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# Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men

Michael Higdon

# MARGINALIZED FATHERS AND DEMONIZED MOTHERS: A FEMINIST LOOK AT THE REPRODUCTIVE FREEDOM OF UNMARRIED MEN

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"Reproductive freedom is critical to a whole range of issues. If we can't take charge of this most personal aspect of our lives, we can't take

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care of anything. It should not be seen as a privilege or as a benefit, but a fundamental human right." – Faye Wattleton[1]

## I. INTRODUCTION

In November 1999, a woman named Katie Carton informed her live-in boyfriend, Dale Heidbreder, that she was pregnant with their first child.[2] The couple resided in Fort Madison, Iowa—a town with a population of slightly more than 10,000.[3] Carton and Heidbreder were eighteen and nineteen years of age, respectively.[4] At some point, the couple had a disagreement, and Carton moved out.[5] She did not tell Heidbreder where she was going and likewise instructed friends and family to keep her whereabouts a secret.[6] She had, in fact, moved to Minnesota, where she would eventually put the child up for adoption.[7] When the child was born, Carton refused to identify Heidbreder as the father and instead left that portion of the birth certificate blank.[8] Still in Iowa, Heidbreder attempted repeatedly to locate Carton and even hired an attorney to try and protect his paternal rights.[9] Thirty-one days after Carton gave birth, Heidbreder, for the first time, learned not only that she was in the state of Minnesota, but also that she was in the process of giving the child up for adoption.[10] Although Heidbreder immediately took legal action to protect his paternal rights, Minnesota law requires nonmarital fathers to take such action thirty days following the birth of the child.[11] Because he was one day late, his rights were terminated, and the adoption was allowed to proceed.[12]

Now, consider the story of S.F., an Alabama man, who in 1992 attended a party at the home of a female friend, T.M.[13] He arrived at the party intoxicated and shortly thereafter passed out in T.M.'s bed.[14] The other party-goers eventually left for the evening, leaving S.F. in the sole

1. Marcia Ann Gillespie, *Repro Woman: Faye Wattleton Maps Strategy with Marcia Ann Gillespie*, MS., Oct. 1989, at 50, 50.

2. *See* Heidbreder v. Carton, 645 N.W.2d 355, 360 (Minn. 2002).

3. *Id.*; FORT MADISON COMPREHENSIVE PLAN 10 fig.1.1, *available at* http://www.fortmadison-ia.com/ DocumentCenter/View/191.

4. *Heidbreder*, 645 N.W.2d at 360.

5. *Id.* at 361.

6. *Id.*

7. *Id.*

8. *Id.* at 362.

9. *Id.* at 361.

10. *Id.* at 362.

11. *Id.*

12. *Id.* at 363.

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

14. *Id.*

care of T.M.[15] When S.F. awoke the next morning, he was surprised to find that all of his clothing—save his unbuttoned shirt—had been removed sometime during the night.[16] Over the next few months, T.M. would boast to others about how she had engaged in sexual intercourse with S.F. while he was unconscious.[17] She would even go so far as to describe the evening as one that had "saved her a trip to the sperm bank."[18] T.M. did in fact give birth to a child, and genetic testing confirmed that S.F. was the biological father.[19] As a result, he was ordered to pay child support.[20] The fact that he never consented to the sexual act was deemed irrelevant.[21]

I begin with these two examples (and there are numerous others in both categories)[22] to illustrate the degree to which a mother can dictate what degree of reproductive freedom a nonmarital father may enjoy. In the first class of cases, the law permits a mother to evade the father long enough to sever his parental rights without his consent. In the second, the law allows a mother to use sexual assault as a means to force fatherhood on a male who never even consented to the sexual act that created the child. The role the women's actions played in the resolution of both classes of cases is, of course, quite troubling. I must confess, however, that I feel somewhat uncomfortable even bringing up these examples of male subordination. After all, I consider myself a feminist and have even written in the past on the extreme harms that flow from society's devaluation of all things feminine.[23] As Professor Janet Halley astutely recognized, "[e]xposing the possibility that women sometimes use a posture of suffering powerfully, thus harming others, and especially exposing the possibility that they harm men, is tantamount to a denial that women suffer *and thus also* a denial that they are subordinated."[24] And, indeed, I do sincerely believe that, despite the progress that has been made, women continue to suffer subordination at the hands of men. For numerous reasons, however, I ultimately conclude that none of these concerns should mean that male subordination in the area of reproductive freedom should go ignored by feminists—in fact, just the opposite.

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15. *Id.* at 1188.
16. *Id.* at 1187.
17. *Id.* at 1188.
18. *Id.*
19. *Id.* at 1186.
20. *Id.*
21. *Id.* at 1189.
22. *See infra* Part III.
23. *See, e.g.*, Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation's Schools*, 86 IND. L.J. 827 (2011).
24. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 317 (2006) (recognizing, but ultimately disagreeing with that line of reasoning).

To start with, feminists are no strangers to controversy or difficult questions. Legal feminists, after all, do come in many different varieties, among which a great deal of disagreement exists.[25] At the heart of feminism, however, lies what has been described as "a subordination theory set by default to seek the social welfare of women, femininity, and/or female or feminine gender by undoing some part or all of their subordination to men, masculinity, and/or male or masculine gender."[26] Or, more simply, feminism is a "universal theory in that it is a general theory of the oppression of women by men."[27] When we look, then, at a problem through the lens of feminist legal theory, we are engaging in "an analysis of women's subordination for the purpose of figuring out how to change it."[28]

It is for this reason that feminist legal theory is the perfect lens through which to look at laws like those that are the subject of this Article—laws that allow one person to dictate the reproductive responsibilities of another. Indeed, these current deprivations facing men parallel the broader struggles women have historically faced in attempting to wrest control of their destinies out of the hands of men. For example, just as common law coverture gave men complete dominion over their wives' property,[29] the current law puts women in almost complete control of the parental rights of a nonmarital male.[30] More importantly, however, legal feminist theory is not merely a useful vehicle for analyzing this area of father's rights, but legal feminists themselves should be acutely concerned with the degree to which the law denies men reproductive freedom.[31] After all, as Justice Ginsburg once wrote, "discrimination by gender generally cuts with two edges and is seldom, if ever, a pure favor to women."[32] Indeed, as discussed later in this Article, the laws under discussion here directly impact several key feminist principles such as sex stereotypes and bodily autonomy.

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25. *See* Debora Halbert, *Feminists Interpretations of Intellectual Property*, 14 AM. U. J. GENDER SOC. POL'Y & L. 431, 432 (2006) (noting "there is no single feminism that can claim to speak for all women who call themselves feminists. Feminist thought aligns loosely around themes regarding women's equality, but the multiplicity of feminism(s) at times overshadows the similarities.").

26. HALLEY, *supra* note 24, at 4; *see also* Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1041 (1996) (noting that feminism has primarily been concerned with ending "the unjust subordination of women").

27. CAROLINE RAMAZANOGLU, FEMINISM AND THE CONTRADICTIONS OF OPPRESSION 22 (1989) (emphasis omitted).

28. Linda Gordon, *The Struggle for Reproductive Freedom: Three Stages of Feminism*, *in* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 107, 107 (Zillah R. Eisenstein ed., 1978).

29. *See infra* Part II.

30. *See infra* Part III.

31. *See infra* Part IV.

32. Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 132, 140 (Vincent Blasi ed., 1983).

This Article first begins, however, with a closer look at the common law practice of coverture. Section II does so in an attempt to set the stage with an example of another area of law—mercifully no longer in effect—that placed one's gender's rights in the hands of the other. Feminists fought hard to end that practice and, as a result, have gained a rich understanding of why such an approach does not work and why similar systems should be resisted. Section III then shifts to a discussion of the law as it relates to the parental rights of nonmarital fathers, expanding upon the two examples that began this Article—men who were conscripted into fatherhood by the actions of the mother and men who were, likewise as a result of the mother's actions, thwarted in their attempts to legally father their resulting children. Next, Section IV analyzes why feminists should be concerned with this area of the law and its current failure to fully protect reproductive autonomy. Finally, Section V offers suggested changes to the law that would help combat these discriminatory laws yet, at the same time, not erode those protections currently afforded female reproductive autonomy.

## II. THE LAW OF COVERTURE

Under common law coverture, a woman's legal identity was almost completely subsumed by that of her husband.[33] As Blackstone described: "[T]he husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs every thing."[34] Thus, marriage worked an enormous legal disability on most women given that "[m]arried women could not sue, be sued, make contracts, own property, or keep their own earnings."[35] Further, "[i]n entering coverture marriage, a woman relinquished control of all property and assets that she might have inherited from her family. Any assets that the couple might have accumulated during their marriage were considered the husband's property exclusively, including the household goods, the wife's clothing, and even the

33. Peter Goodrich, *Gender and Contracts*, *in* FEMINIST PERSPECTIVES ON THE FOUNDATIONAL SUBJECTS OF LAW 17, 24 (Anne Bottomley ed., 1996) ("The legal effect of marriage or *coverture* was to place the wife not simply within the power or under the control of the husband but it was also to annex the woman to the husband such that husband and wife were in law one person.").

34. 1 WILLIAM BLACKSTONE, COMMENTARIES 430, *reprinted in* KATHRYN CULLEN-DUPONT, ENCYCLOPEDIA OF WOMEN'S HISTORY IN AMERICA app., at 302 (2d ed. 2000).

35. Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1497 (2009).

children."[36] In essence, then, a married female was herself rendered "civilly dead,"[37] existing almost entirely under the shadow of her husband.

Those who supported coverture did so by arguing that the institution actually benefitted women.[38] Blackstone himself stated, when describing the incidents of coverture, that "the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England."[39] According to its advocates, coverture assisted women by, first, confining them to the roles of wife and mother—roles they were destined to fill.[40] Such beliefs were so widespread that one need only look to decisions of the Supreme Court from this period to see just how ingrained such notions were. For example, in *Bradley v. State*, in which the Court upheld the constitutionality of laws excluding women from the legal profession, Justice Bradley offered the following:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.[41]

A second justification for coverture was the belief that women were simply incapable of looking out for their own best interests. Professor Jill

36. LYNNE E. FORD, WOMEN AND POLITICS: THE PURSUIT OF EQUALITY 363 (3d ed. 2010).

37. 1848 DECLARATION OF SENTIMENTS, *reprinted in* JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN app. 2, at 384 (1991).

38. *See, e.g.*, Short v. Battle, 52 Ala. 456, 459 (1875) ("The protection of the wife . . . was the principle on which the common law proceeded."); EDWARD W. SPENCER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS 101 (1911) ("[T]he wife or feme during marriage is under the cover or protection of her husband (her lord or baron), *who, for her good and for that of offspring*, is the head of the family and paramount.") (emphasis added).

39. 1 WILLIAM BLACKSTONE, COMMENTARIES 433, *as reprinted in* MARY POOVEY, UNEVEN DEVELOPMENTS: THE IDEOLOGICAL WORK OF GENDER IN MID-VICTORIAN ENGLAND 71 (1988).

