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There are words that echo through the judicial and social construct of every society. Words such as "choice," "equality," "morality," and "balance" are stated with such certainty of meaning that the fact of their generational interpretation is lost and corresponding results are skewed. The search for a father's rights in pursuing a claim for misrepresentation of fertility intersects with each of these concepts and emerges burdened not only by this certainty but also obfuscated in a well-meaning fog of judicial interpretation. In part, this obfuscation is attributable to the conflicts and emotions attendant to the controversy over abortion rights and the moral uncertainty surrounding the inception of life and the point at which moral definitions intersect with legal rights.[1] The debate has

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1. *Roe v. Wade* and its progeny reflect an effort by the Supreme Court to balance state legislation of morality, premised on life beginning at conception, against individual liberty, emerging from challenges to state actions viewed as inhibiting or otherwise interfering with this liberty interest. Michael J. Perry, *What is 'Morality' Anyway?*, 45 VILL. L. REV. 69, 70 (2000). Perry asserts:

> Moral controversy is often at the center of legal controversy; in particular, controversy about whether one or another practice (abortion, homosexual sexual conduct, physician-assisted suicide, etc.) is, at least in some instances, morally permissible is often at the center of controversy about whether the practice should be, at least in some instances, legally permissible.

Perry, *supra*, at 70; *see* Stefanie Lee Black, Comment, *Competing Interests in the Fetus: A Look into Paternal Rights After* Planned Parenthood v. Casey, 28 WAKE FOREST L. REV. 987, 988–89 (1993) (commenting that the debate over abortion rights stems from epistemological bases upon which each side constructs its belief with the position of pro-lifers in natural law under which abortion is ethically unconscionable).

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stages. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions . . . .

Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992).

centered on the right of pregnant women, *vis-à-vis* all other interests, to terminate their pregnancies with impunity,[2] with lawyers and academicians exploring virtually every aspect of the abortion debate on moral, legal and feminist grounds.[3] Indeed, the tension between the right of a pregnant woman to abort a fetus and the rights—if any—of the state, the unborn fetus, or even the father has become an intellectual cul-de-sac and has served to reshape the law governing both privacy and procreation.

This Article seeks at least one exit to this intellectual penumbra by expanding on the existing body of scholarship examining paternal rights as they exist in the shadow of *Roe v. Wade* and its progeny.[4] While this Article necessarily navigates its way through some of the discussion on abortion rights, it expresses no view on the merits of the controversy itself but rather seeks simply to identify the resultant balance accorded

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2. *See generally,* Wendy C. Shapero, *Does A Nonviable Fetus's Right to Bring A Wrongful Death Action Endanger a Woman's Right to Choose?*, 27 SW. U. L. REV. 325 (1999) (opposing expansion of fetal rights to the extent it impacts women's reproductive choices). Recent scholarship has questioned whether the Supreme Court's refusal to recognize a fetus as a "person" can be reconciled with the expansion of state wrongful death actions to include an unborn fetus, both viable and, in some states, nonviable. *Id.*

3. Scholarship critical of the Supreme Court's reasoning in *Roe* and related decisions is legion. *See* Christina L. Misner, *What if Mary Sue Wanted an Abortion Instead? The Effect of* Davis v. Davis *on Abortion Rights,* 3 AM. U.J. GENDER SOC. POL'Y & L. 265 (1995) (analyzing the lesser scrutiny courts can use to review state laws restricting abortion as a result of *Roe v. Wade*); Krista L. Newkirk, *State-Compelled Fetal Surgery: The Viability Test Is Not Viable*, 4 WM. & MARY J. WOMEN & L. 467 (1998) (discussing how *Roe* has been used by both those arguing for women's rights and those arguing for fetal rights); Rosamund Scott, *The Pregnant Woman and the Good Samaritan, Can a Woman Have a Duty to Undergo a Caesarean Section?*, 20 OXFORD J. LEG. STUDIES 407 (2000) (discussing the abortion issue under English law); Shapero, *supra* note 2 (claiming that because *Roe* did not create new rights for the fetus, it cannot be used to apply a new nonviability standard); Mary A. Totz, Comment, *What's Good for the Goose is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141 (1994) (arguing that the child-rearing burden no longer falls entirely on a woman, as it did in *Roe*, so *Roe* should not apply to paternal rights cases).

4. Roe v. Wade, 410 U.S. 113 (1973). *See also Casey*, 505 U.S. 833 (1992) (invalidating a provision requiring husband notification as constituting an undue burden on women); S. Dresden Brunner, *Cultural Feminism: It Sounds Good, But Will it Work? Application to a Husband's Interest in His Wife's Abortion Decision*, 22 U. DAYTON L. REV. 101 (1996) (arguing that a woman in a nonabusive marriage should allow her husband a say in the abortion decision); Molly Diggins, *Paternal Interests in the Abortion Decision: Does the Father Have a Say?*, 1989 U. CHI. LEGAL F. 377 (1989) (proposing a statute that would take into account the father's interest prior to a woman obtaining an abortion); Michael L. Jackson, *Fatherhood and the Law: Reproductive Rights and Responsibilities of Men*, 9 TEX. J. WOMEN & L. 53 (1999) (analyzing whether the disparity in treatment of the reproductive liberty of men and women is justified and proposing a more equal approach); Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests In and Obligations to the Unborn Child*, 7 J.L. & POL'Y 1 (1998) (presenting a model statute for a father to voluntarily terminate his rights and obligations to his child); Erika M. Hiester, Note, *Child Support Statutes and the Father's Right Not to Procreate*, 2 AVE MARIA L. REV. 213, 218–20 (2004) (discussing laws regarding parental obligations).

parental interests in light of the dictates of the *Roe* decision and the cases that have followed. In so doing, this Article focuses specifically on the ability of a putative father to seek damages in tort for a woman's misrepresentations as to fertility or contraceptive use in the event she chooses *not* to abort, and carries the child to term.[5] To date, efforts by deceived fathers to seek redress for misrepresentations of fertility by the mother have been soundly rejected even though the repercussions of such conduct are substantial.[6] Both case and statutory law effectively hold a putative father strictly liable should sexual intercourse result in the birth of a child.[7] 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. Intuitively, the balance between the outrage of the father and the needs of the child compel denial of relief as a matter of policy despite what would otherwise seem to be actionable fraud.[8] Despite arguments by some commentators that a claim for misrepresentation of fertility is no different than other claims sounding in tort and therefore should be allowed,[9] this Article contends that refusal to accord relief is appropriate and warranted by overriding public policy concerns. At the same time, the Article suggests that the articulated rationales underlying judicial denial of relief have been inconsistent and lack coherence, permitting differential treatment in certain cases where the

5. These claims have been presented both as defenses to actions for child support as well as in separate actions for breach of contract, emotional distress, negligence and fraud. *See generally* J. Terrell Mann, *Misrepresentation of Sterility or of Use of Birth Control*, 26 J. FAM. L. 623 (1987–88) (discussing battery, misrepresentation, breach of contract and breach of fiduciary duty).

6. Damages have been available in some circumstances where the deceived party is the mother. *See generally* Judith R. Taber, Note, Zehr v. Haugen *and Wrongful Pregnancy: Extending the Rationale to Deceitful Pregnancy Claims*, 74 OR. L. REV. 405 (1995) (noting difference in treatment between maternal and paternal claims for deceit and arguing that the differentiation is appropriate).

7. Decisions such as *Roe* and its progeny, although permitting a pregnant woman to avoid the consequences of intercourse, extend no correlative right to the man, but rather permit the woman to unilaterally determine whether a man will or will not become a father. *See infra* Part IV (detailing the disparity in the rights of men and women in the decision to abort a fetus).

8. Claims for misrepresentation of fertility are not limited to fraud, but can include theories of negligence, intentional infliction of emotional distress and even contract. This Article focuses generally on the tort of fraud or deceit, although the substance of the analysis and conclusion apply to related claims.

9. *See, e.g.*, Paula C. Murray & Brenda J. Winslet, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. ILL. L. REV. 779 (1986) (arguing that public policy should not completely bar recovery for misrepresentations of fertility and courts should look at each case on an ad hoc basis to insure the interests of the child are protected); *see also* Sarah E. Rudolph, *Inequities in the Current Judicial Analysis of Misrepresentation of Fertility Claims*, 1989 U. CHI. LEGAL F. 331 (1989) (arguing that the misrepresenting party should have primary liability for the support obligation).

misrepresentation of fertility claim is brought by the deceived mother.

Part I begins by briefly addressing the evolution of the right to privacy in procreative decisions that culminated in *Roe* and its progeny and the current inequity in treatment between putative fathers and pregnant women.[10] Part II then discusses the implications of fatherhood from a socioeconomic perspective.[11] In Part III, this Article looks at the judicial treatment of claims for misrepresentation of fertility and the various policy arguments advanced by the courts to support the denial of redress for paternal claims.[12] The discussion considers some of the inconsistencies inherent in these policies either as applied or as articulated, and notes the difference in treatment accorded to identical claims brought by the mother. Part IV suggests that the courts have extended a de facto immunity to a pregnant woman that effectively insulates her from liability to the father even for conduct unrelated to her decision to or not to abort a fetus and notes that the father enjoys no similar immunity from claims by the mother.[13] In Part V, this Article contends that the refusal to grant relief is firmly entrenched in the protective polices that surround procreation and, when viewed within the framework of procreative rights, can easily be reconciled with traditional theories of tort law and justice.[14] Accordingly, this Article concludes that neither maternal nor paternal claims for misrepresentation of fertility should constitute a legal wrong entitled to protection in tort, regardless of the nature of the damages alleged.

I. THE RIGHT TO PRIVACY AND THE EROSION OF PATERNAL INTEREST

The substantive due process afforded by the Fourteenth Amendment has been held to encompass a right to liberty that includes "a right of personal privacy, or a guarantee of certain areas or zones of privacy."[15]

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10. *See infra* Part I (discussing the right to privacy in the wake of *Roe v. Wade*).

11. *See infra* Part II (analyzing the socioeconomic impacts of fatherhood).

12. *See infra* Part III (examining recent jurisprudence in misrepresentation-of-fertility claims).

13. *See infra* Part IV (discussing the disparity between rights enjoyed by the mother and father in a decision to abort a fetus).

14. *See infra* Part V (arguing that the rights granted to women in procreation can be reconciled with traditional theories of justice).

15. Roe v. Wade, 410 U.S. 113, 152 (1973). *See* Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (mentioning that the Due Process Clause "has been understood to contain a substantive component as well, on 'barring certain government actions regardless of the fairness of the procedures used to implement them'"); Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) (quoting the above-cited language from the *Roe* decision); Palko v. Connecticut, 302 U.S. 319, 325 (1937) (stating that this is a right that is "implicit in the concept of ordered liberty" entitled to protection); Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[A]ll fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the States."). Early privacy rights were discussed in the context of

The penumbra of personal rights protected under the umbrella of the Fourteenth Amendment is neither explicitly articulated in the Constitution, nor have its "outer limits" been marked.[16] However, the Supreme Court has found certain privacy rights to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"[17] and it is against this standard that asserted privacy rights are measured and state actions seeking to interfere with their expression strictly construed.[18]

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the Fourth Amendment. For example, Justice Douglas, in an early effort to describe the breadth of privacy rights, dissenting in *Public Utility Commission v. Pollak*, stated:

> The right to be let alone is indeed the beginning of all freedom. Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people. A man loses that privacy of course when he goes upon the streets or enters public places. But even in his activities outside the home he has immunities from controls bearing on privacy. He may not be compelled against his will to attend a religious service; he may not be forced to make an affirmation or observe a ritual that violates his scruples; he may not be made to accept one religious, political or philosophical creed as against another.

Public Util. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

16. *Casey*, 505 U.S. at 834. In his *Roe v. Wade* opinion, Justice Blackmun sought to define the basis of the right to privacy, stating:

> The Constitution does not explicitly mention any right of privacy. [However], the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment . . . in the Fourth and Fifth Amendment . . . or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment . . . .

Roe, 410 U.S. at 152 (citations omitted). Justice Blackmun further noted that Supreme Court decisions made it clear that the zone of privacy "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child-rearing and education." *Id.* at 152–53 (citations omitted).

17. Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105, (1934)); *Casey*, 505 U.S. at 851.

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

Casey, 505 U.S. at 851; *see* Bowers v. Hardwick, 478 U.S. 186 (1986) (denying protection to homosexual activity), *overruled by* Lawerence v. Texas, 539 U.S. 558 (2003); *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) ("In determining which rights are fundamental, judges . . . must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'"); *Palko*, 302 U.S. at 325 (noting that these rights include those fundamental liberties "implicit in the concept of ordered liberty" whereby liberty and justice would not exist if they were sacrificed).

18. *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring) (quoting Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) for the proposition that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling"); *see Roe*, 410 U.S. at 155 (noting that where regulation touches a fundamental right,

The Court has been emphatic that such individual liberty interests include decisions on procreation and child-rearing.[19] Early cases described the right to procreate as one "fundamental to the very existence and survival of the race,"[20] and as "one of the basic civil rights of man."[21] Both *Griswold v. Connecticut*[22] and later *Carey v.*

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states must show compelling interest and the resulting legislation must be narrowly drawn). Accordingly, in holding that the right to privacy extended to marriage and the family unit, the Court in *Griswold* wrote:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold, 381 U.S. at 486. The Court has consistently recognized the importance of the integrity of the institution of marriage and of the family unit as "deeply rooted in this Nation's history and tradition." Michael H. v. Gerald D., 491 U.S. 110, 124 (1989); *see also* Hodgson v. Minnesota, 497 U.S. 417, 447 (1990) ("The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.") (citations omitted)); Zablocki v. Redhail, 434 U.S. 374, 406 (1978) (holding unconstitutional a statute that sought to prevent residents obligated to provide child support from marrying without court approval); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); Boddie v. Connecticut, 401 U.S. 371, 376 (1971) (noting that "marriage involves interests of basic importance in our society"); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (describing the existence of a "private realm of family life which the state cannot enter"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the right "to marry, establish a home and bring up children" is central to the liberty protected by the Due Process Clause); Maynard v. Hill, 125 U.S. 190, 211 (1888) (stating that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress").

19. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (finding that the First and Fourteenth Amendments prohibit a state school-attendance statute); Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925) (striking down a statute requiring parents to send children to public schools). Similarly, the Court has upheld the right of parents to determine the manner in which their children will be reared and educated. *Hodgson*, 497 U.S. at 445; Lehr v. Robertson, 463 U.S. 248, 257 (1983) (finding that parents have an interest in controlling the education and upbringing of their children); *Yoder*, 406 U.S. at 233–34; *Meyer*, 262 U.S. at 401; Gilbert v. Minnesota, 254 U.S. 325, 335–36 (1920) (Brandeis, J., dissenting).

20. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

21. *Id.* In *Skinner*, the Supreme Court overturned a statute mandating compulsory sterilization of felons convicted of crimes of "moral turpitude," effectively rejecting its prior decision in *Buck v. Bell*, 274 U.S. 200, 207 (1927), which had upheld a similar statute as applied to institutionalized "imbeciles." *Id.* at 542–43. "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." *Buck*, 274 U.S. at 207. The Court reasoned that the right to procreate was a basic liberty, which once impaired by involuntary sterilization, was irreparably injured and forever lost: "There is no redemption for the individual whom the law [mandating sterilization] touches. Any experiment which the State conducts is to

Population Services International recognized that the scope of fundamental privacy rights under which procreative autonomy fell necessarily included a right not to procreate.[23] And, although *Griswold* suggested that constitutional protection was afforded the marital unit, as opposed to its individual components, *Eisenstadt v. Baird*[24] subsequently recognized that the privacy right inherent in procreative decisions, albeit often raised within the confines of marriage, extended not just to those within the marital relationship, but to those without it as well. "If the right to 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 to the decision whether to bear or beget a child."[25] Because this privacy right inured in the individual, without regard to marital status, the state had no grounds upon which to prohibit access to or use of contraceptive devices by unmarried persons.[26]

Until the advent of the abortion debate, privacy rights related to family and procreation were discussed without regard to gender. Both the man and the woman were held to have a commensurate right to

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his irreparable injury. He is forever deprived of a basic liberty." *Skinner*, 316 U.S. at 541; *see also* May v. Anderson, 345 U.S. 528, 533 (1953) (holding that the right to conceive and raise a child is "far more precious to appellant than property rights").

22. *Griswold*, 381 U.S. at 485–86.

23. *See* Carey v. Poulation Servs. Int'l, 431 U.S. 678, 685 (1977) (noting that "in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive").

24. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

25. *Id.* at 453; *see also* Washington v. Harper, 494 U.S. 210, 221–22 (1990) (finding a significant liberty interest in avoiding unwanted administration of antipsychotic drugs); Winston v. Lee, 470 U.S. 753, 758 (1985) (balancing the liberty interest against a state's attempt to compel an individual to undergo surgery to recover evidence of a crime). Professor Dolgin discussed the implications of *Eisenstadt* on social understanding of the family, and indeed *Griswold's* representation of the family as a unit, as opposed to individual members, commenting that:

> [T]he claim in *Eisenstadt* is far more startling and far less traditional than that in *Griswold*.... In fact, it is revolutionary when applied to the family. Long after the last vestiges of the feudal order were replaced in the marketplace by notions of free contract and autonomous individuality, Western society continued to define spouses—and, even more particularly, parents and their children—as units of relationship with reality apart from, and encompassing, that of the individuals involved.

Janet L. Dolgin, *The Family in Transition: From* Griswold *to* Eisenstadt *and Beyond*, 82 GEO. L.J. 1519, 1545 (1994) [hereinafter Dolgin, *Family in Transition*]. Professor Dolgin asserts that *Eisenstadt* reflected constitutional acceptance of "momentous" changes in the societal view of the family into one more aligned with traditional market relations. *Id.* at 1553–54.

26. "The liberty acknowledged in *Eisenstadt* has been coined 'reproductive autonomy.' This term adopts the notion that the intimacy and gravity of contraceptive decisions are not lessened by the absence of marriage; individuals make up the reproductive act." Black, *supra* note 1, at 997.

procreate. [27] With the Supreme Court's decision in *Roe v. Wade*, however, the procreative rights of the woman gained ascendancy over the rights of the man, effectively curtailing, if not eliminating the man's "procreative autonomy."[28] *Roe* established that the breadth of a woman's fundamental right to privacy under the Due Process Clause of the Fourteenth Amendment encompassed the woman's right to terminate her pregnancy should she choose to do so.[29] The linchpin of the *Roe* decision, reaffirmed twenty years later in *Planned Parenthood v. Casey*,[30] was the Court's determination that the fetus's "viability" serves as the demarcation line between a woman's right to choose to abort a pregnancy and the state's right to prohibit or otherwise regulate abortion.[31]

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27. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (rationalizing liberty interests of parents and children with respect to the family unit and without focusing on procreation rights of a specific gender, but rather the family unit as a whole); Loving v. Virginia, 388 U.S. 1 (1967) (applying the equal protection clause to hold that men and women, regardless of race, have the right to marry, and procreate, with whomever they choose); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (finding a law, which mandated sterilization for habitual criminals, to be unconstitutional and that each individual has the right to procreate).

28. Roe v. Wade, 410 U.S. 113, 164–66 (1973); *see also* Jackson, *supra* note 4, at 53 (discussing inequalities in parental rights of women and men).

29. This constitutional right to abortion was deemed to be a liberty interest inherent in the individual and accordingly protected against state interference. Such protection was not unlimited. The Court in *Roe v. Wade* also held that the fetus was a separate entity from the pregnant woman. As a result, simply by virtue of being pregnant a woman necessarily "[cannot] be isolated in her privacy . . . ." *Roe*, 410 U.S. at 159. Accordingly, the state had a legitimate interest in protecting the "potentiality" of life, and the woman's right to privacy was to be "measured accordingly." *Id.* at 164. At the time of *Roe*, the standard of measurement set by the Supreme Court was the end of the second trimester. The state could not impede a woman's decision to terminate her pregnancy during the first or second trimester, although in the interests of protecting maternal health, the state could regulate the abortion procedure during the second trimester. Once viability was reached, the state could prohibit abortion with limited exception. *Id.* at 164–65.

30. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

31. *Casey*, 505 U.S. at 860. *Roe's* trimester approach lasted until the Supreme Court decision in *Planned Parenthood v. Casey*. *Id.* at 870–73. Although several previous cases seemed to erode the purportedly unfettered right to abortion established in *Roe*, it was not until the *Casey* decision that the Court rejected the rigid trimester approach in favor of a "viability" approach. *Id.* *Casey* permitted the state to protect fetal interests at any point during the pregnancy, and further permitted the state to prohibit abortion at the point of viability. *Id.* Recognizing the impact of advances in neonatal care had advanced the point of viability since the *Roe* decision, the Court stated "these facts go only to the scheme of time limits on the realization of competing interests, and . . . have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions." *Id.* at 860. More significant however, is the query whether advances in reproductive and prenatal technology render the Court's persistent adherence to an artificial definition of "person" logically supportable. *But see Roe*, 410 U.S. at 152 (rejecting the argument that the Constitution protected a previable fetus and finding the fetus was not a person until that point). Inherent in this inquiry is the workability of the Court's benchmark of viability.

As a consequence, despite dicta by the Court in some of the early privacy decisions suggesting equality between parents, *Roe* dispelled any illusions that procreative rights were gender-neutral.[32] Subsequent decisions simply affirmed this prioritization of women's rights.[33] The Court continued to reject arguments seeking to advance paternal rights or interests in the fetus, adhering to its admonition that no obstacle be placed in the path of a woman's right to choose.[34] In deciding *Planned Parenthood v. Danforth*, three years following *Roe*, the Court specifically addressed the issue of paternal rights in a case challenging a Missouri statute that required a married woman to obtain spousal consent prior to an abortion.[35] In response to the state's contention that the spousal consent requirement was designed to insure that "any major change in family status [of a marriage] is a decision to be made jointly by the marriage partners,"[36] Justice Blackmun, although acknowledging the importance of the marital relationship, found that the statute gave the spouse a unilateral right to veto an abortion and thereby sought to accomplish by delegation what it could not do directly.[37]

See, e.g., Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus: Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051, 1059 (1997) (criticizing *Roe* and stating "[s]ince a woman's right is linked to viability it will surely be eroded as technology improves"). Walen comments that viability eventually could exist at conception, but maintenance outside the womb would be economically infeasible. *Id.* at 1055.

32. *Roe*, 410 U.S. at 165 (1973).

33. More commonly referred to as a woman's right to choose, the core of the inquiry in each case has turned on the determination of whether, and when, a professed state interest becomes compelling enough to override privacy interests deemed inherent in the substantive rights accorded under the due process clause. Indeed, *Roe v. Wade* involved a challenge by an unwed pregnant woman to a Texas statute criminalizing abortion unless the pregnancy endangered the mother's life. *Roe*, 410 U.S. at 117–18. *Planned Parenthood v. Danforth* addressed the constitutionality of a Missouri statute requiring spousal consent prior to an abortion and *Planned Parenthood v. Casey* invalidated Pennsylvania's mandatory statutory spousal notification of a woman's pregnancy prior to abortion as presenting a "substantial obstacle to a woman's choice to undergo an abortion." The Supreme Court in *Casey* held that such a provision would be "tantamount to the veto found unconstitutional in *Danforth*." *Casey*, 505 U.S. at 897. Thus, while prior to viability a state may not interfere with a woman's right to choose to abort a fetus, the state may nonetheless ensure that the choice is informed and further take measures to "persuade the woman to choose childbirth over abortion." *Id.* at 878. The inquiry is whether the methods chosen by the state hinder or obstruct the fundamental right of the woman to choose to abort or otherwise restrict access to abortion. However, once the fetus is deemed viable, the state "may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother." *Roe*, 410 U.S. at 163–64.

