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

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FATHERHOOD BY CONSCRIPTION: NONCONSENSUAL INSEMINATION AND THE DUTY OF CHILD SUPPORT

Michael J. Higdon

“The strictest law sometimes becomes the severest injustice.”
– Benjamin Franklin

INTRODUCTION

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

First, there is S.F., an Alabama man, who in 1992 attended a party at the home of a female friend, T.M. He arrived at the party intoxicated and shortly thereafter passed out on T.M.’s couch. The other party-goers eventually left for the evening, leaving S.F. in the sole care of T.M. When S.F. awoke the next morning, he was surprised to find that all of his clothing—save his unbuttoned shirt—had been removed sometime during

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

2 See Linda H. Edwards, Once Upon A Time in Law: Myth, Metaphor, and Authority, 77 TENN. L. REV. 883 (2010) (“We have known for some time that stories are among the primary ways of making sense of the world, including the world of law.”).


the night. Over the next few months, T.M. would openly boast to several people about how she had engaged in sexual intercourse with S.F. while he was unconscious. She would even go so far as to describe the evening as one that had “saved her a trip to the sperm bank.” T.M. did in fact give birth to a child, and genetic testing confirmed that S.F. was the biological father.

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

Finally, there is Emile, a Louisiana man, who in 1983 was visiting his sick parents at the hospital—something he did quite regularly. One evening, a nurse, Debra, offered to perform oral sex on Emile, but only if he wore a condom. He accepted. At the end of their sexual encounter, Debra agreed to dispose of the used condom. Emile, however, never witnessed this disposal and thus could not say what Debra ultimately did with either the condom or its contents (i.e., Emile’s sperm). Nine months later she gave birth to a child, and genetic testing revealed a 99.9994% that Emile was the father. The two never had sexual intercourse, only the one instance of oral sex with a condom.

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

In fact, these are but three examples of men who have been forced into fatherhood and the attendant obligation to pay child support, despite not having consented to the act that lead to insemination. As such, these stories highlight a problem that exists in the current approach to adjudicating child support. Namely, the courts have focused exclusively on the child’s interest in receiving support with the result that fathers are now strictly liable for any biological child, regardless of any wrongful conduct by the mother. Indeed, courts have been unwilling to allow fathers to even

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7 See infra Part II for additional cases.
8 See infra notes 63-64 and accompanying text.
raise consent as a defense to liability for child support given the overriding policy that children are entitled to financial support from both parents and, if the biological father is not liable, then the child would be left with only one supporting parent.  

Although others have pointed to the seemingly bizarre holdings in the above-reference cases, these commentators have done so largely in a “Ripley’s Believe it or Not” fashion, expressing shock and wonder at the courts’ rulings but offering no solutions or alternative approaches to this admittedly difficult issue. The purpose then of this article is, first, to underscore these criticisms that the current approach and its attendant justifications pose a grave injustice not only to the men who are pressed into the obligations of fatherhood but also to society, which has an interest in protecting all citizens from sexual assault. More importantly, however, I also offer a new objection and, on that basis, a proposed solution.

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

To begin, Section I contains an overview of current law as it relates to the determination and enforcement of child support obligations. Section II,
looking at the strict liability approach, discusses those cases where the biological father was held liable for child support despite the fact that the child was conceived as a result of sexual assault. In Section III, I offer a critique of the courts’ use of strict liability when adjudicating the child support obligations of male victims of sexual assault, pointing out various flaws in this approach and the resulting injustices. Section IV then discusses the laws relating to artificial insemination, where consent is very much a relevant consideration when determining child support obligations. Finally, Section V offers a proposed solution, whereby, just as it is with artificial insemination, consent would operate as an affirmative defense to child support obligations for those fathers whose parenthood arose as a result of sexual assault.

I. THE LAW OF CHILD SUPPORT: AN OVERVIEW

Society has long had an interest in establishing children’s paternity, an interest that is driven primarily “by the desire to provide support for children without making excessive demands on the public coffers and the hope of reducing the incidence of irresponsible procreative behavior.” In early common law, however, an illegitimate child was considered “filius nullius,” the child of no one. As such, not only could the child not inherit from either parent, but she also had very limited right to support from the child’s father. Indeed, “the common law contained no obligation of maintenance of bastards until the enactment of the Elizabethan Poor Laws in the sixteenth century,” which “authorized towns to sue nonsupporting fathers in order to reimburse public aid.” In contrast, the early American

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

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


20 Daniel L. Hatcher, Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State, 42 WAKE FOREST L. REV. 1029, 1037 (2007); see also, FINEMAN, supra note 19, at 79-80 (“These laws, which imposed a duty of maintenance on mothers as well as fathers, were explicitly designed to relieve the
colonies, in what has been described as a “legal innovation,” passed bastardy laws that affirmatively required fathers to support their illegitimate children.\textsuperscript{21} As Professor Daniel Hatcher describes, “[a]s early as 1808, courts began to order noncustodial parents to pay financial support to mothers and children . . . By the 1930s, almost all states had such child support statutes.”\textsuperscript{22}

Shortly thereafter, the federal government would become increasingly involved in the issue of child support. The first step was taken in 1950, when an amendment to the Social Security Act required state welfare agencies to notify law enforcement when a family received Aid to Families with Dependent Children (“AFDC”) on behalf of a child who had been abandoned or deserted.\textsuperscript{23} AFDC was “created to enable each state and jurisdiction to provide a minimum standard of living to needy dependent child and, in some cases, to their caretakers.”\textsuperscript{24} Subsequent amendments would increase the ability of these state agencies “to obtain the address and employment information of noncustodial parents and required states to create single government units to pursue child support on behalf of children receiving AFDC.”\textsuperscript{25}

There was a problem, however, in these early attempts to assist needy children. Specifically, the statutes did not require the custodial parent who was seeking AFDC to cooperate with the state in pursuing child support against the noncustodial parent.\textsuperscript{26} Without a such a requirement, those mothers seeking benefits would have little incentive to provide the information necessary for the government to identify nonpaying fathers, from whom the government could then try and seek reimbursement. All that changed, however, in 1974 when Congress enacted Title IV-D of the Social Security Act, which “created a partnership between federal and state parish of economic responsibility for children.”).

\textsuperscript{21} FINEMAN, supra note 19, at 80; Drew D. Hansen, Note, The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law, 108 YALE L.J. 1123, 1144 (1999). As Professor Hatcher notes, the bastardy laws were in addition to “poor laws and criminal nonsupport laws.” Hatcher, supra note 20, at 1038. Of course, child support obligations extended not only to illegitimate children, but to the children of divorce as well.


\textsuperscript{25} Hatcher, supra note 20, at 1041.

\textsuperscript{26} See GWENDOLYN MINK, WELFARE’S END 59 (1998) (“[T]hough the 1967 [welfare amendments] required states to improve paternity establishment programs, it did not compel mothers to cooperate.”).
government” to collect child support. Indeed, it is this framework that still exists today, and a key provision of that law is that genetic mothers who are receiving benefits must cooperate “in good faith” in establishing paternity.

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

The purpose if this assignment is to “recoup the government costs of welfare assistance.” After all, “[w]elfare is not free.” In fact, [o]ut of the $105 billion in child support debt nationwide, the government claims half so it can seek to recoup the costs of welfare benefits provided to low-income families.” As a result, “[m]others, fathers, and children all become

28 Hatcher, supra note 20, at 1041.
31 See Kansas v. United States, 214 F.3d 1196, 1197 (10th Cir. 2000) (“The PRWORA, also known as ‘welfare reform,’ made sweeping changes in social policy relating to low-income people.”).
33 See 42 U.S.C. § 666.
34 Hatcher, supra note 20, at 1042; see also Carmen Solomon-Fears, Child Support Enforcement: Program Basics, in FAMILY STRUCTURE AND SUPPORT ISSUES 65, 68 (Anne E. Bennett ed., 2007) (“Assigned child support collections are not paid to families; rather, this revenue is kept by states and the federal government as partial reimbursement for welfare benefits.”).
35 Hatcher, supra note 20, at 1030.
36 Id. In 2009, the latest year for which data has been reported, the amount climbed to $107 billion. See Office of Child Support Enforcement, U.S. Dep’t of Health & Human
government debtors—the mothers and children owe their child support rights and the fathers owe the payments—until the welfare benefits are repaid in full.”