40. *See* Gila Stopler, *Gender Construction and the Limits of Liberal Equality*, 15 TEX. J. WOMEN & L. 43, 54 (2005) (footnote omitted) ("Men's right to keep women subordinated in the private sphere while keeping the public sphere of freedom and equality for themselves is justified by Locke on the basis of the order of God and of the laws of nature and hence is predicated on Adam's dominion over Eve and on Eve's submissive role as wife and mother.").

41. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

Elaine Hasday has summarized some of the legal treatises from this time that illustrate the prevalence of this stereotype that "married women's contract rights were still limited to protect women 'against their own improvidence.'"[42] For instance, one treatise from 1900 stated that "'feminine weakness' was 'the determining factor' accounting for continued restrictions on married women's rights to contract."[43] Finally, many supported coverture on the basis that, by vesting power in one spouse, the law cut down on marital and familial discord: "[I]t is absolutely necessary for the preservation of peace, that where two or more persons are destined to pass their lives together, one should be endued with such a pre-eminence as may prevent or terminate all contestation."[44] Of course, under the law of coverture, it was the man who would always and forever be placed in that position.

Whatever the justification, the reality was that "[m]arried women were at the mercy of their husbands' good will."[45] After all, whatever pleasures a married woman might enjoy during her marriage largely depended on how much benevolence her husband chose (in his absolute discretion) to bestow upon her. And, as one scholar points out, "[n]o doubt there were many marriages in which husbands treated their wives decently. And some wives, like Chaucer's wife of Bath, surely managed to get the upper hand over their husbands, in spite of prevailing institutions and norms."[46] On the other hand, "[i]f a husband unleashed the full fury of coverture on his wife, she could be reduced to penury and [even] lose her children."[47]

Regardless of how kindly a husband wielded the power bestowed upon him by the law of coverture, the greater problem lies in the fact that the law would even give the husband such power in the first place. Indeed, far from advancing the interests of women, coverture was instead a mechanism for "institutionalizing and reproducing the powerlessness and passivity it

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42. *See* Hasday, *supra* note 35, at 1499 (emphasis omitted) (citing WILLIAM H. CORD, A TREATISE ON THE LEGAL AND EQUITABLE RIGHTS OF MARRIED WOMEN 207 (Philadelphia, Kay & Bro. 1861)).

43. Hasday, *supra* note 35, at 1499–1500 (quoting ISIDOR LOEB, THE LEGAL PROPERTY RELATIONS OF MARRIED PARTIES 34 (1900) "The inexperience of the woman and the probability that her confidence, which she so freely accords, may be taken advantage of, are the chief considerations at the basis of such provisions.").

44. PEREGRINE BINGHAM, THE LAW OF INFANCY AND COVERTURE 181–82 (E.H. Bennet ed., F.B. Rothman 1980) (1816).

45. SARA M. BUTLER, DIVORCE IN MEDIEVAL ENGLAND: FROM ONE TO TWO PERSONS IN LAW 12 (2013).

46. Daniel Klerman, *Women Prosecutors in Thirteenth-Century England*, 14 YALE J.L. & HUMAN. 271, 276 (2002).

47. Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 HARV. WOMEN'S L.J. 179, 185 (1988). As an example, Professor Turano details the story of author Caroline Norton, "whose husband exercised his legal rights to take away her children, her inheritance, her copyrights, and her real property." *Id.*

supposedly reflected to keep women in the home."[48] Elizabeth Cady Stanton, analogizing the protection that coverture gave to women as being the same as protection "[s]uch as the wolf gives the lamb,"[49] argued that "[t]here can be no true dignity or independence where there is subordination to the absolute will of another, no happiness without freedom."[50] Fueled by the realization that women could never be equal so long as they had to look to their husbands to dole out their rights, feminists led the fight to replace coverture with a system that provided married women with greater rights and a more equal say in their marriages and their lives.[51]

Although the fight for gender equality continues to this very day, feminists are at least somewhat better equipped now than in the past simply by virtue of the lessons gained from these past struggles. And, there is one extremely important lesson that has emerged from the law of coverture as it existed in this country. Specifically, gender equality can never be achieved so long as one gender is permitted to serve as gatekeeper to the legal rights of the other. Unfortunately, as the next Section details, when it comes to reproductive freedom, that is precisely the position in which the current state of the law has placed unmarried mothers and fathers: the former, should she choose to wield it, has almost unbridled power to control both the rights and obligations the latter possesses vis-à-vis a resulting child.

## III. FATHER'S REPRODUCTIVE FREEDOM: AN IMBALANCE OF POWER

Under the Equal Protection clause of the Fourteenth Amendment, which requires that a certain level of scrutiny be applied to laws that fail to treat "similarly situated" people alike,[52] discrimination on the basis of race is subject to strict scrutiny[53]—the rationale being that rarely would a noninvidious reason exist for discriminating on such a superficial basis.[54]

48. Danaya C. Wright, *"Well-Behaved Women Don't Make History": Rethinking English Family, Law, and History*, 19 WIS. WOMEN'S L.J. 211, 237 (2004).

49. SUE DAVIS, THE POLITICAL THOUGHT OF ELIZABETH CADY STANTON: WOMEN'S RIGHTS AND THE AMERICAN POLITICAL TRADITIONS 105 (2008).

50. BRADFORD MILLER, RETURNING TO SENECA FALLS: THE FIRST WOMAN'S RIGHTS CONVENTION & ITS MEANING FOR MEN AND WOMEN TODAY 176 (1995).

51. *See* DAVIS, *supra* note 49, at 82.

52. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–40 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." (citing Plyler v. Doe, 457 U.S. 202, 216 (1982))).

53. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

54. *See* Amy Hinkley, Comment, *Scrutinize This!: The Questionable Constitutionality of Gender-Conscious Admissions Policies Utilized by Public Universities*, 37 PEPP. L. REV. 339, 366 n.153 (2010)

Accordingly, such discrimination is almost always ruled unconstitutional.[55] Gender discrimination, on the other hand, is merely subjected to intermediate scrutiny given that, unlike race, "differences between men and women may in some circumstances justify different treatment."[56] As the Court has pointed out, "[t]he truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both."[57] Thus, a state may occasionally have need to treat the two sexes differently, and the intermediate level of scrutiny provides the state with greater freedom to do just that. For example, applying intermediate scrutiny, the Court has upheld legislation that required only males to register for the draft[58] and also state laws that only criminalized acts of statutory rape when perpetrated by males.[59] Most recently, the Court upheld legislation that imposed different requirements on unmarried fathers and unmarried mothers to transmit U.S. citizenship to children born abroad.[60] For mothers, U.S. citizenship is conferred on the child automatically; for fathers, certain steps have to be taken before the child could gain U.S. citizenship.[61] The Court ruled that this disparate treatment nonetheless satisfies Equal Protection:

> To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of

("Racial classifications are considered to be inherently suspect and are, therefore, automatically subject to strict scrutiny because, among other reasons, people of different races do not have different physical abilities in the same way that men and women do.").

55. Such distinctions can only survive "if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors*, 515 U.S. at 227.

56. Lindsey Sacher, Comment, *From Stereotypes to Solid Ground: Reframing the Equal Protection Intermediate Scrutiny Standard and its Application to Gender-Based College Admissions Policies*, 61 CASE W. RES. L. REV. 1411, 1416 (2011).

57. Ballard v. United States, 329 U.S. 187, 193 (1946).

58. Rostker v. Goldberg, 453 U.S. 57, 58 (1981).

59. Michael M. v. Superior Court, 450 U.S. 464, 473 (1981) ("Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.").

60. Nguyen v. INS, 533 U.S. 53, 71 (2001)

61. *See* 8 U.S.C. § 1409 (2012). In 2011, the Court would once again uphold this same gender-based distinction. *See* Flores-Villar v. United States, 131 S.Ct. 2312, 2313 (2011).

> equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.[62]

Historically, however, the Court has often sidestepped this equal protection analysis entirely, finding that the class of men and women at issue are not even "similarly situated."[63] For example, in *Parham v. Hughes*, the Court stated that "[t]he fact is that mothers and fathers of illegitimate children are not similarly situated."[64] In light of these perceived differences between mothers and fathers, nonmarital fathers have historically encountered discriminatory laws. As one scholar explained it, "Like illegitimate children, unwed fathers historically were presumed to operate outside the bounds of the conventional household. . . . [T]he illegitimate child had no claim to parentage and the putative father had no rights or responsibilities with respect to a child conceived out of wedlock."[65]

Starting in the 1970s, however, the Court began to strike down a number of laws that discriminated against nonmarital fathers. The case of *Stanley v. Illinois* paved the way with the Court striking down an Illinois law that presumed nonmarital fathers, but not nonmarital mothers or even marital fathers, to be unfit.[66] Later, in *Caban v. Mohammed*, the Court would also strike down legislation that required the consent of a nonmarital mother, but not the nonmarital father, before a child could be adopted.[67] Thus, these cases began a trend of Supreme Court jurisprudence whereby, although the differences between the two sexes are understood and even recognized in some instances as justifiable reasons for gender-based discrimination, a state is nonetheless limited in the degree to which it can discriminate on the basis of gender when it comes to unmarried parents.

With these principles in mind, what follows are two areas of law where nonmarital fathers are currently facing grave legal disabilities that, due to the relatively passive role men play in human reproduction, only burden

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62. *Nguyen*, 533 U.S. at 73.

63. *See* Parham v. Hughes, 441 U.S. 347, 354 (1979) ("In cases where men and women are not similarly situated, however, and a statutory classification is realistically based upon the differences in their situations, this Court has upheld its validity.").

64. *Id.* at 355.

65. Allison Anna Tait, *A Tale of Three Families: Historical Households, Earned Belonging, and Natural Connections*, 63 HASTINGS L.J. 1345, 1377 (2012).

66. Stanley v. Illinois, 405 U.S. 645, 656–57 (1972) ("Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.").

67. Caban v. Mohammed, 441 U.S. 380, 394 (1979) ("We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests.").

men. What makes these legal disabilities particularly troubling is that: (1) they pertain to the man's ability to control his own procreation, and (2) the man is, in essence, powerless to protect his rights given that he is at the mercy of the mother.

### *A. Conscripted Fathers*

A man who is the legal father of a child is obligated to provide that child with financial support.[68] 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."[69] Further, much of the law relating to child support is based on the fact that it is typically in a child's best interest to receive financial support from mothers as well as fathers.[70] 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."[71]

Thus, child support is essentially a form of strict liability with the justification being that "[t]he child is an innocent party, and it is the child's interests and welfare" that the court must look to in adjudicating support.[72] So strict is this liability that even those men who never consented to the sexual act that caused the pregnancy are nonetheless liable for support.[73] 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."[74] 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

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

69. *Id.* at 61.

