoting Cynthia M. v. Rodney E., 279 Cal. Rptr. 94, 98 (Ct. App. 1991)). According to the court, it then followed that "[o]ne who is injured as a result of criminal conduct in which he willingly participated is not a typical crime victim." *Id.*

[102] *Id.* (citation omitted).

[103] *See* Jones, *supra* note 27, at 412 ("Without exception, appellate courts have held that while the criminal law deems minors incapable of consenting to sexual intercourse, family law can hold victims financially liable for children conceived during a criminal act.").

[104] 680 N.W.2d 902, 914 (Mich. Ct. App. 2004) (emphasis added).

years old at the time of conception, was nonetheless liable for child support:

> This State's interest in requiring minor parents to support their children overrides the State's competing interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part of the other parent . . . . This minor child, the only truly innocent party, is entitled to support from both her parents regardless of their ages.[105]

Similarly, in *In re Paternity of JLH*, the Court of Appeals of Wisconsin rejected the claim that a fifteen-year-old should be relieved of child support obligations given that he was the victim of sexual assault: "If voluntary intercourse results in parenthood, then for purposes of child support, the parenthood is voluntary. This is true even if a fifteen-year old [sic] boy's parenthood resulted from a sexual assault upon him within the meaning of the criminal law."[106]

Again, these represent a small sampling of the many cases in which courts have ordered victims of statutory rape to pay child support to a child who was conceived as a result of a sexual act to which the victim was legally incapable of consenting.

B. "STOLEN" SPERM

Male victims of statutory rape are not the only men who, despite not having consented to a sexual act, have nonetheless been held liable for the support of the resulting child. After all, "the absence of consent need not result from force or coercion; it may also result from some form of ignorance or incapacity."[107] Thus, included in this category of "fathers" are also those men who have had their sperm taken and used for conception without their consent. To illustrate, consider again the stories from the beginning of this article concerning S.F. and Emile.

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[105] 847 P.2d 1273, 1279 (Kan. 1993).

[106] 441 N.W.2d 273, 276–77 (Wis. Ct. App. 1989).

[107] Hubin, *supra* note 28, at 66 (citing Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 133 (2002)).

S.F. was the Alabama gentleman who passed out in a bed at T.M.'s—the eventual mother's—house while attending a party.[108] He awoke the next day and noticed that his clothes had been removed.[109] In the ensuing months, T.M. bragged to friends and acquaintances that she had engaged in sexual intercourse with S.F. while he was unconscious and, thus, in her words, S.F. had "saved her a trip to the sperm bank."[110] A child resulted from the incident, and in 1994, the State of Alabama, on behalf of T.M., brought an action against S.F. to collect child support.[111] The lower court entered a judgment against S.F., requiring him to pay $106.04 a week and also $8,960.64 in arrears.[112]

On appeal, S.F. argued that the court should relieve him of liability given that "he did not have consensual intercourse with T.M. and that he was a victim of a sexual assault by T.M."[113] According to S.F., "to require him to support the child that resulted from this nonconsensual intercourse would be to punish him, to deprive him of his property rights, and to deny him equal protection under the law."[114] The court, however, rejected S.F.'s argument: "The child is an innocent party . . . . [A]ny wrongful conduct on the part of the mother should not alter the father's duty to provide support for the child."[115] In reaching this conclusion, the court relied on support cases where the child was a product of statutory rape.[116] However, the court also relied on a

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[108] S.F. v. State *ex rel.* T.M., 695 So. 2d 1186, 1187 (Ala. Civ. App. 1996).

[109] *Id.* According to S.F., although he had been clothed when he passed out, "when he awoke the following morning he was wearing only his unbuttoned shirt and . . . T.M. was standing in the bathroom doorway 'toweling off.' " *Id.*

[110] *Id.* at 1188. Dr. Lane Layton, an expert witness, "testified that it was her medical opinion that a man who is intoxicated to the point of losing consciousness is physically capable of having an erection and ejaculation." *Id.*

[111] *Id.* at 1186.

[112] *Id.* The trial court also ordered S.F. "to include the child on his medical insurance; to pay one-half of any medical expenses not covered by insurance; and to pay $300 for the cost of the blood tests." *Id.* at 1186–87.

[113] *Id.* at 1188.

[114] *Id.* S.F. "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." *Id.* at 1187.

[115] *Id.* at 1189 (noting also that the purpose of the Alabama Uniform Parentage Act "is to provide for the general welfare of the child").

[116] *Id.* (citing Mercer Cnty. Dep't of Soc. Servs. v. Alf M., 589 N.Y.S.2d 288 (N.Y. Fam. Ct. 1992) and State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273 (Kan. 1993)).

case where the mother lied to the father about being on birth control and, as a result of that misrepresentation, the father engaged in sexual intercourse with the mother.[117] In all such cases, the courts have held that the father was liable for child support despite the mother's false statement.[118]

Similar to S.F., in *In re Paternity of Daniel S.H.*, a Wisconsin father, Daniel, claimed that the mother, Jennifer, engaged in nonconsensual sexual intercourse with him after lacing his drink with "a date rape drug."[119] In an action to collect child support for the resulting child (a son named Derek), the lower court allowed Daniel to introduce evidence of nonconsent.[120] Even so, the court placed the burden of proof on Daniel, requiring him "to prove all factual issues by clear, satisfactory, and convincing evidence."[121] Ultimately, "[t]he jury found that Daniel's sexual intercourse with Jennifer was involuntary."[122] Nevertheless, the lower court still required Daniel to pay child support.[123] On appeal, Daniel argued that the lower court's order was in error and that "the jury's finding of lack of consent should bar or reduce his child support obligation."[124]

The Court of Appeals of Wisconsin, however, agreed with the lower court because "[t]he paramount goal of any child support decision is to secure the best interests of the child"[125] and that, in this case, "Derek was not at fault" and thus "was entitled to

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[117] *Id.* (citing L. Pamela P. v. Frank S., 449 N.E.2d 713 (N.Y. 1983)).

[118] *See* Michelle Oberman, *Sex, Lies, and the Duty to Disclose*, 47 ARIZ. L. REV. 871, 891–92 (2005) (summarizing courts' approaches to cases where one partner did not disclose or misrepresented his or her fertility status); J. Terrell Mann, Note, *Misrepresentation of Sterility or Use of Birth Control*, 26 J. FAM. L. 623, 631–34 (1988) (collecting cases holding fathers liable for financial support despite their partners' misrepresentations).

[119] *In re* Paternity of Derek S.H., 642 N.W.2d 645, No. 01-0473, 2002 WL 265006, at *1 (Wis. Ct. App. Feb. 26, 2002) (unpublished table decision).

[120] Notably, "[t]he trial court barred Daniel from introducing evidence of his nonconsent as a defense to paternity. The court stated that Daniel's allegation was not a defense to paternity, but that the issue could be considered for purposes of establishing child support." *Id.*

[121] *Id.*

[122] *Id.* The jury's special verdicts appear inconsistent. Despite finding that the act of intercourse was involuntary, the jury found "that Jennifer did not give him a drug causing him to have involuntary sex with her." *Id.*

[123] *Id.* Specifically, the court ordered Daniel to pay child support in the amount of $100 per week. *Id.*

[124] *Id.*

[125] *Id.* at *2 (citing Luciani v. Montemurro-Luciani, 544 N.W.2d 561, 572 (Wis. 1996)).

receive child support from both parents."[126] Despite agreeing with the lower court's determination of child support, the Court of Appeals nonetheless disagreed with the lower court putting the issue of consent to the jury.[127] Specifically, the Court of Appeals found no statutory basis for permitting a jury to consider consent when ruling on the issue of child support.[128] Instead, the Court of Appeals ruled that the only real question the jury had to answer was whether Daniel was the father: "Daniel had a right to have a jury decide whether he is Derek's father. However, Daniel admitted he was Derek's father. As a result, a judgment of paternity was entered. When the court determined that Daniel was Derek's father, Daniel's right to a jury trial was extinguished."[129]

A final example of stolen sperm is that of Emile, discussed in the introduction to this Article.[130] His story is somewhat different, however, in that Emile did consent to sexual activity with the mother.[131] Nonetheless, Emile claimed that he merely consented to oral sex with the mother and never consented to her use of his sperm for purposes of self-insemination.[132] In that case, from mid-August to early September of 1983, Emile was visiting his parents in a hospital when Debra Rojas, a nurse, offered to perform oral sex on him provided that he wore a condom.[133] Emile consented to the sex act but claimed that subsequently Debra had, without Emile's knowledge or consent, used Emile's sperm to successfully impregnate herself.[134] Nearly ten years later, the state filed an

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[126] *Id.*

[127] *Id.* at *3.