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

One of the direct ways in which federal law has influenced state laws relating to child support is the way in which the federal government has offered incentives to the states to collect as much child support as possible. Specifically, every state now has in place a federally-funded child support enforcement program, which are designed to reward states with “incentive payments” relating to “establishment of paternities, establishment of child support orders, collections on current child support payments, collections on past-due child support payments (i.e., arrearages), and cost effectiveness.” Under this program, “states receive incentive payments of 6-10% of each dollar collected in arrearages and current amounts owing, as well as two-thirds of states' collection costs and 90% of computer costs.”

In addition, federal law has also expanded the penalties that states can impose against those parents who fail to meet their child support obligations. For instance, in 1984 Congress enacted the Child Support Enforcement Amendment (“CSEA’’), which required “[s]tates to put teeth into their enforcement laws and strengthen their enforcement powers.”


37 Hatcher, supra note 20, at 1030.
38 See 42 U.S.C. § 654a(e); see also Carmen Solomon-Fears, supra note 34, at 68 (“The federal directories consist of information from the state directories and federal agencies, and are located in the Federal Parent Locator Service (FPLS).”).
39 42 U.S.C. § 666(f); Kansas, 214 F.3d at 1198.
40 DOMESTIC RELATIONS, supra note 18, at 262.
41 Carmen Solomon-Fears, PATERNITY ESTABLISHMENT CHILD SUPPORT AND BEYOND 22 (Susan Boriotti & Donna Dennis eds., 2003); see also 42 U.S.C. § 658a(b)(6)(A)-(E) (2010).
Under the CSEA, states are compelled to: “(1) require employers to withhold child support from paychecks of delinquent parents for one month (2) provide for the imposition of liens against the property of defaulting, support obligors, and (3) deduct from federal and state income tax refunds unpaid support obligations.” PRWORA also increased the ways in which a state can seek to compel payment of child support. Specifically, “[w]hen a parent fails to pay child support, the PRWORA requires states to revoke passports, suspend professional and other licenses, place liens on property, and notify consumer reporting agencies.”

In thinking about the way in which the laws relating to child support adjudication and enforcement have developed, it is important to keep in mind that, despite this evolution, the policies driving these enforcement mechanisms have remained the same. Thus, to fully understand the nature of child support obligations, one must not only look to the governing statutes, but also these underlying policies. They are: 1) the best interest of the child and 2) the preservation of public funds. The remainder of this section discusses each of these motivating influences more fully.

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

> There is a societal interest in children’s well-being. Insofar as one of the objectives of a society is to “promote the common good,” children’s well-being is, ipso facto a societal interest. Furthermore, for a society to flourish through time, its children must be raised with love, care and

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45 Kansas, 214 F.3d at 1198.

46 Hatcher, supra note 20, at 1032 (“The current child support system developed from competing interests and purposes, a mixture of common law, divorce codes, state poor laws, bastardy acts, and criminal nonsupport statutes. From this history emerged the two primary interests in child support.”).

47 Browne Lewis, Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process, 13 LEWIS & CLARK L. REV. 949, 991 (2009); Johnson, supra note 10, at 529 (“The policy of private support is based on the theory that the best interests of a child are served by receiving support from both of his biological parents.”).
sufficient material resources for them to flourish as individuals. The societal costs of children who are raised in abject poverty without the guidance of loving, involved parents are high.\footnote{48 Hubin, supra note 16, at 44.}

Of course, just because society has an interest in a child’s well-being does not necessarily mean that the duty of support should fall on the child’s parents. We could, for example, craft a legal system in which these obligations are shared by the whole community.\footnote{49 See, e.g., D. Marianne Blair et al, FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE INTERNATIONAL FAMILY LAW 589 (giving examples of “communities where communal child-rearing is the norm.”).} American law, however, has declined to adopt such an approach.\footnote{50 See Anne Corden & Daniel R. Meyer, Child Support Policy Regimes in the United States, United Kingdom, and Other Countries: Similar Issues, Different Approaches, 21 FOCUS 72, 75 (2000) (“In all [European countries and the United States] . . . parents who are or were married to each other are legally obliged to support their children. In the case of unmarried parents, once paternity is established the father must also provide financial support.”).} Instead, child support law is premised on the “widely held belief that parents are morally and socially obligated to support their children.”\footnote{51 Maureen R. Waller & Walter Plotnick, Effective Child Support Policy for Low-Income Single Parents, in SINGLE-PARENT FAMILIES: PAST, PRESENT, AND FUTURE 271 (Annice D. Yarber & Paul M. Sharp eds., 2010).} As Sir William Blackstone explained, parents “would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish.”\footnote{52 William Blackstone, 1 Commentaries *447.} After all, the child and his attendant needs would not even exist but for the actions (which are generally voluntary) of the parents.\footnote{53 See Hubin, supra note 16, at 65 (“Typically, fathers and mothers share moral responsibility for the existence of their children—they voluntarily engage in actions that they know, or should know, might cause pregnancy.”).} Further, the law charges adults with full knowledge of where babies come from: “Because a woman and a man voluntarily have sex, and that sex could result in a pregnancy, that woman and man are responsible for the child.”\footnote{54 Katharine K. Baker, Bionormativity and the Construction of Parenthood, 42 GA. L. REV. 649, 664 (2008).} For these reasons, it is generally accepted that “[a] child’s right to support is owed by a child’s parents, not the state.”\footnote{55 City of San Francisco v. Garnett, 82 Cal. Rptr. 2d 924, 928 (Ct. App. 1999)}

The final reason the law refuses to place such responsibility on the greater community is, as noted earlier, the policy of reducing demands on public funds.\footnote{56 See supra notes 16, 34-37 and accompanying text.} For instance, one of the primary objectives of early bastardy
acts was “to protect the public from the burden of maintaining illegitimate children.” Nonetheless, as Professor Hatcher notes, the state’s desire to provide for its citizens in need does create a tension “between the societal interest in supporting children and the simultaneous interest in supporting society from the burden of supporting children.” It was this tension that ultimately lead to the current statutory framework that addresses child support obligations. Namely, a parent can obtain support from the state but, in exchange, must cooperate in the state’s attempt to recoup those costs from the other parent. Although the current system has certainly been criticized in its overall effectiveness, the underlying goal is to simultaneously, 1) “provide assistance to needy families,” 2) “encourage the formation and maintenance of two-parent families,” and also 3) recoup welfare costs.

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

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

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

58 Hatcher, supra note 20, at 1035.

59 See supra note 29 and accompanying text.

60 42 U.S.C. § 601(a). Other goals listed in the statute include ending “the dependence of needy parents on government benefits by promoting job preparation, work, and marriage” and preventing and reducing “the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies.”

61 See Hatcher, supra note 20, at 1086 (“Two of the primary purposes of the TANF welfare program are encouraging the ‘formation and maintenance’ of two-parent families and helping families to achieve economic self-sufficiency. However, welfare cost recovery—also a centerpiece of welfare policy—undermines both TANF goals.”).

62 See supra note 47 and accompanying text.

essentially a form of strict liability with the justification being that “the child is an innocent party, and it is the child’s interests and welfare” that the court must look to in adjudicating support. 64

To see this principle in action, consider the issue of paternity fraud, 65 whereby a mother secures child support payments from a man after intentionally lying to him and telling him that he is the child’s father. 66 Despite this deception and the resulting financial burden, these “fathers,” even after learning that they are not the child’s biological parent, are nonetheless often ordered to continue paying child support on the basis that doing so is in the child’s best interest. 67 Thus, if open misrepresentation of

695 So.2d at 1189 (“[A]ny wrongful conduct on the part of the mother should not alter the father’s duty to provide support for the child.”).


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

66 Although I am focusing here on an extreme example of maternal misconduct here to highlight just how strict liability can be for child support, it is important to note that paternity fraud claims may not always involve intentional deception by a mother. As Professor Jacobs explains:

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


67 For example, the Supreme Court of Vermont, in denying one father’s request for paternity disestablishment, pointed to the “many jurisdictions holding that the financial and emotional welfare of the child, and the preservation of an established parent-child relationship, must remain paramount.” Godin v. Godin, 725 A.2d 904 (Vt. 1998). Following those cases, the court ruled that “absent a clear and convincing showing that it would serve the best interests of the child, a prior adjudication of paternity is conclusive.” Id.; see also Michael K.T. v. Tina L.T., 387 S.E.2d 866, 868 (W. Va. 1989) (“Even if blood test evidence excludes paternity in a given case, the trial judge should refuse to permit
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paternity by the mother offers little defense to child support liability, one can imagine how limited a defense is available to a man who is the biological father. In that case, “[s]o long as a man engages in an intimate sexual act resulting in his depositing of his sperm with a woman who then becomes pregnant, he is liable for child support.”