34. *Roe v. Wade*, although acknowledging the existence of a paternal interest, expressly reserved the question of a father's rights in the context of abortion. *Roe*, 410 U.S. at 165, n.67.

35. Planned Parenthood v. Danforth, 428 U.S. 52, 56–58 (1976).

36. *Id.* at 68.

37. *Id.* at 69–70. Yet, in invalidating the spousal consent provision, *Danforth* did not hold that any protection of paternal interests would be unconstitutional. The focus of the decision was on

By its terms, *Danforth* addressed the issue of paternal rights within the context of a spousal consent provision. The Court was confronted with balancing the right of a woman to choose to abort against the right of the spouse to unilaterally veto that decision.[38] The Court acknowledged that *Roe*, read together with its concurrent decision in *Doe* v. *Bolton*, effectively afforded a woman the unilateral right to terminate even against the father's wishes.[39] Regardless, the Court had little difficulty concluding that the balance, and therefore ultimate decision-making power as to whether to abort, should rest exclusively with the woman,[40] expounding that it is "[she] who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two . . . ."[41] Subsequent Supreme Court decisions reaffirmed that any provisions requiring absolute spousal consent were precluded by *Danforth*.[42]

The Court finally addressed the constitutionality of a statute requiring only spousal notification, but not consent, in *Planned Parenthood v. Casey*.[43] *Casey* was premised in part on the idea that the old common law view of marriage, with a woman holding an inferior position bereft of legal right or status, was no longer consonant with *Roe* and its progeny.[44] The Court reiterated its rejection of presumptions explicit in

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the state's determination "that the husband's interest in continuing the pregnancy of his wife always outweighs any interest on her part in terminating it irrespective of the condition of their marriage." *Id.* at 70, n.11. Such a balance did not simply impair a woman's right to choose, but placed an insurmountable, and therefore unconstitutional, obstacle in her path.

38. *Id.* at 69–72.

39. Doe v. Bolton, 410 U.S. 179 (1973).

40. *Danforth*, 428 U.S. at 71.

41. *Id.*

42. *See, e.g.*, City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 448–55 (1983) (using the Court's reasoning in *Danforth* to find that a mandatory waiting period does not further any legitimate state interest); Harris v. McRae, 448 U.S. 297, 314 (1980) (recognizing that a woman is protected from requirements that interfere with her freedom of choice); Maher v. Roe, 432 U.S. 464, 473 (1977) (reiterating the *Danforth* decision).

43. In holding that it was not constitutional, the Court distinguished its decisions in *Bellotti v. Baird*, *Ohio v. Akron Center for Reproductive Health*, and *Danforth* which all upheld parental notice and consent provisions:

> Those enactments, and our judgment that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women.

Planned Parenthood v. Casey, 505 U.S. 833, 895 (1992).

44. *Casey*, 505 U.S. at 897. The Court cited the 1873 decision of *Bradwell v. State*, 83 U.S. 130 (1873), where "three Members of this Court reaffirmed the common-law principle that "a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state . . . ." *Id.* at 896–97. The Court then noted that as recently as 1961, the law still did not afford women "full and independent legal status under the

prior precedent that treated the marital unit simply as an extension of the man: "[t]hese views, of course, are no longer consistent with our understanding of the family, the individual, or the Constitution."[45] The Court acknowledged that the fundamental right to procreate as delineated in cases such as *Casey* and *Eisenstadt* inured to the individual—not the marital unit—and concluded that requiring spousal notification, at least as provided by the statute at issue, imposed an undue burden on a woman's individual right to choose to abort a fetus.[46]

A number of prior Supreme Court cases recognized a man's strong paternal rights regarding children he has fathered.[47] However, *Casey* clearly differentiated between the rights of the father before and after childbirth asserting that the father's interest in the unborn and presumably non-viable child was less than that of the mother.[48] Although *Danforth* conceded that paternal interests could be significant, *Casey* established that they simply would not outweigh what was deemed to be the stronger interest of the woman in the integrity and use of her body.

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has

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Constitution." *Id.* at 897 (citing Hoyt v. Florida, 368 U.S. 57, 62 (1961)).

45. *Id.* *See* Dolgin, *Family in Transition*, *supra* note 25, at 1519 (noting that "the old inequalitites that defined women and children—as a matter of nature's inevitabilities—as essentially inferior to men, are being eroded").

46. *See Casey*, 505 U.S. at 897 (reasoning that the risk of domestic violence might deter women from seeking an abortion if they were required to notify their spouses, the Court stated that mandatory spousal notification prior to an abortion would be "tantamount to the veto found unconstitutional in *Danforth*"). It was sufficient, in the eyes of the Court, that only a few women would be deterred for the statutory requirement to be unconstitutional. *Id.* at 897–98. Again, as in many of its prior decisions, at issue in *Casey* was a statute that imposed requirements upon married women. *Id.* at 897. Although not specifically addressed by the *Casey* decision, presumably, even though clearly the same interests are not at stake, the argument nonetheless exists that unmarried women are subject to an equal risk from violent boyfriends.

47. *See, e.g.*, *Danforth*, 428 U.S. at 69 (recognizing that a husband has a "deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying"); Stanley v. Illinois, 405 U.S. 645, 652 (1972) (stating that the father has "cognizable and substantial" interest in custody of his children); *see also*, Caban v. Mohammed, 441 U.S. 380, 394 (1979) (pointing out "the harshness of classifying unwed fathers as being invariably less qualified" than mothers); Quilloin v. Walcott, 434 U.S. 246, 248 (1978) (finding the interest of a father in the "companionship, care, custody, and management" of his offspring to be "cognizable and substantial").

48. *Casey*, 505 U.S. at 896–97; *but see* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (affirming a father's right not to procreate where divorcing couple had stored frozen embryos and no pregnancy had yet occurred).

been in the course of our history and our culture.[49]

Indeed it is only once the child is living, the opinion suggests, that the interests of the mother and father approached even a semblance of equality. Thus, *Danforth* and *Casey* served to cement the transcendence of the woman's right to choose, regardless of the acquiescence or opposition of the man and regardless of the circumstances under which conception occurred.[50]

Without doubt, the trend reflected by the abortion decisions has its genesis in part on the reshaping of societal attitudes towards women and awareness that traditional notions of a woman's role were incompatible with the Constitution.[51] Yet the abortion decisions reflect an approach consistent with the views of radical feminists and patriarchic jurisprudence—the idea that a woman has the sole right to decide what intrusions she is willing to bear upon her body, including the intrusion created by pregnancy.[52] Countervailing interests of the state, the fetus, or the father are subjugated to this interest in bodily integrity, at least until the point of viability. Within the context of pregnancy, paternal rights are clearly non-existent.[53] Neither married nor unmarried fathers have standing to enjoin or otherwise interfere in a woman's decision to

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49. *Casey*, 505 U.S. at 852; *see Caban*, 441 U.S. at 397 (Stewart J., dissenting) ("The mother carries and bears the child . . . .").

50. *See* Jackson, *supra* note 4, at 67 (arguing that men and women should be treated more equally than is allowed under *Danforth* and *Casey*); Black, *supra* note 1, at 998–99 (outlining judicial decisions culminating in the current elevated status of women's procreative liberty).

51. For an article discussing the need to reevaluate the legal and cultural assumptions surrounding the male and female role and accompanying limitations on rights, see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 995 (1984). Interestingly, proponents of cultural feminism arguably would accord the father a right to participate in the abortion decision out of a concern for the marital relationship. *See* Brunner, *supra* note 4, at 101 (arguing that within a nonabusive marriage the wife should allow the husband input in the abortion decision); *see also* Diggins, *supra* note 4, at 390 (arguing that "unilateral control over the abortion decision can operate to destabilize the institution of marriage"). In response to the focus by *Casey* on the potential for spousal abuse as a justification for rejecting spousal notification, cultural feminist theory would differentiate between abusive and non-abusive relationships. Brunner, *supra* note 4, at 102. In non-abusive relationships, a father would have a legal interest and moral right in the abortion decision. In reconciling lack of notification in an abusive relationship, feminist theory would hold that the "woman's individual responsibility to herself to avoid harm outweighs her obligation to communicate with her husband," again presumably in the interest of maintaining the marital relationship. *Id.* "Cultural feminism theorizes that the sense of connection entails a way of learning, of moral development, a view of the world and one's place in it which sharply contrasts with men's." *Id.* at 104.

52. Brunner, *supra* note 4 at 111. *See* Scott, *supra* note 3, at 430 ("It is neither fair nor just that a person (a woman) be considered to assume obligations which override her rights to self-determination and, especially, bodily integrity.").

53. *But see* Misner, *supra* note 3 (discussing paternal rights over preembryos and noting that in the context of preembryos, paternal rights approach equality with maternal rights).

carry a child to term or to terminate her pregnancy.[54] Notably, this circumscription of paternal rights has been unaccompanied by a concomitant restriction in paternal obligations.

II. THE PATERNAL OBLIGATION TO SUPPORT

Although paternal rights increase with the birth of the child, those rights are tenuous at best and, in the case of unmarried putative fathers, often overruled. Historically, paternal rights subsequent to the birth of a child arose only through the marital relationship and in modern jurisprudence have not been afforded the same protection as maternal rights.[55] A child born to a married woman was presumed to be the child of the spouse, whether or not the spouse was the biological father.[56] The state interest in preserving the stability of marriage and the

54. Jones v. Smith, 278 So. 2d 339, 344 (Fla. Dist. Ct. App. 1973); Doe v. Doe, 314 N.E.2d 128, 130 (Mass. 1974); Rothenberger v. Doe, 374 A.2d 57, 59 (N.J. Super. Ct. Ch. Div. 1977); Steinhoff v. Steinhoff, 531 N.Y.S.2d 78 (N.Y. Sup. Ct. 1988). These were all cases where a putative father was successful in obtaining an injunction in the lower court that have been uniformly overturned on appeal. *See* Conn v. Conn, 525 N.E.2d 612, 616 (Ind. Ct. App. 1988) (holding an injunction prohibiting a wife from getting an abortion due to lack of consent from husband to be a violation of her constitutional rights); Andrea M. Sharrin, *Potential Fathers and Abortion: A Woman's Womb Is Not A Man's Castle*, 55 BROOK. L. REV. 1359, 1359 (1990) (discussing numerous cases brought by fathers to "enjoin pregnant women from obtaining abortions"). The Massachusetts Supreme Court in *Doe v. Doe*, decided shortly after *Roe v. Wade*, commented:

> We are deeply conscious of the husband's interest in the abortion decision, at least while the parties are living together in harmony. Surely that interest is legitimate. Surely if family life is to prosper, he should participate with his wife in the decision. But it does not follow that he must have an absolute veto, or that his veto, reasoned or unreasoned, can be enforced by the Commonwealth.

Doe, 314 N.E.2d at 564.

55. *See* Karen Czapanskiy, *Volunteers and Draftees: The Struggle For Parental Equality*, 38 UCLA L. REV. 1415 (1991) (discussing historical presumptions accorded maternal role and accompanying rights and obligations). *But see* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993) [hereinafter Dolgin, *Just a Gene*] (discussing impact of surrogate cases on concept of the maternal role).

56. *See* Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (noting that where child "is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter"); Girard v. Wagenmaker, 470 N.W.2d 372, 374 (Mich. 1991) (finding the putative father of a child born to a married woman had no standing to seek determination of paternity); *In re* Paternity of C.A.S., 456 N.W. 2d 899, 900 (Wis. Ct. App. 1990) (ruling putative father could not compel tests to establish paternity where child born to married woman); *see also* Editorial, *Presumption of Legitimacy of a Child Born in Wedlock*, 33 HARV. L. REV. 306 (1906) (discussing the basis of the presumption that a child born to a married woman is a child of her husband). *But see* Schaffer v. Schaffer, 445 A.2d 589, 590 (Conn. 1982) (allowing a rebuttable presumption only with clear and convincing "proof that the child is illegitimate"); Tacchi v. Tacchi, 195 N.Y.S.2d 892, 895 (N.Y App. Div. 1959) (finding, in annulment action based on fraud and misrepresentation by wife, that husband was not biological father of child born several months following the marriage and denied motion for support).

legitimacy of the child was valued over the rights of the natural father who was denied any relationship with the child at all.[57] Courts upheld, as issues of "legislative policy," state statutes carrying presumptions of parentage for children born within a marriage.[58] In cases where neither party was married, the rights of a putative father depended less on a biological connection with the child and more on the depth of the relationship the father maintained with the mother.[59]

In *Stanley v. Illinois*[60] and *Quilloin v. Walcott*,[61] the Supreme Court rejected the extension of rights to a putative father based solely on biological parentage, instead requiring the father to establish that he had a relationship with the child as well as the child's mother. Cases such as *Stanley*,[62] *Quilloin*,[63] and *Caban v. Mohammed*,[64] followed shortly

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57. Kristen Santillo, *Disestablishment of Paternity and the Future of Child Support Obligations*, 37 Fam. L.Q. 503, 505 (2003). Santillo writes:

> The policy interests undergirding the paternity presumption were: (1) maintaining the integrity of the family unit; (2) preventing children from being declared illegitimate, which carried with it severe legal and social consequences under the common law; and (3) having an individual, rather than the state, assume the financial burden of supporting the child.

Id.

58. *Michael H.*, 491 U.S. at 129–30; Vincent B. v. Joan R., 179 Cal. Rptr. 9, 10–11 (Cal. Ct. App. 1981). The California Court of Appeals viewed the presumption that a child born to a married couple would be deemed the child of the husband as a matter of overriding social policy to ensure the integrity of the marital relationship and the family unit. *Vincent B.*, 179 Cal. Rptr. at 10. The presumption was rebuttable only where the husband was impotent or sterile, or had not been cohabiting with the wife. *Id.* Under those circumstances, the husband would be aware that the child could not be his. *Id.* at 11; *see also* County of Orange v. Leslie B., 17 Cal. Rptr. 2d 797, 800 (Cal. Ct. App. 1993) (holding that biological child born while married woman was separated from her husband was not entitled to presumption of marital paternity to shield himself from financial consequences of adulterous affair).

59. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 253 (1995); *see also* Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J. L. & PUB. POL'Y 29, 49 (2003) (discussing the treatment of support obligations for illegitimate children under the theories of delict and descent, and the subsequent enactment of the "Bastardy Laws").

60. Stanley v. Illinois, 405 U.S. 645, 646 (1972).

61. Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

62. In *Stanley*, the putative father could show that although unmarried, he and the children's mother had cohabited for many years and had raised the children as if they were married. *Stanley*, 405 U.S. at 646. However, state statute conclusively presumed unwed fathers' lack of fitness, and, upon the death of the mother, the children were removed from the custody of the father and became wards of the state. *Id.* at 646–47. The Supreme Court held that in establishing such a presumption, the statute violated an unwed father's equal protection and due process rights and that where the father could demonstrate an established relationship with the children, he was entitled to notice and a particularized hearing on whether he was or was not a "fit" parent for purposes of retaining custody after the mother's death. *Id.* at 658–59.

63. In *Quilloin*, the father could show no established relationship either with the mother or the child, who lived with and was raised by the mother. *Quilloin*, 434 U.S. at 247. The Court differentiated between a developed parent-child relationship and simply the "potential" for a

thereafter by *Michael H. v. Gerald D.*,[65] reflected deference to the "historic respect—indeed sanctity would not be too strong a term—traditionally accorded the relationships that develop within the unitary family," a concept that was held to include the household of unmarried parents and their children.[66] Returning again to the theme that pervaded its privacy decisions, the Court asserted that constitutional protection was accorded the sanctity of the family "precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[67] The failure to adequately demonstrate either assumption of

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relationship as of primary importance in determining whether the putative father's rights would be upheld. *Id.* at 256; *see also* Hopkins v. S.C. Dep't of Soc. Servs., 437 S.E.2d 542, 544 (S.C. 1993) (affirming family court refusal to terminate the paternal rights where father had "done everything within his means *not* to abandon but rather to establish a parent-child bond").

64. In *Caban v. Mohammed*, decided a year after *Quilloin*, the Court overturned a New York statute that permitted an unmarried mother to veto adoption, but not unmarried fathers. Caban v. Mohammed, 441 U.S. 380, 394 (1979). In responding to the mother's assertion that there was a fundamental difference between paternal and maternal relations, the Court stated that "[e]ven if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization . . . would become less acceptable as a basis for legislative distinctions as the age of the child increased." *Id.* at 389. The Court also rejected the state's argument that requiring the consent of the natural father would seriously impair the ability of illegitimate children to be adopted and thereby legitimized. *Id.* at 391–92. Notwithstanding that the best interests of the child may be adoption into a stable two-parent home, this did not justify the use of a gender-based distinction to achieve that goal. *Id.* at 392. "The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children." *Id.* at 394. However, the Court noted that the state could enact a more narrowly-drawn statute under which putative fathers might be precluded from vetoing an adoption based on their failure to establish a relationship with the child or acknowledge paternity that would be reasonably related to the state's interest without treating similarly situated persons differently. *Id.* at 391–92.

65. Michael H. v. Gerald D., 491 U.S. 110, 129–30 (1989).

66. *Id.* at 123.

67. *See id.* at 124 (acknowledging that the concept of the family unit included the household of unmarried parents and their children). Unfortunately, based on decisions such as *Quilloin*, *Caban* and *Lehr*, the fact that a putative father might be entitled to notice and a hearing does not mean that his parental rights will not be terminated during adoption proceedings where the mother has remarried or given the child up for adoption. *Caban*, 441 U.S. at 414–15 (Stevens, J., dissenting). Justice Stevens, in a dissenting opinion, stated that an adoption decree that terminates the parental relationship between an unwed father and the child, even where the father has an established relationship,

> may also be justified by a finding that the adoption will serve the best interest of the child, at least in a situation such as this in which the natural family unit has already been destroyed, the father has previously taken no steps to legitimate the child, and a further requirement such as a showing of unfitness would entirely deprive the child—and the State—of the benefits of adoption and legitimation.

Id. (Stevens, J., dissenting); *see also* Lehr v. Robertson, 463 U.S. 248 (1983) (expressing similar views as the Court in *Michael H.*). *But see In re* Adoption of Baby Boy B., 866 P.2d 1029 (Kan. 1994) (upholding district court denial of a petition to adopt child over natural father's wishes); *In re* Adoption of J.J.B., 868 P.2d 1256, 1262 (N.M. Ct. App. 1994) (overturning nonconsensual adoption absent some finding of parental unfitness and rejecting termination where sole reason

financial responsibility or the existence of a meaningful parent-child relationship significantly impaired, if not eliminated, any right of the father to object to or veto adoption or placement decisions by the mother.[68]

What is clear from these decisions is that putative fathers are faced with a Hobson's choice in order to retain any parental rights at all. On one hand, they can marry the mother to obtain the protections and presumptions afforded married fathers, even though they may subsequently divorce.[69] *Quilloin* clearly differentiated between the rights of married and unwed fathers, with married fathers presumed not only to accept greater responsibilities by virtue of their marital status but also to have an established relationship with the child by virtue of the family unit.[70] Alternatively, they must register their paternity, seek custody, and make every effort to "participate" in the rearing of the child, hoping that the court, in a subsequent action, concludes that their

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was best interest of child).

68. *Quilloin*, 434 U.S. at 256; *Stanley*, 405 U.S. at 665. *See generally* Katharine T. Bartlett, *Re-expressing Parenthood*, 98 Yale L.J. 293, 316–19 (1988) (suggesting that in the context of adoption proceedings, rigidly applying a requirement that a meaningful paternal parent-child relationship exist prior to according any weight to paternal interests, while presuming the existence of a maternal relationship, "in some instances may have the effect of treating a decision by the mother to place her child for adoption as an exercise of her (superior) parental rights rather than as a forfeiture of them"); Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX L. REV. 967, 1000–08 (1994) (discussing various approaches adopted by courts in applying threshold requirements to unwed fathers seeking an order to establish paternal rights to object to adoption proceedings).

69. *Caban*, 441 U.S. at 397 (Stewart, J., dissenting). Stewart's dissent in *Caban* in fact noted that a putative father can marry the mother and ensure the protection of his rights, stating that "[i]t seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children." *Id.* (Stewart, J., dissenting); *see also Lehr*, 463 U.S. at 251–55 (upholding a New York law that denied a putative father notice of adoption against a Due Process and Equal Protection challenge because he established only a biological link). Professor Dolgin argues that paternal rights with respect to their children are conditioned upon cultural, as opposed to biological ties. She asserts that whether the view of paternal rights is conditioned upon marriage to the mother or behavioral involvement with the child, are premised on certain assumptions about family. She argues that the conditioning of paternal rights on behavioral involvement with the child reflects an erosion of the long held traditional form of 'family':

> This second position, presuming legal paternity to follow from the development of a relationship between a father and his biological child, more fully rejects the old order in which familial relationships are deeply embedded in traditional forms that entail clear rights and obligations, and reflects a newer world of "economic man," connected to others only through a network of impersonal economic relationships.

Dolgin, *Just a Gene*, *supra* note 55, at 649.

70. *Quilloin*, 434 U.S. at 255; *see* Forman, *supra* note 68, at 967 (discussing theories of fatherhood and accompanying rights and interest in the child, including fatherhood defined by marital rights, genetics, or upon affirmative assumption of responsibility).

efforts were "enough."[71]

Notwithstanding the putative father's clear lack of rights in procreative decisions and the limited constitutional protection afforded his rights upon the child's birth, a determination of paternity carries with it significant economic consequences.[72] State and federal legislatures as well as the courts have imposed an unequivocal obligation to provide child support.[73] "[T]he putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law."[74] The legal obligation to support imposed on the man has evolved from the still-recognized marital presumption to include any marital or non-marital child for which a genetic relationship is shown.[75]

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71. *See Lehr*, 463 U.S. at 261 (noting that Due Process protection would be afforded in situations where the putative father demonstrates "full commitment" to being a father); *see also* Toni L. Craig, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U. L. REV. 391 (1998) (advocating for the implementation of a biological rights doctrine to facilitate recognition of unwed biological fathers' interests in adoption cases); Dolgin, *Just a Gene*, *supra* note 55, at 650 (arguing that the Supreme Court cases explicating the paternal rights of unwed fathers could only be reconciled if a father establishes a relationship with his biological father). Dolgin asserts that paternal rights of unwed fathers can be reconciled:

> [I]f the apparently sufficient requirement for effecting legal paternity—that a father effect a social relationship with his biological child—is read as code for the requirement that he effect that relationship *within the context of family*, most easily identified in cases in which the father has established a marriage or marriage-like relationship with the child's mother.

Id.

72. Paternity carries with it social and moral consequences as well. *See, e.g.*, McCulley, *supra* note 4, at 21 (quoting *Rivera v. Minnich*, 483 U.S. 574, 584 (1987), as stating that "[a]long with the financial and legal implications involved, the paternity determination creates a parent-child relationship, which is a pronouncement of far more than a financial responsibility. [Meaning that] the adjudicated father 'assumes a cultural role with distinct moral expectations'"). McCulley argues that social consequences can also stem from adjudicated paternity proceedings, citing comments by Justice Brennan in his dissent in *Rivera v. Minnick* that an adjudicated father would be subject to moral opprobrium for failing to voluntarily embrace his parental role. *Id.*

73. *See, e.g.*, Jo Michelle Beld & Len Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 FAM. L. Q. 165, 165 (2003) ("Presumptive guidelines for the determination of child support orders have been in effect in every state since 1990. It would be hard to overstate the impact of these guidelines on the economic circumstances of millions of children and their separated parents."); *see also In re* Doe, 543 So. 2d 741, 746 (Fla. 1989) ("[B]iological father, wed or unwed, has a responsibility to provide support during the prebirth period."); Hiester, *supra* note 4, at 218–20 (discussing federal and state statutes).