[128] *Id.* (analyzing WIS. STAT. § 767.50(1)).

[129] *Id.* (citations omitted).

[130] *See supra* notes 16–22 and accompanying text.

[131] State v. Frisard, 694 So. 2d 1032, 1035 (La. Ct. App. 1997). Emile testified that one evening "this woman came upon me in the waiting room and she told me that she wanted to perform oral sex on me" and "as being any male would, I did not refuse . . . ." *Id.* (internal quotation marks omitted).

[132] *Id.* According to Emile, Debra, the child's mother, asked him to wear a condom as a condition to providing him with oral sex, "but he denied having any knowledge of what she planned to do with the sperm." *Id.*

[133] *Id.*

[134] *Id.* at 1035 ("Several months later, plaintiff started insinuating that he might be the father of her child, and although he did not personally see her do it, he believed that she may have inseminated herself.").

action against Emile to collect child support.[135] Despite his objections, the lower court ordered Emile to pay $436.81 per month, $17,909.21 in arrears, and 5% court costs.[136]

The Court of Appeals of Louisiana affirmed, stating that "[t]he fact of paternity obliges a father to support his child."[137] The court then recounted the story of how Debra had allegedly impregnated herself without Emile's consent. The allegation notwithstanding, the court held that "the evidence presented clearly supported [the trial judge's] determination that defendant is the father of the minor child."[138] Further, the court noted that paternity testing revealed a 99.9994% probability that Emile was the father.[139] Finally, in addressing the issue of Debra's self-insemination without Emile's consent, the court dismissed the point, merely noting that "[Emile's] own testimony showed that he had *some sort* of sexual contact with the plaintiff around the time frame of alleged conception."[140] The fact that any sexual contact occurred was sufficient to hold Emile liable for child support.

An appellate court in Illinois reached a similar result in *Phillips v. Irons*.[141] In that case, Dr. Richard Phillips and Dr. Sharon Irons began a dating relationship, during which time the couple engaged in oral sex on three occasions.[142] The two never had sexual intercourse because Irons told Phillips that she was menstruating and thus needed to refrain from vaginal intercourse.[143] Nonetheless, Phillips alleged that, unbeknownst to him, Irons used Phillips's semen (obtained from oral sex) to successfully

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[135] *Id.* at 1033.

[136] *Id.* at 1033–34.

[137] *Id.* at 1034 (citing Dubroc v. Dubroc, 388 So. 2d 377 (La. 1980)).

[138] *Id.* at 1035. This evidence consisted of "plaintiff's affidavit in which she named defendant as the father of the child," her admission "she had sexual intercourse with him in September 1983, and further claimed that she did not have sexual intercourse with any other man thirty days prior to or . . . after the date of conception." *Id.*

[139] *Id.* at 1035–36.

[140] *Id.* at 1036 (emphasis added).

[141] No. 1-03-2992, 2005 WL 4694579, at *1 (Ill. App. Ct. Feb. 22, 2005).

[142] *Id.*

[143] *Id.* Further, "[d]uring their relationship, the parties discussed the possibility of having children only after they married. Plaintiff informed defendant he did not wish to have children prior to marriage, and intended to use a condom if and when they engaged in sexual intercourse." *Id.*

inseminate herself.[144] Subsequently, Irons gave birth to a daughter and, soon thereafter, filed a "Petition to Establish Paternity and Other Relief" against Phillips.[145] Because he had ended the relationship with Irons over a year prior, Phillips had no knowledge of Irons's pregnancy or the birth of the child.[146] Nonetheless, DNA testing proved that Phillips was the biological father.[147] Ignoring the deceptive manner in which the child was conceived, the court awarded child support to Irons in the amount of $800 a month, which was later increased to $1,600 a month.[148]

In sum, in cases involving a father who claims that the mother stole his sperm, whether this "theft" occurred during nonconsensual intercourse or by the mother harvesting the sperm from sexual activity other than intercourse and then surreptitiously using for insemination, the result is the same: the lack of consent is no bar to an obligation to pay child support. In other words, "[i]f a man intends to have sexual [relations] with a woman and a baby results, the man is liable for child support. The sexual [relations] in these cases is 'factually voluntary' and thus intentional, even if it is nonconsensual in the criminal sense."[149]

IV. THE PROBLEMS WITH STRICT LIABILITY

The practice of holding male victims of sexual assault liable for child support is problematic for a number of reasons. Before getting into these problems, however, it is important to note at least one very strong reason for preserving a strict liability approach to adjudicating child support claims. Namely, doing so makes the process of securing child support that much simpler.[150]

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[144] *Id.* ("On or around February 19, 1999, and March 19, 1999, defendant 'intentionally engaged in oral sex with [plaintiff] so that she could harvest [his] semen and artificially inseminate herself,' and 'did artificially inseminate herself.' " (quoting Phillips' complaint)).

[145] *Id.*

[146] *Id.* Phillips ended the relationship after learning that Irons was, in fact, still married to her first husband. *Id.*

[147] *Id.*

[148] Chris Hack, *Man Claiming Stolen Sperm Ordered to Double Child Support*, CHI. SUN TIMES, Mar. 14, 2005, at 24.

[149] *See* Morgan, *supra* note 82.

[150] *See, e.g.*, Amy G. Langerman & Richard W. Langerman, *Arizona Insurance Bad Faith and the Doctrine of Strict Liability*, 22 ARIZ. ST. L.J. 349, 364 (1990) ("Strict liability creates

Without a bright-line rule, courts would be required to expend a considerable amount of judicial resources on what could easily become endless litigation over whether making the biological father pay child support is equitable.[151] Such justifications, however, are not without limits. As one commentator aptly put it, "[i]t seems far better to protect the rights of the few than to make a blanket ruling where the rights of those few are brushed aside in the name of efficient court dockets."[152]

Regardless, some may argue that the strict liability approach is not just driven by judicial economy, but also the importance of securing child support payments for needy children.[153] In the context of male victims of sexual assault, however, this justification is not only misleading but somewhat myopic since holding these victims liable for child support creates a number of problems. The remainder of this Part discusses each of those problems in turn.

A. STRICT LIABILITY MISCHARACTERIZES THE ISSUE

The question the courts should be asking in the cases discussed above[154] is not whether receiving support from both parents is the child's best interest but, given the way child support laws operate,[155] whether the child's best interest is served by having the victimized parent reimburse the state for payments the state has made on behalf of the child.[156] After all, "the child's rights in these cases have actually been relinquished to the government, since

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certainty and is simple to apply.").

[151] *See id.* ("Strict liability would significantly reduce litigation.").

[152] Nancy S. McCahan, Comment, *Justice Scalia's Constitutional Trinity: Originalism, Traditionalism and the Rule of Law as Reflected in His Dissent in* O'Hare *and* Umbehr, 41 ST. LOUIS U. L.J. 1435, 1463–64 (1997).

[153] *See supra* notes 60–69 and accompanying text.

[154] *See supra* Part III.

[155] *See supra* Part II.

[156] Jones, *supra* note 27, at 449–50; *see also* Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 259 (2000) (noting that federal laws relating the establishment of paternity "were not motivated[ ] by the belief that children deserve to know who their absent fathers are or that child support might lead to a more secure bond between these children and their noncustodial fathers. . . . [Instead,] [s]tates want to establish paternity to identify a child support obligor so that they can collect support payments to offset the costs of welfare payments.").

these cases arise when a county seeks repayment of public benefits paid on behalf of the child."[157] When one phrases the question this way, the best interest argument loses a lot of steam. Further, even if the state is unable to collect child support from the victimized father, "the child will likely continue to receive benefits from the state."[158] As one commentator describes, "[t]he only way a child can actually financially benefit from the state successfully seeking and obtaining reimbursements from the victimized father is in a situation where the father pays more in child support than the state pays in welfare benefits on behalf of the child."[159] Accordingly, the state—and not the child—is the one most in danger of harm should the state be unable to collect support payments from the victimized father.