At first glance, such a standard seems eminently reasonable. Few would argue with the proposition that, if a man voluntarily has sex with a woman and a child results, then he should be liable for child support. The problem with the court’s current approach, however, is that the standard is so strict that even those men who never consented to the sexual act that caused the pregnancy are nonetheless liable for support. As one commentator describes, “[w]hile courts have declared that child support obligations are dependent on voluntary parenthood, they are often reluctant to look to consent for guidance.”

Professor Hubin goes even further, pointing out that, under contemporary legal standards, it has become a “settled approach” that “genetic relationships establish legal paternity regardless of whether the genetic fathers gave legal consent, or were capable of giving legal consent, to an act of sexual intercourse that resulted in the pregnancies.”

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

A. Statutory Rape

State legislatures, understanding that most adolescents lack full emotional, mental and physical maturity are rightly concerned with protecting teens from “unequal, manipulative, or predatory relationships.” One of the primary ways in which legislatures attempt to accomplish this

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69 Johnson, * supra* note 10, at 535.
goal is through statutory rape laws, which in essence, criminalize sexual activity with a child who is below the statutorily defined age of consent. Thus, age of consent laws, which vary by state, lay out the minimum age at which a person can legally consent to engage in a sexual act. In most instances, engaging in a sexual act with someone below the age of consent is a criminal act, given that the child was incapable of legally consenting. As one commentator describes: “The law conceives of the younger partner as categorically incompetent to say either yes or no to sex. Because she is by definition powerless both personally and legally to resist or to voluntarily relinquish her ‘virtue,’ the state, which sees its interest in guarding that virtue, resists for her.” In most states, the offense of statutory rape is a felony.

Aside from the criminal penalty, however, there arises the question of whether a male victim of statutory rape should be liable for child support payments should the rape result in a child. Unfortunately, this issue arises somewhat frequently. Indeed, there are “numerous cases in which an adult woman became pregnant as a result of sexual relations she initiated with a minor child.”

In that case, Nathaniel J., who was fifteen at the time, and the mother Ricci Jones, who was thirty-four, engaged in sexual intercourse, which would be considered statutory rape. The court held that the minor father is liable.
Nathaniel described as “a mutually agreeable act.” Nonetheless, by having sexual relations with Nathaniel, Jones violated California law, which states that “[a]ny person over the age of 21 years who engages in an act of unlawful sexual intercourse with a minor who is under the age of 16 years is guilty of either a misdemeanor or a felony.” As a result, Jones was prosecuted and convicted of statutory rape. Subsequently, however, the district attorney’s office brought an action against Nathaniel, seeking child support and welfare reimbursement. After the trial court reserved an order of child support, Nathaniel appealed, arguing that “exacting child support from a victim of statutory rape violates public policy” in that “public policy protects [minors] from the effects of sexual exploitation by an adult.”

The court, however, flatly rejected Nathaniel’s arguments. The court began its opinion by noting that “California law provides that every child has a right to support from both parents.” The court then refused to release Nathaniel from liability because, as the court concluded, “he is not an innocent victim of Jones’s criminal acts.” Indeed, the court noted that “there is an important distinction between a party who is injured through no fault of his or her own and an injured party who willingly participated in the offense about which a complaint is made.” The court placed Nathaniel in the latter category given that he voluntarily engaged in sexual intercourse with Jones—“It does not follow that a minor over the age of 14 who voluntarily engages in sexual intercourse is a victim of sexual abuse.” Paradoxically, then, the court held that Nathaniel was liable for child support because he voluntarily engaged in sexual intercourse despite the fact he was a minor at the time of conception and, thus, legally could not consent to sexual relations.

The Nathaniel case is no anomaly; indeed, every court to consider the

79 Id. (citing Cal. Penal Code § 261.5).
80 Id. (“The San Luis Obispo County prosecutor prosecuted Jones and obtained a conviction of unlawful sexual intercourse with a minor.”).
81 Id.
82 Id. Further, Nathaniel argued that “the reserved child support order ‘is exactly the exploitation which the Legislature intended to prevent’ because it inflicts economic loss on a crime victim.” Id.
83 Id. at 845.
84 Id. Specifically, the court noted that “[a]fter discussing the matter, he and Jones decided to have sexual relations. They had sexual intercourse approximately five times over a two week period.”
85 Id. (quoting Cynthia M. v. Rodney E., 279 Cal. Rptr. 94 (Ct. App. 1991)). According to the court, it then followed that “[o]ne who is injured as a result of criminal conduct in which he willingly participated is not a typical crime victim.”
86 Id.
issue of whether a male victim of statutory rape is liable for child support has reached the same conclusion, using the same reasoning.\textsuperscript{87} For instance, in holding that the respondent was liable for child support, despite the fact that he was only fourteen years of age at the time of conception,\textsuperscript{88} the Court of Appeals of Michigan stated as follows: “[R]espondent participated in the act of sexual intercourse that resulted in the conception of [the child]. Respondent is not absolved from the responsibility to support the child because [the mother] was \textit{technically} committing an act of criminal sexual conduct.”\textsuperscript{88} Likewise, the Supreme Court of Kansas in \textit{Hermesmann v. Seyer}, held that the defendant, who was only twelve years old at the time of conception, was nonetheless liable for child support:

This State’s interest in requiring minor parents to support their children overrides the State’s competing interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part of the other parent . . . This minor child, the only truly innocent party, is entitled to support from both her parents regardless of their ages.\textsuperscript{89}

Similarly, in \textit{In re Paternity of JLH}, the Wisconsin Court of Appeals rejected the claim that a fifteen year-old should be relieved of child support obligations given that he was the victim of sexual assault: “If voluntary intercourse results in parenthood, then for purposes of child support, the parenthood is voluntary. This is true even if a fifteen-year-old boy’s parenthood resulted from a sexual assault upon him within the meaning of the criminal law.”\textsuperscript{90}

Again, these are but a small sampling of the many cases in which courts have ordered victims of statutory rape to pay child support to a child who was conceived as a result of a sexual act to which the victim was legally incapable of consenting.\textsuperscript{91}

\begin{flushright}
\textit{B. “Stolen” Sperm}
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Male victims of statutory rape are not the only men who, despite not

\textsuperscript{87} See Jones, \textit{supra} note 10, at 412 (“Without exception, appellate courts have held that while the criminal law deems minors incapable of consenting to sexual intercourse, family law can hold victims financially liable for children conceived during a criminal act.”).


\textsuperscript{89} 847 P.2d 1273, 1279 (Kan. 1993).

\textsuperscript{90} 149 Wis.2d 349, 360 441 N.W.2d 273, 276-77 (1989).

\textsuperscript{91} See \textit{supra} note 77.
having consented to a sexual act, have nonetheless been held liable for the support of the resulting child. After all, “the absence of consent need not result from force or coercion; it may also result from some form of ignorance or incapacity.”

Thus, included in this category of “fathers” are also those men who have had their sperm taken and used for conception without their consent. To illustrate, consider again the stories from the beginning of this article concerning S.F. and Emil.

S.F. was the Alabama gentleman who passed out on T.M.’s (i.e., the mother’s) couch, while attending a party at her house in 1992. He awoke the next day and noticed that his clothes had been removed. In the ensuing months, T.M. bragged to friends and acquaintances that she had engaged in sexual intercourse with S.F. while he was unconscious and, thus, in her words, S.F. had “saved her a trip to the sperm bank.” A child resulted from the assault and, in 1994, the State of Alabama, on behalf of T.M., brought an action against S.F. to collect child support. The lower court entered a judgment against S.F., requiring him to $106.04 a week and also $8,960.64 in arrears.

On appeal, S.F. argued that he should be relieved of liability given that “he did not have consensual intercourse with T.M. and that he was a victim of a sexual assault by T.M.” According to S.F., “to require him to support the child that resulted from this nonconsensual intercourse would be to punish him, to deprive him of his property rights, and to deny him equal protection under the law.” The court, however, rejected S.F.’s argument: “The child is an innocent party, [and] any wrongful conduct on the part of the mother should not alter the father’s duty to provide support for the child.”

In reaching this conclusion, the court relied on support cases—like

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92 Hubin, supra note 16, at 66 (citing Patricia J. Falk, Rape by Drugs: A Statutory Overview and Proposals for Reform, 44 Ariz. L. Rev. 131, 133 (2002)).


94 Id. at 1187. According to S.F., although he had been clothed when he passed out, “when he awoke the following morning he was wearing only his unbuttoned shirt and that T.M. was standing in the bathroom doorway ‘toweling off.’” Id.