74. Rivera v. Minnich, 483 U.S. 574, 580 (1987).

75. Donald Hubin suggests that there are both genetic paternity and causal paternity and that "the genetic and causal elements of paternity are conceptually, and sometimes empirically, separate. Keeping them separate is crucial to solving some of the legal conundrums concerning paternity." Hubin, *supra* note 59, at 65. The refinement of DNA paternity testing has added to the exceptions to the marital presumption, where the husband makes a timely challenge to

> In fact, the genetic link between a man and his biological child can create a legal obligation in the absence of any concomitant social connection, as in the case of biological fathers required to provide financial support for their offspring even in cases in which the mother is married to another man. . . . The state relies on the genetic tie between a man and a child to hold the man financially responsible for what is *his* even where the man can claim no familial rights to the child he must support because he *chose* to sire the child outside a family setting.[76]

Even without a genetic tie, however, a man can still be held responsible for the care and support of a child where he has held the child out as his own and/or failed to undertake a timely investigation of his suspicions regarding paternity.[77] Failure to pay child support when due puts the man at risk of imprisonment, wage garnishment, and other

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paternity, and further enables identification of the actual genetic father to whom the support obligation would then attach. *See, e.g.*, UNIF. PARENTAGE ACT, 9B U.L.A. 287 §§ 1–30; *see also* Dolgin, *Just a Gene*, *supra* note 55, at 663 n.114 (detailing cases that discuss the contractual obligations owed by biological fathers). Courts have also found legal fatherhood where the child was the result of a surrogacy contract. In In re *Marriage of Buzzanca*, the court stated "[i]ndeed the establishment of fatherhood and the consequent duty to support when a husband consents to the artificial insemination of his wife is one of the well-established rules of family law." *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 286 (Cal. Ct. App. 1998); *see also* People v. Sorenson, 66 Cal. Rptr. 7, 13 (Cal. 1968) (affirming conviction of man for failure to support a child conceived through artificial insemination).

76. Dolgin, *Just a Gene*, *supra* note 55, at 645–46; *see also* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L & PUB. POL'Y 1, 8–9 (2004) (commenting that "much paternity law seems to be based on a strict liability theory for genetic contribution"); Paula Roberts, *Truth and Consequences: Part II: Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 60 (2003) (analyzing paternity disestablishment in cases where marital children are involved); Kristen Santillo, *Disestablishment of Paternity and The Future of Child Support Obligations*, 37 FAM. L.Q. 503 (2003) (discussing attempts made to balance interests of non-biological fathers, children, and the state).

77. *See* Baker, *supra* note 76, at 1 (discussing circumstances where support obligations can be imposed even in the absence of a genetic tie); Roberts, *supra* note 76, at 60. Roberts asserts:

> *Timing matters*; a man who suspects he is not the biological father of his wife's child and fails to act on his suspicions, faces an uphill battle in disestablishing paternity. A man who waits for years before seeking genetic tests to confirm or rebut his suspicions is likely to be estopped from denying his paternity.

Id.; *see also* UNIF. PARENTAGE ACT (establishing timeframes within which paternity can be challenged); Santillo, *supra* note 57, at 506 (noting that states have passed limitations periods within which fathers who fail to discover that "children born during the marriage are not biologically related to them . . . are compelled to retain the legal status of father"). Santillo contends that forcing men to support children that are not biologically theirs diverts resources, and therefore places a financial strain upon their biological children. Santillo, *supra* note 57, at 510. She notes that some states will permit fathers to challenge paternity based on newly discovered evidence regardless of the limitations period to address situations where the father had no reason to suspect or challenge paternity, although some exceptions exist to this right. *Id.* at 511–13.

sanctions.[78] Federal statutes have required mothers seeking Aid for Families with Dependent Children ("AFDC")[79] to identify the father and cooperate in state efforts to obtain child support.[80] In addition to ensuring that the mother receives financial assistance in raising the child, the state has an articulated interest in enforcing paternal support obligations so that the child does not become a public charge.[81] Unless and until parental rights are terminated, support obligations continue throughout the minority of the child.[82]

These obligations cannot be waived, either through contract or otherwise.[83] In this respect, both married and unmarried fathers are

78. *See, e.g.*, UNIF. INTERSTATE FAMILY SUPPORT ACT; CHILD SUPPORT RECOVERY ACT, 18 U.S.C. § 228 (detailing consequences for failure to provide child support); IND. CODE § 35-46-1-5 (1978) (imposing criminal sanctions); NEB. REV. STAT. § 28-706 (1995) (imposing criminal sanctions); N.Y. DOM. REL. § 244-C (1998) (regarding suspension of professional, occupational and business licenses); S.C. CODE ANN. § 20-7-941 (West 1997) (dealing with the revocation of recreational, drivers and professional licenses); *see also* McCulley, *supra* note 4, at 5–8 (examining state and federal procedures enforcing child support).

79. 42 U.S.C. §§ 601–669b (1997). The statute further requires that the mother assign all rights to receive child support to the state. "In order to participate . . . states must require that [the] recipient family assign its right to receive child support to the state; states are then required to collect any support money and to offset them against amounts paid in AFDC . . . ." 42 U.S.C. § 657 (1997).

80. *See, e.g.*, Child Support Enforcement Act, Pub. L. No. 93-647 (1975) (codified at 42 U.S.C. §§ 651–669b (1975). Congress passed the Family Support Act in 1988, which among other things, requires states to obtain social security numbers of both parents upon birth of the child. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2344-51 (codified as amended in scattered sections of 42 U.S.C.).

81. *See* Rivera v. Minnich, 483 U.S. 574, 580 (1987) (finding that "the putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law"); Zablocki v. Redhail, 434 U.S. 374, 390 (1978) (finding that "if the State believes that parents of children out of their custody should be responsible for ensuring that those children do not become public charges, this interest can be achieved by adjusting the criteria used for determining the amounts to be paid under their support orders").

82. *Rivera*, 483 U.S. at 583 (Brennan, J., dissenting). Justice Brennan, in a dissenting opinion in *Rivera v. Minnich*, stated: "What is at stake for a defendant in such a proceeding is not merely the prospect of a discrete payment in satisfaction of a limited obligation. Rather, it is the imposition of a lifelong relationship with significant financial, legal, and moral dimensions." *Id.* In *Rivera*, the Court considered the evidentiary standard required in paternity determinations, suggesting that a paternity proceeding required only a "preponderance of the evidence" standard of proof. *Id.* at 586.

83. *See, e.g.*, New York Family Court Act §§ 413, 416(a) (1977) (prohibiting release of father from support obligations by contract); Erwin L.D. v. Myla Jean L., 847 S.W.2d 45, 47 (Ark. Ct. App. 1993) (holding as unenforceable a mother's promise not to pursue paternity determination and child support since "the duty of child support cannot be bartered away permanently to the detriment of the child"); Paul M. v. Teresa M., 818 S.W.2d 594, 595 (Ark. Ct. App. 1991) (noting that the duty of support cannot be relinquished to the detriment of the child); Faske v Bonanno, 357 N.W.2d 860, 861 (Mich. App. 1984) (disallowing misrepresentation of contraceptive protection as a defense); Ferguson v. McKiernan, 60 Pa. D. & C. 4th 353, 364 (Pa. Com. Pl. 2002) (refusing to enforce oral contract for artificial insemination and holding the donee

treated alike. The obligation to support a natural child is non-discriminatory. Nevertheless, while both parents are held responsible for the care and support of the child, the financial burden is not necessarily equal.[84] In post-divorce situations, for example, researchers documented a drop in the standard of living for the custodial mother while the father's standard of living increased.[85] Moreover, Lenore Weitzman's findings that the standard of living for women and children post-divorce dropped seventy-three percent while the standard for men increased by forty-two percent "prompted a wide array of advocates to suggest that fathers must compensate mothers for this differential change in their relative economic prospects."[86] Although some researchers argue that there is in fact no disparity,[87] and despite errors subsequently discovered in Weitzman's results, child support reform efforts nonetheless target the assumed gap through increases in awards.[88] In many states, the obligation imposed upon the putative father, while designated child support, is in excess of the amount needed to support the child simply because the father can afford more.[89] The

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responsible for paying child support).

84. *See* Hiester, *supra* note 4, at 233 ("All that is required to enforce a child-support obligation against a man is the mere fact of his genetic relationship to the child. On the other hand, because a woman has the right to terminate her pregnancy, child-support obligations can never be enforced against her without her consent to the existence of a parental obligation.").

85. *See, e.g.*, Sanford L. Braver, Ph.D., *The Gender Gap in Standard of Living After Divorce: Vanishing Small?*, 33 FAM. L.Q. 111, 112 (1999) (criticizing flaws in research methodologies demonstrating post-separation standard of living between mothers and fathers); Hubin, *supra* note 59, at 35 ("In 2000, 32.5% of single mother households with children were below the poverty level, compared with only 16.1% of single father households with children and only 6% of married couple households with children under the age of eighteen.").

86. Braver, *supra* note 85, at 113–14. Braver notes that Weitzman's results were widely cited although she subsequently "acknowledged that her original figures were wrong" and argued that the disparity was substantially smaller. *Id.* at 115–16.

87. *Id.* at 134. Braver further notes that "after correcting the method for two matters not hitherto considered, unequal taxes and the sharing of the expenses of the children between the two parents' households, the gender gap was vanishingly small; it all but disappeared." *Id.*

88. *See* Laura Wheaton & Elaine Sorensen, *Reducing Welfare Costs and Dependency: How Much Bang for the Child Support Buck?*, 4 GEO. PUB. POL'Y REV. 23, 24–26 (1998) (examining the gap and legislative policies aimed at increasing awards to single mothers).

89. *See, e.g.*, Joann P. v. Gary W., 441 A.2d 1161, 1162 (N.H. 1982) (rejecting the defendant's argument on appeal that his obligation to support the child should not include support for the mother, holding the trial court did not abuse its discretion in considering the mother's needs as well). "The fact of parenthood and the presence of a child determine, in a large measure, the housing requirement as to location and nature of accommodations as well as her life style." *Id.; see also* Smith v. Freeman, 814 A.2d 65, 78 (Md. Ct. Spec. App. 2002) (holding that "the determination of 'need' . . . takes into account more than just the basic necessities of survival"); Bagley v. Bagley, 632 A.2d 229, 239 (Md. Ct. Spec. App. 1993) ("The Bagley children are entitled to every expense reasonable for a child of someone with Dr. Bagley's affluence."). The child of a multi-millionaire would be entitled to share in that standard of living and would accordingly be entitled to a greater award of child support to provide for various luxuries, even

family court in *Pamela P. v. Frank S.* noted that:

> The child is entitled in this court's opinion to no less a standard of living than his father's, because it indicates the likely level that the child would enjoy if he had been born into the still-prevalent circumstance of an intact family or a father willingly sharing his custody and care.[90]

In essence, the support obligations can become a combination of child support and implicit palimony—the child should live in a manner to which he or she would be entitled if the parents were married—regardless of whether they ever were or ever would be.[91]

III. JUDICIAL TREATMENT OF MISREPRESENTATION OF FERTILITY CLAIMS

The lack of significant paternal rights coupled with the economic and emotional obligations accompanying fatherhood lead to an understandable outrage upon discovery of deceit involving representations of fertility or contraceptive use. Efforts to assuage this outrage through the judicial system have been singularly unsuccessful regardless of whether the claims have sounded in contract or tort.[92] Although the outcomes have been unsuccessful, the courts have not adopted a consistent approach in denying paternal misrepresentation of fertility claims and articulated rationales have ranged from fatally defective allegations or other deficiencies in the claim to reliance on various public policies. In particular, courts have focused on the ability

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though provision for such items would not be ordered in a different case. *Smith*, 814 A.2d at 239.

90. Pamela P. v. Frank S., 443 N.Y.S.2d 343, 348 (N.Y. Fam. Ct. 1983).

91. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 309, 3 U.L.A. 400 (1987) (permitting support order that requires either or both parents to pay support in the amount necessary to maintain same standard of living child would have had absent the divorce); Beld & Biernat, *supra* note 73, at 166–67 (discussing the federal child support guidelines and their incorporation into state statutory approaches to support determinations). Beld and Biernat note that:

> [M]ost states have adopted one of two general models for the determination of support. The "percentage-of-obligor-income" model, used in ten states, bases child support on the income of the obligor alone. In contrast, the "income shares" model, used in approximately three-quarters of the states, bases support on the combined incomes of both parents. Thirty-five states rely on a simple income shares approach, while three states have adopted the more complex Melson formula. The remaining three states' guidelines have some percentage-of-obligor-income features and other features consistent with income shares.

Id. at 167; *see also* Deborah H. Bell, *Child Support Orders: The Common Law Framework-Part II*, 69 MISS. L.J. 1063, 1091–93 (2000) (discussing cases both upholding and rejecting support awards based on percentage of income approach).

92. *See generally* Anne M. Payne, Annotation, *Sexual Partner's Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R. 5TH 301 (1992) (focusing on claims in tort, and particularly, claims for fraud and misrepresentation).

of the father to allege justifiable reliance or damages, the applicability of anti-heartbalm and child support statutes, and constitutional rights of privacy either as the sole basis for denial or in combination to buttress the conclusion that relief should be unavailable.[93]

1. The Statutory Bar of Anti-Heartbalm Legislation

Beginning in the early 1900s, courts became increasingly disinclined to permit recovery in tort for claims that emerged out of "tender matters of romantic or sexual emotion."[94] Claims such as alienation of affection, breach of promise, or criminal conversation fell into disfavor under the weight of criticism that such claims were "anachronistic," resulted in excessive and unwarranted damage verdicts, and were used to extort or blackmail a marriage that was no longer wanted.[95] Underlying much of the criticism was also the implicit belief that community mores had changed.[96] Thus, for example, a failure to progress from engagement to marriage no longer carried the stigma that previously may have warranted a breach of promise action.[97] As a result, a number of states enacted what are commonly referred to as "anti-heartbalm statutes," which bar breach of promise and related cases

93. In cases where the substance of the father's claim was considered, the courts ultimately concluded that there had been either an alleged insufficiency of proof to meet the fraud standard or belatedly applied public policy principles. *See, e.g.*, Inez M. v. Nathan G., 451 N.Y.S.2d 607, 612 (N.Y. Fam. Ct. 1982) (holding that father failed to prove either misrepresentation as to contraceptive precautions or deception as to contracteption).

94. Askew v. Askew, 28 Cal. Rptr. 2d 284, 293 (Cal. Ct. App. 1994).

95. *See* Hoye v. Hoye, 824 S.W.2d 422, 427 (Ky. 1992) (abolishing tort of criminal conversation and stating "[s]uch suits invite abuse" and were based on "anachronism"); Helsel v. Noellsch, 107 S.W.3d 231, 233 (Mo. 2003) (abolishing tort of alienation of affection); Jeffrey D. Kobar, Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770, 1775–78 (1985) (discussing the underlying policies and limitations of heartbalm statutes). *But see* Norton v. MacFarlane, 818 P.2d 8, 12 (Utah 1991) ("To a large extent, the basis for abuse has diminished as the Victorian attitudes towards sex have diminished and yielded to a much more frank and open attitude. . . .").

96. *See Helsel*, 107 S.W.3d at 232 (arguing that revenge, not reconciliation, is the primary motive); *Norton*, 818 P.2d at 14 (declining to abolish tort of alienation of affection).

97. Kobar, *supra* note 95, at 1778. Jeffrey D. Kobar states that:

> Engagements are now viewed as important trial periods when couples can determine if they do indeed want to commit their lives to each other, and during which the freedom to decline marriage without sanction is essential. Enforcing marriage promises destroys the social utility of this trial period, making it 'as expensive to get engaged as it is to get married.'

Id; *see also* Jane E. Larson, *Women Understand So Little They Call My Good Nature "Deceit": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993) (discussing common law claim of seduction and proposing tort of sexual fraud); Rebecca Tushnet, Note, *Rules of Engagement*, 107 YALE L.J. 2583 (1998) (discussing engagement and conditional gifts).

and abolish the old common law claims.[98]

> The trend against such actions has moved slowly, but in the light of increased emphasis in our society on personal choice, the decriminalization of sexual activities in many states, and skepticism [sic] about the role of law in protecting feelings and enforcing highly personal morality, it seems doubtful that the trend will be reversed.[99]

Nonetheless, it became apparent that enactment and enforcement of the anti-heartbalm statutes reflected a social determination that the abuses and excesses of such actions were great enough, on balance, to warrant their abolition and for such conduct to no longer constitute a civil wrong compensable in tort.[100] In this respect, the boundaries of tort law in this area were clearly redrawn.

Not all courts, however, interpreted the anti-heartbalm statutes as a complete bar to the vicissitudes of ill-fated romance. Some jurisdictions permitted exceptions for restitution and unjust enrichment even though the underlying claim sounded in one of the abolished causes of action.[101] Others courts, however, took the position that any action grounded in those common law claims subject to heartbalm statutes would be precluded without exception.[102] In *A.B. v. C.D.*, involving an

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98. *See, e.g.*, *Hoye*, 824 S.W.2d at 426 nn.1–2 (discussing history of tort of alienation of affection and criminal conversation and listing states and statutes abolishing those claims).

99. PROSSER & KEATON ON TORTS § 124 at 930 (W. Page Keaton ed., 5th ed. 1984). The *McFarlane* court argued that the tort of alienation of affection was not limited to incidents of sexual misconduct and "lies for all improper intrusions or assaults on the marriage relationship, whether or not they are associated with extramarital sex." *Norton*, 818 P.2d at 13. *But see* Jonathan Turley, *When Lust and the Law Collide*, CINNCINATI POST, Sept. 15, 2004, at A19 (reporting on prosecution in Virginia of attorney for adultery under that state's criminal statutes and noting "[s]ince 1980, adultery cases have been recorded from Alabama to Massachusetts to Pennsylvania"); Michelle Boorstein, *Virginia Adultery Case Goes From Notable to Nonevent*, WASH. POST, Aug. 25, 2004, at B4 (discussing a Virginia adultery case).

100. For example:

> There is good reason to believe that even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives; that it is impossible to compensate for such damage with what has derisively been called 'heart balm;' that people of any decent instincts do not bring an action which merely adds to the family disgrace; and that no preventive purpose is served, since such torts seldom are committed with deliberate plan.

PROSSER & KEATON, *supra* note 99, at 929; *see also* Larson, *supra* note 97, at 397 ("Although latently misogynistic rhetoric fueled the anti-heartbalm reform, in several states women lawmakers actively initiated the legislative movement to abolish these torts.").

101. *See* Kobar, *supra* note 95, at 1772 n.9 (examining precedent based on traditional common law and equity); *see also* Richard P. v. Superior Court, 249 Cal. Rptr. 246, 250 n. 3 (Cal. Ct. App. 1988) (declining to permit husband to sue the man who fathered a child in adulterous relationship with wife in tort, and noting that "[w]e do not foreclose the possibility that a man in Gerald's position might be able to recover actual out of pocket costs incurred in supporting another man's children on an equitable theory for reimbursement, such as unjust enrichment").

102. *See, e.g.*, Thorpe v. Collins, 263 S.E.2d 115, 119 (Ga. 1980) (holding that there was no

action for breach of promise, a Pennsylvania district court expressed discomfort with creating an exception to the bar imposed by the anti-heartbalm statutes, stating:

> The legislatures did not intend that courts should explore the minds of suitors and determine their sincerity at the moment of proposal of marriage but rather declared it to be the policy of the state that in the event a breach of the promise occurs relief will be denied in the courts.[103]

These jurisdictions even rejected traditional fraud and deceit claims where they implicated matters of romance or sexual conduct, proclaiming that the government "did not belong in the bedroom" and that romance was an inappropriate subject for judicial intervention.[104] Anti-heartbalm legislation was viewed as codifying "the sheer unseemliness" of litigating matters deemed to be "intensely private."[105] Brandishing cases such as *Griswold v. Connecticut* and *Stanley v. Georgia*, courts declined to attach tortious liability to intimate matters between a man and a woman, finding it inconceivable that matters of the heart belonged in the courtroom. "[T]he judiciary should not attempt to regulate all aspects of the human condition. Relationships may take varied forms and beget complications and entanglements which defy reason."[106] The court in *Askew v. Askew* bluntly contended that "[w]ords of love, passion and sexual desire are simply unsuited to the cumbersome strictures of common law fraud and deceit,"[107] calling the idea of a judge or jury determining whether romantic declarations

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cause of action in tort independent of action for breach of promise to marry); Waddell v. Briggs, 381 A.2d 1132, 1136–37 (Me. 1978) (dealing with a state statute that prohibited tort action for defendant's failure to attend wedding ceremony and breach of promise to marry daughter).

103. A.B. v. C.D., 36 F. Supp. 85, 87 (E.D. Pa. 1940), *aff'd per curiam*, 123 F.2d 1017 (3d Cir. 1941).

104. Government intrusion into the privacy of sexual decisions abounds. A number of states have penal statutes that criminalize certain sexual behavior, even when performed in the privacy of the bedroom between consenting adults. *See, e.g.*, ALA. CODE § 13A-6-63 (1977) (sodomy in the first degree); ALA. CODE § 13A-13-2 (1977) (adultery in the first degree); 720 ILL. COMP. STAT. ANN. § 5/11-8 (West. 1990) (fornication); MASS. ANN. LAWS ch. 272 § 35 (Law. Co-op. 1977) (unnatural and lascivious acts); VA. CODE ANN. § 18.2-345 (Michie 1975) (lewd and lascivious cohabitation); Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (refusing to recognize a right to privacy in homosexual behavior). *But see* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling *Bowers*).

105. Askew v. Askew, 28 Cal. Rptr. 2d 284, 292–93 (Cal. Ct. App. 1994).

106. Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 245–46 (N.Y. Sup. Ct. 1985).

107. *Askew*, 28 Cal. Rptr. 2d at 294; *see also* Larson, *supra* note 97, at 410 (suggesting that judicial reluctance to become involved in sexual misconduct cases may stem in part from the courts' "lack of confidence in [their] ability to ascertain the presence or absence of sexual consent"). Larsen asserts that the courts are more likely to become involved in cases presenting claims of physical injury than emotional harm. Larson, *supra* note 97, at 411.

were fraudulent "ridiculously wooden."[108]

The extent to which actions alleging fraud or deceit[109] fell outside the scope of anti-heartbalm legislation remained a major area of disagreement.[110] Clearly to some degree the courts are still a haven for the deceived despite the existence of anti-heartbalm statutes even where that deceit occurs in the course of intimate relationships.[111] For example, most jurisdictions addressing the issue have permitted recovery in tort for fraudulent or negligent concealment of sexually transmitted diseases[112] under various theories including battery,[113] negligence,[114] fraud, and emotional distress.[115] Courts have also been

108. *Askew*, 28 Cal. Rptr. 2d at 294.