70. *See id.* at 35

71. Kansas *ex rel*. Hermesmann v. Seyer, 847 P.2d 1273, 1279 (Kan. 1993) (quoting Weinberg v. Omar E., 482 N.Y.S.2d 540, 541 (N.Y. App. Div. 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.").

72. Hubin, *supra* note 68, at 55 (quoting *S.F.*, 695 So. 2d at 1189).

73. 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, 535 (2005).

74. *Id.*

resulted in the pregnancies."[75] Such cases typically arise in two forms: those involving statutory rape and those involving stolen sperm.

*1. 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."[76] 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 who is below the statutorily defined age of consent.[77] 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.[78] In most instances,[79] engaging in a sexual act with someone below the age of consent is a criminal act.[80]

Despite the criminal penalty, when the victim is male, the question also arises as to whether he should be liable for child support payments should the rape result in a child. This scenario unfortunately arises somewhat frequently.[81] Nonetheless, without exception, courts have consistently ruled that the underage father is indeed liable for child support. In the words of one court, "[i]f voluntary intercourse results in parenthood, then for

75. Hubin, *supra* note 68, at 55.

76. CAROLYN E. COCCA, JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES 2 (2004).

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

78. *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) (footnote omitted) ("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.").

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

80. MADDEX, *supra* note 77, at 275. 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." JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 71 (2002). In most states, statutory rape is a felony, but statutes typically include age-gap provisions so that consensual teenage sex is either not criminal or only a misdemeanor. *See* Meredith Cohen, Note & Comment, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & POL'Y 717, 734–35, 748–50 & n.196.

81. Indeed, there are "numerous cases in which an adult woman became pregnant as a result of sexual relations she initiated with a minor child." Hubin, *supra* note 68, at 51 (listing cases); *see also* Ruth Jones, *Inequality from Gender-Neutral Laws: Why Must Male Victims of Statutory Rape Pay Child Support for Children Resulting from Their Victimization?*, 36 GA. L. REV. 411, 416 n.23 (2002) (listing cases).

purposes of child support, the parenthood is voluntary. This is true even if a fifteen-year old boy's parenthood resulted from a sexual assault upon him within the meaning of the criminal law."[82]

Consider, for example, Nathaniel J., who at the age of fifteen was statutorily raped by a woman named Ricci Jones. Although Nathaniel described the sexual encounter as "a mutually agreeable act,"[83] Jones was convicted of statutory rape.[84] Nonetheless, the district attorney's office brought an action against Nathaniel seeking child support and welfare reimbursement.[85] In response, Nathaniel argued 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 an adult."[86] The court, however, rejected Nathaniel's arguments, finding that Nathaniel was "not an innocent victim of Jones's criminal acts."[87] Specifically, the court distinguished 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."[88] 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 14 who voluntarily engages in sexual intercourse is a victim of sexual abuse."[89] 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, was legally incapable of consenting to such acts.[90]

In another case, a Michigan court ruled that a fourteen-year-old victim of sexual assault was likewise liable for child support: "[R]espondent participated in the act of sexual intercourse that resulted in the conception of [the child]. Respondent is not absolved from the responsibility to support

82. J.J.G. v. L.H. (*In re* Paternity of J.L.H.), 441 N.W.2d 273, 276–77 (Wis. Ct. App. 1989).

83. Cnty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843, 844 (Cal. Ct. App. 1996).

84. *Id.* (citing CAL. PENAL CODE § 261.5 (West 2014), which states that "[a]ny person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony.").

85. *Id.* Indeed, in most of the cases presented here, "the child's rights in these cases have actually been relinquished to the government, since these cases arise when a county seeks repayment of public benefits paid on behalf of the child." Jones, *supra* note 81, at 449.

86. *San Luis Obispo*, 57 Cal. Rtpr. 2d at 845. 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.*

87. *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.*

88. *Id.* (quoting Cynthia M. v. Rodney E., 279 Cal. Rptr. 94, 98 (Cal. 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.*

89. *Id.*

90. *Id.*

the child because [the mother] was *technically* committing an act of criminal sexual conduct."[91] The Supreme Court of Kansas reached the same conclusion in a case involving a male who was only twelve at the time he was statutorily raped: "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."[92]

### *2. Sexual Assault and Misappropriated 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."[93] Thus, included in the category of "conscripted fathers" are also those men who have had their sperm taken and used for conception without their consent.

To illustrate, recall the case of S.F., the Alabama man who passed out on T.M.'s (i.e., the mother's) couch, while attending a party at her house in 1992.[94] 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."[95] In 1994, the State of Alabama, on behalf of T.M., brought an action against S.F. to collect child support.[96] S.F. was found liable and was ordered to pay not only $106.04 a week from that point onward, but also $8,960.64 in arrears.[97] On appeal, S.F. argued that he should be relieved of liability given that he was a victim of sexual assault.[98] 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,

91. L.M.E. v. A.R.S., 680 N.W.2d 902, 914 (Mich. Ct. App. 2004) (emphasis added).

92. State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1279 (Kan. 1993) ("This minor child, the only truly innocent party, is entitled to support from both her parents regardless of their ages.").

93. Hubin, *supra* note 68, at 66 (citing Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 133 (2002)).

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

95. *Id.* at 1186, 1190. 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.*

96. *Id.* at 1186.

97. *Id.* at 1188. S.F. was also ordered "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.

98. *Id.* at 1188. S.F. claimed that "he did not have consensual intercourse with T.M. and that he was a victim of a sexual assault by T.M." *Id.*

and to deny him equal protection under the law."[99] The court, however, rejected S.F.'s argument, and it did so by—like the statutory rape cases discussed above[100]—focusing exclusively on the child's interest in receiving support: "The child is an innocent party, and . . . any wrongful conduct on the part of the mother should not alter the father's duty to provide support for the child."[101]

In a similar case, a father, Daniel, claimed that the mother, Jennifer, had engaged in nonconsensual sexual intercourse with him after lacing his drink with "a date rape drug."[102] In an action to collect child support for the resulting child, the lower court had allowed Daniel to introduce evidence of nonconsent but required him "to prove all factual issues by clear, satisfactory, and convincing evidence."[103] The jury ultimately found that Daniel's act of sexual intercourse with Jennifer was involuntary, yet nonetheless still required Daniel to pay child support.[104] On appeal, the appellate court agreed and held that "[t]he paramount goal of any child support decision is to secure the best interests of the child."[105] According to the court, the child "was not at fault [and thus] was entitled to receive child support from both parents."[106] The appellate court went one step further, however, and held that the lower court erred in even putting the issue of consent to the jury.[107] Instead, the appellate court ruled that the only question the jury had to answer was whether Daniel was Derek's father: "When the court determined that Daniel was Derek's father, Daniel's right to a jury trial was extinguished."[108]

A final example of stolen sperm is that of Emile, whose story is somewhat different, however, in that he did consent to sexual activity with the mother.[109] Nonetheless, Emile claimed that he merely consented to oral sex with the mother and never consented to her use of his sperm for

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99. *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.

100. *See supra* notes 82, 83, 91, and 92.

101. *S.F.*, 695 So. 2d at 1189 (noting that the purpose of the Alabama Uniform Parentage Act "is to provide for the general welfare of the child; any wrongful conduct on the part of the mother should not alter the father's duty to provide support for the child").

102. State v. Daniel G.H. (*In re* Paternity of Derek S.H.), No. 01-0473, 2002 WL 265006, at *1 (Wis. Ct. App. Feb. 26, 2002) (unpublished table decision).

103. *Id.*

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

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

106. *Id.*

107. *Id.* at *3.

108. *Id.*

109. *See* 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.*

purposes of self-insemination.[110] In that case, during the Fall of 1983, Emile was visiting his parents in a hospital when Debra Rojas, a nurse, offered to perform oral sex on him, provided he wore a condom.[111] Emile consented but claimed that subsequently Debra had, without Emile's knowledge or consent, used Emile's sperm to successfully impregnate herself.[112] Eleven years later, the state filed an action against Emile to collect child support.[113] Despite his objections, the lower court ordered Emile to pay $436.81 per month, $17,909.21 in arrears, and 5% court costs.[114] The appellate court then affirmed, relying solely on the fact that paternity testing revealed Emile to be the father.[115] According to the court: "The fact of paternity obliges a father to support his child."[116] As to the allegations that Debra had engaged in self-insemination without Emile's consent, the court dismissed the point, merely noting that "defendant's own testimony showed that he had *some sort* of sexual contact with [the] plaintiff around the time frame of alleged conception."[117] Thus, the fact that there was any sexual contact was sufficient to hold Emile liable for child support.

An appellate court in Illinois reached a similar result in *Phillips v. Irons*.[118] 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.[119] The two never had sexual intercourse because Irons told Phillips that she was menstruating and thus needed to refrain from vaginal intercourse.[120] However, unbeknownst to Phillips, Irons used Phillips's semen (obtained from oral sex) to successfully inseminate herself.[121] Subsequently, Irons gave birth to a daughter and, soon thereafter, sought an order of child support against Phillips.[122] After DNA testing proved that

110. *Id.* According to Emile, Debra 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.*

111. *Id.*

112. *Id.* ("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.").

113. *Id.* at 1033.

114. *Id.* at 1033–34.

115. *Id.* at 1035–36, 1041.

116. *Id.* at 1034 (citing Dubroc v. Dubroc, 388 So. 2d 377, 379–80 (La. 1980)).

117. *Id.* at 1036 (emphasis added).

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

119. *Id.* at *1.

120. *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.*

121. *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.'") (alteration in original).

122. *Id.*

Phillips was in fact the biological father, the court awarded child support to Irons in the amount of $800 a month, which was later increased to $1,600 a month.[123] The court paid no consideration to the mother's alleged wrongdoing.

In sum, in cases involving a father who claims that his sperm was stolen by the mother, whether this "theft" occurred during nonconsensual intercourse or whether the sperm was harvested from sexual activity other than intercourse and then surreptitiously used for insemination, the courts have universally reached the same result. Specifically, 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 intercourse with a woman and a baby results, the man is liable for child support. The sexual intercourse in these cases is 'factually voluntary' and thus intentional, even if it is nonconsensual in the criminal sense."[124]

### *B. Thwarted Fathers*

Conscripted fathers are not the only class of men whose reproductive freedom has been compromised by the actions of women. Indeed, the law not only permits women to force fatherhood upon men—again, those who never consented to the procreative act that created the child—but at the other end of the spectrum, the law likewise permits women to effectively thwart men's attempts to actually father a biological child. As a result, these men permanently lose their parental rights to children they, in many instances, never even had the opportunity to meet.

To understand how such a situation can arise, it is first necessary to examine two areas of law as they are currently applied to nonmarital fathers: substantive due process and adoption law.