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

96 Id. S.F. was also ordered “to include the child on his medical insurance; to pay one-half of any medical expenses not covered by insurance; and to pay $300 for the cost of the blood tests.” Id.

97 Id.

98 Id. S.F. “further contended that the court, acting in equity, could abate any child support payments due because of what he alleged to be T.M.’s sexual assault upon him.” Id. at 1187.

99 Id. at 1189 (noting that the purpose of the Alabama Uniform Parentage Act “is to provide for the general welfare of the child; any wrongful conduct on the part of the mother
those discussed above—where the child was a product of statutory rape.\textsuperscript{100} However, the court also relied on cases where the mother had lied to the father about being on birth-control and, as a result of that misrepresentation, the father had engaged in sexual intercourse with the mother.\textsuperscript{101} In all such cases, the courts have held that the father was liable for child support despite the mother’s false statement.\textsuperscript{102}

Similar to S.F., in \textit{State v. Daniel G.H.}, a Wisconsin father, Daniel, claimed that the mother, Jennifer, had engaged in nonconsensual sexual intercourse with him after lacing his drink with “a date rape drug.”\textsuperscript{103} In an action to collect child support for the resulting child (a son named Derek) the lower court had allowed Daniel to introduce evidence of nonconsent.\textsuperscript{104} Even so, the court placed the burden of proof on Daniel, requiring him “to prove all factual issues by clear, satisfactory, and convincing evidence.”\textsuperscript{105} Ultimately, the jury found that Daniel’s act of sexual intercourse with Jennifer was involuntary.\textsuperscript{106} Nevertheless, the lower court still required Daniel to pay child support.\textsuperscript{107} On appeal, Daniel argued that the lower court’s order was in error and that “the jury’s finding of lack of consent should bar or reduce his child support obligation.”\textsuperscript{108}

The Court of Appeals of Wisconsin, however, agreed with the lower court given that “[t]he paramount goal of any child support decision is to secure the best interest of the child”\textsuperscript{109} and that, in this case, “Derek was not

\textsuperscript{100} Id. (citing Mercer County Dep’t of Social Services v. Alf M., 155 Misc. 2d 703, 589 N.Y.S. 2d 288 (Fam. Ct. 1992) & State ex rel. Hermesmann v. Seyer, 252 Kan. 646, 847 P. 2d 1273 (1993)).

\textsuperscript{101} Id. (citing L. Pamela P. v. Frank S., 59 N.Y. 2d 1, 462 N.Y.S. 2d 819, 449 N.E. 2d 713 (1983)).


\textsuperscript{104} Notably, “[t]he trial court barred Daniel from introducing evidence of his nonconsent as a defense to paternity. The court stated that Daniel’s allegation was not a defense to paternity, but that the issue could be considered for purposes of establishing child support.” Id. at ¶ 3.

\textsuperscript{105} Id. at ¶ 5.

\textsuperscript{106} Id. Somewhat confusing is the fact that, despite finding that the act of intercourse was nonconsensual, the jury found “that Jennifer did not give him a drug causing him to have involuntary sex with her.”

\textsuperscript{107} Id. at ¶ 6. Specifically, the court ordered Daniel to pay child support in the amount of $100/week.

\textsuperscript{108} Id. at ¶ 7.

\textsuperscript{109} Id. ¶ 11 (citing Luciani v. Montemurro-Luciani, 199 Wis. 2d 280, 544 N.W. 2d 561 (1996)).
at fault [and thus] was entitled to receive child support from both parents.\textsuperscript{110} Despite agreeing with the lower court’s determination of child support, the Court of Appeals nonetheless disagreed with the lower court putting the issue of consent to the jury. Specifically, the Court of Appeals found no statutory basis for permitting a jury to consider consent when ruling on the issue of child support.\textsuperscript{111} Instead, the Court of Appeals ruled that the only real question the jury had to answer was whether Daniel was Derek’s father: “Daniel had a right to decide whether he is Derek’s father. However, Daniel admitted he was Derek’s father. As a result, a judgment of paternity was entered. When the court determined that Daniel was Derek’s father, Daniel’s right to a jury trial was extinguished.”\textsuperscript{112}

A final example of stolen sperm is that of Emil, discussed in the introduction to this article.\textsuperscript{113} His story is somewhat different, however, in that Emil did consent to sexual activity with the mother.\textsuperscript{114} Nonetheless, Emil claimed that he merely consented to oral sex with the mother and never consented to her use of his sperm for purposes of self-insemination.\textsuperscript{115} In that case, during the Fall of 1983, Emil was visiting his parents in a hospital when Debra Rojas, a nurse, offered to perform oral sex on him provided he wore a condom.\textsuperscript{116} Emil consented but claimed that subsequently Debra had, without Emil’s knowledge or consent, used Emil’s sperm to successfully impregnate herself.\textsuperscript{117} Many years later, in 1996, the state filed an action against Emil to collect child support. Despite his objections, the lower court ordered Emil to pay $436.81 per month, $17,909.21 in arrears, and 5% court costs.\textsuperscript{118}

The Court of Appeal of Louisiana affirmed, stating that “[t]he fact of paternity obliges a father to support his child.”\textsuperscript{119} The court then recounted the story of how Debra had allegedly impregnated herself without Emil’s consent. Regardless, the court held that “the evidence presented clearly

\textsuperscript{110} Id. at ¶ 12.
\textsuperscript{111} Id. at ¶ 14 (analyzing WIS. STAT. § 767.50(1)).
\textsuperscript{112} Id. at ¶ 18.
\textsuperscript{113} See supra note 6 and accompanying text.
\textsuperscript{114} Emile testified that one evening “this woman came upon me in the waiting room and she told me that she wanted to perform oral sex on me,” and “as being any male would, I did not refuse . . . .” 694 So.2d at 1035.
\textsuperscript{115} According to Emile, Debra asked him to wear a condom as a condition to providing him with oral sex, “but he denied have any knowledge of what she planned to do with the sperm.” Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. (“Several months later, plaintiff started insinuating that he might be the father of her child, and although he did not personally see her do it, he believed that she may have inseminated herself.”).
\textsuperscript{118} Id. at 1033.
\textsuperscript{119} Id. at 1034 (citing Dubroc v. Dubroc, 388 So.2d 377 (La. 1980)).
supported [the trial judge’s] determination that defendant is the father of the minor child.”

Further, the court noted that paternity testing revealed a 99.9994% probability that Emil was the father. Finally, in addressing the issue of Debra’s self-insemination without Emile’s consent, the court dismissed the point, merely noting that “defendant’s own testimony showed that he had some sort of sexual contact with the plaintiff around the time frame of alleged conception.” According to the court, the fact that there was any sexual contact was sufficient to hold Emile liable for child support.

An appellate court in Illinois reached a similar result in Phillips v. Irons. In that case, Dr. Richard Phillips and Dr. Sharon Irons began a dating relationship, during which time the couple engaged in oral sex on three occasions. The two never had sexual intercourse because Irons told Phillips that she was menstruating and thus needed to refrain from vaginal intercourse. However, unbeknownst to Phillips, Irons used Phillips’ semen (obtained from oral sex) to successfully inseminate herself. Subsequently, Irons gave birth to a daughter and, soon thereafter, filed a “Petition to Establish Paternity and Other Relief” against Phillips. Because he had ended the relationship with Irons some months prior, Phillips had no knowledge of Iron's pregnancy or the birth of the child. Nonetheless, DNA testing proved that Phillips was in fact the biological father. Ignoring the deceptive manner in which the child was conceived, the court awarded child support to Irons in the amount of $800 a month, which was later increased to $1,600 a month.

In sum, in cases involving a father who claims that his sperm was stolen

120 Id. at 1036. This evidence consisted of “plaintiff’s affidavit in which she named defendant as the father of the child,” her admission “she had sexual intercourse with him in September 1983, and further claimed that she did not have sexual intercourse with any other man thirty days prior to . . . or after the date of conception.”

121 Id. at 1035-36.

122 Id. at 1036 (emphasis added).


124 Id. at *1.

125 Further, “During their relationship, the parties discussed the possibility of having children only after they married. Plaintiff informed defendant he did not wish to have children prior to marriage, and intended to use a condom if and when they engaged in sexual intercourse.” Id.

126 Id. (“On or around February 19, 1999, and March 19, 1999, defendant ‘intentionally engaged in oral sex with [plaintiff] so that she could harvest [his] semen and artificially inseminate herself,’ and ‘did artificially inseminate herself.’”).