B. STRICT LIABILITY PLACES RESPONSIBILITY ON THE WRONG PARTY

Typically, "[a] child's right to support is owned by anyone the government can somehow make pay, not the state."[160] Yet, simply because a child has a right to support does not necessarily tell us who is liable for that support.[161] As Professor Hubin rightfully points out, "[t]he existence of a positive right to education, for instance, does not establish any particular person has the obligation to provide this education; this obligation could fall on all of society collectively."[162] In the cases discussed in Part II, by holding those men liable for child support, the courts, in essence, punish the victims *for being victimized*. But if anyone is to be blamed in these cases, it is the state.

After all, as Professor Ruth Jones points out, "[e]very state has a law authorizing compensation for crime victims, indicating that legislatures do not believe these persons should have to bear the financial costs of their victimization."[163] Such compensation has

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[157] Jones, *supra* note 27, at 449.

[158] Johnson, *supra* note 27, at 530.

[159] *Id.* at 530–31 (noting that "[a] child is not likely to benefit in this way because statistics show that children born to poor mothers usually have poor biological fathers as well").

[160] Morgan, *supra* note 82.

[161] Hubin, *supra* note 28, at 56.

[162] *See id.* ("A further argument is necessary to determine who has the obligation to provide a person with something to which she has a positive right.").

[163] *See* Jones, *supra* note 27, at 456; *see also* STEVEN E. BARKAN & GEORGE J. BRYJAK,

"been justified by the failure of the state to protect its citizens from crime, by the 'shared risk' theory in which all citizens share the cost and risk of victimization, and by the 'moral obligation' theory, in which the state has a moral responsibility toward crime victims."[164] Although the number of children in need of financial assistance who are fathered by men as a result of sexual assault is unclear, putting the burden on the state to contribute support to those children would stop punishing the victims and provide the state with a greater incentive to better address the problem of male sexual assault.

C. STRICT LIABILITY TRIVIALIZES SEXUAL ASSAULT AGAINST MEN

In holding that a fifteen-year-old victim of statutory rape was liable for child support, the judge in the *Nathaniel* case made a very telling statement: "Victims have rights. Here, the victim also has responsibilities."[165] That quote is emblematic of the glaring lack of concern that child support law currently has for the male victims of sexual assault. Now, it seems to be generally accepted that, when compared to women, it is much rarer for a man to be the victim of sexual assault.[166] As such, fewer studies have been conducted on the impact sexual assault has on men.[167] Nonetheless, at least some data exists, albeit limited, on the effect statutory rape has on young men. For example, as psychology professor Roger J.R. Levesque describes, "for boys, a largely excluded group from discussions of the negative impact of early

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FUNDAMENTALS OF CRIMINAL JUSTICE: A SOCIOLOGICAL VIEW 175 (2d ed. 2011) ("Every state has a crime victims compensation program that it administers independently.").

[164] *See* Jones, *supra* note 27, at 456 (citing Lesley J. Friedsam, *Legislative Assistance to Victims of Crime: The Florida Crimes Compensation Act*, 11 FLA. ST. U. L. REV. 859, 862–63 (1984)).

[165] Cnty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843, 843 (Ct. App. 1996).

[166] *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) ("[W]e believe that many women share common concerns which men do not necessarily share. . . . Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.").

[167] *See, e.g.*, Jones, *supra* note 27, at 439 ("In contrast to the steps taken to study and address female victimization, male victimization has not been adequately studied."); *see also* 15 AM. JUR. 3d *Proof of Facts* § 259 n.1 (1992) ("This article refers to the victim of sexual assault in the feminine gender because there is very little medical research regarding the effect of sexual assault on male victims.").

sexual activity, research indicates that males pay an emotional price for beginning a sexual relationship early."[168] Specifically, a study of male statutory rape victims revealed that the rape impacted their attendance at school, led to drug and alcohol abuse, and increased the likelihood that the young men would engage in criminal activity.[169]

When courts force these victims to assume financial responsibility for the child resulting from a sexual assault, the courts not only devalue these harms, they likely exacerbate them. As Professor Jones points out, "[b]y imposing financial responsibility to repay state support for an unplanned child,"[170] the law magnifies the harm to statutory rape victims. It fails to protect them from "the long-term, negative consequences resulting from the financial obligations of fatherhood."[171] These obligations, of course, have quite an impact on any male, whether he be a child or an adult at the time a court orders him to pay child support. After all, in many ways, "[t]he imposition of a child-support award is considered to be the equivalent of an eighteen-year sentence."[172] Yet, when a court forces a male to pay child support as a consequence of having been sexually assaulted, the resulting obligation does not only impose financial hardship but, in many ways, compounds his victimization.

D. STRICT LIABILITY RELIES ON IMPERMISSIBLE GENDER STEREOTYPES

In her book, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies*, Professor Martha Albertson Fineman points out that "[w]hile the dominant aspirational story

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[168] ROGER J.R. LEVESQUE, ADOLESCENTS, SEX, AND THE LAW: PREPARING ADOLESCENTS FOR RESPONSIBLE CITIZENSHIP 76 (2000). Likewise, Levesque points out that "[e]arly sexual activity brings a host of health hazards as well," including sexually transmitted diseases. *Id.*

[169] Jones, *supra* note 27, at 439 (citing NEV. PUB. HEALTH FOUND., ENFORCING STATUTORY RAPE IN NEVADA 16 (2000)).

[170] *Id.* at 413.

[171] *Id.* at 412; *see also* Robert I. Lerman, *Employment Patterns of Unwed Fathers and Public Policy, in* YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES 316, 317–24 (Robert I. Lerman & Theodora J. Ooms eds., 1993) (noting the adverse effects on earning capacity that fatherhood poses for young men).

[172] FINEMAN, *supra* note 31, at 212.

for the past decades has been one of spousal 'equality,' great gender inequality in the allocation of the burdens and costs associated with family operation continues to affect how this story is played out in real lives."[173] The current approach to child support adjudication is a prime example of the inequality to which Fineman refers. Indeed, the few commentators who have criticized the court's current approach of holding male victims liable for child support have done so primarily based on the way in which the current approach violates gender equality.[174] Ellen London's commentary is particularly instructive:

> The traditional conceptions of power, dominance, and victimization employed by these courts precluded the judges from providing the defendants with a fair or adequate solution. Little doubt exists that the judges in these cases would have written different opinions if the victims were female—illuminating how men are viewed as the responsible party in a sexual encounter and women have no corresponding agency.[175]

In fact, consider the one case in which a court was called upon to decide whether a female victim of sexual assault was liable for child support.[176] In *DCSE/Esther M.C. v. Mary L.*, a mother refused to provide support for her three minor children on the basis that they were "the result of an incestuous relationship with her brother," and, as such, "it was not a voluntary decision on her part to have the minor children."[177] In ruling, the court did what

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[173] *Id.* at 164; *see also* Kathleen E. Mahoney, *Gender and the Judiciary: Confronting Gender Bias*, *in* GENDER EQUALITY AND THE JUDICIARY: USING INTERNATIONAL HUMAN RIGHTS STANDARDS TO PROMOTE THE HUMAN RIGHTS OF WOMEN AND THE GIRL-CHILD AT THE NATIONAL LEVEL 85, 94 (Kirstine Adams & Andrew Byrnes eds., 1999) ("In family law, gender bias exists in underlying assumptions and stereotypes which affect alimony, maintenance, child support and custody awards.").

[174] *See* Jones, *supra* note 27, at 419–48 (discussing the gendered aspects of statutory rape and child support laws); *see also* London, *supra* note 27, at 1958 ("[T]he use of strict liability has problematic implications for societal conceptions of gender.").

[175] London, *supra* note 27, at 1972.

[176] DCSE/Esther M.C. v. Mary L., No. 38812, 1994 WL 811732 (Del. Fam. Ct. Jan. 3, 1994).