#### *1. The Biology-Plus Doctrine*

Under the Due Process Clauses of the Fifth and Fourteenth Amendments, parents have a fundamental right to direct the upbringing of their children.[125] To have that right, however, a person must first qualify as

123. *See* Chris Hack, *Man Claiming Stolen Sperm Ordered to Double Child Support*, CHI. SUN-TIMES, Mar. 14, 2005, at 24.

124. Laura Wish Morgan, *It's Ten O'Clock: Do You Know Where Your Sperm Are? Toward a Strict Liability Theory of Parentage*, DIVORCE LITIG., Mar–Apr. 2002, *available at* http://www.childsupportguidelines.com/articles/art199903.html.

125. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.")

the child's legal parent.[126] For mothers, simply giving birth to the child is almost always sufficient to confer legal parenthood.[127] When it comes to nonmarital fathers, however, simply being a biological father is insufficient to allow the man to claim legal fatherhood over a child. Instead, something more is required. This requirement is known as the "biology-plus" rule and was developed by the Supreme Court in a series of four cases starting with *Stanley v. Illinois*[128] in 1972 and culminating with *Lehr v. Robertson*[129] in 1983. According to the Court, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[130] Thus, in the case of nonmarital fathers, "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause."[131] In other words, a biological connection gives a man an opportunity to develop a liberty interest in his child, but such an interest will only acquire constitutional protection if the man promptly comes forward and acts as a father to the child.

The biology-plus doctrine comes into play when a nonmarital, biological father desires to involve himself in the child's life. Typically, these cases concern a biological father who is attempting to block the child's adoption by another male. In contrast, when it is another party (or, most frequently, the state) who is attempting to adjudicate a man's paternity—typically for purposes of ordering him to pay child support—a biological connection is all that is needed.[132] Thus, it is only when a man is claiming the benefits of fatherhood that he must satisfy the biology-plus rule. In other words, as one commentator put it, "[t]he Supreme Court

126. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (reasoning that, while generally parents have fundamental rights under the Due Process Clause to direct their children's upbringing, no such right existed here because "this [was] not a case in which the unwed father at any time had, or sought, actual or legal custody of his child.").

127. *See* Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) ("The mother carries and bears the child, and in this sense her parental relationship is clear."); Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 915 (2006) ("With respect to mothers, it is assumed that biological and social motherhood coexist.").

128. 405 U.S. 645 (1972).

129. 463 U.S. 248 (1983).

130. *Id.* at 260 (emphasis omitted) (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).

131. *Id.* at 261 (citation omitted).

132. *See generally* Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 48 (2004) ("While the Court held that a biological connection alone established the requisite link in benefits cases, the Court found that something more was necessary in personal association cases, i.e., 'biology plus.'").

[o]nly [h]elps [t]hose [w]ho [h]elp [t]hemselves."[133] At first blush, this principle appears quite sound. Unlike the mother, who was pregnant with the child for nine months, a father can beget a child with very little involvement and participation on his part. In fact, his role may have in essence been no more than sperm donor, having little to no contact with the birth mother following insemination. In such instances, it would be difficult to justify a system whereby a man who failed to come forward and act as a father is nonetheless permitted to intervene at the last minute and thwart an attempt to place the child with a man who *has* demonstrated a desire to fulfill that role in the child's life. In that respect, then, the biology-plus rule is a mechanism for balancing the father's rights with the child's best interest in finding a stable family unit.[134]

A problem arises, however, when the biological father either did not know he fathered a child, or he did know of the child's existence but was essentially blocked by the mother from seeing the child. In either case, the father is thus unable to come forward and demonstrate the necessary commitment to the child. As a result, a court is then free to terminate his parental rights without his consent or, indeed, even his knowledge. The Supreme Court has yet to rule on how the biology-plus rule operates in such situations, and given the way in which the law pertaining to adoption has evolved—as explained below—such situations unfortunately arise quite frequently.

### *2. Adoption Law and the Putative Father Registry*

When placing a child up for adoption, unwed mothers are generally not required to identify the father.[135] To require otherwise, many argue, would infringe the mother's right to privacy.[136] As one advocate of nondisclosure described, requiring the unwed mother to identify the father would "sublimate[] the unwed mother's rights and interests to those of the putative father, trading her dignity in exchange for the diminished chance that her forced disclosure will identify an earnest father eager to embrace

133. Kevin Lytle, Note, *Rock-a-bye Baby: When Determining How and Where the Cradle Should Fall, Nebraska "Blows It"—An Examination of Unwed Fathers' Rights Regarding Their Children and Nebraska's Infringement of Those Rights*, 74 NEB. L. REV. 180, 194 (1995).

134. *See* Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1047 (Minn. 2002) ("The overarching goal is to establish procedures that advance the best interests of the child by quickly providing her a stable and permanent home and by avoiding disruption of an adoptive placement because a father untimely asserts his paternity.").

135. *But see* Cecily L. Helms & Phyllis C. Spence, *Take Notice Unwed Fathers: An Unwed Mother's Right to Privacy in Adoption Proceedings*, 20 WIS. WOMEN'S L.J. 1, 10 (2005) (detailing some statutory schemes that arguably could pressure the mother to disclose the identity of the father).

136. Caban v. Mohammed, 441 U.S. 380, 408–09 & n.17 (1978) (Stevens, J., dissenting) ("[Q]uestions relating to the adequacy of notice to absent fathers could invade the mother's privacy."').

his parental responsibility."[137] Further, as one court pointed out, "[t]here are numerous situations in which an unmarried birth mother would be justified in keeping information from a putative father, including situations where the woman has fled an abusive relationship, where the pregnancy was the result of nonconsensual intercourse, or where the putative father poses a danger to the child."[138]

For these reasons, it is generally the sole responsibility of the putative father to protect his rights, which he can do by coming forward soon after the child's birth and obtaining a paternity adjudication.[139] Or, he can simply come forward and act as a father to the child.[140] Most states require that men who have undertaken such actions are entitled to notice of any adoption proceedings involving the child.[141] Once again, however, the problem arises when the father does not even know that the child exists or has been thwarted in his attempts to build a relationship with that child. Nonetheless, under the law, it remains the father's sole responsibility to protect himself.

To do so, a father must typically turn to the state's putative father registry, a form of which has been adopted in a majority of states.[142] In essence, the registry sets up a system whereby a male can protect his right to receive notice of any adoption involving his biological children. He does so by submitting his name to the appropriate registry along with the name of the potential mother and, if known, the name of the child.[143] State law then requires that, should the mother attempt to give the child up for adoption, a search of the registry must first be conducted and any matching

137. Helms & Spence, *supra* note 135, at 16.

138. Heidbreder v. Carton, 645 N.W.2d 355, 368 (2002).

139. *See* BROWNE C. LEWIS, PAPA'S BABY: PATERNITY AND ARTIFICIAL INSEMINATION 8 (2012) ("An adjudication of paternity protects a man's legal right to parent his child.").

140. *See* LENORA M. LAPIDUS, EMILY J. MARTIN & NAMITA LUTHRA, THE RIGHTS OF WOMEN: THE AUTHORITATIVE ACLU GUIDE TO WOMEN'S RIGHTS 265 (4th ed. 2009) ("In general, when a father has had a 'substantial relationship' with the child . . . the law will require the father's consent to adoption.").

141. *Id.*

142. *See generally* Beck, *supra* note 134 (including a chart of the 33 states). In states that have not set up such a system, the state relies on the mother and state investigators to try and determine the father's identity. Those suspected of being the father are then contacted directly, or if no men can be identified, the state provides constructive notification through publication. *See* Kimberly Barton, Comment, *Who's Your Daddy?: State Adoption Statutes and the Unknown Biological Father*, 32 CAP. U. L. REV. 113, 114 (2003) ("States that choose to protect the unknown father's inchoate interest in assuming a responsible role in the future of his child take various approaches to protect this interest, but the two predominant approaches they employ are putative father registries and publication notice requirements."); *see also* Alison S. Pally, Note, *Father by Newspaper Ad: The Impact of* In Re The Adoption of a Minor Child *on the Definition of Fatherhood*, 13 COLUM. J. GENDER & L. 169, 190 (2004). Hardly any states, however, require the mother to disclose the father's identity for the reasons noted earlier. *See supra* notes 135–138 and accompanying text.

143. *See generally* Beck, *supra* note 134.

registrant be notified of the upcoming proceeding so that he might intervene should he choose to do so.[144]

Despite how reasonable this system might sound, the putative father registry has a number of significant flaws. First of all, few men are actually aware that such registries even exist and are thus unlikely to avail themselves to the "protection" they afford.[145] More problematic, however, is the fact that the registries are state-specific.[146] Thus, to adequately protect himself, the putative father must know not the state in which the mother resides but the state where she plans to give the child up for adoption.[147] As discussed below, a mother can simply flee her state of residence and travel to another state to surrender her child for adoption. Unless the putative father actually registered in that specific state, he will not be entitled to notice of any adoptions concerning the child. Additionally, any ability he might have had to challenge the adoption is now permanently foreclosed.

The following cases illustrate the degree to which the states' reliance on these registries, instead of assisting biological fathers, has become a powerful tool for mothers who wish to give a child up for adoption without the biological father's knowledge.

### *3. Examples of Thwarted Fathers*

The story with which I began this article—that of Katie Carton and Dale Heidbreder—is but one example of the harm that can arise when the biology-plus rule intersects with the law of adoption.[148] Again, Heidbreder had no idea that the mother of his child had moved to Minnesota until thirty-one days after she had given birth there to the couple's child.[149] In

144. *See* KERRY O'HALLORAN, THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY AND PRACTICE 274 (2d ed. 2009) ("Once registered, such a father must be notified where feasible that adoption proceedings in respect of his child have been, or will shortly be, commenced.").

145. Lytle, *supra* note 133, at 194; Karen R. Thompson, Comment, *The Putative Father's Right to Notice of Adoption Proceedings: Has Georgia Finally Solved the Adoption Equation?*, 47 EMORY L.J. 1475, 1507 (1998) (noting that "it is unlikely that many fathers will have the requisite knowledge to protect their rights").

146. *See* Barton, *supra* note 142, at 128 ("Since putative father registries are established by state law, their particular features vary from state to state. Specifically, state statutes differ on the time frame within which they require a putative father to register, the consequence of the father's failure to register, and the permissible exceptions to the father's failure to register."); Margaret Ryznar, *Two to Tango, One in Limbo: A Comparative Analysis of Fathers' Rights in Infant Adoptions*, 47 DUQ. L. REV. 89, 95 (2009) ("If the baby's mother uses an out-of-state adoption agency or moves to a different state, she avoids triggering the database.").

147. *See* Beck, *supra* note 134, at 1033.

148. *See supra* note 2 and accompanying text.