127 Id.

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

129 Id.

by the mother, whether this “theft” occurred during nonconsensual intercourse or whether the sperm was harvested from sexual activity other than intercourse and then surreptitiously used for insemination, the result is the same: the lack of consent is no bar to an obligation to pay child support. In other words, “[i]f a man intends to have sexual intercourse with a woman and a baby results, the man is liable for child support. The sexual intercourse in these cases is ‘factually voluntary’ and thus intentional, even if it is nonconsensual in the criminal sense.”

III. THE PROBLEMS WITH STRICT LIABILITY

The practice of holding male victims of sexual assault liable for child support is problematic for a number of reasons. Before getting into these problems, however, it is important to note that there is at least one very strong reason for preserving a strict liability approach to adjudicating child support claims. Namely, doing so makes the process of securing child support that much simpler. Without a bright-line rule, courts would be required to expend a considerable amount of judicial resources on what could easily become endless litigation over whether it is equitable to make the biological father pay child support. Such justifications, however, are not without limits. As one commentator aptly put it, “[i]t seems far better to protect the rights of the few than to make a blanket ruling where the rights of those few are brushed aside in the name of efficient court dockets.”

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

Problem 1: The Current Approach Mischaracterizes the Issue. The question the courts should be asking in those cases discussed above is not whether it is the child’s best interest to receive support from both parents,

131 Morgan, supra note 68.
133 Nancy S. McCahan, Comment, Justice Scalia’s Constitutional Trinity: Originalism, Traditionalism and the Rule of Law as Reflected in His Dissent in O’Hare and Umbehr, 41 ST. LOUIS U. L.J. 1435, 1463-64 (1997).
134 See supra notes 47-55 and accompanying text.
135 See supra Part II.
but, given the way in which the child support laws operate, the question is instead whether it is the child’s best interest to have the victimized parent reimburse the state for payments it has made on behalf of the child. After all, “the child’s rights in these cases have actually been relinquished to the government, since these cases arise when a county seeks repayment of public benefits paid on behalf of the child.” When the question is phrased that way, the best interest argument loses a lot of steam. Further, even if the state is unable to collect child support from the victimized father, the child will likely continue to collect benefits from the state. Indeed, as one commentator describes, “the only way a child can actually financially benefit from the state successfully seeking and obtaining reimbursements from the victimized father is in a situation where the father pays more in child support than the state pays in welfare benefits on behalf of the child.” Accordingly, it is the state—and not the child—who is the one most in danger of harm should the state be unable to collect support payments from the victimized father.

**Problem 2: The Current Approach Places Responsibility on the Wrong Party.** Typically, “[a] child’s right to support is owned by anyone the government can make somehow pay, not the state.” However, simply because a child has a right to support does not necessarily tell us who is liable for that support. As Professor Hubin rightfully points out, “[t]he existence of a positive right to education, for instance, does not establish any particular person has the obligation to provide this education; this obligation could fall on society collectively.” In the cases discussed in Part II, by holding those men liable for child support, the courts are, in essence, punishing the victims for being victimized. Instead, if anyone is to be blamed in these cases, it should be the state.

After all, as Professor Ruth Jones points out, “every state has a law authorizing compensation for crime victims, indicating that legislatures do

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136 See supra Part I.
137 See Jones, supra note 10, at 449-50; see also Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 253 (2000) (noting that federal laws relating to the establishment of paternity “were not motivated by the belief that children deserve to know who their absent fathers are or that child support might lead to a more secure bond between these children and their noncustodial fathers . . . . States want to establish paternity to identify child support obligor so that they (the state) can collect support payments to offset the costs of welfare payments.”)
138 See Jones, supra note 10, at 449.
139 See Johnson, supra note 10, at 530.
140 Id. (noting that “[a] child is not likely to benefit in this way because statistics show that children born to poor mothers usually have poor biological fathers as well”).
141 Morgan, supra note 68.
142 Hubin, supra note 16, at 56 (“A further argument is necessary to determine who has the obligation to provide a person with something to which she has a positive right.”).
not believe these persons should have to bear the financial costs of their victimization.” Such compensation has “been justified by the failure of the state to protect its citizens from crime, by the ‘shared risk’ theory in which all citizens share the cost and risk of victimization, and by the ‘moral obligation’ theory, in which a state has a moral responsibility toward crime victims.” Although it is unclear how many children in need of financial assistance are fathered by men as a result of sexual assault, putting the burden on the state to contribute support to those children would not only stop punishing the victims, but also provide the state with a greater incentive to better address the problem of male sexual assault.

Problem 3: The Current Approach Trivializes Sexual Assaults Against Men. In holding that a fifteen year-old victim of statutory rape was nonetheless liable for child support, the judge in the Nathaniel case made a very telling statement: “Victims have rights. Here, the victim also has responsibilities.” That quote is emblematic of the glaring lack of concern that child support law currently has for the male victims of sexual assault. Now, it seems to be generally accepted that, when compared to women, it is much more rare for a man to be the victim of sexual assault. As such, there are fewer studies on the impact that sexual assault has on men. Nonetheless, there is at least some data, albeit limited, on the effect statutory rape has on young men. For example, as psychology professor, Roger J.R. Levesque describes, “for boys, a largely excluded group from discussions of the negative impact of early sexually activity, research indicates that males pay an emotional price for beginning a sexual relationship early.”

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143 See Jones, supra note 10, at 456; see also STEVEN BARKAN & GEORGE J. BRYJAK, FUNDAMENTALS OF CRIMINAL JUSTICE: A SOCIOLOGICAL VIEW 175 (2010) (“Every state has a crime victims compensation program that it administers independently.”)

144 See Jones, supra note 10, at 449 (citing Lesley J. Friedsam, Legislative Assistance to Victims of Crime: The Florida Crimes Compensation Act, 11 FLA. ST. U. L. REV. 859, 862-63 (1984)).


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

147 See e.g., Jones, supra note 10, at 439 (“In contrast to the steps taken to study and address female victimization, male victimization has not been adequately studied.”); 15 Am. Jur. Proof of Facts 3d 259 n.1 (“This article refers to the victim of sexual assault in the feminine gender because there is very little medical research regarding the effect of sexual assault on male victims.”).

revealed that the rape had impacted their attendance at school, led to drug and alcohol abuse, and increased the likelihood that the young man would engage in criminal activity. 149

When courts force these victims to assume financial responsibility for the child who resulted from sexual assault, the courts not only devalue these harms, they likely exacerbate them. Indeed, Professor Jones points out, “[b]y imposing financial responsibility to repay state support for an unplanned child,” 150 the law magnifies the harm to statutory rape victims by failing to protect them from the potential harm that comes from “the long-term, negative consequences resulting from the financial obligations of fatherhood.” 151 These obligations, of course, have quite an impact on any male, whether he be a child or an adult at the time he is ordered to pay child support. After all, in many ways, the “imposition of a child support award is considered to be the equivalent of an eighteen-year sentence.” 152 However, when a male is made to pay child support as a consequence of having been sexually assaulted, the resulting obligation does not only impose financial hardship but is, in many ways, compounding his victimization.

**Problem 4: The Current Approach Relies on Impermissible Gender Stereotypes.** In her book *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, Professor Martha Fineman points out that “[w]hile the dominant aspirational story for the past decades has been one of spousal ‘equality,’ great gender inequality in the allocation of the burdens and costs associated with family operation continues to affect how this story is played out in real life.” 153 The current approach to child support adjudication is a prime example of the inequality to which Fineman refers. Indeed, the few commentators who have criticized the court’s

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150 Id. at 413.

151 Id. at 412; see also Robert I. Lerman, Employment Patterns of Unwed Fathers and Public Policy in Young Unwed Fathers: Changing Roles and Emerging Policies 316-33 (Robert I. Lerman & Theodora J. Ooms eds., 1993) (noting the adverse effects on earning capacity that fatherhood poses for young men).