109. Those courts which have held deceit actions barred under the anti-heartbalm statutes include: Thorpe v. Collins, 263 S.E.2d 115 (Ga. 1980); Waddell v. Briggs, 381 A.2d 1132 (Me. 1978); Thibault v. Lalumiere, 60 N.E.2d 349 (Mass. 1945); A.B. v. C.D., 36 F. Supp. 85, 87 (E.D. Pa. 1940), *aff'd per curiam*, 123 F.2d 1017 (3d Cir. 1941); Sulkowski v. Szewczyk, 6 N.Y.S.2d 97 (N.Y. App. Div. 1938).

110. *See* Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276–77 (Cal. Ct. App. 1984) (rejecting the defendant's efforts to avoid the consequences of his misrepresentation that he did not have a venereal disease prior to intercourse under the state's anti-heartbalm statutes); *see also Askew*, 28 Cal. Rptr. 2d at 291 (noting that after its enactment "the outer perimeters of the [anti-heartbalm] statute remained to be mapped out by the courts" and that courts were to look to the substance of the claim not just how it was styled). *But see* Perry v. Atkinson, 240 Cal. Rptr. 402, 405 (Cal. Ct. App. 1987) (commenting that cases alleging misrepresentations regarding procreative ability fell squarely within the anti-heartbalm statutes).

111. Boyd v. Boyd, 39 Cal. Rptr. 400 (Cal. Ct. App. 1964); Langley v. Schumacker, 297 P.2d 977 (Cal. 1956); Perthus v. Paul. 58 S.E.2d 190 (Ga. Ct. App. 1950). In *Akrep v. Akrep*, the Supreme Court of New Jersey also permitted an annulment of a non-consummated marriage sought by the plaintiff wife based on the husband's misrepresentation that he and the plaintiff would have a religious ceremony subsequent to a civil ceremony. Akrep v. Akrep, 63 A.2d 253, 253–55 (N.J. 1949); *see also* McCulley, *supra* note 4, at 25–26 (criticizing the decision in *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618 (Cal. Ct. App. 1980) and noting that "the government interferes with many private sexual decisions, and this interference has been upheld under scrutiny"); Rudolph, *supra* note 9, at 331 (noting the occurrence of government intrusion in intimate relations in misrepresentation cases involving sexually transmitted disease, divorce and annulment, rape and spousal rape, among others). *But see* Anonymous v. Anonymous, 85 A.2d 706, 720–21 (Del. Super. Ct. 1951) (holding that an annulment sought by husband based on misrepresentations by the wife prior to marriage did go to the essentials of the marriage contract); Rhoades v. Rhoades, 72 A.2d 412, 413–14 (N.J. Super. Ch. Div. 1950) (rejecting husband's claim for annulment of his consummated marriage despite his assertion that his wife falsely represented that she had borne him a child and that based on this representation they got married).

112. In *Kathleen K. v. Robert B.*, the plaintiff alleged the defendant intentionally misrepresented that he was free of venereal disease and that in reliance thereon, she engaged in sexual intercourse. Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276 (Cal. Ct. App. 1984) Reversing the lower court's dismissal of the complaint based on privacy considerations, the appellate court stated that the right to privacy did not protect intentionally tortious conduct that resulted in physical injury in the form of contagious disease. *Id* at 277.

113. *See, e.g.*, Barbara A. v. John G., 193 Cal. Rptr. 422, 433 (Cal. Ct. App. 1983) (refusing to bar a woman from bringing an action in battery for suffering an etopic pregnancy with a man who claimed he could not get her pregnant).

114. *See, e.g.*, B.N. v. K.K., 538 A.2d 1175, 1179 (Md. 1988) (permitting recovery for

willing to set aside a marriage procured through fraud, or where there has been a breach of a fiduciary relationship.[116] These courts easily overcame the distaste of peeking into the bedroom in order to afford redress for the alleged harm.[117] Several courts allowed privacy concerns to be outweighed by the state interest in protecting health and welfare, even though the claims before it were purely private. The court in *Kathleen K. v. Robert B.*, for example, pointed to "[t]he tortious nature of respondent's conduct, coupled with the interest of this state in the prevention and control of contagious and dangerous diseases" as permitting inquiry into private sexual conduct.[118] That court held that "[t]he right of privacy is not absolute, and in some cases is subordinate to the state's fundamental right to enact laws which promote public health, welfare and safety, even though such laws may invade the offender's right of privacy."[119]

Courts have been less sanguine, however, on whether claims of misrepresentation of fertility or use of birth control, clearly precedent to agreeing to sexual intimacies, fall within the scope of the anti-heartbalm statutes.[120] Some courts likened misrepresentation-of-fertility claims to the old common law claims for seduction or alienation of affections and

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negligent transmission of herpes); Long v. Adams, 333 S.E.2d 852, 856 (Ga. App. 1985) (permitting recovery for negligent transmission of herpes).

115. *See, e.g.*, B.N. v. K.K., 538 A.2d at 1180, 1184 (permitting possible actions for fraud and intentional infliction of emotional distress).

116. Tacchi v. Tacchi, 195 N.Y.S.2d 892, 893–95 (N.Y. Sup. Ct. 1959). In *Tacchi v. Tacchi*, the court held that the plaintiff husband was entitled to annulment of marriage where prior to the marriage the defendant was allegedly pregnant with plaintiff's child, and defendant's mother falsely represented that defendant was under age and threatened plaintiff with criminal prosecution for sex with a minor if he did not marry her. *Id.* The court found that although the representations were made by the defendant's mother, the defendant had acquiesced in them and therefore participated in the fraud. *Id.* at 894. Finding that the child was not the plaintiff's, the court, in addition to granting the annulment, also denied the defendant's motion for support. *Id.* at 893.

117. "The right of privacy, hallowed when the woman misrepresents, disappears from the judicial analysis when the man commits the same tort." Rudolph, *supra* note 9, at 331.

118. Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 276 (Cal. Ct. App. 1984).

119. *Id.*; *see also* Perry v. Atkinson, 240 Cal. Rptr. 402, 406 (Cal. Ct. App. 1987) (noting that state interest in prevention and control of disease warranted intervention in some circumstances where intervention might otherwise have been inappropriate).

120. *See, e.g.*, Jose F. v. Pat M., 586 N.Y.S.2d 734, 735–36 (N.Y. Sup. Ct. 1992) (noting that to allow a claim for intentional infliction of emotional distress arising out of disputes "in a marital context would "subvert legislative intent in outlawing this type of lawsuit"); Inez M. v. Nathan G., 451 N.Y.S.2d 607, 611 (N.Y. Fam. Ct. 1982) ("The cause of action of fraud and deceit within the context of a paternity proceeding may well suffer from the very same problems that impelled legislative abolition of causes of action 'based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry.'").

utilized anti-heartbalm legislation to deny relief.[121] In *Jose F. v. Pat M.*, the court considered, among other things whether New York's anti-heartbalm statutes precluded the plaintiff's claims for fraud and intentional infliction of emotional distress ("IIED") as a result of the defendant mother's representations that she was using contraception in order to induce the plaintiff to begin a sexual relationship.[122] In concluding that the plaintiff's claims should be dismissed, the court was concerned that allowing the action to proceed would "subvert legislative intent in outlawing this type of lawsuit."[123] New York did not recognize IIED claims in the context of marital disputes in light of the state's anti-heartbalm legislation abolishing claims for alienation of affection and related actions.[124] In order to bring the plaintiff within this exclusion, the court found the unmarried plaintiff's relationship with the defendant to be "so akin to a conjugal one that the same public policy considerations" would apply.[125]

In *Perry v. Atkinson*,[126] the plaintiff alleged that she obtained an abortion at the behest of her married lover in reliance on his misrepresentations that he would impregnate her the following year.[127] The lower court sustained the demurrer to the fraud claim on the basis that it would violate public policy and interfere with the parties' right to privacy.[128] The California appellate court characterized its inquiry as whether the plaintiff had a cause of action for "fraudulent breach of promise to impregnate."[129] The court held that to permit the plaintiff to

121. *See, e.g., Perry*, 240 Cal. Rptr. at 406 (finding no cause of action existed for a man's fraud and deceit in misrepresenting his intentions to provide a plaintiff with a child); *Jose F.*, 586 N.Y.S.2d at 736 ("It is inappropriate for the court to intrude into an intimate relationship in an attempt to substantiate what is tantamount to an action for seduction."); Venus B. v. Danillo S., 446 N.Y.S.2d 894, 897 (N.Y. Fam. Ct. 1982) (commenting that mother's claim of fraudulent inducement not to file a paternity action might fall within claims no longer recognized in New York and constitute matters considered private and inappropriate to intrusion by the court).

122. *Jose F.*, 586 N.Y.S.2d at 734.

123. *Id.* at 736.

124. *Id.* at 735.

125. *Id.* at 736; *see also supra* note 120 (discussing the New York Family Court's consideration of claims of fraud in paternity proceedings). In *Inez M. v. Nathan G.*, the New York Family Court acknowledged that actions for fraud raised in a paternity proceeding "may well suffer from the very same problems that impelled legislative abolition of causes of action 'based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry.'" Inez M. v. Nathan G., 451 N.Y.S.2d 607, 611 (N.Y. Fam. Ct. 1982).

126. *Perry*, 240 Cal. Rptr. at 402.

127. *Id.* at 403. The plaintiff alleged causes of action for fraud and deceit and for intentional infliction of emotional distress. *Id.*

128. *Id.* (noting that although the emotional distress claim proceeded to trial, the parties settled it prior to the conclusion of the trial).

129. *Id.* at 404 ("Although Perry's cause of action is couched in terms of a tort, the behavior

maintain such a claim would involve the court in the parties' private procreative decisions—matters that were intensely private. Pointing to California's anti-heartbalm statutes, the court concluded that the plaintiff's claims fell within the scope of "sexual conduct and interpersonal decisions [that] are, on public policy grounds, outside the realm of tort liability."[130]

The *Perry* court discussed two other California decisions involving claims surrounding conception, *Stephen K. v. Roni L.*[131] and *Barbara A. v. John G.*,[132] noting that in its view, both should have been decided under the anti-heartbalm provisions of the California Civil Code.[133] "In both, the complaining parties alleged they engaged in sexual relations induced by a false representation regarding their partners' procreative ability. Both cases fall squarely within Civil Code Section 43.5, subdivision (c) precluding a cause of action for seduction."[134] In *Stephen K.*, the father had counterclaimed for compensatory and punitive damages in a paternity suit brought by the mother, alleging she had misrepresented that she was using birth control.[135] The appellate court affirmed the lower court dismissal for failure to state a claim for relief.[136]

The court in *Barbara A.*, however, permitted the mother's claim for fraud to proceed despite allegations of similar misrepresentations by the father, finding they were not barred by the state's anti-heartbalm statute. "In the instant case appellant complains not because her virtue was violated or because she suffered humiliation and loss of reputation, but because the sexual act was *unprotected and led to an ectopic pregnancy* as a result of respondent's *misrepresentation.*"[137] The *Barbara A.* court distinguished *Stephen K.* as seeking damages for the wrongful birth of a child, whereas there was no child in the case before it and instead the plaintiff was seeking damages for physical harm arising out of an ectopic pregnancy.[138]

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of which she complains is Atkinson's breach of a promise to impregnate her . . . .").

130. *Id.* at 405. The court noted that under California Civil Code section 43-4, "[i]f no cause of action can exist in tort for a fraudulent promise to fulfill the rights, duties and obligations of a marriage relationship, then logically no cause of action can exist for a fraudulent promise by a married man to impregnate a woman not his wife." *Id.*

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

132. Barbara A. v. John G., 193 Cal. Rptr. 422 (Cal. Ct. App. 1983).

133. *Perry*, 240 Cal. Rptr. at 404–05.

134. *Id.* at 405.

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

136. *Id.*

137. *Barbara A.*, 193 Cal. Rptr. at 428.

138. *Id.* at 429; *see also* Richard P. v. Superior Court, 249 Cal. Rptr. 246, 249–50 (Cal. Ct.

Without doubt, anti-heartbalm statutes were designed to reach at least some claims that were premised upon deceitful conduct. Actions for seduction and breach of promise to marry are, at bottom, often founded on deceit—the consent to sexual conduct in reliance upon claims of undying love and future marriage or some other tangible or intangible benefit.[139] The enactment of the anti-heartbalm statutes was a function not just of the decreasing stigma of the non-marital state but also of an effort to curb the abuses of the torts of criminal conversation and breach of promise. These torts generally can be categorized as simply the broken pieces of a romance that died, or the consequences of poor character judgment where the harm distills down to hurt feelings or embarrassment—situations squarely within the ambit of claims the statutes targeted. Thus, despite the broad reach sometimes given by some courts, the focus of the anti-heartbalm statutes was principally on removing judicial protection from hurt feelings in a romantic relationship.[140]

Cases involving misrepresentation of fertility or the use of birth control, however, are not concerned with disgruntlement at a relationship that may have soured or the trampling of tender feelings or even with questions of morality. Rather, the harm is centered on the creation of unavoidable lifetime legal and personal obligations without consent and in direct contravention of express representations. Centering refusal to entertain *any* claim that is birthed by a romantic or sexual relationship to the existence of anti-heartbalm statutes would seem to be misplaced. Misrepresentation of fertility claims only tangentially touch issues of seduction or inducements to intercourse. The complaint is not that intercourse would not have occurred, but that it would not have occurred without contraception—a very different issue. Despite the facial appeal of using anti-heartbalm statutes as a convenient vehicle to deny misrepresentation of fertility claims, it is questionable whether they were designed to extend to claims of this

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App. 1988) (distinguishing cases permitting fraud actions to be maintained based on misrepresentations of sterility, finding that those cases involved claims of physical damage and no potential for harm to innocent children).

139. *See, e.g.*, *Barbara A.*, 193 Cal. Rptr. at 427 (discussing the old action for seduction, which involved illicit intercourse through "arts, persuasions, or wiles 'to overcome the resistance of a female who is not disposed of her own volition to step aside from the paths of virtue'" (*citing* Davis v. Stroud, 52 Cal. App. 2d 308, 317 (1942))).

140. *See* Conley v. Romeri, 806 N.E.2d 933, 939 n.5 (Mass. App. Ct. 2004) (noting that "amatory torts (seduction, alienation of affection, and criminal conversation) have been abolished" and that "public policy no longer considers money damages appropriate for what is perceived as only an ordinary broken heart" (citing Quinn v. Walsh, 49 Mass. App. Ct. 696, 701–02 & nn.8, 9 (2000))).

sort.

2. *The Parental Support Obligation and Paternity*

Although some jurisdictions found state anti-heartbalm statutes dispositive, others gave cursory, if any, acknowledgement to any similarities with the old common law claims, thus avoiding inquiry into the impact of anti-heartbalm legislation.[141] These courts chose instead to rest their decisions to permit or deny a claim based on misrepresentations of fertility in statements of public policy and placed a particular emphasis on the policies behind paternity and child support statutes.[142] In *Wallis v. Smith*,[143] for example, the New Mexico court, in rejecting the father's claim against the mother for damages arising out of her false representation that she was using birth control, held that the claim simply was not cognizable regardless of the theory asserted.[144] "[W]e elect to rely primarily on the prevailing public policy of child support, while at the same time recognizing the serious privacy concerns implicated and threatened by the underlying lawsuit."[145] A similar conclusion was reached in *Welzenbach v. Powers*, where the court held that the injuries alleged by the plaintiff father as a result of misrepresentations regarding contraceptive use were

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141. *See, e.g.*, Inez M. v. Nathan G., 451 N.Y.S.2d 607, 611 (N.Y. Fam. Ct. 1982). ("The cause of action of fraud and deceit within the context of a paternity proceeding may well suffer from the very same problems that impelled legislative abolition of causes of action 'based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry.'").

142. *See* Beard v. Skipper, 451 N.W.2d 614, 615 (Mich. Ct. App. 1990) (asserting the inability of a father to use misrepresentation by a mother of contraceptive use as a defense to support obligation); Faske v. Bonnano, 357 N.W.2d 860, 861 (Mich. Ct. App. 1984) (finding a parental obligation of support notwithstanding the circumstances of conception); Welzenbach v Powers, 660 A.2d 1133, 1136 (N.H. 1995) (holding that public policy barred actions by a father of reliance on a mother's assurances of contraceptive use). The court in *Tharp v. Black*, No. C036767, 2001 WL 1380406, at *5 (Cal. Ct. App. Nov. 7, 2001), an unpublished California decision, stated that "public policy considerations weigh against allowing the sort of damages plaintiff claims here" noting that payment of damages would reduce one parent's ability to support the child and expressing concern that such actions "could be emotionally unhealthy to the children should they come to understand they were the damages claimed in their mother's suit against their father." *Id.* at 5. Of course, any litigation including debtor-creditor litigation threatens the ability of the person sued to support his or her child. Since there is no immunity from litigation based on the status of being a parent, this argument lacks credibility standing alone.

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

144. *Id.* at 683. The father alleged causes of action for fraud, breach of contract, conversion and "prima facie tort." *Id.*

145. *Id.* at 685 (citation omitted). The court was concerned about the constitutional implications created by the privacy issues and found it unnecessary to reach them in the case before it. *Id.* at 685 n.1.

simply not actionable:

> Some risks exist without the benefit of a legal remedy. To permit the plaintiff to proceed *on the facts of this case* would ignore strong public policy considerations unfavorable to him, lay the groundwork for the extension of such claims in the area of interspousal torts, ignore rights of privacy in constitutionally protected areas of 'marriage, family and sex,' . . . and invite the courts into the bedroom . . . .[146]

There has been universal rejection of affirmative defenses or counterclaims alleging fraud in paternity or support actions.[147] In *Linda D. v. Fritz C.*, for example, the court considered whether allegations of misrepresentation of birth control had any relevance in the context of paternity actions.[148] The court suggested that the claim might be viable in a separate action unrelated to the Uniform Parentage Act issues currently before it, but concluded that fault had no place in the determination of parentage or child support.[149] A Minnesota court in *Murphy v. Myers*[150] noted that the function of a paternity action was to establish the paternity of a child and impose a duty of support obligation upon both parents, thereby preventing the child from becoming a charge of the state.[151]

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146. Welzenbach v. Powers, 660 A.2d 1130, 1136 (N.H. 1995) (citations omitted).

147. *See, e.g.*, Erwin L.D. v. Myla Jean L., 847 S.W.2d 45, 47 (Ark. Ct. App. 1993) (holding that birth control fraud by mother would not bar action for paternity); *Beard*, 451 N.W.2d at 615 (holding that the fraud of mother could not be used to mitigate amount of support paid by father); Murphy v. Myers, 560 N.W.2d 752, 756 (Minn. Ct. App. 1997) (holding that fraud and misrepresentation were barred as defenses in paternity or child support action); Linda D. v. Fritz C., 687 P.2d 223, 227 (Wash. App. 1984) (noting that the father's claims for misrepresentation by the mother were irrelevant to determination of child support in paternity action under Uniform Parentage Act). The court in *Inez M.* also considered whether defendant's fraud claim would survive outside the context of paternity proceedings. Inez M. v. Nathan G., 451 N.Y.S.2d 607, 611 (N.Y. Fam. Ct. 1982). That court noted that New York had adopted an expansive view of actionable fraud, but defendant had failed to sufficiently introduce evidence to prove a misrepresentation. *Id.* at 612. Although the court did appear to consider the substantive merits of defendant's fraud claim it is unclear whether, given the context in which it was presented, relief would have been afforded had defendant's proof been sufficient. *Id.* at 608–09.

148. *Linda D.*, 687 P.2d at 223.

149. *Id.* at 229; *see also* Moorman v. Walker, 773 P.2d 887, 888 (Wash. Ct. App. 1989) ("'Procedurally and technically' Moorman's claim is 'separate and apart from any issue of either parent's obligation to raise and support the child.'") (citations omitted).

150. *Murphy*, 560 N.W.2d at 752.

151. *Id.* at 754. The Minnesota court in *Murphy* held:

> In addition to issues of monetary support, a child has unique interests in the establishment of paternity for the purpose of securing legal rights such as inheritance, medical support, the ability to bring certain causes of action . . . workers' compensation dependent's allowances, and veterans' education benefits.

Id. (citation omitted).

As a consequence, paternity actions seeking support determinations focused on those factors related to the needs of the child and the financial position of the parents.[152] Since the obligation was owed to the child, not to the mother, fault in conception was irrelevant either to the threshold question of paternity or the amount of support.[153] Courts expressed concern that permitting one parent to recover the costs of statutory child support from the other would defeat the purposes of the support statutes.[154] The court in *Barbara A.*, in distinguishing the earlier California decision in *Stephen K.*, noted that in cases where a child had been born, permitting damages for maternal misrepresentations "would have the practical effect of reducing or eliminating support from the father by way of offset . . . clearly against public policy and the statutory mandate."[155] Concern was also expressed about the potential for such a defense to create a sub-class of children, effectively undermining Supreme Court jurisprudence establishing the equal protection rights of illegitimate children.[156]

The sole case holding that the mother's misconduct should impact a child support award was reversed on appeal.[157] In *Pamela P. v. Frank*

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152. *See, e.g.*, *Linda D.*, 687 P.2d at 226 (going over the statute that provides the factors courts consider when calculating financial support). Child support statutes typically list factors to be considered by the court in assessing support including income, the needs of the child, and related matters. *See, e.g.*, Murray & Winslet, *supra* note 9, at 830 (listing the various factors courts should consider in determining support payments).

153. *Linda D.*, 687 P.2d at 223; *see also* Erwin L.D. v. Myla Jean L., 847 S.W.2d 45, 48 (Ark. Ct. App. 1993) ("To permit this defense [of birth control fraud], as one that assigns fault for conception, would result in the denial of support to innocent children whom the law was designed to protect."); Faske v. Bonanno, 357 N.W.2d 860, 861 (Mich. Ct. App. 1984) ("Parents have an obligation to support their children and the circumstances of a child's conception do not give rise to an exception to that rule."); L. Pamela P. v. Frank S., 449 N.E.2d 713, 715 (N.Y 1983) (holding that the child support statute does not permit consideration of wrongful conduct of parent as a defense to avoid such support), *rev'g* Pamela P. v. Frank S., 443 N.Y.S.2d 343 (N.Y. Fam. Ct. 1981).

154. *See* Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 245–46 (N.Y. Sup. Ct. 1985) (finding that child support statutes impose support obligations regardless of fault and that it consequently would be against public policy to allow avoidance of those support payments based on claims of fraud); *see also* Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620 (Cal. Ct. App. 1980) (finding it inappropriate for the court to intrude upon such a private matter).

155. Barbara A. v. John G., 193 Cal. Rptr. 422, 429 (Cal. Ct. App. 1980).

156. Inez M. v. Nathan G., 451 N.Y.S.2d 607, 609 (N.Y. Fam. Ct. 1982) ("Manifestly, the instant defense would create a new and inferior category of out-of-wedlock child based upon the circumstances of conception and would subordinate the constitutional rights and other interests of the child to those of one of the parents."); *see also* Wallis v. Smith, 22 P.3d 682, 684 (N.M. Ct. App. 2001) (expressing concern over the emotional well-being of the children should they learn that their mother claimed them as damages in a lawsuit); Tharp v. Black, No. C036767, 2001 WL 1380406, at *5 (Cal. Ct. App. Nov. 7, 2001) (upholding a child's best interests regardless of the circumstances surrounding conception).