149. Heidbreder v. Carton, 645 N.W.2d 355, 361 (Minn. 2002) ("While Carton maintained contact with Heidbreder through e-mail, she did not tell him where she was and she instructed her family and friends not to give Heidbreder any information about her location. Although Heidbreder asked for information, Carton's family and friends refused to tell him where Carton was. Heidbreder

fact, one of two promises that Carton made to Heidbreder was that she would never move to Minnesota[150]—the other promise being that she would never put the child up for adoption.[151] Regardless, he did eventually learn the truth on that thirty-first day, at which point Carton spoke to Heidbreder on the telephone, telling him of her actions and that "it was too late for him to stop the adoption."[152] Heidbreder immediately registered with the Minnesota putative father registry, but he was, of course, one day late.[153] According to the court, that one day was all it took for him to lose his parental rights.[154]

On appeal, Heidbreder argued that he should be excused from his delay given that the mother failed to notify him of her location and also failed to identify him as the father on the birth certificate.[155] The court, however, rejected this argument noting that "Carton had no duty to inform Heidbreder of her location or otherwise assist him in protecting his rights."[156] As the court further explained:

> We decline to impose a fiduciary duty on an unmarried birth mother to disclose her location to the putative father even if she knows he wants to know her location or establish a relationship with his child. . . . Furthermore, there is no need to impose such a duty on the birth mother in the interest of protecting a putative father's interests because the legislature has provided a means for the putative father to assert his interest in his child independent of the birth mother through registration with the Minnesota Fathers' Adoption Registry. Because a putative father is able to protect his interest in his child without any assistance or information from the birth mother, the birth mother is not in a position superior to the

testified in his deposition that he believed Carton had returned to Illinois and he never considered the possibility that Carton was in Minnesota because of Carton's poor relationship with her mother.").

150. *Id.* at 375 n.15 ("Heidbreder knew Carton's relationship with her mother was strained and Carton told Heidbreder she would not move to Minnesota with her mother.").

151. *Id.* at 360 ("While respondents dispute whether Carton made an affirmative promise to Heidbreder not to put the child up for adoption, we view the facts in the light most favorable to Heidbreder as the nonmoving party at the summary judgment stage and assume, for purposes of our decision, that Carton did in fact make such a promise to Heidbreder during their discussion of adoption.").

152. *Id.* at 362.

153. *Id.* ("The same day, Heidbreder found a website with information on the Minnesota Fathers' Adoption Registry and completed and mailed the necessary forms.").

154. *Id.*

155. *Id.* at 366.

156. *Id.* at 370.

> putative father such that she should be required to provide him with information regarding her location.[157]

Naturally, Heidbreder argued that the registry was unable to protect him in this case given that he did not know that Carton had left the state.[158] The court rejected that argument, weakly noting that "while Heidbreder did not know with certainty where Carton was, he had sufficient information to put him on notice that it *was possible*" she was in Minnesota.[159] Even so, the court deemed Heidbreder's lack of knowledge irrelevant, ruling that "the fact that Carton concealed her location from Heidbreder does not excuse his failure to timely register" with the state's putative father registry.[160] Finally, as to Carton's misrepresentations to Heidbreder that she would never put the child up for adoption and would never move to Minnesota, the court simply ruled that "it was unreasonable for Heidbreder to rely on Carton's promise."[161]

In other cases, a nonmarital father promptly registered in multiple states—states where the mother was thought most likely to go—yet nonetheless lost parental rights when the mother instead fled to an unexpected state. For example, in *O'Dea v. Olea*, Cody O'Dea and Ashley Olea began an intimate relationship in Sheridan, Wyoming.[162] Subsequently, after Ms. Olea moved to Buffalo, Wyoming, Mr. O'Dea learned that she was pregnant.[163] After traveling to visit Ms. Olea and learning that she was considering abortion, Mr. O'Dea talked her out of it, offering to help with her expenses and with providing her a home.[164] A few

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157. *Id.* at 368. ("Because we decline to impose a fiduciary duty on a birth mother to notify a putative father of her location at the time of birth, Carton had no duty to disclose her location to Heidbreder, and thus Heidbreder's claim of fraudulent nondisclosure fails as a matter of law.").

158. *Id.* at 366.

159. *Id.* at 375 (emphasis added). The court justified this statement by stating:

> Heidbreder knew Carton had relatives in Minnesota and that her mother was moving to Minnesota. While Heidbreder knew Carton's relationship with her mother was strained and Carton told Heidbreder she would not move to Minnesota with her mother, it is reasonable to recognize that there was at least the possibility that a pregnant "scared and confused" 18 year old woman might request assistance from her mother or out-of-state relatives for assistance if she did not want the birth father to know her location.

*Id*. at 375 n.15. The dissent would characterize the majority's argument as "overly simplistic" and "speculative, at best." *Id.* at 380.

160. *Id.* at 367.

161. *Id.* at 371. Ironically, the court made the point that, because Carton, concealed her whereabouts from him, he should have been put on notice that she'd likely changed her mind about adoption. *Id.* ("[S]uch actions by a birth mother, if anything, are consistent with a birth mother's decision to put her child up for adoption without interference from the putative father and would put a putative father on notice of the need to protect his rights.").

162. 217 P.3d 704, 706 (Utah 2009).

163. *Id.* Ms. Olea, however, had actually become aware of her pregnancy prior to moving to Buffalo. *Id.*

164. *Id.*

weeks later, Ms. Olea contacted him, telling him that she had suffered a miscarriage.[165] Several months later, however, Mr. O'Dea would learn she had lied about the miscarriage and that she was also considering giving the child up for adoption.[166]

To protect his rights to the child, with whom he desired to have a parent-child relationship, Mr. O'Dea registered with both the Wyoming and Montana putative father registries.[167] What Mr. O'Dea did not know, however, was that Ms. Olea had subsequently traveled to Utah, where she put the child up for adoption.[168] Mr. O'Dea tried diligently to locate Ms. Olea, who upon learning of his efforts, finally called him (from a blocked number) and said:

> You will listen and you will not speak. First of all I want you to stop harassing me and that includes your mother. I am in Utah. You will not father this child. You will pay child support until the child is in college. You will never see this baby. Do you understand?[169]

The fact that Ms. Olea referred to child support made Mr. O'Dea believe she had abandoned her plan to give the child up for adoption.[170] A month later, however, Mr. O'Dea learned of the adoption in Utah.[171] The next day, Mr. O'Dea wrote the attorney who handled the adoption but was subsequently informed that he had missed the deadline for asserting his parental rights in Utah.[172] Mr. O'Dea filed an action to establish paternity, but his claim was rejected.[173] The Supreme Court of Utah would eventually rule that, even if she were only there temporarily, the fact that Ms. Olea

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165. *Id.* ("At the time Mr. O'Dea believed this statement to be true . . . .").

166. *Id.* ("[I]n mid-May of the next year, Mr. O'Dea learned from a friend that Ms. Olea was possibly still pregnant. Mr. O'Dea contacted Ms. Olea and discovered that she was still pregnant and was planning on placing the child for adoption.").

167. *Id.* He registered in Montana as well thinking that she might use the LDS Family Services agency located there. *Id.* In addition, "Mr. O'Dea also sent a letter to Dennis Ashton of LDS Family Services in Utah informing him of his intent to maintain a relationship with the child." *Id.* Mr. O'Dea did so "on the belief that Mr. Ashton was the regional director of LDS Family Services in Montana, Wyoming, and Utah." *Id.*

168. *Id.* at 706–07.

169. *Id.*

170. *Id.* at 707. During the brief call, Mr. O'Dea actually asked Ms. Olea if she meant she was giving the child up for adoption. She responded with, "If you understand what I have told you, that is all I have to say." *Id.*

171. *Id.* ("Mr. O'Dea and his family created an Internet Website seeking information about the infant. Six days later, Ms. Olea's mother left a message on the Website that the child was born in Utah, placed for adoption, and the attorney was Larry S. Jenkins.").

172. *Id.* Specifically, the attorney informed O'Dea that his "action was too late because, under Utah law, he was required to file a paternity action in Utah within twenty days after becoming aware of a 'qualifying circumstance,' which in this case was that Ms. Olea temporarily resided in Utah." *Id.*

173. *Id.* at 707–08.

*once* mentioned to Mr. O'Dea that she was in Utah should have put him on notice not only of her location, but also of the possibility that the child might be given up for adoption in Utah.[174] Thus, despite the fact that Mr. O'Dea had tried for months to locate Ms. Olea and had even registered in two different states—because he failed to timely take action in Utah—his paternity claim was forever foreclosed.

## IV. WHY FEMINISTS SHOULD BE CONCERNED

In her book, *Split Decisions*, Professor Janet Halley points out that feminists sometimes take an overly narrow view of feminism, viewing it as the following triad: "women are injured, they do not cause any social harm, and men, who injure women, are immune from harm."[175] Professor Halley instead posits that there is indeed a "dark side" to feminism and this "dark side includes its vanquished, its prisoners of war, the interests that pay the taxes it has levied and owe the rents it has imposed."[176] In short, what Professor Halley describes as "[f]eminism with blood on its hands."[177] Professor Halley offers these observations in support of her theory that occasionally feminism should take a break[178] from looking at the world through a lens of simultaneous male power and female subordination so as to allow its members to realize what collateral harms they may be causing—harms that might be damaging to even feminism itself. As Professor Halley puts it:

> When feminist theory refuses to own its will to power, when it insists that the prodigals must be converged back into feminism, it commits itself to a theoretical stance that makes it hard for feminists to see around corners of their own construction. Unless it Takes a Break from itself, it can't see injury to men. It can't see injury to men by women. It can't see other interests, other forms of

174. *Id.* at 715 ("The statement 'I am in Utah' placed Mr. O'Dea on inquiry notice that Ms. Olea was residing in Utah, even if on a temporary basis. His compliance with other states' paternity laws do not overcome this notice."). *But see* Manzanares v. Byington (*In re* Adoption of Baby B.), 308 P.3d 382, 399 (2012) (retreating somewhat from *O'Dea*'s requirement of inquiry notice and instead holding that "it cannot be enough to simply establish that the father had 'notice' in the sense of suspicion sufficient to trigger a further inquiry").

175. HALLEY, *supra* note 24, at 320.

176. *Id.* at 32–33.

177. *Id.*; *see also* Brenda Cossman, Dan Danielsen, Janet Halley & Tracy Higgins, *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 609 (2003) ("[F]eminism is definitionally *against* domination; and if it has dominated, if it has caused harm, it must chasten itself.")

178. As to what she means by "taking a break," Halley clarifies the phrase as follows: "Not kill it, supersede it, abandon it; immure, immolate, or bury it—merely spend some time outside it exploring theories of sexuality, inhabiting realities, and imagining political goals that do not fall within its terms." HALLEY, *supra* note 24, at 10.