[177] *Id.* at *1.

no court has ever done when confronted with the child support obligations of a *male* victim of sexual assault—the court ruled that the mother may not be liable.[178] According to the court, "[i]f the sexual intercourse which results in the birth of a child is involuntary or without actual consent, *a mother* may have 'just cause' . . . for failing or refusing to support such a child."[179] The result in that case is instructive, offering considerable support to London's prediction concerning the role that gender likely plays in these determinations.

Regardless, any case that holds a victim of sexual assault liable for child support—whether that victim is male or female—should "lead one to challenge the applicability of the strict liability theory"[180] given the questions such cases raise concerning both "the feminist ideals of bodily integrity, consent, and sexual autonomy"[181] and "the conception of gender as a fluid and socially constructed category."[182] For these reasons, London ends her critique with a call to action, noting that "[f]eminists and others concerned with gender" are the ones who "will have to ensure that the legal system is forced to answer"[183] the troubling gender questions raised by these cases. According to London, "[t]o concentrate on male victims is not to abandon feminism; rather it is to take a much-needed step toward a more effective understanding of equality and sex."[184]

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[178] *Id.* at *3. Although the court suggested that there would be no liability in the face of nonconsent, based on the facts before it, the court could not "make a summary decision as to whether this case falls within the rape/incest exception" and thus ordered a future hearing on that issue. *Id.*

[179] *Id.* (emphasis added).

[180] London, *supra* note 27, at 1980.

[181] *Id.*; *see also* Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 196–97 (1995) (noting the importance feminist work has played in the areas of "women's bodily integrity and decisional autonomy").

[182] London, *supra* note 27, at 1981.

[183] *Id.* at 1993.

[184] *Id.*; *see also* Martha T. McCluskey, *Fear of Feminism: Media Stories of Feminist Victims and Victims of Feminism on College Campuses*, *in* FEMINISM, MEDIA, AND THE LAW 57, 71 (Martha A. Fineman & Martha T. McCluskey eds., 1997) ("Though feminists should continue to speak out about gendered oppression, and though we should question many of those who claim to be victimized by feminist reforms, we should strive for solutions that will create fewer victims.").

E. STRICT LIABILITY IGNORES MALE REPRODUCTIVE CHOICE

Despite the desire for gender equality, the inescapable fact is that "men and women play undeniably unequal roles in reproduction."[185] Specifically, when it comes to guarding against fatherhood, a male can only exercise that option at the time of conception.[186] Indeed, should he elect to engage in sexual relations with a female and a baby results, he will be strictly liable for child support.[187] A female, on the other hand, can later elect to abort the child or give the child up for adoption, thus terminating her parental rights.[188] In contrast, a father cannot make those choices absent the cooperation of the mother. Thus, when a court holds a male victim of sexual assault liable for the support of the resulting child, it effectively strips him of all reproductive choice, a result which not only goes against feminist principles of bodily autonomy,[189] but arguably may also unconstitutionally infringe on the right to reproductive autonomy as developed by the Supreme Court.[190] As one commentator has noted, "[t]he decision not to reproduce is no less fundamental than the decision to reproduce or

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[185] Sherry F. Colb, *Words that Deny, Devalue, and Punish: Judicial Responses to Fetus-Envy?*, 72 B.U. L. REV. 101, 103 (1992); *see also* Jones, *supra* note 27, at 443 (noting "the differing reproductive roles of men and women").

[186] *See* Angela Thompson, *International Protection of Women's Rights: An Analysis of* Open Door Counselling Ltd. and Dublin Well Woman Centre v. Ireland, 12 B.U. INT'L L.J. 371, 393 (1994) ("As a direct consequence of biological differences, reproductive choice is a right exclusive to women.").

[187] *See supra* Part III.

[188] Vernellia R. Randall & Tshaka C. Randall, *Built in Obsolescence: The Coming End to the Abortion Debate,* 4 J. HEALTH & BIOMEDICAL L. 291, 305 (2008) ("Up until this point, a woman's reproductive interest has consistently prevailed over the man's, not because the law gave greater protection to the woman's reproductive interest, but because the woman's autonomy interest gave her decisions regarding reproduction primacy.").

[189] *See supra* notes 181–83 and accompanying text.

[190] *See* Stephanie Ridder & Lisa Woll, *Transforming the Grounds: Autonomy and Reproductive Freedom*, 2 YALE J.L. & FEMINISM 75, 89 (1989) ("The violation of the Equal Protection Clause exists because men and women are similarly situated with regards to the constitutional right of autonomy."); *see also* Marjorie M. Shultz, *Abortion and the Maternal–Fetal Conflict: Broadening Our Concerns*, 1 S. CAL. REV. L. & WOMEN'S STUD. 79, 93 (1992) ("Men also have interests in their genetic progeny and in their reproductive autonomy. If we object to what some characterize as coerced motherhood, can we close our ears to pleas about coerced fatherhood?" (footnotes omitted)).

to engage in reproductive sexual activities. Without this symmetry, there is no choice."[191]

In sum, given the serious problems discussed in this Part, courts simply have to start taking a different approach to the issue. In doing so, courts must continue their attempts at protecting the child's best interest, but at the same time, they also must not further punish victims of sexual assault. The solution lies in incorporating a consent requirement, as proposed below.[192] Before doing so, however, it is first necessary to understand a narrow area of child support law in which consent already operates as an affirmative defense—the law of artificial insemination—for this area of law serves as the basis for Part VI's proposal.

V. THE LAW OF ARTIFICIAL INSEMINATION AND THE NECESSITY OF CONSENT

Whereas courts have refused to consider consent when adjudicating the child support obligations of men who are victims of sexual assault, when it comes to the law of artificial insemination, consent is crucial to determining the identity of the "father" (i.e., the individual liable for child support). By way of introduction, artificial insemination, as it exists in its most typical form, is a procedure whereby "a woman is impregnated with semen from a man not her husband in a simple procedure that can be accomplished with a syringe."[193] What makes the insemination "artificial" is the fact that "the male agent is not engaged in the act."[194] Thus, whenever a child is conceived using artificial

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[191] PAUL R. ABRAMSON ET AL., SEXUAL RIGHTS IN AMERICA: THE NINTH AMENDMENT AND THE PURSUIT OF HAPPINESS 10 (2003).

[192] *See infra* Part VI.

[193] Walter Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 468 (1983). By "most typical form," this Article is referring to heterologous artificial insemination. There is also "homologous artificial insemination," whereby "[a] married woman is impregnated with the semen of her husband when normal copulation fails because of various medical problems." *Id.* at 469.

[194] Janet Farrell Smith, Remarks at Workshop on Ethical Issues in Human Reproduction Technology: Analysis by Women, Manipulative Reproductive Technologies Discussion: Part I (June 1979), *in* THE CUSTOM-MADE CHILD? WOMEN-CENTERED PERSPECTIVES 253, 255 (Helen B. Holmes et al. eds., 1981) (noting that "this account leaves out the female

insemination, a question arises as to who is the *legal* father of that child. In most cases, the choice comes down to one of two men, either the husband of the mother or the sperm donor. As the remainder of this Part explains, however, for either to be the father, consent is required.

A. HUSBANDS OF WOMEN WHO HAVE BEEN ARTIFICIALLY INSEMINATED

In most jurisdictions, if a married woman is artificially inseminated with the sperm of a third party, her husband is only liable for the financial support of the resulting child if he consented to the insemination.[195] For example, the Tennessee statute that deals with artificial insemination states that "[a] child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife."[196] Further, most states require that the consent of the husband be in writing, an example of which can be found in the Minnesota statue, which provides that "the husband is treated in law as if he were the biological father of the child thereby conceived [via artificial insemination];" however, "[t]he husband's consent must be in writing and signed by him and his wife."[197] In applying a similar statute requiring written consent, a New Mexico court held that the purpose behind the written consent requirement is two-fold:

> First, the writing serves an evidentiary function. The existence of a document signed by the husband and the

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entirely, especially the fact that the natural process of conception occurs in the woman's body" and, as a result, " '[a]rtificial insemination' reflects a patriarchal, male-centered mode of thinking").

[195] Lewis, *supra* note 61, at 960.