157. Pamela P. v. Frank S., 443 N.Y.S.2d 343, 348 (N.Y. Fam.Ct. 1981), *rev'd sub nom.* L.

S., the New York Family Court held that equity required the court to read an exception onto the paternity statutes in light of the mother's intentional deception regarding her use of contraception.[158] "Petitioner's planned and intentional deceit bars her, in this court's opinion, from financial benefit at respondent's expense."[159] In light of the need to ensure that the child was adequately provided for, the court was unwilling to absolve the father from all responsibility despite the mother's misconduct.[160] Nonetheless, the family court believed that her deceit appropriately factored into any support award, holding that the father would not be required to pay support unless and until the mother's means were insufficient to meet the child's needs.[161] In reversing, the New York Appellate Court held that absent statutory language to the contrary, the court could not consider alleged parental misconduct relating to the sexual intimacies surrounding conception.[162]

Yet even beyond the strictures of paternity actions, courts were equally reluctant to permit paternal misrepresentation of fertility claims to proceed.[163] Parental support remained a recurring theme in tort actions outside the family court system, with courts expressing little hesitation in concluding that tort law should not provide a forum for efforts to avoid parental responsibility. Reflected in these opinions is a sense that something is not quite right about a lawsuit by a father against a mother for what in essence is the birth of a child.[164] Claims for damages by the putative father, regardless of whether they were cast as non-support-related, were viewed as simply a subterfuge to recover support payments.[165] In *Wallis*, for example, the plaintiff sought to recover for the economic injury he suffered due to the birth of the child but the court interpreted the plaintiff's complaint as an effort to

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Pamela P. v. Frank S. 449 N.E.2d 713 (N.Y. 1983).

158. *Pamela P.*, 443 N.Y.S.2d at 345 (noting that "courts have grafted some exceptions onto the [support] statutes").

159. *Id.* at 346. The court also considered whether the father's constitutional right to procreate would be impaired by entry of a support order in these circumstances, finding it would raise "Constitutional doubt." *Id.* at 347.

160. *Id.* at 348.

161. *Id.*

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

163. *See, e.g.*, Welzenbach v. Powers, 660 A.2d 1133, 1136 (N.H. 1995) (rejecting plaintiff's claim of misrepresentation for public policy reasons).

164. *See, e.g.*, Inez M. v. Nathan G., 451 N.Y.S.2d 607, 611 (N.Y. Fam. Ct. 1982) (commenting that fraud is sometimes subordinated to interest in the family unit as a matter of public policy and stating that although "the law abhors fraud and deceit . . . the law affords primacy to our society's profound commitment to the family and the child even when the *particeps criminis* is a member of the protected entity").

165. Wallis v. Smith, 22 P.3d 682, 683–84 (N.M. Ct. App. 2001).

circumvent his statutory child support obligations.[166] "In our view, it is difficult to harmonize the legislative concern for the child, reflected in the immutable duty of parental support [reflected in the New Mexico child support statutes], with Wallis's effort in this lawsuit to shift financial responsibility for his child solely to the mother."[167] Accordingly, the policies that were used to reject affirmative defenses of fraud in paternity and child custody and support cases were used to deny similar claims in the civil tort action.[168]

3. Failure to State a Claim for Fraud

Courts have also found claims for misrepresentation of fertility or contraceptive use to be fatally flawed for failure to state a claim for relief. These courts, in analyzing the sufficiency of the pleadings to state claims for fraud, principally focused on the element of justifiable reliance and the ability of the plaintiff to plead and prove damages.[169]

a. Failure to allege justifiable reliance

The courts disagree on whether a party to a sexual relationship can ever justifiably rely upon representations of fertility by the other partner.[170] Some have baldly stated that reliance upon assertions of contraceptive use can never be justifiable.[171] Inextricably tied to that conclusion is a basic policy determination that each partner to a sexual relationship is *always* responsible for taking their own contraceptive precautions—neither will be permitted to shift that burden to the other

166. *Id.*

167. *Id.* at 684.

168. *See, e.g.*, Tharp v. Black, No. C036767, 2001 WL 1380406, at *1 (Cal. Ct. App. Nov. 7, 2001) (denying a plaintiff's claims for reasons of public policy); *Welzenbach*, 660 A.2d at 1136 (refusing to extend tort liability for public policy reasons); *Wallis*, 22 P.3d at 686 (denying a tort claim). Cases such as these reflect the significance accorded to the support obligation, even outside of family court.

169. "The essential elements of a fraud action are (1) material misrepresentation of existing fact; (2) scienter; (3) reliance; and (4) causation." Alice D. v. William M., 450 N.Y.S.2d 350, 354 (N.Y. Civ. Ct. 1982).

170. *But see* Inez M. v. Nathan G., 451 N.Y.S.2d 607, 612 (N.Y. Fam. Ct. 1982) (holding that a father in a paternity action failed to prove fraud or deceit by the mother without considering policy arguments).

171. Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Cal. Ct. App. 1980) ("Claims such as those presented by plaintiff . . . arise from conduct so intensely private that the courts should not be asked to nor attempt to resolve such claims."); *Welzenbach*, 660 A.2d at 1136 (stating that "[t]o permit such actions . . . flies in the face of all reason"); C.A.M. v. R.A.W., 568 A.2d 556, 560 (N.J. Super. Ct. App. Div. 1990) (quoting Richard P. 249 Cal. Rptr. 246, 249 (Cal. Ct. App. 1988) as stating "the subject matter of the action, however, is not one in which it is appropriate for the courts to intervene").

partner.[172] In *Jose F. v. Pat M.*,[173] the court declined to permit a claim seeking recovery for misrepresentation of fertility concluding that as a matter of policy, neither plaintiff's fraud claim nor his claim for emotional distress was cognizable: "We will not allow a cause of action which rewards a party for his irresponsibilities and encourages a disturbing curtailment of the right to privacy."[174] Other courts have either directly found that reliance was justified or, by virtue of allowing recovery, acknowledged that personal relationships can engender the trust necessary for justifiable reliance.[175] The trial court in *Welzenbach v. Powers* "conditionally" found that the plaintiff had alleged the requisite elements for a misrepresentation claim, but nonetheless concluded that public policy precluded the extension of tort liability against a sexual partner arising out of the birth of a child.[176]

The court in *Alice D. v. William M.*,[177] in permitting a claim by the *mother* for *paternal* misrepresentations, found that the plaintiff had justifiably relied on her partner's representations that he was sterile stating:

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172. *Wallis*, 22 P.3d at 685 (noting that plaintiff father could have taken his own contraceptive precautions).

173. Jose F. v. Pat M., 586 N.Y.S.2d 734 (N.Y. Sup. Ct. 1992).

174. *Id.* at 736; *see also* Moorman v. Walker, 773 P.2d 887, 889 (Wash. Ct. App. 1989) ("[T]he moral responsibility for creating a human life is not voidable as if sex were a simple contractual transaction. We can no more recognize a lawsuit which trivializes the responsibility for consensual sex than we can one which trivializes life itself.").

175. *But see* Conley v. Romeri, 806 N.E.2d 933, 936 (Mass. App. Ct. 2004) (stating that the plaintiff had failed to allege negligent infliction of emotional distress arising out of misrepresentation that defendant could father children, where the plaintiff alleged existence of duty of honesty but could not "identify any legally cognizable duty between parties in a dating relationship, nor [was the court] aware of any legally defined duty applicable in these circumstances"). Prior scholarship also has considered whether a plaintiff can even meet the requisite elements of a misrepresentation of fertility claim under the traditional tort forms of fraud and deceit, and in particular the element of justifiable reliance. *See generally* J. Terrell Mann, *Misrepresentation of Sterility or of Use of Birth Control*, 26 J. FAM. L. 623 (1988) (exploring the various tort theories of liability pursued in cases of misrepresentation of use of birth control or infertility); Sarah E. Rudolph, *Inequities in the Current Judicial Analysis of Misrepresentation of Fertility Claims*, 1989 U. CHI. LEGAL F. 331 (1989) (analyzing the different treatment men and women receive from courts in cases of misrepresentation regarding contraception use and fertility); Anne M. Payne, Annotation, *Sexual Partner's Tort Liability To Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R.5TH 301 (1992) (discussing cases of misrepresentation). The viability of claims sounding in negligence, emotional distress or perhaps breach of contract has also been considered.

176. *Welzenbach*, 660 A.2d at 1136; *see also C.A.M.*, 568 A.2d at 560 (quoting *Richard P.*, 249 Cal. Rptr. at 249 as stating, "[w]e agree with real parties in interest that they have alleged words which normally would suffice to state tort causes of action for fraud and intentional infliction of emotional distress").

177. Alice D. v. William M., 450 N.Y.S.2d 350 (N.Y. Civ. Ct. 1982).

> Considering such factors as the length of time the parties had known one another, the regularity with which they saw each other, the degree of intimacy between them and the seriousness to the claimant of the issue of birth control and of an unwanted pregnancy, I hold that she was entitled to trust the defendant's statement.[178]

Inquiry into the length and circumstances of a relationship in order to assess whether there were sufficient indicia to support justifiable reliance is neither untoward nor unusual.[179] Although less compelling in instances of casual sex, established relationships include trust as a primary component, so that one partner presumably is justified in relying on representations made by the other as it relates to intimate aspects. A policy mandating that reliance on representations of contraceptive use is never justified is significantly more intrusive into a relationship.

b. The damage dilemma (Part I)—the birth of a healthy child

In some cases, courts have concluded that as a matter of law the plaintiff failed to allege damages—a necessary element for fraud—a conclusion that hinges on the extent to which damages are defined as the birth of a child.[180] Many courts implicitly or explicitly adopted the presumption that has consistently threaded through wrongful birth cases—that the birth of a healthy child is not a cognizable injury.[181] This presumption is premised on the theory that a child (and life) is a benefit and brings joy to the parents, outweighing any burdens that might result.[182] As a result, neither parent could have suffered injury or

178. *Id.* at 354. Indeed, the *Alice D.* court noted that its conclusion might have been different had those factors not been present. *Id.* Although the court found that the plaintiff had justifiably relied on the defendant's misrepresentations, it also found that she had failed to prove the defendant possessed the scienter necessary to support a fraud claim and imposed liability based on negligent misrepresentation. *Id.* at 354–55.

179. Even decisions dismissing paternal claims have nonetheless admitted that the claim did not fail for lack of sufficiency of the reliance element. Richard P. v. Superior Court, 249 Cal. Rptr. 246, 249 (Cal. Ct. App. 1988). *But see Conley,* 806 N.E.2d at 935–37 (involving misrepresentations by a man that he was fertile when in fact he had had a vasectomy, the court declined to consider the plaintiff's fraud claim because there were no standards against which to assess the materiality of his representation).

180. *See, e.g., C.A.M.*, 568 A.2d at 563 (rejecting plaintiff's claim for damages on the basis of her child).

181. Hartke v. McKelway, 707 F.2d 1544, 1557 (D.C. Cir. 1983); Wilczynski v. Goodman, 391 N.E.2d 479, 488 (Ill. App. Ct. 1979); Thibeault v. Larson, 666 A.3d 112, 115 (Me. 1995); *C.A.M.*, 568 A.2d at 563; Szekeres v. Robinson, 715 P.2d 1076, 1077 (Nev. 1986). *But see* Lovelace Med. Ctr v. Mendez, 805 P.2d 603, 614 (N.M. 1991) (allowing recovery for emotional pain and suffering during pregnancy); Zehr v. Haugen, 871 P.2d 1006, 1013 (Or. 1994) (permitting recovery for healthy child when physician failed to sterilize mother); Marciniak v. Lundborg, 450 N.W.2d 243, 249 (Wisc. 1990) (involving negligent sterilization by physician).

182. "It rests also upon the requirement of considering, in addition to the benefits provided by

damages by the birth of a healthy child, regardless of the circumstances surrounding conception, with any effort to attach a value considered inherently speculative.[183] "A child is born—how can it be said within the ambit of legal predictability that the monetary cost of that life is worth more that its value?"[184]

These courts have also expressed concern about the social impact of permitting such a claim, pointing to the emotional effect on the child and the family of this type of litigation.[185] Courts were unwilling to encourage the "unseemly spectacle of parents disparaging the 'value' of their children or the degree of their affection for them in open court."[186]

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the child, the avoidable consequences or mitigation of damages rule, which would implicate the controversial and emotionally charged issue of whether the mother should have secured an abortion or placed the child for adoption." 2 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 12:5 (3d ed. 1997).

183. *See, e.g.*, Schork v. Huber, 648 S.W.2d 861 (Ky. 1983) (finding the injury too speculative and remote from plaintiff's claim of negligence).

184. Moorman v. Walker, 773 P.2d 887, 889 (Wash. Ct. App. 1989) (citing McKernan v. Aasheim, 687 P.2d 850, 855 (Wash. 1984)).

185. *See, e.g.*, Richard P. v. Superior Court, 249 Cal. Rptr. 246, 249 (Cal. Ct. App. 1988) (displaying concern over the effects that family litigations would have on a child). *Richard P.* was an action for fraud and emotional distress against a man who had an affair with a married woman and fathered two of the children born during the marriage. *Id.* at 248. The California court held that although the husband may have been wronged, "[w]e conclude here that any wrong which has occurred as a result of Richard's actions is not one which can be redressed in a tort action." *Id.* at 249. The court found it unnecessary to determine whether the anti-heartbalm statutes precluded the husband's claims, grounding its decision in public policy. *Id.* It stated that "the innocent children here may suffer significant harm from having their family involved in litigation such as this and . . . this is exactly the type of lawsuit which, if allowed to proceed, might result in more social damage than will occur if the courts decline to intervene." *Id.* at 249; *see also* Steve H. v. Wendy S., 67 Cal. Rptr. 2d 90 (Cal. Ct. App. 1997) (rejecting a former spouse's claims for public policy reasons and out of concern for the child). The court in *Barbara A. v. John G.* made the following observation:

> [W]e think it is not sound social policy to allow one parent to sue the other over the wrongful birth of their child. Using the child as the damage element in a tortious claim of one parent against the other could seldom, if ever, result in benefit to a child. Such a lawsuit would indeed be strong evidence of parental rejection, which could only be emotionally detrimental to the child. Such an action, with its potential for engendering disharmony between a mother and father, would also be contrary to the spirit of the recent legislation providing for mediation between parents in order to reduce acrimony.

Barbara A. v. John G., 193 Cal. Rptr. 422, 429 (Cal. Ct. App. 1983).

186. *Moorman*, 773 P.2d at 889 (citing *McKernan*, 687 P.2d at 855). The perceived emotional harm to the child as a basis for disallowing recovery lacks credibility in cases where the parents are unmarried and the action is based on fraud and deceit. In such cases, it is unlikely that the child will be unaware of the animosity between the parents or the circumstances surrounding his or her conception. This legal fiction of happy parenting and joyful birth is not grounded in the reality of the situation. It is, however, consistent in its focus on the interest of the child and the child's welfare as predominant. This policy is probably best reflected by the adamant statement in *Moorman v. Walker* that the court "simply will not collaborate in conduct that disparages an innocent child." *Id. But see* Taber, *supra* note 6, at 419 (stating "[i]f a child can handle the distress of discovering in the course of a suit against a physician that her parents

These reasons, perhaps colored by the parental support obligation mandated by the state, led courts to refuse as a matter of policy to permit those expenses to be shifted even when the harm resulted from the actions of a third party.[187] The court in *C.A.M. v. R.A.W.* commented on the inequity of permitting parents to shift the expenses of child rearing to a third party, while retaining all of the benefits:

> Every child's smile, every bond of love and affection, every reason for parental pride in a child's achievements, every contribution by the child to the welfare and well-being of the family and parents, is to remain with the mother and father. . . . On the other hand, every financial cost or detriment—what the complaint terms "hard money damages" including the cost of food, clothing and education, would be shifted to the physician who allegedly failed to timely diagnose the fact of pregnancy.[188]

C.A.M. also raised the troubling question of the extent to which mitigation of damages principles would be applicable to claims alleging misrepresentations involving contraception or fertility.[189] The court commented that mitigation principles were equally applicable in tort, as well as contract, actions and that one defense in an action by one parent against the other might be the failure to abort:

> We recognize there are a variety of reasons why a woman may decide not to undergo an abortion. However, we question whether a plaintiff in a tort action for the wrongful birth of a normal, healthy child may decide to have the child and then look to defendant for damages.[190]

The potential that such a defense might be viable buttressed the court's conclusion that public policy precluded claims of this sort.[191]

To the extent that recovery has been permitted, it has historically been limited to those damages immediately related to the expenses of childbirth.[192] In *Smith v. Gore*,[193] for example, a medical malpractice action against a physician for a failed tubal ligation, the plaintiff also

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did not intend her to be born, she can also manage the same information when the suit is brought by her mother against her father").

187. *See* Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 617 nn.1–2 (N.M. 1991) (listing the jurisdictions and a few of the corresponding cases that refuse to shift liability).

188. C.A.M. v. R.A.W., 568 A.2d 556, 561 n.8 (citing P. v. Portadin, 432 A.2d 556, 559 (N.J. Super. Ct. App. Div. 1981)).

189. *Id.* at 562–63.

190. *Id.* at 562.

191. *Id.* at 563.

192. *See, e.g., id.* at 563 (analyzing the limited costs courts should consider for damages); Emerson v. Magendantz, 689 A.2d 409, 411 (R.I. 1997) (discussing different measures of damages for birth of healthy child as a result of negligent sterilization and treatment by other jurisdictions).

193. Smith v. Gore, 728 S.W.2d 738, 740, 751 (Tenn. 1987).

sought to recover expenses associated with raising the child, in addition to damages for emotional distress and the expenses of childbirth. The Tennessee Supreme Court affirmed an appellate court ruling limiting recoverable damages to those immediately related to the pregnancy and birth.[194] The court found that existing child support statutes demonstrated that the state placed the obligation for support upon the parents and that the parents could not shift this obligation to a third party: "Significant and far-reaching questions of social policy are involved, 'and it is the prerogative of the General Assembly to declare the policy of the State touching on the general welfare.'"[195] Looking at plaintiff's claim as an ordinary tort claim sounding in negligence the court held that as a matter of policy, plaintiff was unable to establish proximate, or legal, causation for child-rearing expenses.[196]

This stance may be shifting. In *Lovelace Medical Center v. Mendez,* a medical malpractice case alleging negligent sterilization, the court held that there were two harms suffered by the plaintiffs due to the physician's negligence.[197] First, Mrs. Mendez remained fertile and second, the couple's desire to limit their family size—and associated financial burden—was frustrated.[198] After concluding that the plaintiffs had suffered harm within the restatement definition, the court then questioned whether it was "legally compensable—*i.e.,* an injury, an invasion of a legally protected interest?"[199] Citing the Second Restatement of Torts, the court noted:

> Harm, like injury, is not necessarily actionable. Both, to be actionable, must be legally caused by the tortious conduct of another. In addition, harm, which is merely personal loss or detriment, gives rise to a cause of action only when it results from the invasion of a legally protected interest, which is to say an injury.[200]

Thus, the *Lovelace* court easily found that Mrs. Mendez's personal interest in her physical condition as well as the couple's interest in financial security and economic stability were legally protected interests, the invasion of which was compensable.[201]

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194. *Id.* at 751–52.

195. *Id.* at 751.

196. *Id.*

197. Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 610 (N.M. 1991).

198. *Id.*

199. *Id.*

200. *Id.* at 610 (citing RESTATEMENT (SECOND) OF TORTS § 7 cmt. a, b, d (1965)).

201. *Id.* at 611; *see also* Burns v. Hanson, 734 A.2d 964, 974 (Conn. 1998) (finding plaintiff's claims of harm from defendant's negligence compensable); Marciniak v. Lundborg, 450 N.W.2d 243, 246 (Wis. 1990) (discussing the damages requested by plaintiffs); Ochs v. Borrelli, 445 A.2d 883, 886 (Conn. 1982) (holding that plaintiff's medical expenses qualified as damages).

The *Lovelace* court also found that the defendant's negligence had compromised the plaintiffs' constitutionally protected right to decide whether and when to procreate.[202] The court agreed with the finding by the Connecticut Supreme Court in *Ochs v. Borrelli*,[203] also a negligent sterilization case, that to preclude recovery for all damages caused by a tortfeasor, including ordinary costs of child rearing, would improperly burden the exercise of a constitutionally protected right to "employ contraceptive techniques to limit the size of [one's] family."[204] The court in *Lovelace*, however, expressed concern about how to measure damages from the invasion of this interest beyond those already reflected in the economic costs associated with child birth and rearing, and recast the inquiry as to what other additional damages were available for injuries of this type.[205]

The *Lovelace* court obviously struggled with the prevailing concept that the plaintiffs could have suffered no damages in light of the birth of a healthy child. Over the past twenty years, courts have embraced this struggle and have begun to question the characterization of "harm" in wrongful birth cases, arguing that there is a distinction between an "injury," which is the invasion of a legally protected interest, and "harm," which is the loss or detriment as a result of that injury.[206] Jurisdictions following this path are still in the minority; most jurisdictions continue to adhere to the "no recovery" rule for the ordinary expenses of rearing a healthy child.[207] Indeed the New Mexico court in *Wallis* refused to extend *Lovelace* to misrepresentation

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202. *Lovelace*, 805 P.2d at 613.

203. *Ochs*, 445 A.2d at 885.

204. *Lovelace*, 805 P.2d at 612 (quoting *Ochs*, 445 A.2d at 885). The Connecticut court clarified *Ochs* in *Burns v. Hanson*, explaining that although *Ochs* involved a claim for damages associated with rearing a disabled child, the rule adopted in *Ochs* applied equally in cases where the defendant's negligence resulted in the birth of a healthy child. *Burns*, 734 A.2d at 968–70.

205. *Lovelace*, 805 P.2d at 613.

206. *See Lovelace*, 805 P.2d at 609 (discussing damages). That court stated:

> Given that a tort has occurred (the doctor's negligence in performing the sterilization operation and failing to inform the mother of the unsuccessful outcome) and given that an injury has resulted from this tort (the mother's continued fertility, despite her desire and effort to be sterilized), what is the measure of damages to compensate her for the injury she has suffered?

Id.

207. *See Lovelace*, 805 P.2d at 617 & n.1 (listing jurisdictions which adhere to the "no recovery" rule but noting that many of the decisions cited "include strong dissents from one or more judges criticizing the rationale of the majority and urging the adoption of a different rule"). Judge Alarid, writing for the appellate court and whose opinion was reproduced in the Appendix in *Lovelace*, also listed jurisdictions where some recovery was allowed for child-rearing expenses but with an offset for the emotional benefits of parenthood. *Id.* at 617 n.1. Judge Alarid also lists jurisdictions with dissents who urge the adoption of the offsets rule. *Id.* at 617 n.2.

of fertility claims, distinguishing *Lovelace* on the basis that it did not involve inter-parental liability but the fault of a third party: "Therefore, *Lovelace* does not implicate the public policy of individual responsibility and liability illustrated in the UPA and our child support statutes."[208]

Lovelace does, however, indicate that the view that the birth of a child is a benefit that will always outweigh any inconvenience in family circumstances is beginning to erode. This departure from damages related to the immediate expenses of childbirth[209] signals a common-sense exception and an implicit acknowledgement that rules created to ensure the financial well being of a child and meant to govern the behavior of the immediate participants are not transferable to an independent third party. Certainly, the argument that the damage question has been miscast is equally relevant in misrepresentation of fertility cases. Whether the claim sounds in negligence or fraud, the interest invaded is virtually identical to the interest invaded in negligent sterilization cases. It may also include an interest in informed consent similar to that found in the sexual disease cases and premised upon the trust implicit in intimate relations—that there will be full disclosure of disease or status prior to engaging in sexual activity.

c. The damage dilemma (Part II)—beyond child support

The issue of damages is broader, however, than simply the ordinary expenses of childbearing or support obligations. Such a limited focus wholly ignores non-support related damages. Setting aside whether support obligations can or should be avoidable, damages in misrepresentation of fertility cases include allegations of emotional trauma resulting from the betrayal of trust and subsequent role of unwilling parent-to-be.[210] Emotional distress can result from the

208. Wallis v. Smith, 22 P.3d 682, 686 (N.M. Ct. App. 2001).

209. The birth of a deformed or unhealthy child, however, can sustain a claim for child-rearing and extraordinary medical care. *See* Greco v. United States, 893 P.2d 345, 351 (Nev. 1995) (deeming it reasonably foreseeable for a mother of a deformed child to experience emotional distress for the rest of the child's life). Many state statutes provide for recovery of expenses related to pregnancy and childbirth in filiation proceedings against the putative father. *See* Alice D. v. William M., 450 N.Y.S.2d 350, 353 (N.Y. Civ. Ct. 1982) (determining the purpose of a filiation proceeding).