153 Id. at 164; see also Kathleen E. Mahoney, Gender and the Judiciary: Confronting Gender Bias, in GENDER EQUALITY AND THE JUDICIARY: USING INTERNATIONAL HUMAN RIGHTS STANDARDS TO PROMOTE THE HUMAN RIGHTS OF WOMEN AND THE GIRL-CHILD AT THE NATIONAL LEVEL 85, 94 (Kristine Adams & Andrew Byrnes eds., 2000) (“In family law, gender bias exists in underlying assumptions and stereotypes which affect alimony, maintenance, child support, and custody awards.”).
current approach of holding male victims liable for child support have done so primarily on the way in which the current approach violates gender equality.\textsuperscript{154} Ellen London’s commentary is particularly instructive:

The traditional conceptions of power, dominance, and victimization employed by these courts precluded the judges from providing the defendants with a fair or adequate solution. Little doubt exists that the judges in these cases would have written different opinions if the victims were female—illuminating how men are viewed as the responsible party in a sexual encounter and women have no corresponding agency.\textsuperscript{155}

In fact, consider the one case in which a court was called upon to decide whether a female victim of sexual assault was liable for child support.\textsuperscript{156} In \textit{DCSE/Esther M.C. v. Mary L}, a mother refused to provide support for her three minor children on the basis that they “were the product and result of an incestuous relationship with her brother,” and, as such, “it was not a voluntary decision on her part to have children.”\textsuperscript{157} In ruling, the court did what no court has yet to do when confronted with the child support obligations of a male victim of sexual assault—the court ruled that there was no liability.\textsuperscript{158} According to the court, “[i]f the sexual intercourse which results in the birth of a child is involuntary or without actual consent, a mother may have ‘just cause’ . . . for failing or refusing to support such a child.”\textsuperscript{159} The result in that case is instructive, offering considerable support to London’s prediction concerning the role that gender likely plays in these determinations.

Regardless, any case that holds a victim of sexual assault liable for child support, whether that victim is male or female, should “lead one to challenge the applicability of the strict liability theory”\textsuperscript{160} given the

\textsuperscript{154} See, e.g., Jones, \textit{supra} note 10, at 416-449 (discussing the gendered aspects of statutory rape and child support laws); London, \textit{supra} note 10, at 1958 (“[T]he use of strict liability has problematic implications for societal conceptions of gender.”).
\textsuperscript{155} London, \textit{supra} note 10, at 1972.
\textsuperscript{157} \textit{Id.} at *1.
\textsuperscript{158} Although the court held that there would be no liability in the face of nonconsent, based on the facts before it, the court could not “make a summary decision as to whether this case falls within the rape/incest exception” and thus ordered future hearing on that issue. \textit{Id.} at *3.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} London, \textit{supra} note 10, at 1980.
questions such cases raise concerning both “the feminist ideals of bodily integrity, consent and sexual autonomy” and also “the conception of gender as a fluid and socially constructed category.” For these reasons, London ends her critique with a call to action, noting that it is “[f]eminists and others concerned with gender,” who “will have to ensure that the legal system is forced to answer” the troubling gender questions that are raised by these cases. According to London, “[t]o concentrate on male victims is not to abandon feminism, rather it is to take a much-needed step toward a more effective understanding of equality and sex.”

**Problem 5: The Current Approach Ignores a Male’s Reproductive Choice.** Despite the desire for gender equality, the inescapable fact is that “men and women play undeniably unequal roles in reproduction.” Specifically, when it comes to guarding against fatherhood, a male can only exercise that option at the time of conception. Indeed, should he elect to engage in sexual relations with a female and a baby results, he will be strictly liable for child support. A female, on the other hand, can later elect to abort the child or give the child up for adoption, thus terminating her parental rights. In contrast, a father cannot make those choices absent the cooperation of the mother. Thus, when a male victim of sexual assault is held liable for the support of the resulting child, he has effectively been

161 Id. at 1979; see also Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 Yale J.L. & Human. 195, 196-97 (1995) (noting the importance feminist work has played in the areas of “women’s bodily integrity and decisional autonomy”).
163 Id. at 1993.
164 Id.; see also Martha T. McCluskey, *Media Stories of Feminist Victims and Victims of Feminism on College Campuses, in Feminism, Media, and the Law* 57, 71 (Martha Fineman & Martha T. McCluskey eds., 1997) (“Though feminists should continue to speak out about gendered oppression, and though we should question many of those who claim to be victimized by feminist reforms, we should strive for solutions that will create fewer victims.”).
166 See Angela Thompson, *International Protection of Women’s Rights: An Analysis of Open Door Counselling Ltd. and Dublin Well Woman Centre v. Ireland,* 12 B.U. Int’l L.J. 371, 393 (1994) (“As a direct consequence of biological differences, reproductive choice is a right exclusive to women.”)
167 See *supra* Part II.
168 Vernellia R. Randall & Tshaka C. Randall, *Built in Obsolescence: The Coming End to the Abortion Debate,* 4 J. Health & Biomedical L. 291, 305 (2008) (“Up until this point, a woman’s reproductive interest has consistently prevailed over the man’s, not because the law gave greater protection to the woman’s reproductive interest, but because the woman’s autonomy interest gave her decisions regarding reproduction primacy.”).
stripped of all reproductive choice, a result which not only goes against feminist principles of bodily autonomy, discussed above, but arguably may also unconstitutionally infringe on the right to reproductive autonomy as developed by the Supreme Court. As one commentator noted, “[t]he decision not to reproduce is no less fundamental than the decision to reproduce or to engage in reproductive sexual activities. Without this symmetry, there is no choice.”

In sum, given the serious problems discussed in this section, courts simply have to start taking a different approach to the issue. In doing so, the courts must continue their attempts at protecting the child’s best interest but, at the same time, they also have to find a way of not further punishing victims of sexual assault. The solution lies in incorporating a consent requirement, and I propose such a solution below. However, before doing so, it is first necessary to understand a narrow area of child support law in which consent already operates as an affirmative defense—the law of artificial insemination—for it is this area of law upon which my proposal is based.

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

Whereas courts have refused to consider consent when adjudicating the child support obligations of men who are victims of sexual assault, when it comes to the law of artificial insemination, consent is crucial to determining the identify of the “father”—i.e., the individual liable for child support. By way of introduction, artificial insemination, as it exists in its most typical form, is a procedure whereby “a woman is impregnated with semen from a man not her husband in a simple procedure that can be accomplished with a syringe.” What makes the insemination “artificial,” is the fact that “the
male agent is not engaged in the act.”174 Thus, whenever a child is conceived using artificial insemination, a question arises as to who is the legal father of that child. In most cases, the choice comes to down to one of two men, either the husband of the mother or the sperm donor. As the remainder of this section explains, however, for either to be the father, consent is required.

A. Husbands of Women Who Have Been Artificially Inseminated

In most jurisdictions, if a married woman is artificially inseminated with the sperm of third party, her husband is only liable for the financial support of the resulting child if he consented to the insemination.175 For example, the Tennessee statute that deals with artificial insemination states that “[a] child born to a married woman as a result of artificial insemination, with consent of the married woman’s husband, is deemed to be the legitimate child of the husband and wife.”176 Further, most states require that the consent of the husband be in writing, an example of which can be found in the Minnesota statute, which provides that the husband “is treated in law as if he were the biological father of the child thereby conceived [via artificial insemination]”; however, the husband’s consent “must be in writing and signed by him and his wife.”177 In applying a similar statute requiring written consent, a New Mexico court held that the purpose behind the written consent requirement is two-fold:

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

174 HELEN B. HOLMES, BETTY B. HOSKINS & MICHAEL GROSS, THE CUSTOM-MADE CHILD?: WOMEN-CENTERED PERSPECTIVES 255 (1981) (noting that “this account leaves out the female entirely, especially the fact that the natural process of conception occurs in the woman’s body” and, as a result, “‘Artificial Insemination’ reflects a patriarchal male-centered mode of thinking.”)

175 Lewis, supra note 47, at 960.

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

177 MINN. STAT. ANN. § 257.56 (West 2010). Additionally, “[t]he consent must be retained by the physician for at least four years after the confirmation of a pregnancy that occurs during the process of artificial insemination.” Id.; see also Lewis, supra note 47, at 961 n. 66 (listing other state statutes that explicitly require written consent).
wife avoids disputes regarding whether consent was actually given. Second, the requirement serves a cautionary purpose. One who pauses to sign a document can be expected to give more thought to the consequences of consent than one who gives consent in a less formal setting.\textsuperscript{178}

There are a few states, however, that take a slightly different approach when deciding the parental obligations of a man whose wife undergoes artificial insemination. In Maryland, for instance, the husband is simply presumed to be the father of the resulting child: “A child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed.”\textsuperscript{179} Other states follow a similar presumption, yet offer the husband a limited window of time in which he may successfully elude his support obligations by proving lack of consent. For example, Delaware law provides “that the husband of a wife who gives birth to a child by means of assisted reproduction” is not liable for child support if “(1) Within 2 years after learning of the birth of the child he commences a proceeding to adjudicate his paternity; and (2) The court finds that he did not consent to the assisted reproduction, before or after birth of the child.”\textsuperscript{180}

Even in states where consent is not presumed, courts can be quite permissive in extrapolating from the surrounding circumstances a husband’s consent to serve as the child’s father. For instance, some states have held that a husband’s consent to artificial insemination “may be express, or it may be implied from conduct which evidences knowledge of the procedure and failure to object.”\textsuperscript{181} Utah, for example, provides that “[a] consent to assisted reproduction by a married woman must be in a record signed by the

\textsuperscript{178} Lane v. Lane, 912 P.2d 290, 295 (N.M. Ct. App. 1996).