[196] TENN. CODE ANN. § 68-3-306 (2006); *see also In re* Marriage of Witbeck-Wildhagen, 667 N.E.2d 122, 126 (Ill. App. Ct. 1996) (holding that, because respondent—the husband of petitioner—did not provide "his consent to petitioner or any support to her choice to undergo artificial insemination . . . it would be inconsistent with public policy to force upon respondent parental obligations which he declined to undertake").

[197] MINN. STAT. ANN. § 257.56 (West 2011). Additionally, "[t]he consent must be retained by the physician for at least four years after the confirmation of a pregnancy that occurs during the process of artificial insemination." *Id.*; *see also* Lewis, *supra* note 61, at 961 n.66 (listing other state statutes that explicitly require written consent).

> wife avoids disputes regarding whether consent was actually given. Second, the requirement serves a cautionary purpose. One who pauses to sign a document can be expected to give more thought to the consequences of consent than one who gives consent in a less formal setting.[198]

A few states, however, take a slightly different approach when deciding the parental obligations of a man whose wife undergoes artificial insemination. In Maryland, for instance, the husband is simply presumed to be the father of the resulting child: "A child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed."[199] Other states follow a similar presumption, yet offer the husband a limited window of time in which he may successfully elude his support obligations by proving lack of consent. For example, Delaware law provides that "the husband of a wife who gives birth to a child by means of assisted reproduction" is not liable for child support if "(1) Within [two] years after learning of the birth of the child he commences a proceeding to adjudicate his paternity; and (2) [t]he court finds that he did not consent to the assisted reproduction, before or after birth of the child."[200]

Even in states where consent is not presumed, courts can be quite permissive in extrapolating from the surrounding circumstances a husband's consent to serve as the child's father. For instance, some states have held that a husband's consent to artificial insemination "may be express, or it may be implied from conduct which evidences knowledge of the procedure and failure to

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[198] Lane v. Lane, 912 P.2d 290, 295 (N.M. Ct. App. 1996).

[199] MD. CODE ANN., EST. & TRUSTS § 1-206(b) (LexisNexis 2011); *see also* ARK. CODE ANN. § 28-9-209(c) (2009) ("Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.").

[200] DEL. CODE ANN. tit. 13, § 8-705(a) (2009). Other states follow a similar approach. *See* UTAH CODE ANN. § 78B-15-705(1) (LexisNexis 2008); WYO. STAT. ANN. § 14-2-905(a) (2009). Texas allows a husband to bring an action challenging paternity within four years. TEX. FAM. CODE ANN. § 160.705(a) (West 2010).

object."[201] Texas, for example, provides that "[c]onsent by a married woman to assisted reproduction must be in a record signed by the woman and her husband."[202] The statute, though, qualifies this language with the following: "Failure by the husband to sign a consent . . . before or after the birth of the child does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treated the child as their own."[203]

In fact, even those states that have statutes requiring written consent have nonetheless avoided a strict reading of the statute when the husband's subsequent actions indicate an acceptance of the child as his own. For example, in *Lane v. Lane*, the husband and wife had married in 1984; however, prior to the marriage, the husband underwent a vasectomy.[204] Desiring a child with her new husband, however, the wife decided to get pregnant using artificial insemination.[205] Although the husband participated in the process (i.e., by "driving Wife for some medical visits, attending birthing classes, and being present in the delivery room"),[206] he never formally consented in writing either before the insemination or afterwards.[207] Nonetheless, the husband played an active role in the child's rearing, treating the resulting daughter (Colleen) in all respects as his own child.[208] In 1991, the couple filed for divorce, and the wife sought sole custody of the child on the grounds that

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[201] *In re* Baby Doe, 353 S.E.2d 877, 879 (S.C. 1987) (citing R.S. v. R.S., 670 P.2d 923 (Kan. Ct. App. 1983)); *see also* Karen De Haan, Note, *Whose Child Am I? A Look at How Consent Affects a Husband's Obligation to Support a Child Conceived Through Heterologous Artificial Insemination*, 37 BRANDEIS L.J. 809, 812–14 (1998–1999) (discussing *In re Baby Doe* and similar cases).

[202] TEX. FAM. CODE ANN. § 160.704(a) (West 2010).

[203] *Id.* § 160.704(b); *accord* WASH. REV. CODE ANN. § 26.26.715(2) (West 2011) (establishing similar, gender neutral, statutory regime).

[204] 912 P.2d 290, 292 (N.M. Ct. App. 1996).

[205] *Id.* Initially, he was "hesitant" to have children and "refused to have his vasectomy reversed"; however, "after Wife stated that she would leave Husband if she could not have children, Husband and Wife explored various options." *Id.*

[206] *Id.*

[207] *Id.* Despite the fact that "[t]he customary practice of the University of New Mexico Hospital was not to undertake artificial insemination without the signed consent of both the husband and the wife," there were no consent forms bearing the signature of the husband, only the wife. *Id.*

[208] *Id.* ("Wife encouraged Husband to be an active parent, and he was.").

the husband never gave written consent to the insemination as required by state statute and thus was not the child's father.[209] In rejecting this argument, the court noted, at the outset, that "even though a statute constitutes a command to the courts regarding what law to apply, the command must be read with intelligence."[210] Furthermore, in looking at the statute, the court made the following observations:

> The statute does not require any particular form of words for the consent. Given the purposes of the statute, a writing should be satisfactory if it conveys in some manner that (1) the husband knows of the conception by artificial insemination, (2) the husband agrees to be treated as the lawful father of the child so conceived, and (3) the wife agrees that the husband will be treated as the lawful father of the child.
>
> We also note that the New Mexico Act does not prescribe when the written consent must be executed.[211]

With these principles in mind, the court ultimately found that the husband had substantially complied with the statute. Specifically, the court first looked to the pleadings that the husband and wife had filed in the divorce action—over two years after the child in question had been born: "Husband verified his petition claiming Colleen as a 'minor child[ ] of the marriage.' Wife likewise verified the response, which admitted that 'there is one minor child of the marriage, Colleen Dawn Lane,' and did not challenge Husband's paternity in any manner."[212] Additionally, the court relied on the fact that both parties had signed a stipulated order which stated: "The parties agree and stipulate as follows: 1. The parties are the parents of Colleen Dawn Lane, born

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[209] *Id.* at 294 ("Wife further argues that strict compliance with the statutory requirements is called for because of the precious maternal rights that are at stake.").

[210] *Id.* at 295 (noting that the legislature "cannot anticipate every contingency . . . [but] can, however, expect that when one of its orders . . . is to be carried out, those who have that duty . . . will discern its purpose and act in accordance with its essence if not necessarily its letter").

[211] *Id.*

[212] *Id.* at 296 (alteration in original).

August 26, 1988."[213] Based on this evidence, the court rejected the wife's claim:

> Although no document was signed by both Husband and Wife, and one of the pleadings was signed only by their attorneys, these pleadings unequivocally demonstrate that more than two and one-half years after the birth of Colleen, and even after the marriage had failed, both Husband and Wife were acknowledging Husband's status as Colleen's natural father.[214]

Regardless of how willing courts may be to find consent even in the absence of a signed writing, the point remains that when it comes to the husband of a woman who is artificially inseminated, some form of consent is required before he will be liable for the support of that child.

B. THE THIRD-PARTY SPERM DONOR

In most states, the man who donates his sperm for use in artificial insemination is not treated as the father of any resulting child.[215] For example, Alabama law, which is emblematic of most states' approach to this issue, provides as follows: "A donor who donates to a licensed physician for use by a married woman is not a parent of a child conceived by means of assisted reproduction."[216]

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[213] *Id.* After securing new counsel, the wife's counsel filed a motion for leave to amend, "stating that '[t]he facts leading to the proposed Amended Response and Counterpetition have recently come to light.' The new pleadings for the first time alleged that Colleen was conceived through artificial insemination and that Husband was neither her natural nor legal father." *Id.* at 293.

[214] *Id.* at 296. In so holding, the court also found that facts of this case satisfied the dual purposes behind the consent requirement. According to the court, first, "there is absolutely no dispute in this case that Husband was fully aware of the artificial insemination and that Wife knew that he was fully aware," and second, "the pleadings referred to represent a knowing consent by both Husband and Wife to treating Husband as the natural father of the child born to Wife as a result of artificial conception." *Id.*

[215] Lewis, *supra* note 61, at 973 ("The approach taken by the [Uniform Parentage Act (UPA)] and most states is to declare that the sperm donor is not a parent to the child." (footnotes omitted)).