> power, other justice projects. It insists that all justice projects will track a subordination model. And this refusal to see, sustained while feminism imposes costs on interests and projects outside its purview, gives us a textbook case of bad faith.[179]

To the extent feminism can be defined as only being concerned with female subordination at the hands of men, I would agree that perhaps a break might be in order so that feminists can see other harms that are resulting—harms like those under discussion here. However, this Article need not go that far because, even if we only limit feminist concern to that narrow area, the interests at stake here are nonetheless quite damaging to both men and women—in some ways more directly than others, but in all instances eroding many of the rights for which feminists have long fought. Chief among them is the fundamental right to procreate, which of course includes the right to elect not to procreate—a right that resides with each individual, regardless of gender.[180] As discussed above, the current state of the law has, at the very least, compromised that right as it relates to nonmarital fathers.[181] Even leaving aside the constitutional question, however, it is the position of this Article that this imbalance of rights is an issue with which feminists should be very much concerned for a number of reasons.

### *1. Constitutes a Form of Modern Day Coverture*

This Article began with a discussion of common law coverture, the system whereby husbands were permitted to control a great number of their wives' legal rights—rights a husband might choose to extend to her, in his sole discretion, if and when he saw fit.[182] Despite the attempts to justify this practice as benefitting wives and despite the fact that some husbands did likely treat their wives quite generously, the practice instead posed an enormous disability to women and their attempts to be treated as equals.[183] Feminists fought hard to have these laws repealed, and in the process revealed the harms that arise when one gender is permitted to serve as gatekeeper to the legal rights of the other. After all, the greatest harm that flowed from coverture lay, not so much in its application to specific

179. *Id.* at 33.

180. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

181. *See supra* Part III.

182. *See supra* Part II.

183. *See supra* Part II.

marriages, but the fact that the male member of the marriage was even given that level of control in the first place.

Sadly, a similar mechanism has emerged in the way the law treats the reproductive rights of unmarried men. Specifically, as illustrated by the cases discussed earlier, an unwed male can be forced into fatherhood[184] or he can be denied the right to legally father his own offspring[185] simply through actions the mother might decide to take. Admittedly, the area of law I am discussing is less overt and much more narrow than the vast array of legal disabilities that coverture imposed on women. Nonetheless, the right under discussion here—the right to procreate—is one that is fundamental.[186] Further, and most relevant to this discussion, even if this area of law in actuality only affects a relatively small number of men, that is precisely why feminist legal scholars should be particularly concerned. As Cynthia Farina once said:

> [T]he meaning and value of rules and institutions can be discovered only by understanding how they affect the people within them. [Feminism] typically understands knowledge as nonfinal—that is, as expanded by increasing perspective and *seeking out voices on the margins*. Therefore, ends and means must constantly be reassessed as new information is acquired.[187]

After all, even if they merely represent a group on the margins, the deprivations these men are facing are significant.

### *2. Undermines a Basic Tenet of Feminist Jurisprudence—Bodily Integrity*

The fact that the current state of the law might be characterized as a contemporary form of coverture is, in itself, insufficient to justify great concern. After all, when talking about family units and reproduction, it is exceedingly difficult to balance the conflicting interests of the various people involved. Thus, a natural reaction to saying that the reproductive rights outlined above bear some resemblance to coverture might be that perhaps the law is a justified attempt to bestow greater power on mothers in order to make up ground and help balance out the subordination women have endured (and continue to endure) for so much of this nation's history. However, additional considerations warrant heightened concern over the

184. *See supra* Part III.A.

185. *See supra* Part III.B.

186. *See supra* note 180 and accompanying text; *see also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (describing the ability to procreate as "one of the basic civil rights of man").

187. Cynthia R. Farina, *Getting From Here to There*, 1991 DUKE L.J. 689, 707 (emphasis added).

current state of the law—considerations very much at the heart of feminist jurisprudence.

First, the control that the law has given mothers in cases discussed above[188] pertains to reproductive freedom, which in turn, implicates bodily autonomy. As one scholar put it, "[r]eproductive freedom is, in the final analysis, the freedom not merely to experience pleasure and seek meaning through reproduction, but also the freedom to take on responsibilities, including the responsibility to limit one's bodily autonomy and one's activities for the child's sake."[189] And although feminists might disagree on the full scope of decisions encompassed by bodily autonomy, few would argue that reproductive autonomy is not of critical importance, underscoring many of the legal fights feminists have waged in the name of gender equality.[190]

The legal fight that comes most readily to mind is that of abortion—a legal battle that continues to this very day. Those feminists involved in this fight continue to make the point that the right to abortion flows from the constitutional right to privacy and its concern with reproductive and bodily autonomy.[191] To paint this right as a one-way street, one that only benefits women, would greatly undermine its force. On the contrary, the argument is very much strengthened when it is likewise advanced to protect the reproductive autonomy of males. In other words, it is harder to claim a robust constitutional right in that area while turning a blind eye to men—like those detailed earlier in this Article—who have either been forced into fatherhood or thwarted in their attempts to become fathers.[192] Further, to only selectively push for this level of autonomy could give the appearance of bad faith. And, as Professor Halley warns:

> Operating in bad faith can have other pretty acute downsides. It can produce rage and distrust among the unacknowledged bearers of the costs of one's activities. . . . Suspending this bad faith might enable feminism to participate in a much more expansive political

188. *See supra* Part III.

189. John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 463–64 (1983).

190. *See, e.g.*, CHERYL L. MEYER, THE WANDERING UTERUS: POLITICS AND THE REPRODUCTIVE RIGHTS OF WOMEN 81 (1997) ("[M]any feminists fear that regulating surrogacy may undermine the right to bodily autonomy that women fought so hard to acquire.").

191. *See generally, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1 (1992).

192. *See supra* Part III.

> engagement with its own effects, its own imagined constituency, and other political projects it professes to care about.[193]

In making the above comparison to the abortion fight, it is important to note that abortion restrictions are hardly comparable to the deprivations faced by some unwed fathers. Those are different things altogether. Instead, the point here is merely that, to the degree abortion rests on an argument that all should have reproductive freedom and bodily autonomy, perhaps the cases discussed in this Article have greater significance and, thus, can lend some greater force to the development and perpetuation of that constitutional right. Further, although this Article does favor giving unwed fathers greater rights as it relates to their children, such rights should be strictly limited to children who have already been born. It is not the intent of this Article to in any way suggest that fathers (regardless of marital status) should have a legal say in decisions relating to abortion.

### *3. Promotes Gender Stereotypes*

Within feminist legal jurisprudence, there exists a rich source of literature on the harms that flow from sex stereotypes.[194] And one need only look at the development of Equal Protection jurisprudence to see that it is a message that has not gone ignored by the Supreme Court. As Justice Brennan once explained: "Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection."[195] For this reason, even the language of Title VII has been construed to include discrimination on the basis of sex stereotyping: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[196]

So concerned with entrenching and advancing sexual stereotypes, feminists have frequently advocated for gender-neutral language.[197] In fact,

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193. HALLEY, *supra* note 24, at 343–44. Thus, "[w]hile feminism is committed to affirming and identifying itself with female injury, it may thereby, unintentionally, intensify it." *Id.* at 346.

194. *See, e.g.*, Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757 (2013); Morvareed Z. Salehpour, *Election 2008: Sexism Edition: The Problem of Sex Stereotyping*, 19 UCLA WOMEN'S L.J. 117 (2012); Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010).

195. Orr v. Orr, 440 U.S. 268, 283 (1979).

196. L.A. Dep't. of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

197. *See, e.g.*, Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 8 (2008) ("According to the theory of gender neutrality, differences between men and women should be ignored in the law because equality means being treated the 'same as' men regardless of gender difference.").

feminists have even attacked those laws that single out women for protection on the basis that such laws actually hurt women in the long term, labeling them as unequal and, thus, requiring special protections.[198] As Ruth Bader Ginsburg warned, while advocating for the Equal Rights Amendment in the 1970s, one must "perceive laws for 'women only' as ultimately harmful to the group they purport to protect, and favors as characteristically entailing an accompanying detriment."[199] And, indeed, the Supreme Court has struck down a number of laws that singularly imposed burdens on men on the basis that such laws actually promote damaging gender stereotypes about women. For instance, in striking down the Mississippi University for Women's practice of only admitting women to its nursing program, Sandra Day O'Connor, writing for the Court, ruled that "MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."[200] Likewise, in *Orr v. Orr*, the Court struck down a state law that required only husbands to pay alimony on the basis that such laws "effectively announc[e] the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and as [such] seek[] for their objective the reinforcement of that model among the State's citizens."[201]

Feminists have likewise lobbied for changes to laws that offer protections for women but not men on the basis that failing to protect both would perpetuate pernicious female stereotypes. The law of statutory rape is one such example. Historically, most statutory rape laws only protected underage females: "[t]hey punished a male who had sexual intercourse with a female, who was not his wife, under the age of consent."[202] The primary purpose behind these laws was to protect a father's property interest in his daughter's chastity so as to attract more advantageous suitors.[203] Over time, however, the laws became less about property and more about protecting children.[204] Feminists were largely responsible for this shift, and one of the key ways in which they effectuated this change was by successfully lobbying state legislatures to include underage males within the protection

198. *See generally* Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975).

199. *Id.* at 15.

200. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982).

201. 440 U.S. 268, 279 (1979).

202. COCCA, *supra* note 76, at 9; *see also* 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, 225–27 (2008).

203. COCCA, *supra* note 76, at 11 ("The idea behind such laws at the time was less about the ability or lack thereof to consent to such activity on the part of the female, and more about protecting white females and their premarital chastity—a commodity—as property.") (citation omitted).

204. *Id.* at 12.

of statutory rape laws.[205] Feminists did so despite the fact that the Supreme Court had ruled that such discrimination satisfied heightened scrutiny.[206]

In pushing for this change, feminists were motivated by a number of concerns, and protecting young males was certainly high on that list.[207] However, many feminists also felt that "gender-specific laws inscribed the stereotypes of male-as-aggressor and female-as-victim in the realm of sexuality"[208] and likewise presented "young females as a monolithic group unable to make decisions about their own bodies."[209] Persuaded by these arguments, states began making statutory rape laws gender-neutral.[210] As Michelle Oberman describes: "Rather than focus on a gendered notion of power in sexual relations, they decided to isolate and criminalize sexual conduct which they felt raised a presumption of coercion."[211]

Just as the failure of statutory rape laws to protect men only served to codify sex stereotypes, the same can be said of the law's current failure to equally protect the reproductive freedom of unmarried men. For example, the instances of conscripted fatherhood, described above,[212] all involve men who never consented (either factually or legally) to the sexual act that produced their child. Instead, it was the unilateral, wrongful acts of the mother that caused the pregnancy. Yet in each case, the fathers were ordered to pay child support—their lack of consent deemed irrelevant. Such a system continues the stereotype of "male as aggressor/female as victim" by effectively ignoring those situations where those stereotypical sexual roles are reversed, treating such situations as, instead, a factual impossibility.