\textsuperscript{179} MD. CODE ANN., EST. & TRUSTS §1-206(b) (LexisNexis 2010); see also ARK. CODE ANN. §28-9-209(c) (2004) (“Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.”)

\textsuperscript{180} DEL. CODE ANN. tit. 13, § 8-705(a) (2010). Other states follow a similar approach. See UTAH CODE ANN. § 78B-15-705(1) (2010); WYO. STAT. ANN. § 14-2-905(a) (2010). Texas allows a husband to bring an action challenging paternity within four years. TEX. FAM. CODE ANN. § 160.705(a) (2010).

woman and her husband.” However, the statute qualifies this language with the following: “Failure of the husband to sign a consent . . ., before or after the birth of the child, does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treat the child as their own.”

In fact, even those states that have statutes requiring written consent have nonetheless avoided a strict reading of the statute when the husband’s subsequent actions indicate an acceptance of the child as his own. For example, in *Lane v. Lane*, the husband and wife had married in 1984; however, prior to getting married, the husband underwent a vasectomy. Desiring a child with her new husband, however, the wife decided to get pregnant using artificial insemination. Although the husband participated in the process (i.e., “driving Wife for some medical visits, attending birthing classes, and being present in the delivery room”), he never formally consented in writing either before the insemination or afterwards. Nonetheless, the husband played an active role in the child’s rearing, treating the resulting daughter (Colleen) in all respects as his own child. In 1991, the couple filed for divorce, and the wife sought sole custody of the child on the ground that the husband never gave written consent to the insemination as was required by state statute, and thus he was not the child’s father. In rejecting this argument, the court noted, at the outset, that “even though a statute constitutes a command to the courts regarding what law to apply, the command must be read with intelligence.” Furthermore, in looking at the statute, the court made the following observations:

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183 Id. at § 160.704(1); accord WASH. REV. CODE § 26.26.710(2) (2004).
185 Id. Initially, the husband was “hesitant” to have children and refused to have his vasectomy reversed. However, “after Wife stated that she would leave Husband if she could not have children, Husband and Wife explored various options.” Id.
186 Id.
187 Id. Despite the fact that “[t]he customary practice of the University of New Mexico Hospital was not to undertake artificial insemination without the signed consent of both the husband and the wife,” there were no consent forms bearing the signature of the Husband, only the Wife. Id.
188 Id. (“Wife encouraged Husband to be an active parent, and he was.”).
189 Id. at 294 (“Wife further argues that strict compliance with the statutory requirements is called for because of the precious maternal rights that are at stake.”).
190 Id. at 295 (noting that the legislature “cannot anticipate every contingency [but] can, however, expect that when one of its orders . . . is to be carried out, those who have that duty . . . will discern its purpose and act in accordance with its essence if not necessarily its letter.”).
The statute does not require any particular form of words for the consent. Given the purposes of the statute, a writing should be satisfactory if it conveys in some manner that (1) the husband knows of the conception by artificial insemination, (2) the husband agrees to be treated as the lawful father of the child so conceived, and (3) the wife agrees that the husband will be treated as the lawful father of the child. . . . We also note that the New Mexico Act does not prescribe when the written consent must be executed.191

With these principles in mind, the court ultimately found that the husband had substantially complied with the statute. Specifically, the court first looked to the pleadings that husband and wife had filed in the divorce action—over two years after the child in question had been born: “Husband verified his petition claiming Colleen as a ‘minor child[] of the marriage.’ Wife likewise verified the response, which admitted that ‘there is one minor child of the marriage, Colleen Dawn Lane,’ and did not challenge Husband's paternity in any manner.”192 Additionally, the court relied on the fact that both parties had signed a stipulated order which stated: “The parties agree and stipulate as follows: 1. The parties are the parents of Colleen Dawn Lane, born August 26, 1988.”193 Based on this evidence, the court rejected the wife’s claim: “Although no document was signed by both Husband and Wife, and one of the pleadings was signed only by their attorneys, these pleadings unequivocally demonstrate that more than two and one-half years after the birth of Colleen, and even after the marriage had failed, both Husband and Wife were acknowledging Husband's status as Colleen's natural father.”194

Regardless of how willing courts may be to find consent even in the absence of a signed writing, the point remains, however, that when it comes

191 Id.
192 Id. at 296.
193 Id. Two weeks later, after securing new counsel, Wife’s counsel filed a motion for leave to amend, “stating that ‘[t]he facts leading to the proposed Amended Response and Counterpetition have recently come to light.’ The new pleadings for the first time alleged that Colleen was conceived through artificial insemination and that Husband was neither her natural nor legal father.” Id. at 293.
194 Id. In so holding, the court also found that facts of this case satisfied the dual purposes behind the consent requirement. According to the court, first, “there is absolutely no dispute in this case that Husband was fully aware of the artificial insemination and that Wife knew that he was fully aware,” and second, “the pleadings referred to represent a knowing consent by both Husband and Wife to treating Husband as the natural father of the child born to Wife as a result of artificial conception.” Id.
to the husband of a woman who is artificially inseminated, some form of consent is required before he will be liable for the support of that child.

B. The Third-Party Sperm Donor

In most states, the man who donates his sperm for use in artificial insemination is not treated as the father of any resulting child. For example, Alabama law, which is emblematic of most states’ approach to this issue provides as follows: “A donor who donates to a licensed physician for use by a married woman is not a parent of a child conceived by means of assisted reproduction.” By not being recognized as the father, the sperm donor is thus relieved of any financial liability for the resulting child. Consider, for instance, Wisconsin’s statute, which has explicitly codified this very point: “The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child.” As this language makes clear, the donor is stripped not only of financial responsibility, but also of his parental rights vis-à-vis the child.

Relieving the donor of parental rights and responsibilities serves two important objectives. First, doing so actually encourages men to donate sperm as, under these statutes, they need not worry about any resulting liability. And, indeed, the liability in these cases could be quite large given that “a popular sperm donor could potentially father dozens of children.” Second, under this approach, neither single mothers nor married couples who conceive using sperm from a third-party donor need

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195 Lewis, supra note 47, at 973 (“The approach taken by the UPA and most states is to declare that the sperm donor is not a parent to the child.”).
197 WIS. STAT. ANN. § 891.40(2) (West 2010).
198 See also OKLA. STAT. ANN. tit. 10, § 555 (West 2010) (“An oocyte donor shall have no right, obligations or interest with respect to a child born as a result of a heterologous oocyte donation from such donor. A child born as a result of a heterologous oocyte donation shall have no right, obligation or interest with respect to the person who donated the oocyte which resulted in the birth of the child.”).
199 See In re Interest of R.C., 775 P.2d 27 (Colo. 1989) (noting how such laws provide “men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support”).
200 Lewis, supra note 47, at 975.
worry about the donor making future claims on their child.\textsuperscript{201} As the Supreme Court of Colorado points out “women are not likely to use donated semen from an anonymous source if they can later be forced to defend a custody suit and possibly share parental rights and duties with a stranger.”\textsuperscript{202}

Nonetheless, parties can elect to deviate from this general approach, and affirmatively provide the sperm donor with parental rights and responsibilities.\textsuperscript{203} To do so, however, all involved must affirmatively consent to this deviation. A few states require such consent to be in writing. New Jersey law, for example, provides that: “Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor . . . shall have no rights or duties stemming from the conception of a child.”\textsuperscript{204} Likewise, the relevant statute in Kansas provides that “[t]he donor of semen provided to a licensed physician for use in artificial insemination . . . is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.”\textsuperscript{205}