210. Indeed, the Court in *Roe v. Wade* identified a litany of "harms" that a pregnant woman might suffer as a result of pregnancy beyond the physical impact of her condition. Roe v. Wade, 410 U.S. 113, 153 (1973).

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by childcare. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already

uncertainty of parental status pending termination of a pregnancy through miscarriage or abortion, the related parenting obligations foisted upon the victimized party beyond the support obligations or the various social censures that may accompany unwed parenthood.[211] Notably, when the defrauded party is a woman, these emotional costs may become compensable damage items as do other expenses related to the physical toll of pregnancy and/or abortion—damages considered personal to her.[212] The court in *Alice D.* held that the plaintiff was entitled to recover those damages that would return her to the same position she would have been in if she were not pregnant.[213] The court awarded damages that included the cost of the abortion and accompanying transportation expenses as well as lost wages and, more significantly, the pain and suffering she claimed resulted from having become pregnant and then having an abortion.[214]

> If her distress was attributable to her emotional upset from the pregnancy and abortion, and not from external causes, damages therefor [sic] may be awarded. I believe that she suffered considerably as a result of facing the trauma of an unwanted pregnancy. Emotional distress is clearly a foreseeable and proximate consequence of an unwanted pregnancy that has been aborted.[215]

Courts have not, however, accorded men similar emotions.[216]

When couched as an issue of child support, the judicial stance

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unable, psychologically and otherwise, to care for it.

Id.

211. *See, e.g.*, Welzenbach v. Powers, 660 A.2d 1133, 1134 (N.H. 1995) (stating that plaintiff sought, in addition to support costs, the cost of paternity blood tests, "medical expenses connected with psychiatric care and medicines, as well as damages for emotional distress"). Note that even in wrongful birth cases permitting recovery for the child-rearing costs, courts are unlikely to permit recovery for the emotional burdens of parenthood. *See, e.g.*, Jones v. Malinowski, 473 A.2d 429, 436 (Md. 1984) (holding that in an action for a negligent sterilization that results in a healthy childbirth, damages for child-raising costs to the age of majority can be recovered, but should potentially be offset by emotional benefits the parents have received).

212. As discussed below, emotional and physical damages are recoverable only in cases by women for paternal misrepresentations. *See* Barbara A. v. John G., 193 Cal. Rptr. 422, 430 n.10 (Cal. Ct. App. 1983) (determining that men and women can be treated differently, because they are not similarly situated in terms of the risk of pregnancy).

213. *Alice D.*, 450 N.Y.S.2d at 356.

214. *Id.* at 356–57.

215. *Id.* at 357. Although the plaintiff also sought to recover for physical changes and therapist visits allegedly connected to her pregnancy, the court found that her failure to submit adequate proof precluded any damages on those items suggesting that upon sufficient proof an award would have been appropriate. *Id.*

216. *See, e.g.*, Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620–21 (Cal. Ct. App. 1980) (refusing to bring the court into such a private matter); Jose F. v. Pat M, 586 N.Y.S.2d 734, 735–36 (N.Y. Sup. Ct. 1992) (finding that permitting a biological father's claim for intentional infliction of emotional distress went against public policy).

denying recovery in misrepresentation of fertility claims is at least facially gender neutral.[217] To the extent that the wronged party seeks to recover for monies paid in child support, whether asserted directly or indirectly, the courts have consistently denied relief regardless of the gender of the claimant.[218] Where damages sought are non-support-related, the asserted basis for differential treatment between maternal and paternal misrepresentations with respect to the element of damages turns solely on the characterization of the actual condition of pregnancy as synonymous with "physical harm," whether the woman miscarries, aborts or carries to term.[219] In *Alice D.*, for example, the plaintiff alleged that the defendant's misrepresentation that he was sterile resulted in her becoming pregnant and having an abortion.[220] With little discussion, the court made the following finding: "Under the facts in this case, it would be incredible and intolerable to state that a woman who becomes pregnant against her wishes and then aborts, has not been harmed. I hold that she has."[221] Obviously, under this reasoning, since only women can become pregnant, only women can suffer the harm requisite to maintain a claim and therefore only women would have any right to recover.[222] The father is liable for the expenses of pregnancy,[223] including the cost of abortion, as well as for a pregnancy

217. *See, e.g.*, C.A.M. v. R.A.W., 568 A.2d 556, 563 (N.J. Super. Ct. App. Div. 1990) (holding that a woman alleging misrepresentation of fertility could not recover costs of child support from the father); Wallis v. Smith, 22 P.3d 682, 686 (N.M. Ct. App. 2001) (stating that denial of claim for misrepresentation of fertility "is gender neutral insofar as it precludes monetary reimbursement for child support").

218. The California court, in the unpublished decision of *Tharp v. Black*, denied recovery to the mother for the costs of support associated with the birth and rearing of a healthy child, making no distinction in treatment between such claims whether brought by the mother or the father. Tharp v. Black, No. C036767, 2001 WL 1380406, at *4–5 (Cal. Ct. App. Nov. 7, 2001).

219. Admittedly, allowing allegations of physical harm to outweigh privacy interests is not unusual. As noted earlier, courts have frequently cast aside the right to privacy that might otherwise have shielded sexual conduct in the face of alleged threats to health, safety and welfare. *See supra* Part II (analyzing a woman's right to privacy in matters of procreation).

220. *Alice D.*, 450 N.Y.S.2d at 352. In *Alice D.*, the defendant told the plaintiff that he was sterile due to a medical condition called hydrocele although in fact, this condition does not cause sterility. *Id.*

221. *Id.* at 356. The *Barbara A.* court similarly permitted the plaintiff's claim to proceed on the basis that the plaintiff suffered an ectopic pregnancy after relying upon the defendant's misrepresentation of sterility before having unprotected sexual intercourse. Barbara A. v. John G., 193 Cal. Rptr. 422, 425 (Cal. Ct. App. 1983).

222. Under this rationale, the gender bias or distinction is at least plausible albeit still uncomfortable. It is at least consistent with the underlying assumptions of the abortion cases and the gender disparities that exist within jurisprudence.

223. In many instances child support statutes provide for recovery of the expenses of childbirth.

that may be abnormal owing to no fault of his own.[224]

However, subsumed within the "physical harm" adopted by the court in *Alice D.* is the incurrence of emotional and economic harm as well, all of which the woman becomes entitled to seek recovery for.[225] At that point, the plausibility of any gender distinction (to the extent that it is accepted as a plausible and therefore legitimate distinction) fails, because both the pregnant mother and the putative father can experience emotional and economic harm arising from the pregnancy.[226] Indeed, Donald Hubin, discussing some of the emotional accoutrements of paternity, noted that impending fatherhood caused some men to experience symptoms that mimicked pregnancy.[227] Upon recognition that harm is not limited to just the economic costs of support, these "other" costs, including emotional costs, lost wages or transportation costs, theoretically should be compensable regardless of gender. When the plaintiff is a man, however, the assumption in the case law is that these harms are derivative—they stem from the birth of the child and therefore form part of the bundle of joys that a child is presumed to bring. The claim is perceived as one for "wrongful birth" and the focus

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224. No "fault" means that the woman's unique physical characteristics create an ectopic or other condition in which the fetus cannot survive as opposed to any participatory culpability in conception.

225. *See Alice D.*, 450 N.Y.S.2d at 356 (allowing a woman to recover economic losses incurred due to abortion).

226. To the extent the emotional harm suffered by the woman is limited to distress directly related to the physical discomfort of pregnancy or abortion, then a valid distinction may still exist. In such cases, awarding damages for that narrow subset of emotional harm remains consistent with existing rationales that equate pregnancy with physical harm.

227. Hubin, *supra* note 59, at 38. Hubin writes:

> Men's concerns with their children and their status as a father often begin before the birth of the child. A surprising number of expectant fathers, "especially those who are involved in committed relationships" with the mothers, experience couvade syndrome. This set of symptoms mimics, in some ways, the experiences of pregnancy. Estimates of the frequency of couvade syndrome vary from 11% to 65% of expectant fathers.

Id.

Other scholars have made similar observations about the emotional condition of men during pregnancy. *See, e.g.*, Geoffrey P. Miller, *Custody and Couvade: The Importance of Paternal Bonding in the Law of Family Relations*, 33 IND. L. REV. 691, 692 (2000) ("In nearly all societies a significant percent of men display pregnancy-like symptoms when their mates are expecting a child—weight gain, nausea, irritability, indigestion, and so on."); Forman, *supra* note 68, at 992. Professor Forman comments on the rise in fathers seeking custody of their children, and observes that interest in parenting is prevalent even among teenage fathers, noting that "[s]tudies reveal that the majority of teen fathers remain involved with their partners . . . [and] express interest in assuming parenting responsibility, and most plan to provide support and care for their children." *Id.* at 993. Pointing to studies that looked at the negative emotional fallout experienced by unwed fathers involved in adoption proceedings, Forman posits that these studies suggest that for some men, parenting is a significant event and denial of the opportunity to parent "represents a profound loss . . . ." *Id.*

shifts from the maternal tortfeasor to the reality of a child and concentrates solely on the parental obligation of support, effectively nullifying the very real anger, hostility, resentment and emotional distress that the defrauded father may experience. Accordingly, to maintain the façade of legitimate gender bias, an even finer line must be drawn between the type of emotional harm suffered by the father as a result of the "knowledge" of the state of pregnancy and the presumably very different—and compensable—emotional harm suffered by the woman as a result of the "experience" of pregnancy. In reality, any such distinction is illusory, yet the judicial decisions make no effort to explain the inconsistency in application between maternal and paternal misrepresentation claims beyond reference to physical harm.

4. Privacy Rights and Public Policy

Cases addressing paternal claims of misrepresentation of fertility or contraceptive use also emphasize privacy rights as precluding judicial interference. These decisions reflect an unwillingness to delve into the social interaction and discourse attendant to intimate relationships.[228] Consistent with the position taken in the heartbalm cases, courts shroud the conversations, persuasions, and interchange of emotions, words, and conduct that occur in the course of relationships within a protected and expected zone of privacy.[229] The courts were disinclined to become involved in the feelings and nuances involved in romantic relations, considering this course either "unseeml[y]" as noted by the judge in *Askew v. Askew*,[230] or as simply presenting an impossible task of attempting to discern truths amid the persuasions and not technically false communications accompanying the constant shifts in power that may occur over the course of a single discussion. The California

228. *See, e.g.*, Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619–21 (Cal. Ct. App. 1980) (claiming that the state has minimal interest in the private matter of a woman misrepresenting her use of birth control to a husband, who did not want a child); Wallis v. Smith, 22 P.3d 682, 685 (N.M. Ct. App. 2001) (stating that an individual's choice of whether or not to use contraceptives falls into a zone of privacy that courts should not enter); C.A.M. v. R.A.W., 568 A.2d 556, 558 (N.J. Super. Ct. App. Div. 1990) (noting that courts have long recognized a right of privacy in matters relating to marriage, family and sex).

229. Professor Larson comments that privacy in the context of intimate relations is an oxymoron as the desire to be alone, yet with someone, means that there is no true privacy. *See* Larson, *supra* note 97, at 441–42. This protected zone includes the marital relationship, recognized in decisions such as *Griswold v. Connecticut*, 381 U.S. 479 (1965). The extension of the right of privacy to protect contraceptive decisions outside the marital relationship necessarily recognized some privacy rights attendant to nonmarital sexual relationships despite the fact that many states criminalized fornication and adulterous relationships.

230. Askew v. Askew, 28 Cal. Rptr. 2d 284, 293 (Cal. Ct. App. 1994).

appellate court in *Stephen K. v. Roni L.*[231] took just such a stand, noting that:

> Despite its legalism, [plaintiff's misrepresentation claim] is nothing more than asking the court to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct. To do so would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy.[232]

The court acknowledged that the defendant mother may have lied to the plaintiff and "betrayed the personal confidence reposed in her," but nonetheless concluded "the circumstances and the highly intimate nature of the relationship wherein the false representations may have occurred are such that the court should not define any standard of conduct therefor[e]."[233] Thus, concerns about violating the traditional right to privacy in procreative choice factor into privacy discussions, albeit playing a secondary role.[234] This right protects the autonomous individual as an entity distinct from the sexual unit and considers the protected privacy right to include the right to determine when, how and whether to procreate without unwarranted government—and therefore judicial—intrusion. By extension, any conduct that is an integral part of the procreative decision would be protected from judicial scrutiny.

Policy rationales articulated by the courts to deny paternal misrepresentation of fertility claims ultimately prove to be unsatisfactory. Judicial refuge in the alleged privacy of the sexual conduct itself has been roundly criticized as hypocritical at best.[235]

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

232. *Id.* at 620.

233. *Id.* In another case, the California court followed similar reasoning in rejecting a claim for fraudulent breach of promise to impregnate in *Perry v. Atkinson*, expressing its concern over utilizing tort law to remedy what it perceived as purely private affairs of the heart. Perry v. Atkinson, 240 Cal. Rptr. 402, 406 (Cal. Ct. App. 1987).

> The courts should not undertake the adjudication of promises and representations made by consenting adults regarding their sexual relationships. Once we attempt to determine in court, by means of tort law, the bona fides of promises such as are alleged here, we will of necessity be required to set standards for the making and performing of such promises.

Id.; *see also* Tharp v. Black, No. C036767, 2001 WL 1380406, at *5 (Cal. Ct. App. Nov. 7, 2001) (finding that the case would be governed by *Stephen K.* and the reasoning of *Barbara A.*).

234. *See, e.g.*, *Stephen K.*, 164 Cal. Rptr. at 620–21 (holding that the misrepresentation of birth control is a private matter merely representing a broken promise between two consenting adults).

235. *See, e.g.*, Murray & Winslet, *supra* note 9, at 793–94 (stating that if consensual, heterosexual conduct is granted constitutional privacy, there must be a "remedy to the injured party in these encounters where consent is lacking"); Rudolph, *supra* note 9, at 338–39 (claiming that the state is attempting to regulate beyond its police power in areas where there is no public interest).

Most note that the government frequently intrudes into private matters, depending upon the particular state interest being advanced.[236] The right to privacy has not been held inviolate and may be abrogated upon a showing of compelling state interest, with legislation permitting intrusion into private sexual conduct upheld in both civil and criminal contexts.[237] Both the legislatures and the courts have sought to regulate personal sexual preferences between consenting partners.[238] As noted above, the courts also have sanctioned inquiry into the intimate details of sexual encounters where relevant to redress the transmission of a sexually transmitted disease and have demonstrated little hesitation at diving into private sexual conduct where the woman alleges that misrepresentations of fertility by the man resulted in physical harm.[239] Those courts have expressed little concern that an inquiry into private sexual conduct would risk a judicially mandated standard of conduct against which all intimate relationships would be measured.[240] Yet, by definition, imposition of a penalty for lack of honesty and forthrightness within the confines of intimacy establishes a willingness to impose upon

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236. Murray and Winslet note:

> [I]f the court intervened on behalf of the defrauded party in the *Stephen K* situation, it would not deprive the offender of her personal choice regarding use of contraception. Thus the court would not deprive the offender of her constitutional right to privacy. Judicial intervention would simply prevent her from using fraud in the exercise of such a choice.

Murray & Winslet, *supra* note 9, at 793.

237. *See* Rudolph, *supra* note 9, at 342 ("This inconsistency makes no sense since the public policy which protects an individual from harm is applicable in both the criminal and civil contexts.").

238. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (refusing to extend constitutional protection to homosexual conduct, even though it took place between consenting adults), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). In *Bowers v. Hardwick*, the Supreme Court refused to extend constitutional protection to homosexual conduct even thought it took place between consenting adults. *Bowers*, 478 U.S. at 192–93. In reaching its holding, the Court noted that there had long been proscriptions in the law against consensual sodomy at common law and at the time the Bill of Rights was ratified by the original thirteen states. *Id.* "In fact, until 1961, all 50 States outlawed sodomy, and today 24 States and the District of Columbia continue to provide criminal penalties . . . ." *Id.* at 193. It was not until the recent decision in *Lawrence v. Texas* that the Court overruled Bowers. *Lawrence*, 539 U.S. at 578. In *Lawrence*, the Court acknowledged, among other things, that the condemnation of homosexual conduct "has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Id.* at 571. The Court held its mandate to define liberty, not impose its own moral view, and found private sexual conduct between consenting adults fell within a protected right of privacy, whether that conduct involved homosexual or heterosexual behaviors. *Id.* at 578–79.

239. As with the sexual disease cases, bedroom antics and protestations are no longer too "private" when confronted with the state interest in health, safety and welfare triggered by allegations of physical harm.

240. The courts have addressed the general right of privacy and held that it gave way to the government's overriding interest in protecting the health, safety and welfare of its citizens.

society as a whole the obligation to order behavior accordingly when acting within the sphere of the romantic unit.

Finally, reliance upon the privacy of the decision to use or not to use contraceptives as a basis for denying relief for misrepresentation of fertility claims, upheld against government intrusion in *Eisenstadt* and *Griswold,* is misplaced. The issue presented by the misrepresentation of fertility cases is not the election by the man or woman to conceive; it is the fraud perpetuated on an unsuspecting partner in order to achieve conception. Refusal to accord relief to the victimized partner through tort law effectively condones the intentional disregard by one partner of the procreative rights—the right *not* to conceive—of the other.[241] Neither *Eisenstadt* nor *Griswold* nor any of the abortion decisions suggests that exercise of a right protected under the privacy umbrella shields the actor from any and all misfeasance that implicates that right. Although the state may not interfere in the decision to conceive, or place obstacles in the path of conception, fraud remains tortious when used to facilitate the exercise of an otherwise protected constitutional right.[242] Once again, the state interest in protecting the safety and welfare of its citizens is both strong enough, and the interference minimal enough, that fraud should not be wrapped in a cocoon of constitutional right.

IV. THE IMMUNIZATION OF MATERNAL TORTS

The unarticulated premise running through judicial—and much of the academic—discussion surrounding paternal rights and obligations is that paternity is a voluntary state rendering imposition of the attendant moral, social and financial consequences just.[243] No weight or

241. *But see* Linda D. v. Fritz C., 687 P.2d 223, 228 (Wash. Ct. App. 1984) ("[The right of privacy does not] encompass[] the right of one parent to avoid a child support obligation where the other parent's choice regarding procreation is not fully respected.").

242. Consent—or lack therof—is also relevant. For example, consent to sexual conduct does not extend to consent to contract a sexually transmissible disease. Similarly consent to sexual conduct does not extend to consent to parent (absent acceptance of the assumption of the risk theories discussed *infra*). In both scenarios, the risk of "harm" is present. Without an affirmative misrepresentation or omission there is no fraud, and at best a claim for negligence. Murray and Winslet argue that:

> Courts have not applied the right to privacy to prevent a state from protecting the rights of a victim of a coerced or nonvoluntary sexual act. If the constitutional right to privacy is extended to protect consensual, heterosexual encounters, the right must not foreclose a remedy to the injured party in those encounters where consent is lacking.

Murray & Winslet, *supra* note 9, at 794.

243. *See* Totz, *supra* note 3, at 141 (arguing that the existence of presumptions surrounding sexual conduct depending upon marital state). Totz suggests that there may be procreative presumptions as to the intent to or not to procreate, which create implied contracts:

consideration is given to whether the putative father in fact sought to procreate[244] or whether representations may have been made, and relied upon, as to fertility or contraceptive use.[245] The act of sexual intercourse with a woman carries with it a risk of pregnancy and the implicit assumption, clearly premised on theories of tort law, is that by engaging in consensual intercourse, whether protected or unprotected, a man can be held to have voluntarily consented to pregnancy or at minimum to have assumed the risk of such an outcome should it in fact occur.[246] Under this traditional theory of liability, responsibility is

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> Utilizing the above presumed intentions, a man would be fiscally responsible for a child when it is presumed that the man desired to beget the child .... On the other hand, a man should not be fiscally responsible to provide child support if he was single and the conception was unintended or the result of a birth control mishap—one of the main rationales for a woman's abortion right.

Id at 153. If an unmarried woman became pregnant and bore the child, she would be breaching a presumed agreement not to procreate and would not be entitled to damages. *Id* at 153–54. Totz asserts that she may also have a duty to mitigate, one option of which being abortion. *Id.* at 154.

244. In fact, state judicial decisions have held that the father's constitutional right to procreate was limited to the preclusion of governmental *interference* into decisions related to contraceptive use. *See, e.g.*, L. Pamela P. v. Frank S., 449 N.E.2d 713, 715 (N.Y. 1983) (holding that the constitutional right to decide whether to father a child does not encompass the right to avoid child support obligations because the mother misrepresented use of a contraceptive); Inez M. v. Nathan G., 451 N.Y.S.2d 607, 610 (N.Y. Fam. Ct. 1982) (holding that the father failed to prove misrepresentation as to use of contraceptive or precautions or deception); *Linda D.*, 687 P.2d at 227 (holding that a father's right to make choices regarding procreation is not limited by refusing to allow him to claim a right to avoid child support obligations).

245. *See, e.g.*, Beard v. Skipper, 451 N.W.2d 614, 615 (Mich. Ct. App. 1990) (stating that a mother's alleged misrepresentation as to contraceptive protection could not be used as a mitigating fact when computing the father's contributions towards child support); Weinberg v. Omar E., 482 N.Y.S.2d 540, 541 (N.Y. App. Div. 1984) (holding that statutes impose obligation to support regardless of circumstances surrounding conception including the age of the father); Hughes v. Hutt, 455 A.2d 623, 624 (Pa. 1983) (saying that the mother's alleged deceit is not a valid counterclaim or defense in paternity suit); *Linda D.*, 687 P.2d at 226–27 (holding that mother's alleged conduct does not affect father's child support obligations). Cases that said that a misrepresentation defense was not appropriate or cognizable, or was irrelevant to paternity proceeding note that the primary purpose of paternity proceeding is to protect the child's welfare and that obligations are statutory requirements. Also, courts that addressed the support issue are of limited jurisdiction. *See* Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 245 (N.Y. Sup. Ct. 1985) ("To allow one parent to utilize a plenary action to deflect the statutory obligation onto the other would render" child support statutes nugatory and would "jeopardize the welfare of the child by reducing the financial means of the parent found to be at fault."); Smith v. Price, 328 S.E.2d 811, 817 (N.C. Ct. App. 1985) (holding that one cannot raise a counterclaim based on a misrepresentation defense in paternity or support actions because the law imposed an obligation to support and the child had right to support).