The sex stereotypes advanced by the thwarted father cases, discussed above,[213] are less obvious but nonetheless still quite damaging to female interests. Specifically, to allow a pregnant female to universally evade all notice requirements to a nonmarital father as to the existence of his biological child likewise paints the unmarried mother as the victim, in need of sanctuary. And, of course, it may be that she does have such a need, and it may even be that there are strong justifications for not requiring notice in

205. *Id.* at 16–17; Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, *in* APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION 460, 460 (D. Kelly Weisberg ed., 1996) (describing feminists as "the most trenchant critics of gender-based statutory rape laws").

206. *See supra* note 59 and accompanying text.

207. COCCA, *supra* note 76, at 18.

208. *Id.*

209. *Id.* at 18, 20.

210. *Id.* at 22.

211. Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 32 n.87 (1994).

212. *See supra* Part III.A.

213. *See supra* Part III.B.

some situations; however, the law is currently not that specific. Instead, as the law exists today, an unmarried female can effectively terminate a father's rights by refusing to disclose the existence of the child or her location regardless of their relationship.[214] It is important for feminists to recognize the harm that is being caused here and realize that this harm goes directly to the heart of reproductive freedom. Thus, feminists must be careful of what Professor Halley describes as "representing women as end points of pain, imagining them as lacking the agency to cause harm to others and particularly to harm men."[215] After all, in doing so, "feminists refuse also to see women—even injured ones—as powerful actors."[216]

In sum, just as feminists have historically been concerned with how women can actually be harmed by laws that serve to only protect female interests, so too should they be concerned about the current failures of the law to protect the parental rights of unwed fathers. The failure to protect men's interest in this regard creates a system of discrimination vis-à-vis nonmarital males, and this discrimination only underscores many of the same damaging sex stereotypes from which feminists have fought long and hard to distance themselves.

#### *4. Creates Negative Consequences for Women*

This Article is titled as it is because, under the current law as it relates to the reproductive rights of nonmarital men, neither gender escapes unscathed. Instead, these laws both marginalize unwed fathers and simultaneously demonize unwed mothers—and by extension, all women. Beyond perpetuating the sex stereotypes discussed above, the laws' failure to adequately protect the reproductive rights of unmarried fathers holds two undesirable consequences for women. First, it paints women in a negative light and, second, it encourages behavior that most women would find offensive.

In terms of how these laws portray women, one must keep in mind that the cases referenced above are relatively high profile cases. They are the variety of cases that tend to get significant mainstream press and, as a result, could heavily influence how the average person views unmarried mothers. And the women in those cases include women who either sexually assaulted men or lied to men about the existence or location of their children. Yet, regardless, the women ended up bearing no legal consequences. On the surface, then, these women appear as liars and schemers. The men, on the other hand, although innocent of any

214. *See supra* Part III.B.

215. HALLEY, *supra* note 24, at 346.

216. *Id.* ("*Feminism* objectifies women, *feminism* erases their agency—could that be right?").

wrongdoing, suffered greatly and without any legal remedy at the hands of these women. To say that such a message does not reflect well on women would be an understatement; nonetheless, it is precisely the message these cases send and will continue to send until there is a change in the law.

Additionally, to those men who hear these messages, consider the behaviors they encourage. Recall that, given that the law currently offers little protection, men must not only protect themselves, but must do so at every turn. For unmarried men in intimate relationships who wish to legally father a resulting child, they must doubt everything their partner tells them about her fertility; whether she is pregnant; the status of that pregnancy; and what she intends to do with any resulting child. The decision in *Heidbreder v. Carton* explicitly sent that message when it ruled that it was unreasonable for the father to rely on the mother's representations that she would neither put the child up for adoption nor move to Minnesota—both of which she eventually did.[217] In addition, lest the mother get out of his sight, nonmarital fathers are being sent the message by this line of cases to keep tabs on where she is at all times. Indeed, in the cases discussed above,[218] the only action that would have helped the men who were trying desperately to locate their child would have been to constantly stalk the mother of the child. After all, the putative father registry only works if the father knows exactly where the mother plans to give the child up for adoption.[219] But, even then, the putative father registry offers limited protection because, even if a father registered in every such registry in the country, not all states offer this service, and the mother could have simply used a different name to evade detection.[220] In order to protect their reproductive freedom, then, men are being encouraged to resort to stalking and perpetually distrusting the women with whom they are involved—two behaviors most women, and indeed most human beings, would prefer not to deal with.

## V. REDRAWING THE LINES: POSSIBLE SOLUTIONS

The primary goal of this Article is to advance the proposition that male reproductive freedom is not only a very serious issue, but also one that—for the reasons outlined above—should be of concern to feminists. Legal feminists, drawing upon struggles of the past and lessons learned in the process, are particularly well-suited to help lead the way in striking a balance that is more protective of fathers' rights. How exactly that balance

217. *See supra* note 161 and accompanying text.
218. *See supra* Part III.B.
219. *See supra* note 146 and accompanying text.
220. *See supra* note 142 and accompanying text.

is to be achieved is, of course, a much tougher question to answer given that whatever rights are given to men could come at the expense of the legal protections currently held by women and children. Although a much more robust discussion is needed to eventually guide the courts as they attempt to balance these interests, what follows are some avenues through which a more equitable solution might be attained.

### *A. Conscripted Fathers*

To solve the problem of men being forced into legal fatherhood either through statutory rape or sexual assault,[221] the law needs a mechanism whereby men can escape liability for child support if the man can successfully prove that he never consented to the sexual act that resulted in the child. So far, the law has refused to allow any such exception on the basis that the child is innocent of any wrongdoing and deserves support from both parents.[222] When it comes to adjudicating child support claims, however, the child's best interest in receiving support from both parents does not always mean the biological father is strictly liable. For example, a child born as a result of artificial insemination to a single mother would almost always have no right of support from the biological father.[223] Instead, unless the donor explicitly consented to becoming a legal parent,[224] the law would only view the child as having one parent—the mother—despite the fact that it would almost certainly be in the child's best interest to receive support from both biological parents.

It is, of course, true that 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 either statutory rape or sexual assault. The policies behind requiring consent in the case of sperm donors is to encourage donation and, at the same time, protect donees from future paternity claims.[225] After all, "a popular sperm donor could potentially

221. *See supra* Part III.A.

222. *See supra* notes 69–71 and accompanying text.

223. *See* Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 973 (2009) ("The approach taken by the UPA and most states is to declare that the sperm donor is not a parent to the child.") (footnote omitted).

224. *See, e.g.*, N.J. STAT. ANN. § 9:17–44(b) (West 2013) ("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."); KAN. STAT. ANN. § 23–2208(f) (Supp. 2013) ("The 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. *See* In Interest of R.C., 775 P.2d 27, 31 (Colo. 1989) (noting how such laws provide "men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support").

father dozens of children."[226] Nonetheless, given the harms that arise from the present state of the law, a similar exception is likewise necessary to guard against fatherhood by conscription.

Of course, a consent exception in these cases would need to operate somewhat differently than it does when talking about artificial insemination. There is, after all, a real danger of fraud 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 be encouraged to 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 have quite a difficult time 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.

Instead, any such exception would, first, be limited to only those situations where the man never consented to the sexual act that resulted in pregnancy. Situations in which he engaged in sexual intercourse under the belief that the mother could not get pregnant or would not get pregnant due to birth control would fall outside the consent exception. By limiting the rule in 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, those men who willingly engaged in sexual intercourse with a woman, despite what they may have been led to believe about her ability to conceive, were still very much in a position to protect themselves from becoming fathers. Not only could they 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 or was sterile.[227]

A second way in which to narrow such a defense would be to require men to prove lack of consent by clear and convincing evidence. The purpose of this heightened standard would be to further protect against fraudulent claims and, at the same time, minimize frivolous claims that would only serve to waste judicial resources. Under the clear and convincing standard, a party "must convince the trier of fact that it is highly

226. Lewis, *supra* note 223, at 975.

227. 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, 1047 (2005) ("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.").

probable that the facts he alleges are correct."[228] Family law is, of course, no stranger to the clear and convincing standard; indeed, there are several areas of family law in which the threat of fraud is great and, as a result, courts have employed this heightened standard.[229]

Applying this heightened standard here, victims of statutory rape would have little difficulty meeting the required burden. Specifically, they need only prove that they were below the age of consent at the time the child in question was conceived. State legislatures set the age of consent at a certain point for good reasons,[230] and those below that age should be protected not only by criminal laws relating to statutory rape but also those laws relating to child support. And, given the relative ease with which a person can prove his age, child support claims involving male statutory rape victims would be fairly easy to dispose of under the consent defense.

Adult men, on the other hand, who claim the child was a product of nonconsensual sex or 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 above,[231] where the father had evidence that the mother had told acquaintances that she had sexually assaulted S.F. while he was sleeping. It could be that a court would find that the mother's admission of sexual assault was sufficient to prove by clear and convincing evidence that the father did not consent. However, in cases where a mother denies any claims of sexual assault or nonconsensual self-insemination, the father

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

229. For example, courts in those states that recognize common law marriage have noted that such claims are a "fruitful source of perjury and fraud," Staudenmayer v. Staudenmayer, 714 A.2d 1016, 1019 (Pa. 1998), and, as such have placed a heavy burden on the party claiming common marriage. *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."). Similarly, in cases in which a person challenges the validity of a former spouse's subsequent remarriage, the courts, recognizing the possibility for 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." 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 (1995).

Of course, 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. 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 should 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.

230. *See supra* note 76 and accompanying text.

231. *See supra* note 13 and accompanying text.

would have a much harder time satisfying his burden. Given that most acts of sexual intercourse, sexual assault and, presumably, self-insemination do not take place in public, absent some kind of admission from the mother, it would be almost impossible for courts to decide whether a child was conceived without the biological father's consent. Nonetheless, the failure of the consent defense to cover those more questionable cases may send a message to potential fathers to not willingly put themselves in positions of vulnerability—such as passing out drunk in a woman's home or trusting relative strangers to dispose of one's semen.[232]

### *B. Thwarted Fathers*

Solving the problem of thwarted fathers is much more difficult because there are many more interests that must be balanced. Given that these cases typically arise when the biological mother attempts to put the child up for adoption, the biological father's rights must be balanced not only with those of the adoptive parents, but also the state's interest in promoting adoptions. After all, if a biological father could appear at any time to claim his child, adoption would become a much more uncertain and, thus, less attractive option for those couples seeking children. Also, to rip a child away from an adoptive home could be devastating not only to the adoptive parents, but the child itself who could have already formed strong attachments to that family.[233] Finally, the mother's privacy interests are also very much at play in these situations—as noted earlier, she may have compelling reasons for not contacting or even identifying the father to inform him of the adoption.[234]

In an attempt to balance these competing concerns, the putative father registry has emerged as the dominant solution.[235] And, at first blush, it appears to be a rather clever solution whereby the onus is on the father to protect himself by simply registering in a timely manner. As discussed above, however, these systems often fail to adequately protect the rights of nonmarital fathers. Few men are even aware of such registries and, given that the registries are state specific, men are placed in the sometimes impossible situation of having to figure out exactly where the mother intends to give the child up for adoption.[236] Failure to register in the proper

232. *See supra* Part III.A.2.