[216] ALA. CODE § 26-17-702 (LexisNexis Supp. 2008); *accord* COLO. REV. STAT. § 19-4-106(2) (2008) ("A donor is not a parent of a child conceived by means of assisted reproduction . . . ."); TEX. FAM. CODE ANN. § 160.702 (West 2002) (same); UTAH CODE ANN.

By not recognizing the donor as the father, these statutes relieve the sperm donor of any financial liability for the resulting child. Consider, for instance, Wisconsin's statute, which has explicitly codified this very point:

> The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child.[217]

As this language makes clear, the donor is stripped not only of financial responsibility, but also of his parental rights *vis à vis* the child.[218]

Relieving the donor of parental rights and responsibilities serves two important objectives. First, doing so actually encourages men to donate sperm as, under these statutes, they need not worry about any resulting liability.[219] And, indeed, the liability in these cases could be quite large given that "a popular sperm donor could potentially father dozens of children."[220] Second, under this approach, neither single mothers nor married couples who conceive using sperm from a third-party donor need worry about the donor making future claims on their child.[221] As the Supreme Court of Colorado points out: "[W]omen are not likely to use donated semen from an anonymous source if they can later

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§ 78B-15-702 (LexisNexis 2008) (same).

[217] WIS. STAT. ANN. § 891.40(2) (West 1996).

[218] *See* OKLA. STAT. ANN. tit. 10, § 555 (West 2007) ("An oocyte donor shall have no right, obligation or interest with respect to a child born as a result of a heterologous oocyte donation from such donor. A child born as a result of a heterologous oocyte donation shall have no right, obligation or interest with respect to the person who donated the oocyte which resulted in the birth of the child.").

[219] *See In re* Interest of R.C., 775 P.2d 27, 32 (Colo. 1989) (en banc) (noting that such laws provide "men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support" (quoting Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 534 (Ct. App. 1986))).

[220] Lewis, *supra* note 61, at 975.

[221] *Id.*; *see also R.C.*, 775 P.2d at 32 (recognizing the policy of "extending to unmarried women the protection afforded to married women under the UPA to use donated semen for use in artificial insemination without fear of paternity suits.").

be forced to defend a custody suit and possibly share parental rights and duties with a stranger."[222]

Nonetheless, parties can elect to deviate from this general approach and affirmatively provide the sperm donor with parental rights and responsibilities.[223] To do so, however, all involved must affirmatively consent to this deviation. A few states require such consent to be in writing. New Jersey law, for example, provides: "Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor . . . shall have no rights or duties stemming from the conception of a child."[224] Likewise, the relevant statute in Kansas provides that "[t]he donor of semen provided to a licensed physician for use in artificial insemination . . . is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman."[225]

Other states, even in the absence of a statutory exception, have found ways around the statutes that deny parental rights and responsibilities to sperm donors when the parties' conduct evinces an intent that the donor serve as the child's father. For example, in *In re Interest of R.C.*, the mother, E.C., asked her friend, J.R., to donate sperm with which she could be artificially inseminated.[226] J.R. agreed, and E.C. (who was unmarried) successfully used his sperm to give birth to a child, R.C.[227] Following the birth, E.C. eventually refused to allow J.R. see the child, prompting J.R. to bring a paternity action.[228] In his action, J.R. claimed that he and E.C. had an oral agreement whereby he had agreed to provide sperm in exchange for parental rights.[229] Further, J.R. claimed that

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[222] *R.C.*, 775 P.2d at 33. Likewise, "anonymous donors are not likely to donate semen if they can later be found liable for support obligations." *Id.*

[223] Lewis, *supra* note 61, at 975 ("Under the laws of some states, it is possible for the sperm donor to become financially responsible for the artificially conceived child.").

[224] N.J. STAT. ANN. § 9:17-44(b) (West 1993).

[225] KAN. STAT. ANN. § 38-1114(f) (West 1994).

[226] 775 P.2d at 28. E.C. claimed, however, that it was J.R.'s idea to donate sperm. *Id.* at 28 n.1.

[227] *Id.* at 27–28.

[228] *Id.* at 28 ("J.R. claims that E.C. said that she would not let him see R.C. again unless he signed a release of his parental rights. He refused to sign the release.").

[229] *Id.* ("He alleges that E.C. had been the one to solicit J.R. to donate his semen; that he donated the semen only because E.C. promised that J.R. would be treated as the father of

he had taken actions in reliance on the agreement and had even been allowed to play an active role in the child's life, including

> that when he learned E.C. was pregnant, J.R. bought clothing, toys, and books for R.C.; that he opened a college trust fund for R.C. and furnished a room in his house as a nursery; that he "provided for [R.C.] in the event of [J.R.'s] death;" that he attended birthing classes with E.C.; that he was a "guest of honor" at E.C.'s baby showers; that he assisted in the delivery of R.C.; that he occasionally handled night feedings of R.C.; that he "took care of [E.C.] and [R.C.] on a daily basis" during the first week of R.C.'s life; that E.C. both knew about and encouraged J.R.'s conduct; and that he intended to retain a parental relationship with R.C. at the time J.R. donated his semen.[230]

The governing statute in Colorado, which E.C. argued preempted J.R.'s paternity claim, provided that "[t]he donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[231] The Supreme Court of Colorado, however, rejected her argument. In interpreting and applying the governing statute, that court first noted that the parental rights of a semen donor are "least clearly understood when the semen donor is known and the recipient is unmarried."[232] The court then ruled that the statute did not apply when a man donated semen to an unmarried woman

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any child conceived by the artificial insemination.").

[230] *Id.* (quoting J.R.'s pleadings and affidavits).

[231] *Id.* at 30 (quoting COLO. REV. STAT. § 19-4-106(2) (Supp. 1988)). This provision is based on the UPA and "[w]ith the important exception of the omission of the word 'married' in subsection (2), section 19-4-106 of the Colorado UPA is a verbatim reproduction of section 5 of the model UPA." *Id.*

[232] *Id.* at 33–34 ("In extending the protection of section 19-4-106 to unmarried women without delineating the rights of the affected parties, the General Assembly failed to provide the guidance not employed by the model UPA. For these reasons, we conclude that section 19-4-106(2) is ambiguous with respect to the rights and duties of known donors and unmarried recipients.").

with the understanding that he would be the father of the resulting child:

> [T]he General Assembly neither considered nor intended to affect the rights of known donors who gave their semen to unmarried women for use in artificial insemination with the agreement that the donor would be the father of any child so conceived. [The statute] simply does not apply in that circumstance.[233]

In ruling, the court also noted that the parties' intent is "a relevant consideration in determining whether the known donor's parental rights were extinguished."[234]

As a final point, it is important to highlight the fact that most of these donor statutes only extinguish the parental rights/obligations of the sperm donor if the artificial insemination was done by a licensed physician.[235] For example, in *Jhordan C. v. Mary K.*, Jhordan provided semen directly to Mary, who then inseminated herself at home.[236] Given the fact that no physician was involved in the insemination, as was required by state statute, the court held that Jhordan was the father of the resulting child.[237] In ruling, the court noted that "nothing inherent in artificial insemination requires the involvement of a physician."[238] Nonetheless, the court found "at least two sound justifications" for the statute requiring physician involvement.[239] The first was health related: "a physician can obtain a complete medical history of the donor . . . and screen

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[233] *Id.* at 35.

[234] *Id.* at 34.

[235] *See* Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1649 n.40 (1984) (listing representative state statutes).

[236] 224 Cal. Rptr. 530, 531–32 (Ct. App. 1986).

[237] *Id.* at 535 ("The Legislature's apparent decision to require physician involvement in order to invoke the statute cannot be subject to judicial second-guessing and cannot be disturbed, absent constitutional infirmity.").