246. *See, e.g.*, Dorsey v. English, 390 A.2d 1133, 1138 (Md. 1978) (holding that the father, by having sex with the mother, risked her pregnancy and rejecting the argument that the mother's refusal to abort broke causal relationship); *Inez M.*, 451 N.Y.S.2d at 612 (noting that the plaintiff's assumption that just because the woman viewed motherhood as incompatible with her career plans did not mean she was "guarantor against the natural consequences of the parties' intimacies"). Note, however, that imposition of absolute liability for support obligations has even

easily assigned and the imposition of costs attendant to that outcome—a child—is fair.[247] The father cannot be heard to complain because the risk became a reality. Although current constitutional doctrine does afford a man an "out" for an unwanted pregnancy, should the woman choose to abort, this "out" is without his control or input, and should she choose to bear the child, his liability is strict.[248]

In theory, at least, this tort concept presumably would also extend to a woman who engaged in consensual intercourse.[249] Because of the woman's unique position and equal (to the man) understanding of the risks, the burdens of pregnancy would be equally foreseeable and parenthood voluntarily assumed.[250] Arguably, the "choice" afforded

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been imposed on fathers who were victims of statutory rape, County of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843 (Cal. Ct. App. 1996), as well as sperm donors, Ferguson v. McKiernan, 60 Pa. D. & C.4th 353 (Ct. Com. Pleas 2002). *See also* Kate Sutherland, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 WM. & MARY J. WOMEN & L. 313 (2003) (exploring the state's presence in the realm of teenage sexuality). In *People v. Sorenson*, the California Supreme Court affirmed the misdemeanor conviction of a man for failure to pay child support, noting "[a] reasonable man who . . . actively participates and consents to his wife's artificial insemination . . . knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport." People v. Sorenson, 437 P.2d 495, 499 (Cal. 1968).

247. *But see* Karen Czapanskiy, *supra* note 55, at 1416 (arguing that paternal rights have expanded while maternal rights have decreased).

248. *See, e.g.*, Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to the Unborn Child*, 7 J.L. & POL'Y 1, 26 (1998) (arguing that if courts will not permit putative fathers to rely on the woman's representations regarding birth control, they are creating a "strict liability standard for any unmarried male engaging in sex . . . ."). Interestingly, feminist scholars have argued that fatherhood is a choice. *See, e.g.*, Czapanskiy, *supra* note 55, at 1418 (stating that no mandatory duty has developed with respect to the familial or personal relationship between father and child while the mother has no choice). *See also In re* S.P.B., 651 P.2d 1213, 1217 (Colo. 1982) (pointing out that statutes create an irrebutable presumption between conception and child birth).

249. Obviously all conduct carries with it certain risks. Walking down the sidewalk risks being hit by a car or knocked over by a scooter. Admittedly, assumption of the risk implies some negligence on the part of one or both parties. But unprotected consensual sex is the equivalent of walking not on the sidewalk but in the middle of the street. *See also* Alice D. v. William M., 450 N.Y.S.2d 350, 354 (N.Y. Civ. Ct. 1982). ("While it is true that the alternative methods of birth control which the claimant would have used had she not relied upon the defendant's misrepresentation are not one hundred percent effective, these methods are far superior to sexual intercourse without the use of any contraception. Therefore the remote chance the pregnancy might have resulted in any event is not sufficient to deny the claimant recovery.").

250. Andrea M. Sharrin, *supra* note 54, at 1401 (quoting Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1017 (1984), as stating that "all women of childbearing age know that pregnancy may violently alter their lives at any time"). The high costs of pregnancy include a substantial physical and emotional toll, directly borne by the woman and implicating her right to be free from unwanted physical intrusion. A number of commentators, as well as the Supreme Court, have commented on the "burdens" of pregnancy. *But see* Alec Walen, *supra* note 31, at 1054 (discussing perceived problems with the application of an assumption of the risk argument to women and framing it as whether a woman "assumes the risk

under *Roe* would be rendered moot, since the woman would be deemed already to have "chosen" to be pregnant by having consensual sex.[251] The rights of the fetus would attach at conception and she would have no greater right than would he to avoid the outcome.[252] This theory drastically simplifies any inquiry into procreative conduct to "was there consensual sex?" Parental obligations attach immediately upon an affirmative response. In reality, however, even the suggestion that a woman has agreed to pregnancy by virtue of agreeing to engage in sexual intercourse generates significant controversy, with the Supreme Court decisions on abortion clearly rejecting that position.[253] Under the abortion decisions, implicit in the procreative rights of the woman, unlike the man, is that pregnancy must be consciously and affirmatively consented to, at least until the point of viability.[254] At that point, consent is presumed, although the presumption is rebuttable under limited circumstances.[255] Whether couched in terms of when the woman's right to privacy can be overcome by state interest or the extent of a woman's right to control her body, fundamentally it is a question of

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of carriage").

251. Under such an analysis, as a practical matter, *Roe* would be meaningless to any woman who was not the victim of rape.

252. This is essentially a fetal right premised upon the existence of a duty owed by the mother to the fetus by virtue of the pregnancy, at least to the extent it arises from consensual sex. Although solidly grounded in tort law, it not surprisingly has found little support among advocates of abortion rights. *See, e.g.*, Donald Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979) (discussing the duty to aid as well as the Good Samaritan rule in the context of fetal versus maternal rights); Walen, *supra* note 31, at 1054 (arguing that abortion advocates can defend the practice on moral grounds, even if it is accepted that the fetus is a person).

253. Commentators, raising various objections, have also argued against an assumption of the risk argument. Professor Walen, for example, in exploring the viability of an assumption of the risk argument, questioned whether simply because pregnancy *might* occur meant that a woman assumed the risk of carriage by engaging in consensual intercourse. Walen, *supra* note 31, at 1051. Walen contends that it does not and further explores the woman as Good Samaritan in determining whether pregnancy creates even a moral obligation given the undue burden of carriage. *Id.*

254. *See* Peter D. Feaver et al., *Sex As Contract: Abortion and Expanded Choice*, 4 STAN. L. & POL'Y REV. 211, 212 (1992–93) (stating that, under *Roe*, the "fetus is legally 'alive' only when the mother makes the choice to carry the fetus past the viability hurdle"). Feaver argues that child support laws assume life begins at coitus, at least for purposes of holding the father responsible. *Id.* at 213. This presumption is in conflict with *Roe's* refusal to accord "life" to the fetus at coitus but rather at the woman's decisional point. *Id.*

255. Once the fetus has reached viability, the state interest in protecting the potentiality of life becomes compelling and state regulation is permissible subject to the health of the mother. *See, e.g.*, Planned Parenthood Ass'n. v. Ashcroft, 462 U.S. 476, 494 (1983) (holding unconstitutional a requirement that abortions after twelve weeks of pregnancy be performed in a hospital); Simopoulos v. Virginia, 462 U.S. 506, 519 (1983) (requiring second-trimester abortions to be performed in licensed clinics).

consent.[256]

In part, the discomfort with this gender disparity may be whether the law should, as it does in *Roe*, carve an exception which permits a woman, but not a man, to discard any obligations that might arise out of consensual sex that results in pregnancy, and not only presume that a woman has not "chosen," but indeed that she cannot be *required* to choose, until viability.[257] Scholarship is replete with articles debating the legal, moral and religious merits of a woman's constitutional right to choose.[258] More significantly, however, at the same time that it

256. The expressed justification underlying the argument in favor of abortion rights and rejecting paternal input is that because women, and only women, can get pregnant; women, and thus only women, get to decide when to abort. There is substantial merit to this view. Some have cast the fetus as the equivalent of a tumor or foreign body that the woman should be able to refuse to carry and deny the sustenance that only she necessarily can provide. This fetus as an "attacker" premise is also used to counter arguments that a woman owes a duty of care to the fetus that would supersede her right to abort. Recent action by states to assign personhood status to a fetus and permit actions against not only third parties but also the mother for harm to the fetus have kept the debate over the extent of a woman's obligation to the fetus in the forefront. A recent example involves the charges brought by the state of Utah against a woman who allegedly refused to agree to a recommended Caesarian until it was too late to save one of the twins she was carrying. *See* Matt Canham, *Proposed Law Targets Pregnant Drug Users*, THE SALT LAKE TRIB., Apr. 10, 2004, at A1 (discussing proposed Utah law that would make abusing a fetus a crime, thus targeting drug-abusing pregnant women); Sarah Childress, *Justice: A New Controversy in the Fetal-Rights Wars*, NEWSWEEK, Mar. 29, 2004 (giving a brief overview of the controversy surrounding laws that hold mothers liable for injury to the fetus).

257. *See, e.g.*, *In re* S.P.B., 651 P.2d 1213 (Colo. 1982) (rejecting a father's effort to avoid child support on the basis that that Uniform Parentage Act denied him Equal Protection where mother refused his offer to pay for an abortion).

258. *See* Sarah E. Hurst, *A One Way Street to Unconstitutionality: The "Choose Life" Specialty License Plate*, 64 OHIO ST. L.J. 957 (2003) (arguing that state statutes, which allow motorists to purchase "Choose Life" license plates and gives proceeds to groups such as Catholic charities, violate establishment and free speech clauses of First Amendment); Charles I. Lugosi, *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn From Creation to Natural Death*, 48 ST. LOUIS U. L.J. 425 (2004) (contending that it is immoral and unjust to classify the unborn as "separate and unequal" and that the unborn should be given constitutional protection); Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057 (1999) (arguing that if a woman does not consent to pregnancy, she can use deadly force to stop the harms to her that the fetus causes); Sharrin, *supra* note 54 (arguing that a woman's right to an abortion should be upheld over challenges of fathers-to-be seeking to enjoin abortion); David M. Smolin, Commentary, *Abortion Legislation After* Webster v. Reproductive Health Services: *Model Statutes and Commentaries*, 20 CUMB. L. REV. 71 (1989–90) (proposing model statutes to restrict abortions in light of the decision in *Webster*); Karen E. Walther, *Partial-Birth Abortion: Should Moral Judgment Prevail Over Medical Judgment?*, 31 LOY. U. CHI. L.J. 693 (2000) (outlining various courts' rationales concerning partial birth abortions and arguing that outlawing the procedure is an undue burden to women seeking abortions); David J. Zampa, Note, *The Supreme Court's Abortion Jurisprudence: Will the Supreme Court Pass the "Albatross" Back to the States?*, 65 NOTRE DAME L. REV. 731 (1990) (suggesting that the Supreme Court can lessen conflict with the states by adopting Justice O'Connor's "unduly burdensome" standard, which abandons the per se strict scrutiny standard when analyzing state restrictions on abortion).

provides a pregnant woman with a choice—and an option—*Roe* and its progeny also serve to insulate a woman from at least some of the consequences of her procreative conduct that might otherwise have been redressable in tort. Instead, a woman has no liability in tort or otherwise for her post-conception decision to bear or not to bear a child. Current law unequivocally subsumes the rights of the fetus to exist to those of the woman and no action in tort can be brought in the name of the fetus—or the father—in an effort to supersede those rights;[259] paternal lawsuits seeking damages for that "choice" rightly have foundered under constitutional scrutiny.[260] The affirmative assertion in cases such as *Farley v. Sartin*[261] that by definition a woman who chooses abortion cannot be a tortfeasor stands cloaked in the certainty that a constitutional right that carries with it a penalty for its exercise is illusory.[262] Indeed, in *Maher v. Roe*, the Court noted: "A woman has at least an equal right to choose to carry the fetus to term as to choose to abort it."[263] Accordingly, a woman cannot be held any more liable for the act of carrying a child to term than she can for choosing to abort.[264]

Claims arising out of misrepresentations of fertility do not directly implicate a woman's right to choose.[265] The issue is not whether a

259. *See, e.g., In re* S.P.B., 651 P.2d at 1214 (rejecting the argument that plaintiff's equal protection rights were violated by imposing a statutory duty of child support where the mother declined plaintiff's offer to pay for an abortion). The Supreme Court decision in *Casey*, however, has placed some limits on those rights and has been viewed as eroding *Roe*. Planned Parenthood v. Casey, 505 U.S. 833, 895–98 (1992).

260. *See also* Perry v. Atkinson, 240 Cal. Rptr. 402, 405 (Cal. Ct. App. 1987) ("Tort liability cannot apply to the choice, however motivated, of whether to conceive or bear a child.").

261. Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995) (holding that the term "person" in wrongful death statutes incompasses nonviable unborn child).

262. *See* Morris v. Frudenfeld, 185 Cal. Rptr. 76, 80 (Cal. Ct. App. 1982) (stating that "in a case of 'wrongful birth' . . . a mother . . . cannot be required, under the legal doctrine that a plaintiff take reasonable measures to mitigate damages, to undergo an abortion"); Hughes v. Hutt, 455 A.2d 623, 625 (Pa. 1983) (holding that to penalize a decision not to abort could result in women deciding to abort in order to avoid liability, an outcome contrary to professed state interest).

263. Maher v. Roe, 432 U.S. 464, 472 n.7 (1977).

264. In *Perry v. Atkinson*, the court noted that "[a]lthough Atkinson may have deliberately misrepresented his intentions to Perry in order to persuade her to have the abortion, their procreative decisions were so intensely private that we decline to intervene. Tort liability cannot apply to the choice, however motivated, of whether to conceive or bear a child." *Perry*, 240 Cal. Rptr. at 405.

265. Some argument exists that imposing liability for misrepresentations of fertility could raise an obligation to mitigate or otherwise induce a woman to choose abortion to avoid or minimize damages. *See e.g.*, C.A.M. v. R.A.W., 568 A.2d 556, 560 (N.J. Super. Ct. App. Div. 1990) (stating that attempting to correct some of these wrongs may do more social damage than good); Linda D. v. Fritz C., 687 P.2d 223, 228 (1984) (noting that no right encompasses the right of a parent to avoid child support obligations when the other parent's choice regarding procreation is not fully respected); Payne, *supra* note 175, § 10 (providing examples of

woman should have liability in tort for exercising her right to an abortion; rather, the issue is the extent of procreative conduct that is or even should be immunized by that right and protected from liability, whether implicitly or explicitly.[266] Recent cases in the area of fetal rights suggest that, at minimum, the historical deference accorded to women in their choice of behavior while pregnant is eroding.[267] Some of these limits are already being tested both in civil and criminal courts.[268] What is becoming clear is that upon exercising her choice to

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constitutional considerations in various jurisdictions concerning refusal to abort on paternity or support proceedings).

266. *But see* Stacie L. Lude, *After* Farley v. Sartin*: The Consequences of Declaring a Nonviable Fetus A "Person" for the Purpose of Wrongful Death*, 99 W. VA. L. REV. 339, 347–48 (1996) (suggesting that *Farley* opens the door to suits against mothers for tortious abortion).

267. It may be that this erosion was precipitated by the abortion debate and the subsequent focus by states and anti-abortion advocates on according personhood status to a fetus, thereby opening the door not only for criminal liability but for civil tort liability as well. State statutes seeking to impose criminal liability upon women who use illegal drugs or abuse alcohol while pregnant are increasing in number. *See, e.g.*, Bonte v. Bonte, 616 A.2d 464, 466 (N.H. 1992) (holding that a child born alive has a cause of action against his or her mother, who negligently crossed the street and was hit by a car while pregnant); Grodin v. Grodin, 301 N.W.2d 869, 871 (Mich. Ct. App. 1981) (stating that a child had a cause of action against his mother for damages to his health, allegedly resulting from use of medication during pregnancy); *see also* WIS. STAT. ANN. §§ 48.01–48.347 *et. seq.* (West, 2003) (including the Children's Code, which protects the unborn children of expectant mothers); S.D. CODIFIED LAWS §§ 34-20A-63 to 70 (Michie 1998) (providing for involuntary commitment to emergency medical treatment center if threatening physical harm to herself or another); *see also* Ferguson v. City of Charleston, 532 U.S. 67, 75 (2001) (holding that it was an illegal search and seizure to report urine tests positive for drugs to police when taken while mother is giving birth); Doretta Massardo Mcginnis, Comment, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505 (1990) (arguing that the criminal justice system is not suited to intervene in the medical and sociological problems associated with drug use and pregnancy). Some courts have upheld negligence claims by children against their mothers for harms occurring while in the womb. *But see* Stallman v. Youngquist, 531 N.E.2d 355 (Ill. 1988) (declining to permit cause of action by fetus against mother for negligence and remanding a grant of summary judgment allowing suit against mother for taking harmful medication during pregnancy to proceed).

268. Recent decisions have found little reason to distinguish between the negligence of third parties resulting in fetal harm and the negligence of the mother, despite the slippery slide toward maternal servitude. *See In re* Unborn Child, 683 N.Y.S. 2d 366, 371 (N.Y. Fam. Ct. 1998) (showing of harm caused by mother's continued use of cocaine allowed court to find neglect and issue protective order for unborn child); *In re* J.G., No. 21944, 2004 WL 1103971, at *4 (Ohio Ct. App. May 19, 2004) (noting mother's parental rights terminated after continued drug use while pregnant); State v. McKnight, 576 S.E.2d 168, 174 (S.C. 2003) (upholding twenty year sentance for injesting cocaine while pregnant); Perez v. Tex. Dept. of Protective Custody & Regulatory Servs., 148 S.W.3d 427 (Tex. App. 2004) (discussing situation in which parental rights for all children terminated after mother became pregnant again and refused drug treatment); State *ex rel.* Angela M.W. v. Kruzicki, 561 N.W.2d 729, 730 (Wisc. 1997) (reversing an order to place mother in detention under order to take unborn child into custody to protect child from mother's drug use, but reversing only after the child was born). *But see* Remy v. MacDonald, 801 N.E. 2d 260, 267 (Mass. 2004) (noting that a mother did not owe a duty of care to her unborn fetus in negligence action brought by child to recover for injuries suffered in automobile accident); State v. Deborah J.Z., 596 N.W. 2d 490, 496 (Wisc. Ct. App. 1999) (holding that an unborn child was

bear the child, the pregnant woman—once inviolate in her pregnancy—loses the freedom to order her behavior as she chooses without regard to fetal rights.[269]

Of concern when considering the propriety of misrepresentation of fertility claims is the de facto presumption of impunity that seems to exist at the other end of the procreative spectrum; that the woman may be insulated from liability for any conduct, even where tortious, in the *course* of conceiving a child as long as that conduct does not present a threat to health, safety and welfare.[270] In one respect, the abortion debate is irrelevant to this issue; the right protected by the abortion decisions is the right to choose to abort a fetus regardless of how the fetus was conceived. Once the choice is made not to abort, *Roe* becomes meaningless in most cases.[271]

However, implicit in the application of the abortion decisions and built on the foundation of *Griswold* and *Baird*, is that from conception through viability there is a legal (and moral) vacuum where some inchoate right to exist remains in limbo pending the woman's conclusion that the reality of pregnancy should be embraced. Depending upon the form of the debate, whether it advocates abortion

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not a "human being" for purpose of first degree homicide charge so mother could not be charged although she delivered child with blood alcohol concentration over thirty percent). In *Bonte*, the New Hampshire court held that a pregnant women owed a duty of reasonable care to her fetus stating, "[w]hile we recognize that the relationship between mother and fetus is unique, we are not persuaded that based upon this relationship, a mother's duty to her fetus should not be legally recognized." *Bonte*, 616 A.2d at 466. The court disagreed with the dissent that the imposition of such a duty would unduly impair the privacy and personal autonomy rights of the mother, opening up day-to-day decisions and activities to judicial scrutiny. *Id.*

269. *See* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 450 (1983) (discussing limits placed on a woman's feedom to control her body during pregnancy). Robertson notes:

> [When a woman] chooses to carry the child to term, she acquires obligations to assure its well-being. These obligations may require her to avoid work, recreation, and medical care choices that are hazardous to the fetus. They also obligate her to preserve her health for the fetus' sake or even allow established therapies to be performed on an affected fetus.

Id.

270. Clearly as to some tortious conduct accompanying sexual relations, *e.g.* transmission of a sexually transmitted disease, any immunity is immediately abrogated. The courts have had little difficulty imposing liability on either partner in such circumstances with privacy rights easily sublimated almost as a matter of course to the state interest in health, safety and welfare. Conception, if it occurs, is a throwaway at best and a non-issue in the press by the victimized partner for redress. As to other conduct, such as intentional (or even negligent) misrepresentation of fertility or use of birth control, conception represents the point at which harm accrues and the claim matures.

271. There are, of course, cases where late term abortions may be considered and, in those cases, the rights accorded under *Roe* and its progeny are resurrected, although the balancing equation may have changed.

rights or procreative rights, conception itself is simply either the point at which the potentiality comes into existence—triggering the running of the abortion clock—or a vehicle for elaboration on fundamental rights of privacy.[272] In either form, however, conception is cloaked with the presumptive exercise by the woman of a protected right immune from challenge under the umbrella of the privacy decisions and the looming shadow of *Roe* triggered by the state of pregnancy. For her, at least, the protection from liability in tort *vis-à-vis* the father seems to extend through pregnancy with her actions becoming virtually unassailable upon actually bearing a child. Concomitantly, no immunity, de facto or otherwise, attaches to the man's conduct even though it too occurred in the course of conceiving a child. In short, while the decision to conceive or not to conceive may be a fundamental right protected from unreasonable governmental intrusion and the method of conception similarly shielded, these protections are effectively one-sided with no real protection accorded to the father's procreative choice.

The basis for any determination of tort claim viability, however, should be the legal wrong committed (for which redress is available) and the harm caused by that wrong. Short of legislative expression or substantial public policy to the contrary, presumably, our system of justice provides a remedy for such civil wrongs. A corollary premise, however, is that not every wrong rises to the level of a legal wrong entitled to protection and by extension, compensation.[273] In tort law, particularly, goals of compensation and deterrence intersect to protect against the unreasonable interference of the interest of others.[274] However, it is the breadth of the concept of what constitutes a tort that leads to an inability to adequately define its parameters—i.e., the basis upon which the unreasonable invasion of an interest, resulting in harm, is deemed not simply a wrong, but a legal wrong and, hence, a tort.[275]

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272. In *Roe*, the Court stated that embryological data and new medical techniques at the time "purport to indicate that conception is a 'process' over time, rather than an event . . . ." Roe v. Wade, 410 U.S. 113, 161 (1973); *see also* Misner, *supra* note 3, at 286–89 (discussing fetal rights and conception with respect to preembryos).

273. *See, e.g.*, Richard P. v. Superior Court, 202 Cal. Rptr. 246 (Cal. Ct. App. 1988) (finding that the husband's claim for fraud and emotional distress against the man who had an adulterous affair with the plaintiff's wife and was the actual father of two children born to the marriage, was not a wrong that should be redressable in tort). The court noted:

> It does not lie within the power of any judicial system, however to remedy all human wrongs. There are many wrongs which in themselves are flagrant. For instance, such wrongs as betrayal, brutal words, and heartless disregard of the feelings of others are beyond any effective legal remedy and any practical administration of the law.

Id. at 249.

274. PROSSER & KEATON, *supra* note 99, at §1.

275. *See id.* §§1–5 and accompanying notes (discussing the difficulty in defining torts).