233. To understand just how horrific such scenarios can be, one need only recall the cases revolving around Baby Jessica and Baby Richard. *See generally* Gregory A. Kelson, *In the Best Interest of the Child: What Have We Learned from Baby Jessica and Baby Richard?*, 33 J. MARSHALL L. REV. 353 (2000).

234. *See supra* notes 135–138 and accompanying text.

235. *See supra* note 142 and accompanying text.

236. *See supra* note 146 and accompanying text.

state leads to an irretrievable loss of parental rights—an aspect of the law that, as discussed above,[237] some mothers have used to effectively hide adoptions from biological fathers so as to permanently deprive them of parental rights.

It is the opinion of this Article that the putative father registry does nonetheless provide a good start to protecting the rights of nonmarital fathers. The alternative approach, providing constructive notice by publication, is much less effective.[238] As the Supreme Court has noted, notice through publication is rarely effective: "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed."[239] However, some adjustments to the putative father registry are needed. What follows are a number of suggestions as to aspects of the putative father registry that might be broadened or either changed so as to provide better protections for nonmarital fathers.

*1. Require Greater Disclosures from the Mother*

The law's current refusal to require the mother to identify the father is not only required to protect the mother's privacy interests, but is also necessary to protect her emotional and physical health.[240] After all, the father of her child could also be her rapist, her abuser, her relative (i.e., incest) or someone whose presence in her life simply does more harm than good. Being forced to identify such men, who would then be notified, could be very traumatic for any number of reasons. Nonetheless, absent some disclosures by the mother, the current state of the law makes it extremely difficult for that male to safeguard his ability to come forward and father the resulting child.

One potential compromise might lie in what exactly a mother is required to disclose. Instead of requiring disclosure relating to the father's identity, perhaps states could require disclosures that help uncover the mother's location for purposes of maximizing the father's ability to effectively protect his rights. For instance, a state could require that a mother who wishes to put her child up for adoption disclose and document her previous residences as far back as one year before the child was born. Doing so would offer a number of benefits. First, the law would continue to

237. *See supra* Part III.B.3.

238. *See supra* note 142.

239. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

240. *See supra* notes 135–138 and accompanying text.

safeguard the mother's right to refuse to identify the father. And, that which she is required to disclose is less likely to result in the harms discussed earlier. Additionally, by requiring the mother to indicate past states in which she has resided, the law would make it less likely that a mother can thwart the desires of a biological father who genuinely wants to father the resulting child.[241]

Finally, the burden remains on the father to protect his rights. If his desire to father the child is genuine, he needs to demonstrate that willingness by promptly registering in the appropriate state. If he fails to register, he would still lose his rights. Nonetheless, in a statutory scheme like the one proposed here, registration is more likely to result in a diligent biological father actually receiving notice of an adoption than in a statutory scheme—like those discussed above—where the state was unwilling to look beyond its own registry.[242] And, as the courts have consistently held, it is not the mother's duty to inform him of her pregnancy given that, whenever a male engages in sexual intercourse with a female, he should be on notice that a child could result.[243]

### *2. A National Registry*

A number of scholars and commentators have suggested that, instead of having state specific putative father registries, the law should instead move to a national registry.[244] Implementation of such a program would eliminate the need for men to effectively stalk the mothers of their children so as to keep tabs on her every move. Instead, states would require that before any adoption can be finalized, a search of the national registry must first be conducted and any man who has registered as the potential father of that mother's child be contacted. Doing so would not only enhance the protections of nonmarital fathers by making it more likely that they would receive notice of pending adoptions, but nonmarital mothers as well. As one commentator explains:

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241. Incidentally, such disclosures would only need to encompass past domiciles, excluding those states the mother might have merely temporarily visited. Given that the goal is to better match up which states' putative father registries are searched with the biological father's expectations of which states the mother would likely surrender the child, requiring the mother to disclose states in which she has resided should be sufficient. After all, had the biological father met the mother when she was merely visiting a state, he would have little reason to believe that she would return simply to give the child up for adoption. He would instead likely assume that she would do so in the state in which she permanently resides.

242. *See supra* Part III.B.3.

243. *See* Helms & Spence, *supra* note 135, at 20 (discussing statutes that view nonmarital sex as sufficient to put a man on notice of a possible pregnancy).

244. *See, e.g.*, Beck, *supra* note 134; Helms & Spence, *supra* note 135, at 16, 40;; Donna L. Moore, Comment, *Implementing a National Putative Father Registry by Utilizing Existing Federal/State Collaborative Databases*, 36 J. MARSHALL L. REV. 1033, 1051 (2003).

> A national putative father registry advances the privacy and safety interests of mothers as well as assisting their adoption decision by clarifying the intentions and rights of birth fathers. The erection of a national registry provides States with the ability to relieve women of naming unwed fathers of their children. This protects the privacy right of a woman not to name the man or men with whom she has had sexual intercourse and relieves the woman of the need to accurately identify the father when she may or may not know his identity. Importantly, protecting mothers' privacy rights also protects their safety from abusive men with whom they have fathered a child, because the registry does not need to disclose the mother's address or location. For example, a woman may conceive her child in Alabama, deliver and relinquish her child for adoption in Kansas, and ultimately decide to settle in Missouri. The registry only needs to provide information about the adoption proceeding in Kansas, so the woman's actual location is concealed.[245]

The question arises, of course, as to who would create and maintain this national registry. Some have suggested that Congress is the appropriate body given that it could justify doing so under the Commerce Clause and then require state participation under the Spending Clause.[246] Regardless of how such a system might be implemented, the purpose here is to merely echo and endorse the suggestion of a national putative father registry as one means of addressing the discrimination currently faced by nonmarital fathers.

*3. Increase the Effectiveness of Existing Putative Father Registries*

Assuming the law is not yet comfortable in moving in the directions discussed thus far in this section, one interim remedy would be to simply modify existing state laws as they relate to putative father registries so as to provide a greater chance that nonmarital fathers actually learn of their existence. The two primary ways this might be accomplished is, first, through greater promotion of the putative father registry and, second, extending the period of time within which the father can register and still be protected.

The first is relatively simple and uncontroversial. Quite simply, states need to do more to inform fathers of the putative father registry and the benefits it provides. Many states have statutes that require regular notice of

245. Beck, *supra* note 134, at 1072.

246. *Id.* at 1073–74.

the registries appear in print locations.[247] Nonetheless, such efforts are likely insufficient to provide any meaningful notice. To better communicate this message, states need to take steps to publicize the registries in channels with which those men in need of this protection—including the young and the uneducated—are likely to come into contact. As one commentator suggests, "publication of the registry's existence by means of television advertisements or through the dissemination of information by high school guidance counselors and sex education programs would increase the likelihood that putative fathers have the requisite knowledge to protect their rights to their offspring."[248]

The second suggestion is a bit more controversial, but could likewise offer some greater protections to nonmarital fathers. Although some variation exists, most states require a biological father to register within 30 days of the child's birth;[249] otherwise, he forfeits his right to notification of any subsequent adoption proceedings. One way states might attempt to ameliorate the harsh effects of the current system is by extending that time period. Doing so would provide those fathers who are attempting to locate their biological child with more time to do so. Of course, the more time a

247. Consider for example, MONT. CODE ANN. § 42-2-214 (2013):

Duties of department.

(1) The department shall:

(a) prescribe a registration form for the information that a putative father submits under 42-2-205; and

(b) make the registration forms available through:

(i) the department;

(ii) each clerk of a district court; and

(iii) each local health department.

(2) A notice provided by the department that informs the public about the purpose and operation of the registry must be posted in a conspicuous place by each:

(a) clerk of a district court;

(b) driver's examination station of the motor vehicle division of the department of justice;

(c) local health department; and

(d) county clerk and recorder.

(3) The notice under subsection (2) must include information regarding:

(a) where to obtain a registration form;

(b) where to register;

(c) the circumstances under which a putative father is required to register;

(d) the period under 42–2–206 during which a putative father is required to register in order to entitle the putative father to receive notice of an adoption;

(e) the information that must be provided for the registry and what other actions the putative father is required to take to preserve a right to notice;

(f) the consequences of not submitting a timely registration; and

(g) the penalties for filing a false claim with the putative father registry.

248. Thompson, *supra* note 145, at 1507.

249. Rebeca Aizpuru, Note, *Protecting the Unwed Father's Opportunity to Parent: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 716 (1999) ("The time limits vary widely by state, but thirty days after the birth is by far the most common deadline.").

father has to appear and potentially halt the adoption, the less desirable that child might appear to adoptive parents. Thus, although such a move might do more to protect fathers, increasing the time could also be harmful to both the child and the state's interest in promoting adoption. For those reasons, the solutions offered earlier, albeit more complicated, might be more mutually beneficial in the long-term.

In sum, for both classes of nonmarital fathers whose reproductive freedom the law currently fails to adequately safeguard, a number of possible solutions exist—solutions that would not only continue to safeguard rights women have achieved as to their own reproductive freedom, but solutions that would benefit legal feminism in general by helping ameliorate the harsh concerns outlined above.

## CONCLUSION

The fathers' rights movement is one that has justifiably been looked upon with suspicion given its past attempts, as one scholar put it, "to co-opt and adapt feminist rhetoric of equality, victimization, and freedom of choice, and combine it with taken-for-granted stereotypes of women to turn the successes of the women's movement into defeat for mothers."[250] For that reason, skepticism may be warranted; turning a blind eye to all claims of gender discrimination by men, however, is not. Reproductive freedom need not be seen as a zero-sum game, with a victory for one gender necessarily coming at the expense of the other. In fact, among the many things feminism has taught us is that laws favoring only women are often little more than Trojan horses filled with pernicious gender stereotypes. Thus, the fight for true gender equality has sometimes required feminists to attack those laws that, on their face, disproportionately favor females.[251] The law of statutory rape, discussed above, is but one example.[252] The reproductive rights of nonmarital males should be another.

By failing to include greater protections for nonmarital males in its fight for legal equality, feminists risk the erosion of several key ideals of modern legal feminism and, in addition, the creation of new barriers flowing from the negative messages these cases send about women.[253] And, given the number of avenues through which the law can provide nonmarital men greater reproductive freedom without causing corresponding harms to women, there is little to lose but much to gain.[254] Finally, given all that

250. Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers' Rights*, 40 FAM. L.Q. 315, 323–24 (2006).

251. *See supra* notes 197–206 and accompanying text.

252. *See supra* Part III.A.1.

253. *See supra* Part IV.

254. *See supra* Part V.

feminism has taught us about the nature of discrimination and what it means to truly enjoy equality, feminists are likely the best suited for the job of addressing the inequality that currently affects the reproductive freedom of nonmarital men. After all, in the words of Nelson Mandela, "For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others."[255]

255. NELSON MANDELA, LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA 544 (1995).