[238] *Id.* ("Artificial insemination is, as demonstrated here, a simple procedure easily performed by a woman in her own home."); *see also* C.M. v. C.C., 377 A.2d 821, 821–22 (N.J. Juv. & Dom. Rel. Ct. 1977) (woman inseminated herself using a glass syringe and glass jar); McIntyre v. Crouch, 780 P.2d 239, 241 (Or. Ct. App. 1989) (woman inseminated herself without physician's assistance); L. v. L., [1949] P. 211, 212–13 (Eng.) (wife inseminated herself with husband's sperm).

[239] *Jhordan C.*, 224 Cal. Rptr. at 534.

the donor for any hereditary or communicable diseases."[240] Second, "the presence of a professional third party . . . can serve to create a formal, documented structure for the donor-recipient relationship, without which . . . misunderstandings between the parties regarding the nature of their relationship and the donor's relationship to the child would be more likely to occur."[241]

On a related note, the physician requirement also likely protects against fraud. Indeed, but for the physician requirement, fathers may be tempted to try and avoid liability (and, conversely, mothers may try and deny a father parental rights) by claiming that the child was merely a result of home insemination instead of sexual intercourse. Judges would have some difficulty adjudicating such claims given that most acts of sexual intercourse and, presumably, home insemination would take place without corroborating witnesses.

VI. A PROPOSED SOLUTION

As the previous Part illustrates, when it comes to adjudicating child support claims, the child's interest in receiving support from both parents does not *always* mean that the biological father is strictly liable. For example, a child born to a single mother as a result of artificial insemination performed under a doctor's supervision would likely have no right of support from the biological father.[242] Instead, the law would only view the child as having one parent—the mother—despite the fact that the child's best interest would almost certainly be to receive support from both biological parents. Although this is merely a limited exception to a biological father's strict duty to support his children, it is nonetheless a necessary and important one for the reasons discussed earlier.[243] Further, as proposed below, jurisdictions

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[240] *Id.*

[241] *Id.* at 535. *But see* Marc E. Elovitz, *Reforming the Law to Respect Families Created by Lesbian and Gay People*, 3 J.L. & POL'Y 431, 442 n.49 (1995) ("Reasons against the physician requirement include the woman's right to privacy and autonomy, the cost of physician involvement and a preference for performing artificial insemination at home.").

[242] The same would be true of a child born to a married woman, via artificial insemination, if her husband did not consent in any way to the procedure. *See supra* Part V.A.

[243] *See supra* Part IV.

should extend the exception to cover those fathers who never consented to the sexual act that resulted in a biological child.

Of course, the policies underlying the need for consent in the artificial insemination context differ somewhat from those involving men who become fathers as a result of sexual assault. Again, requiring consent in the case of sperm donors encourages donation and, at the same time, protects donees from future paternity claims.[244] Similarly, for the husband of the donee, the courts require his consent so as not to foist parental rights and responsibilities on a man who has no biological connection to the child.[245] In contrast, the men this Article focuses on are, in fact, the biological fathers of the children in question. Additionally, because they never intended to donate sperm, there can be no justification of trying to encourage donation. Nonetheless, as discussed in Part IV, there are a number of serious policy concerns raised by the courts' practice of holding these fathers liable. Therefore, a consent exception is just as necessary here as in the artificial insemination cases.

Of course, this is not to say that a consent exception in these cases should operate as it does in artificial insemination. After all, a real danger of fraud exists in allowing a putative father to simply raise lack of consent as a defense to a claim of child support. Indeed, in an attempt to avoid liability, fathers might routinely claim that they did not consent to the sexual act that gave rise to a child, and given the private nature of most sexual relations, courts would endure great difficulty ascertaining the merits of such a defense. As such, for a consent defense to operate effectively in this factual setting, it would need to be much more narrow. Otherwise, an overly generous consent defense could permit even meritorious claims for child support to ultimately fail.

For these reasons, states should adopt the following rule—either legislatively or by encouraging courts to use their powers in equity to effectuate the change—when dealing with claims that the biological father did not consent to the act that resulted in the mother's pregnancy:

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[244] *See supra* notes 219–22 and accompanying text.

[245] *See supra* Part V.A.

> A man is not the natural father of a child, bears no liability for the support of the child, and has no parental rights to the child if he can show, by clear and convincing evidence, that he did not consent to the act of sexual intercourse (or, in the case of home insemination, to the act of self-insemination) that resulted in the conception of the child.

This proposed rule imposes a number of limitations on those men who might try to raise the defense. The remainder of this Part discusses each of those limitations in turn.

A. LIMITING CONSENT TO THE SEXUAL ACT ITSELF

When it comes to making a baby, there are a number of steps, and the rule proposed above would only absolve a man from liability if he did not consent to one key part of the process. Specifically, the defense would only extend to a man who did not consent to the act of sexual intercourse itself or, in cases in which there was no intercourse, to the act of self-insemination. Going back to the story at the beginning of this article, then, S.F. could make the claim that, because he was unconscious, he never consented to have sexual intercourse with the mother and thus should bear no child support obligations.[246] Emile, however, could not make such a claim as (1) he never had sexual intercourse with the mother and (2) he did consent to some form of sexual activity (i.e., oral sex) with the mother.[247] Nonetheless, under the proposed rule, he too could claim lack of consent as he never consented to the use of his sperm for the purposes of self-insemination.

Notably absent from the protections of this defense are, first, those men who became fathers after engaging in consensual sexual intercourse with a woman under the mistaken impression that she was incapable of conceiving a child.[248] Under the proposed rule, these men could not raise the consent defense given that it is

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[246] *See supra* notes 4–10, 108–17 and accompanying text.

[247] *See supra* notes 16–22, 131–40 and accompanying text.

[248] *See supra* notes 117–18 and accompanying text; *see also* Jill E. Evans, *In Search of Paternal Equity: A Father's Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045, 1075 n.147 (2005) (listing cases).

available only to those who did not consent to intercourse or self-insemination. By limiting the rule this way, it would protect only those men who would otherwise be deprived of their reproductive choice should they be forced to pay child support for the resulting child. After all, a man who willingly engages in sexual intercourse with a woman—despite what the woman might have led him to believe about her ability to conceive a child—is still very much in a position to protect himself from becoming a father. Not only could these men have chosen to use contraception, but they also could have elected to simply abstain from sexual intercourse. Accordingly, under this proposal, the law would remain unchanged in those jurisdictions that have held men liable for child support despite the mother's misrepresentation that she was on birth control and/or was sterile.[249]

Second, men like Jhordan C., discussed earlier, who consent to a woman using their sperm to artificially inseminate herself without the assistance of a licensed physician (referred to as "home insemination" in the proposed rule) would continue to be liable for the support of the resulting child.[250] Indeed, such men could not argue that they never consented to fatherhood and thus, should not bear the legal obligations thereof. Again, the consent defense proposed above would not cover claims that a man did not consent to fatherhood *in general*, but only claims that he never consented to the *specific* act of intercourse or self-insemination that produced the child. Thus, the defense would not alter the current rule that, if a man wishes to donate sperm to someone yet escape all legal obligations to the child, a licensed physician must perform the insemination.[251]

B. PROVING LACK OF CONSENT

Under the proposed rule, the burden of proving lack of consent would fall on the biological father, and he would bear a rather heavy burden. Specifically, to successfully avoid child support

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[249] Evans, *supra* note 248, at 1047 ("Child support obligations attach immediately upon birth, without regard to whether fatherhood was desired or conception occurred through the mother's deceit as to her fertility or use of birth control.").

[250] *See supra* notes 236–41 and accompanying text.

[251] *See supra* note 235 and accompanying text.

obligations on the basis of lack of consent, a biological father would have to prove by clear and convincing evidence that he never consented to the act in question (intercourse or self-insemination, depending on the facts of the case). The purpose of this heightened standard would, again, be not only to protect against fraudulent claims, but also to minimize frivolous claims that would only waste judicial resources. Generally, under the clear and convincing standard, a party "must convince the trier of fact that it is highly probable that the facts he alleges are correct."[252]

Family law is, of course, no stranger to the clear and convincing standard; indeed, several areas of family law already employ this heightened standard because the threat of fraud is great. For example, courts in those states recognizing common law marriage have noted that such claims are a "fruitful source of perjury and fraud"[253] and, as such, have placed a heavy burden on the party claiming common law marriage.[254] Similarly, in cases in which a person challenges the validity of a former spouse's subsequent remarriage, the courts, recognizing the possibility of fraud, require the complaining spouse to produce evidence that is "clear, strong, and satisfactory and so persuasive as to leave no room for reasonable doubt."[255]

Applying this heightened standard here, victims of statutory rape would have little difficulty meeting the required burden. Specifically, they only have to prove that they were below the age of consent at the time the child in question was conceived. State legislators set the age of consent at a certain point for good

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[252] Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 462 (2002).