Indeed as noted by Dean Prosser,

> The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.[276]

In both the recognition of interests previously unrecognized and the rejection of existing claims, the evolution of social mores plays a role. Similarly, legislation reining in exercises of judicial power that fail to recognize the new moral environment or, alternatively, have pushed beyond the bounds of existing moral comfort also impacts the availability of a remedy. In short, notions of public policy grounded in judicial economy and constrained by often-antiquated social constructs determine the outer bounds of tort law, regardless of whether that boundary is justified in reality.[277]

Thus, the difficult task of considering the appropriate judicial stance in misrepresentation-of-fertility cases is essentially an identification of what policy in reality underlies the inherent unwillingness to permit such a claim to go forward, and whether the boundary imposed by the courts precluding relief is warranted in light of that policy. The primary rationales for denying relief—current dependence upon child support, privacy concerns or the sufficiency of damages, either alone or in combination—fail to quiet the underlying sense of discomfort threading through decisions that deny recovery for tortious conduct that would be redressable in other circumstances.[278] This discomfort is exacerbated by the willingness of some courts to afford relief to deceived mothers. To some extent, efforts to overcome the inadequacies of a given rationale by buttressing denial of relief on several different public policy arguments simply serves to cast suspicion upon the conclusion that relief should be denied.[279] Consequently, decisions rebuffing

276. *Id.* §4. Conversely, no clarity is afforded circumstances under which conduct previously deemed tortious is deprived of its tortious character and no longer compensable. *Id.*

277. There are a number of decisions where "public policy" is touted as virtually dictating a certain outcome. In some instances, the policy adhered to has been advanced by the legislature through statutes or other pronouncements. In others, the courts have applied judicial perceptions of what is fair or right or just. *See, e.g.*, Welzenbach v. Powers, 660 A.2d 1133 (N.H. 1995) (relying on public policy in barring actions of a father who was married to another woman at the time of the alleged intentional misrepresentation).

278. The exception may be those cases where the courts have firmly and with little discussion concluded that there could be no justifiable reliance.

279. These flaws are exacerbated even further by the difference in treatment accorded to women who allege misrepresentations by the putative father. Although courts have relied on the existence of child support statutes or the "unseemliness" of inquiring into intimate relationships to deny recovery for paternal claims of misrepresentation of fertility, these same policies have not

paternal misrepresentation of fertility claims seem to reflect an uncertainty or confusion as to the framework within which these claims should be analyzed.[280] The result is a decided lack of coherence as the courts struggle to articulate a reasoned approach.

V. THE IMPACT OF THE RIGHT TO PROCREATION IN TORT? (OR MAKE LOVE NOT WAR)

This article contends that judicial reluctance to afford relief for claims arising out of misrepresentations of fertility should rest squarely in the right to procreate and the obligations accompanying the resulting parent-child relationship. The articulated concerns about privacy, "harm," or support obligations flow from this duality but do not drive it. A slight shift in perspective exposes procreative rights as the real center of any inquiry into the viability of such a claim and the foundation upon which the parties' respective rights and obligations should be assessed. The distinction is subtle but significant.

The procreative decision has been held and consistently reaffirmed as grounded in a social need to reproduce in order to perpetuate the species and maintain the social order.[281] In addition to being a basic instinct, the right to procreate is considered an inherent right that "fulfills cultural norms and individual goals about a good or fulfilled life, and many consider it the most important thing a person does with his or her life."[282] Supreme Court decisions on privacy acknowledge the

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precluded recovery by a woman for misrepresentations made by a man. The implication is that, as to the woman, not only are the circumstances surrounding conception immune to challenge, but she is entitled to redress for the physical discomforts and emotional burdens presumably suffered where conception was not freely risked. The argument that compensation for the physical discomfort experienced by the woman as a result of the deceit is persuasive and is certainly supportable under the reasoning in the sexual disease cases.

280. *See generally* Rudolph, *supra* note 9 (arguing that courts use outmoded concepts of gender roles by treating males and females differently in misrepresentation of fertility cases).

281. Robertson, *supra* note 269, at 408 ("Reproduction is a basic instinct that supplies societies with the members who maintain and perpetuate the social order and who provide services for others. Reproduction also satisfies an individual's natural drive for sex and his or her continuity with nature and future generations."). *But see* Hiester, *supra* note 4, at 233 (contending that "[a]lthough the very existence of the child might be deemed procreation, it is not until the law recognizes or enforces parental rights or obligations that procreation is realized").

282. Robertson, *supra* note 269, at 408. *See* GILBERT MEILENDER, BIOETHICS, A PRIMER FOR CHRISTIANS 25 (1996) (asserting that "it is a task undertaken at God's command for the sustaining of human life"); EARNEST W. PAGE, M.D. ET AL., HUMAN REPRODUCTION, THE CORE CONTENT OF OBSTETRICS, GYNECOLOGY AND PERINATAL MEDICINE 73 (1972) ("Human reproduction is almost wholely a byproduct of human sexuality. Sexual drives, responses, customs and mores determine . . . the structure of society as well as the rate of growth and the composition of our populations."); Aristotle, *On the Relationship of Parents and Children, in* THE ETHICS OF REPRODUCTIVE TECHNOLOGY, 132, 133–34 (Kenneth D. Alpern ed., 1992) ("[F]or any living thing that has reached its normal development . . . the most natural act is the

significance of procreation to society, and society's paramount responsibility to ensure its continued existence.[283] The state, as the embodiment of society, assumes the role of protector both of the right to

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reproduction of another like itself, an animal producing an animal, a plant a plant, in order that, as far as its nature allows, it may partake of the eternal and the divine."); Charles J. Reid, *The History of the Family, in* THE FAMILY 12 (Lisa Sowell Cahill & Dietmar Mieth eds., 1995) (noting that St Augustine (in his treatise "*De bono comiugali*" or "On the Good of Marriage") proposed that Christian marriage exists to serve the goals of fidelity, symbolic stability, and procreation); *see also* Eileen K. Fry-Bowers, *Controversy and Consequence in California: Choosing Between Children and the Constitution*, 25 WHITTIER L. REV. 889 (2004) (suggesting a multi-layered approach to the presence of sex offenders in California); Hiester, *supra* note 4, at 213–14 (positing that child-support laws and welfare regulations creating an automatic obligation to pay child support upon establishment of paternity deprive men of their fundamental right to procreate, violating the Equal Protection and Due Process rights); Carole M. Hirsch, *When the War on Poverty Became the War on Poor, Pregnant Women: Political Rhetoric, The Unconstitutional Conditions Doctrine, and the Family Cap Restriction*, 8 WM. & MARY J. WOMEN & L. 335 (2002) (analyzing the rights of pregnant women as they apply to the poor); H. B. Hodge, *Prisoner of Love: Incarceration as Contraceptive or Should Lifers Beget Life?* Gerber v. Hickman, 22 QUINNIPIAC L. REV. 947 (2004) (outlining the various opinions of the Ninth Circuit in the context of fundamental rights of prisoners to procreate); Amanda Mechell Holliday, *Who's Your Daddy (and Mommy)? Creating Certainty for Texas Couples Entering Into Surrogacy Contracts*, 34 TEX. TECH L. REV. 1101 (2003) (analyzing the desirability of surrogacy contracts in Texas and proposing the type of legislation Texas should consider adopting); Lisa Jarvis, *Should the International Olympic Committee Be Policing Motherhood? Constitutional Implications of Regulating Pregnancy and the Abortion-Doping Scheme Under Domestic Law*, 13 SETON HALL J. SPORT L. 297 (2003) (contending that while proposed hypothetical regulations may not survive constitutional scrutiny, they may at least have a positive moral and ethical impact); Richard M. Lebovitz, *The Accordian of the Thirteenth Amendment: Quasi-Persons and the Right of Self-Interest*, 14 ST. THOMAS L. REV. 561 (2002) (outlining the history of the Thirteenth Amendment and looking at it in light of recent questions of what it means to be a person as a human embryo); Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Concieved Children*, 82 OR. L. REV. 1067 (2003) (examining and critiquing society's response to the needs of posthumously conceived children); Sara D. Petersen, Comment, *Dealing With Cryopreserved Embryos Upon Divorce: A Contractual Approach Aimed at Preserving Party Expectations*, 50 UCLA L. REV. 1065 (2003) (proposing that courts should draw on contract law principles to determine whether the parties to conflicts actually reached agreements regarding embryo disposition in the event of divorce); John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7 (2004) (analyzing six situations of harm to offspring that are of current policy concern); Kelly R. Skaff, *Pay Up or Zip Up: Giving Up the Right to Procreate as a Condition of Probation*, 23 ST. LOUIS U. PUB. L. REV. 399 (2004) (arguing that making probation conditional on a promise not to procreate is constitutionally permissible and a valuable alternative to prison); Amber Stine, Note, *The Implications of the Due Process Clause on the Future of Human Embryonic Gene Therapy*, 45 ARIZ. L. REV. 507 (2003) (concluding that constitutional challenges to the practice of gene therapy are likely to fail in cases where it is used for therapeutic purposes to correct genetic abnormalities); Roger H. Taylor, *The Fear of Drawing the Line at Cloning*, 9 B.U. J. SCI. & TECH. L. 379 (2003) (analyzing the importance of the emotional response to cloning and scientific implications of both cloning and human development); Susan M. Wolf & Jeffrey P. Kahn, *Using Preimplantation Genetic Diagnosis to Create a Stem Cell Donor: Issues, Guideline & Limits*, 31 J.L. MED. & ETHICS 327 (2003) (discussing the issues presented in pre-implantation genetic diagnosis);.

283. *See supra* Part I (discussing the right to privacy in the wake of *Roe v. Wade*).

procreate and of the children conceived pursuant to the exercise of that right.[284] Marriage, as a state-sanctioned institution, facilitated the concept of a nuclear family and functioned as the foundation and structure for this society's ability to perpetuate itself according to established norms and perceived morality.[285] As one commentator points out, "the fundamental purposes of the marital relation itself were procreation and the rearing of children. The 'natural' duration of that relation was the time required for the 'continuation of the species—that is, the time it took to prepare children to care for themselves.'"[286] And, although the state acknowledged the right to procreate outside of marriage, societal stigmas and penalties encouraged individuals to exercise their right within the confines of marriage and raise their children under an umbrella of common goals and aspirations surrounded by the protective cocoon of "family."[287] Indeed, the Supreme Court has

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284. *See, e.g.*, Prince v. Massachussetts, 321 U.S. 158, 168 (1944) ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.").

285. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (stating that marriage is a "basic civil right[]"); Maynard v. Hill, 125 U.S. 190, 211 (1888) (claiming that marriage is the "foundation of the family and of society, without which there would be neither civilization nor progress"). In some societies, the obligation is communal—all members are responsible for the nurture and care of the children of the community. *See, e.g.*, Linda L. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339 (1996) (evaluating the rhetoric of irresponsible reproduction and analyzing why certain choices and behaviors are deemed irresponsible).

286. Mark E. Brandon, Essay, *Family at the Birth of American Constitional Order*, 77 TEX. L. REV. 1195, 1204 (1999). Professor Brandon, looking at the constitutional status of the family and its role in a changing political landscape, notes that under John Locke's thesis, the purpose of the family was to ensure an environment whereby children were introduced to behavior conditioned by the law through the "exercise of reason." *Id.*

287. *See, e.g.*, Jennifer Jaff, Essay, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207 (discussing bias in the law against unmarried persons and contending that the notion of "traditional" family should be discarded). The importance of the family in the United States, which protected it from unwanted governmental intrusions, has not afforded the same level of protection for illegitimate chidren:

> Historically, both the English common law and society itself perceived illegitimate children to be a disgrace, a stigma, and labeled this class with the title of 'bastards.' Through no fault of his own, the bastard was a social outcast. The bastard was a product of an illicit, immoral, and promiscuous relationship. Because the child was not conceived within the legal constraints of marriage, the child could not enjoy the legal rights, liberties, and benefits of a child who was in fact conceived with the bond of marriage. The right of an illigimate child to inherit was nonexistent. . . . This status continued in the common law and was eventually carried over to the United States.

Alexander v. Alexander, 537 N.E.2d 1310, 1311–12 (Ohio Prob. Ct. 1988). Society essentially deemed the illegitimate child a child of no one. *Id.* at 1312. However, the Supreme Court has increasingly reversed the common law's discriminatory treatment of such children by according them greater constitutional protections. *See* Levy v. Louisiana, 391 U.S. 68, 70 (1968) (stating

long emphasized the role of family in society, recognizing that the family's role in the care and management of children serves an important societal interest.[288] It is at the family level that values are learned, mores and customs are observed, and laws ordering individual and community behavior are reinforced to facilitate cohesiveness in what, in effect, is a community effort to build society as a whole.

Recent shifts in traditional social constructs regarding family and marriage,[289] as well as changing sexual mores, have led to increasing judicial scrutiny of parent-child relationships in order to ensure that the interests of the child are protected even if the "family" disintegrates.[290] Regardless of whether the case involves marital or non-marital intimacy, the state seeks to ensure that any children are provided for.[291]

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that "illegitimate children are not 'nonpersons'"); Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 76 (1968) (holding that the mother of an illegitmate child was denied equal protection when the state denied relief in a wrongful death action because the child was illegitimate). Ultimately, the Court began using an intermediate standard of review for cases involving illegitimacy. *See* Trimble v. Gordon, 430 U.S. 762 (1977) (laying out special provisions for surviving illegitimate children under the Social Security Act); Mathews v. Lucas, 427 U.S. 495 (1976) (extending presumption of dependence to illegitimate children under certain conditions for purposes of the Social Security Act); Jimenez v. Weinberger, 417 U.S. 628 (1974) (holding that certain disability benefits unconstitutionally violated the Equal Protection Clause by discriminating against certain children based on the status of birth); Gomez v. Perez, 409 U.S. 535 (1973) (establishing that a state cannot discriminate against illegitimate children by denying them substantial benefits that are generally accorded to legitimate children).

288. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972) (noting that the child's welfare depended on strengthening family ties whenever possible); Caban v. Mohammed, 441 U.S. 380 (1979) (holding that Equal Protection was violated by the sex-based distinction between unmarried mothers and fathers when blocking adoption).

289. *See, e.g.*, Dolgin, *The Family in Transition*, *supra* note 25, at 1534; Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of the Family*, 32 CONN. L. REV. 523, (2000) (reviewing the legal deliniations of paternity and maternity, which ignore contemporary understandings of the biological facts of kinship).

290. *See, e.g.*, L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002) (holding that equitable principles demand that both a mother and her lesbian partner are responsible for the child's needs); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (holding that the intended parents of a surrogate mother's child were treated in law as natural parents and the husband was obligated to pay child support); Richard P. v. Superior Court, 249 Cal. Rptr. 246 (Cal. Ct. App. 1988) (relying on public policy to hold that the husband was not entitled to maintain action against wife who had two children by another man during their marriage); Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976) (remanding case to examine the best interest of the child because of prolonged separation of mother from child, lack of a household, and her unwed status); Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966) (awarding sixty-year-old grandparents permanent custody because of the likelihood of seriously disrupting and disturbing effect on child).

291. *See, e.g.*, Jo Michelle Beld & Len Biernat, *Federal Intent For State Child Support Guidelines: Income Shares, Cost Shares, And The Realities Of Shared Parenting*, 37 FAM. L. Q. 165 (2003) (discussing the impact of federal shield support guidelines on the economic circumstances of children of separated parents); Laurie Madziar, Comment, State v. Oakley*: How Much Further Will The Courts Go In Trying To Enforce Child Support?*, 24 WOMEN'S RTS. L.

The state interest is twofold; characterized as a welfare interest, focused on what is best for the child as well as a vested (albeit secondary) interest in establishing a legally enforceable support mechanism to preclude the necessity of tapping state coffers through public welfare systems.[292] The determination of the child's best interests plays a predominant role in the approach of both courts and legislatures towards issues of paternity, child support, custody, adoption and myriad other matters that impact or involve children, with the law clearly placing an absolute premium on protecting the child once it is born.[293] The imposition of a non-delegable obligation to support a child is grounded in this fundamental premise, and society has logically assigned this responsibility to the parents first. In this respect, the obligation is a social obligation owed by the individual for the good of the whole. Its moral basis stems from the genetic relationship between parent and child and the moral responsibility that attaches to a life for which one is held responsible for creating.[294] In both instances, the moral obligation is guided by a primary sense of personal responsibility freely recognized and respected.

REP. 65 (2002) (addressing the potential impact of the Wisconsin Supreme Court's decision that upheld probation condition that restricted the defendant's right to procreate); John J. Sampson & Barry J. Brooks, *Uniform Interstate Family Support Act* (2001) *with Prefatory Note and Comments (with Still More Unofficial Annotations)*, 36 FAM L. Q. 329 (2002) (outlining the Act's general provisions); Richard F. Storrow, *Parenthood By Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HAST. L.J. 597 (2002) (pointing out that surrogacy and artificial insemination now provide fertile grounds for redefinition of "family").

292. State enforcement efforts intensified with the increase in the divorce rate and proliferation of single-parent (typically women) households in an effort to defray the costs associated with the additional children added to welfare programs. *See, e.g.*, Santillo, *supra* note 57, at 509 (discussing portions of the 1996 Welfare Reform Act that requires states to increase funds to improve effectiveness of child support). In *Pamela P. v. Frank S.*, the family court commented that an "ancient and enduring interest . . . is parental support for helpless children . . . with State care only as a last resort." Pamela P. v. Frank S., 443 N.Y.S.2d 343, 347 (N.Y. Fam. Ct. 1981), *rev'd* 462 N.Y.S.2d 819, 821 (N.Y. 1983).

293. *See, e.g.*, *supra* Part II (analyzing the socioeconomic effect of fatherhood). *See also* Bennet v. Jeffreys, 256 N.E.2d 277, 281 (N.Y. 1976) (finding best interests of child superior to right of parental custody); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 302–04 (1988) (articulating rights-based standard of parental responsibility and contrasting it with the best interests of the child standard).

294. *See, e.g.*, Krause v. Krause, 206 N.W.2d 589, 594 (Wis. 1973) ("This court has consistently held that a father's duty to support his minor children rests upon not only moral law but legally upon the voluntary status of parenthood which the father assumed."). *But see* Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, CARDOZO WOMEN'S L.J. 132 (2003) (arguing that fatherhood should not be defined either by marriage or by genetics, but should be defined by "nurture" focusing on the emotional as well as physical care of and relationship with the child). It is analogous to the moral duty of due care owed by a mother to an unborn fetus, prescribing her conduct during pregnancy to afford the fetus an optimum environment for growth.

As a consequence, society acknowledges and the law recognizes that parents have a unique privity with the child and that the uniqueness of this relationship can override otherwise prevailing laws or theories of recovery.[295] Absent this relationship, no duty exists.[296] Prior to attaining the age of majority, the obligation owed the child is paramount. Once the child achieves majority—the point at which society has determined the child is no longer in need of parental protection—the duty disappears. However, law has always been a statement not of what man—and by extension society—is, but a statement of what man aspires to be. The collective reluctance to interfere in procreative conduct is a tacit acknowledgement of the significance of that conduct to societal interests and aspirations, and more importantly, to its continued existence. The Court has easily rebuffed state encroachment under the auspices of privacy, despite the lack of explicit constitutional authorization.[297] At the same time, protecting procreation also acknowledges that to sanction a remedy is to undermine the privity between parent and child that carries with it the obligation to nurture, support and protect that child.[298] This privity—and the resulting obligation—is joint; it is shared by both parents and owed by both to the child. A denial of that privity propels society towards an uncertain future and further erodes existing self-protections, jeopardizing the fundamental state interest in the maintenance of the social order.

Viewed in this light, the refusal of courts to permit recovery for claims of misrepresentation of fertility can be viewed as twofold. First, it is a recognition that any action that penalizes procreation—to the extent that claim is brought by one parent against the other—conflicts with society's fundamental purpose and is by definition subject to veto. Second, it reflects an unwillingness in light of the joint privity of the parents with the child to sanction claims between them that undermine the resources, tangible and intangible, otherwise available for the child's care and support, even though in any other circumstance and by any

295. For example, tort law permits a stranger to walk by a drowning child but imposes a duty to act upon the parent. PROSSER & KEATON, *supra* note 99, § 56, at 374–76. The laws of intestacy distribute first to the children of the deceased before distributing to more remote relations and include a negative presumption against disinheritance. *See, e.g.*, UNIF. PROB. CODE (1987) (outlining laws governing disposition of property upon death). Intra-family immunities are reflective of the protections afforded the family relationship.

296. *See* PROSSER & KEATON, *supra* note 99, §56, at 374–76 (discussing the concepts of "misfeasance" and "nonfeasance").

297. *See, e.g., supra* Part II (analyzing the socioeconomic impact of fatherhood).

298. *See* PROSSER & KEATON, *supra* note 99, § 122, at 904–10 (discussing torts in the family, particularly between parent and child).

other person or entity the claim might be validly stated. This latter conclusion rests on the amorphous "whole" of resources that would be available through the age of majority, whether currently obligated or not. Nor is it limited to economic resources but includes the emotional resources necessary to adequately nurture the child's emotional health and well-being.[299]

Once the issue is framed as a question on the inherence of procreative rights, the protectionist policies that surround procreation and any resulting children easily provide an appropriate platform upon which to deny recovery in tort and are defensible without regard to gender or shifts in traditional notions of family and relationships; acknowledgement of the ascendancy of procreative rights and its corollary preempting redress for otherwise tortuous conduct is gender neutral. By definition, procreation becomes non-tortious and the immunity implicitly extended to the woman in existing fraudulent conception cases necessarily extends to the man as well. Concomitant with this analysis is the recognition that there is no justification for differentiation between maternal or paternal misrepresentations of fertility, and thus the claim simply is not cognizable as to either, regardless of how damages are cast.[300] To some extent such a conclusion hints at a reincarnation of the assumption of risk theories staunchly rejected in pro-choice rhetoric, extending strict liability to the woman as well as the man. Under the construct of procreative rights suggested above, however, the scope of risk assumed by sexual intercourse that results in conception focuses not on the right to choose abortion, but on the inability of one party to assert claims against the other that are incompatible with those explicated rights. Within this framework, rights of privacy or child support obligations play a secondary and supportive rather than starring role. Judicial recognition of the core premise of procreative rights, protected by society through concepts of privacy or parental support, creates a sound threshold for denial of relief free from the criticisms that current opinions engender and the sense of uncertainty they suggest.

VI. CONCLUSION

There are instances where the interplay between responsibility for the consequences of one's actions and the innate desire to trust those with

299. Whether or not the parents choose to expend those resources on the child is irrelevant. What is protected is the availability of the pool of resources to the parent.

300. This does not suggest an obligation to mitigate, or pretense that abortion itself does not carry emotional loads or physical intrusion. Clearly it does.

whom we are intimate—even if only for a moment—seems to achieve a state of parity. Admittedly, the rejection of a claim for misrepresentation of fertility or contraceptive use removes one of the constraints governing trust and honesty in sexual relationships and threatens to disrupt the underlying premise that each party implicitly understands and agrees to the articulated boundaries of their interaction. The result may be a shift in balance towards simply assigning personal responsibility for types of conduct that impact procreative choice. To some extent, the inquiry comes full circle to rest at the feet of *Griswold* and *Eisenstadt.* The conclusion that the right to procreate inures in the individual imposes not simply a right to choose when and how to procreate, but perhaps a nondelegable obligation to protect against unwanted procreation.[301] Complaints that procreative choice was impaired by the conduct of others are eliminated. At minimum it relieves courts of the effort to shoehorn procreative conduct into traditional tort theory and the morass of state statutory authority that attempts to codify human sexual behavior into a system of financial and moral obligations.

301. In essence, this is the theory behind cases that concluded that there could be no justifiable reliance.