[253] *E.g.*, Staudenmayer v. Staudenmayer, 714 A.2d 1016, 1019 (Pa. 1998).

[254] *See, e.g.*, Ashley Hedgecock, Comment*, Untying the Knot: The Propriety of South Carolina's Recognition of Common Law Marriage*, 58 S.C. L. REV. 555, 565 (2007) ("In reality, the high burden of proof imposed on a claimant alleging common law marriage successfully sorted fraudulent claims from legitimate ones.").

[255] *E.g.*, Chandler v. Cent. Oil Corp., 853 P.2d 649, 652 (Kan. 1993). Called the "last-in-time marriage presumption," this doctrine applies in cases where a former spouse claims some kind of spousal benefits on the basis that, even though the other spouse remarried, there was no evidence of divorce from the former spouse. *See* Peter Nash Swisher & Melanie Diana Jones, *The Last-in-Time Marriage Presumption,* 29 FAM. L.Q. 409, 409–10 (1995) (introducing the last-in-time presumption).

reasons,[256] and criminal laws relating to statutory rape as well as those relating to child support should protect those below that age. Moreover, given the relative ease with which a person can prove his age, courts could fairly easily dispose of child support claims involving male statutory rape victims under the consent defense.

Adult men, on the other hand, who claim the child was a product of nonconsensual sex/insemination would have to resort to other evidence to meet this high burden of proof. For this reason, the burden may be quite difficult to meet in a number of cases. Consider, for example, the case of S.F., discussed earlier, where the father had evidence that the mother had told acquaintances that she had sexually assaulted S.F. while he was sleeping.[257] Now, a court could find that the mother's admission of sexual assault is sufficient evidence to prove by clear and convincing evidence that the father did not consent. Then again, a court might be skeptical of such evidence given the danger of collusion. Specifically, a mother and father could agree to both claim sexual assault on the part of the mother whereby the child would continue to collect welfare benefits and, yet, the father need not reimburse the state.[258] Admittedly, the threat of collusion poses a difficult issue relating to proof. Hopefully, however, the threat of being charged with sexual assault would discourage most mothers from going along with such a scheme. Further, the father would be dissuaded from bringing such a claim given that—as discussed more fully below—should the consent defense succeed, he would lose all parental rights *vis-à-vis* the child.[259]

However, in cases where a mother denies any claims of sexual assault or nonconsensual self-insemination, the father would have a much harder time satisfying his burden. Since most acts of sexual intercourse, sexual assault, and, presumably, self-insemination do not take place in public, it would be almost impossible, absent some kind of admission from the mother, for courts to decide whether or not the manner in which a child was conceived was done with the biological father's consent.

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[256] *See supra* notes 85–90 and accompanying text.
[257] *See supra* notes 4–10, 108–18 and accompanying text.
[258] *See supra* Part III.
[259] *See infra* Part VI.C.

Nonetheless, the failure of the consent defense to cover those more questionable cases may send a message to potential fathers to not put themselves in positions of vulnerability—such as passing out drunk in a woman's home[260] or trusting relative strangers to dispose of one's semen.[261]

C. ACCEPTING THE GOOD WITH THE BAD

Finally, under this proposed consent defense, men who succeed in proving lack of consent would not only avoid liability for child support but they would also lose all parental rights *vis-à-vis* the child in question. In other words, the availability of the consent defense presents these men with an important choice: They can elect to raise the defense, knowing that if they succeed they would sever all rights and responsibilities with the child. Or, should they wish to preserve their right to be the legal father of the child, they can forgo raising the defense.

The reason for requiring such an election is that, first, it would be entirely inequitable to allow a man to avoid supporting a child, yet at the same time, allow him to, as one court put it, "enjoy[ ] the benefits of his representation as the child's father, including the child's love and affection, his status as father in the place of the natural father, and the community's recognition of him as the father."[262] Similarly, a man who has acted as the child's father should be estopped from later attempting to avoid child support obligations simply by claiming lack of consent to the child's conception/insemination.[263] For these reasons, courts should impose time limits similar to those used when dealing with the husband of a woman who becomes pregnant via artificial insemination; namely, the husband can avoid parental obligations

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[260] *See supra* notes 4–10, 108–18 and accompanying text.

[261] *See supra* notes 16–22, 130–40 and accompanying text.

[262] Wade v. Wade, 536 So. 2d 1158, 1160 (Fla. Dist. Ct. App. 1988).

[263] Courts have used a similar estoppel approach when adjudicating claims by husbands that they never consented to their wives' act of being artificially inseminated. *See, e.g.,* Levin v. Levin, 645 N.E.2d 601, 604 (Ind. 1994) (noting that estoppel is the proper remedy when "one party through his course of conduct knowingly misleads or induces another party to believe and act upon his conduct in good faith without knowledge of the facts").

by raising lack of consent, but he must do so in a reasonable time after learning of the child's birth.[264]

Second, as discussed earlier, one of the biggest problems with the court's application of strict liability to victims of sexual assault is that strict liability potentially deprives those men of any meaningful choice when it comes to procreation.[265] Again, the proposed rule would give men a choice. As such, those victims who nonetheless elect to father the resulting child have exercised their ability to choose, and that choice should be honored along with all of the legal obligations that choice entails. As the Supreme Court has made clear, a biological connection provides a father with an extremely valuable opportunity:

> The significance of a biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent–child relationship and make uniquely valuable contributions to the child's development.[266]

This need to protect a biological father's decision to parent the resulting child requires one additional point that should guide courts when applying the consent defense—only the father can raise the defense. Courts should not permit mothers to use the defense as a means of depriving a biological father of parental rights on the basis that he never consented to the conception. This limitation comports with the common law maxim, the Wrongful Conduct Rule: "A person cannot maintain a cause of action if he or she must rely, in whole or in part, on an illegal or immoral act or transaction to which he or she is a party."[267] Thus, the law should not allow a mother to profit from her own wrongdoing; if the

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[264] *See supra* note 200 and accompanying text.

[265] *See supra* notes 185–91 and accompanying text.

[266] Lehr v. Robertson, 463 U.S. 248, 262 (1983).

[267] 1A C.J.S. *Actions* § 68 (2005); *see also* Joseph H. King, Jr., *Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law*, 43 WM. & MARY L. REV. 1011, 1016 (2002) (defining the serious misconduct ban similarly).

biological father, despite the mother's actions, wishes to serve as the legal father, the fact that he did not originally consent should pose no bar to his claim.

Taken together, these limitations mean that only those men who (1) never consented to the conception/insemination that resulted in the birth of their biological child and (2) wish to have no relationship with the resulting child should enjoy the benefit of the proposed consent defense. After all, those men will suffer the most harm should a court order them to pay child support for the child they never wanted and who was conceived without their consent. Further, these limitations help protect against any fears that biological fathers seeking to evade child support obligations resulting from conscious choices they made will improperly use the consent defense.

VII. CONCLUSION

Despite the noble policies ostensibly supporting it, the practice of holding biological fathers strictly liable for child support is not without its shortcomings. Most problematic, however, is the way in which men who never consented to the procreative act are nonetheless held strictly liable for the support of the resulting child. The time has come for courts to remedy this injustice and all the attendant problems this practice poses—not only to male victims of sexual assault, but also to society as a whole. Quite simply, courts must adopt a consent defense that will better protect these men, yet at the same time, not open child support proceedings to meritless claims. Striking this balance will ensure that courts never read a child's interest in support, although very much a worthy consideration, so broadly that it effectively eviscerates a man's ability to choose fatherhood. After all, when it comes to procreative freedom, "choice" is an essential ingredient, and as one feminist legal scholar deftly put it, "more is better than less."[268]

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[268] KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 672 (1993).