Other states, even in the absence of a statutory exception, have found ways around the statutes that deny parental rights and responsibilities to sperm donors when the parties’ conduct evinces an intent that the donor serve as the child’s father. For example, in In the Interest of R.C., the mother, E.C., asked her friend, J.R., to donate sperm with which she could be artificially inseminated.\textsuperscript{206} J.R. agreed, and E.C. (who was unmarried) successfully used his sperm to give birth to a child, R.C.\textsuperscript{207} Following the birth, E.C. eventually refused to allow J.R. see the child, prompting J.R. to bring a paternity action.\textsuperscript{208} In his action, J.R. claimed that he and E.C. had an oral agreement whereby he had agreed to provide sperm in exchange for parental rights.\textsuperscript{209} Further, J.R. claimed that he had taken actions in reliance

\begin{itemize}
\item \textsuperscript{201} Id.; see also R.C., 775 P.2d at 33 (recognizing the policy of extending “to unmarried women the protection afforded to married women under the UPA to use donated semen for use in artificial insemination without fear of paternity suits.”).
\item \textsuperscript{202} In re R.C., 775 P.2d 27, 33 (Colo. 1989). Likewise, “anonymous donors are not likely to donate semen if they can later be found liable for support obligations.” Id.
\item \textsuperscript{203} Lewis, supra note 47, at 975 (“Under the laws of some states, it is possible for the sperm donor to become financially responsible for the artificially conceived child.”).
\item \textsuperscript{204} N.J. STAT. ANN. §9:17-44(b) (West 2010).
\item \textsuperscript{205} KAN. STAT. ANN. §38-1114(f) (West 2010)
\item \textsuperscript{206} 775 P.2d at 28.
\item \textsuperscript{207} Id. E.C. claimed, however, that it was J.R.’s idea to donate sperm. Id. at 28 n.1.
\item \textsuperscript{208} Id. (“J.R. claims that E.C. said that she would not let him see R.C. again unless he signed a release of his parental rights. He refused to sign the release.”).
\item \textsuperscript{209} Id. (“He alleges that E.C. had been the one to solicit J.R. to donate his semen; that he donated the semen only because E.C. promised that J.R. would be treated as the father of any child conceived by the artificial insemination.”).
\end{itemize}
on the agreement and had even been allowed to play an active role in the child’s life:

[W]hen he learned E.C. was pregnant, J.R. bought clothing, toys, and books for R.C.; that he opened a college trust fund for R.C. and furnished a room in his house as a nursery; that he “provided for [R.C.] in the event of [J.R.’s] death;” that he attended birthing classes with E.C.; that he was a “guest of honor” at E.C.’s baby showers; that he assisted in the delivery of R.C.; that he occasionally handled night feedings of R.C.; that he “took care of [E.C.] and [R.C.] on a daily basis” during the first week of R.C.’s life; that E.C. both knew about and encouraged J.R.’s conduct; and that he intended to retain a parental relationship with R.C. at the time J.R. donated his semen.210

The governing statute in Colorado, which E.C. argued preempted J.R.’s paternity claim, provided that “[t]he donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the natural father of the child thereby conceived.”211 The Supreme Court of Colorado, however, rejected her argument. In interpreting and applying the governing statute, that court first noted that the parental rights of a semen donor are “least clearly understood when the semen donor is known and the recipient is unmarried.”212 The court then ruled that the statute did not apply when a man donated semen to an unmarried woman with the understanding that he would be the father of the resulting child: “[T]he General Assembly neither considered nor intended to affect the rights of known donors who gave their semen to unmarried women for use in artificial insemination with the agreement that the donor would be the father of any child so conceived. [The statute] simply does not apply in that circumstance.”213 In ruling, the court also noted that the parties’ intent is “a relevant consideration in

210 Id.
211 Id. at 29. This provision is based on the Uniform Parentage Act and “[w]ith the important exception of the omission of the word ‘married’ in subsection (2), section 19-4-106 of the Colorado UPA is a verbatim reproduction of section 5 of the model UPA.” Id. at 30.
212 Id. at 33-34 (“In extending the protection of section 19-4-106 to unmarried women without delineating the rights of the affected parties, the General Assembly failed to provide the guidance not employed by the model UPA. For these reasons, we conclude that section 19-4-106(2) is ambiguous with respect to the rights and duties of known donors and unmarried recipients.”).
213 Id. at 35.
determining whether the known donor’s parental rights were extinguished.”

As a final point, it is important to highlight the fact that most of these donor statutes only extinguish the parental rights/obligations of the sperm donor if the artificial insemination was done by a licensed physician. For example, in *Jhordan C. v. Mary K.*, Jhordan provided semen directly to Mary, who then inseminated herself at home. Given that fact that no physician was involved in the insemination, as was required by state statute, the court held that Jhordan was the father of the resulting child. In ruling, the court noted that “nothing inherent in the artificial insemination requires the involvement of a physician.” Nonetheless, the court found “at least two sound justifications” for the statute requiring physician involvement.

The first is health related: “a physician can obtain a complete medical history of the donor . . . and screen the donor for any hereditary or communicable diseases.” Second, “the presence of a professional third party . . . can serve to create a formal, documented structure for the donor-recipient relationship, without which . . . misunderstandings between the parties regarding the nature of their relationship and the donor’s relationship to the child would be more likely to occur.”

On a related note, the physician requirement also likely protects against fraud. Indeed, but for the physician requirement, fathers may be tempted to try and avoid liability (and, conversely, mothers may try and deny a father parental rights) by claiming that the child was merely a result of home insemination instead of sexual intercourse. Judges would have some difficult adjudicating such claims given that most acts of sexual intercourse

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214 Id. at 34.
217 Id. at 395 (“The Legislature’s apparent decision to require physician involvement in order to invoke the statute cannot be subject to judicial second-guessing and cannot be disturbed, absent constitutional infirmity.”).
219 Id. at 393.
220 Id.
221 Id.; but see Marc E. Elovitz, *Reforming the Law to Protect Families Created by Lesbian and Gay People*, 3 J.L. & Pol’y 431, 442 n.49 (1995) (“Reasons against the physician requirement include the woman’s right to privacy and autonomy, the cost of physician involvement and a preference for performing artificial insemination at home.”
and, presumably, home insemination would take place without corroborating witnesses.

**V. A Proposed Solution**

As the previous section illustrates, when it comes to adjudicating child support claims, the child’s interest in receiving support from both parents does not *always* mean that the biological father is strictly liable. For example, a child who is born as a result of artificial insemination (done under a doctor’s supervision) to a single mother would likely have no right of support from the biological father. Instead, the law would only view the child as having one parent—the mother—despite the fact that it would almost certainly be in the child’s best interest to receive support from both biological parents. Although this is merely a limited exception to a biological father’s strict duty to support his children, it is nonetheless a necessary and important one for the reasons discussed earlier. Further, as I propose below, it is also one that should be extended to cover those fathers who never consented to the sexual act that resulted in a biological child.

It is, of course, true that the policies underlying the need for consent in the artificial insemination context differ somewhat from those involving men who become fathers as a result of sexual assault. Again, the policy behind requiring consent in the case of sperm donors is to encourage donation and, at the same time, protect donees from future paternity claims. Similarly, for the husband of the donee, the courts require his consent so as not to foist parental rights and responsibilities on a man who has no biological connection to the child. In contrast, the men I am talking about here are, in fact, the biological fathers of the children in question. Additionally, because they never intended to donate sperm, there can be no justification of trying to encourage donation. Nonetheless, as discussed in Part III, there are a number of serious policy concerns raised by the courts’ practice of holding these fathers liable. Therefore, just as it is in the artificial insemination cases, a consent exception is likewise necessary here as well.

Of course, this is not to say that a consent exception in these cases should operate the same as it does when talking about artificial

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

223 *See supra* Part III.

224 *See supra* notes 199-202 and accompanying text.

225 *See supra* Part IV.A.

226 *See supra* Part III.
insemination. There is, after all, a real danger of fraud in allowing a putative father to simply raise lack of consent as a defense to a claim of child support. Indeed, in an attempt to avoid liability, fathers might be encouraged to routinely claim that they did not consent to the sexual act that gave rise to a child and, given the private nature of most sexual relations, courts would have quite a difficult time ascertaining the merits of such a defense. As such, for a consent defense to operate effectively in this factual setting, it would need to be much more narrow. Otherwise, an overly generous consent defense could permit even meritorious claims for child support to ultimately fail.

For these reasons, I propose the following rule for states to adopt, either legislatively or by courts using their powers in equity, when dealing with claims that the biological father did not consent to the act that resulted in the mother’s pregnancy:

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

As you will note from reading this proposed rule, there are a number of limitations imposed on those men who might try to raise this defense. The remainder of this section discusses each of those limitations in turn.

A. LIMITING CONSENT TO THE SEXUAL ACT ITSELF

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

227 See supra notes 4, 93-102 and accompanying text.
228 See supra notes 6, 113-122 and accompanying text.
consent as he never consented to the use of his sperm for the purposes of self-insemination.

Notably absent from the protections of this defense are, first, those men who became fathers after engaging in consensual sexual intercourse with a woman under the mistaken impression that she was incapable of conceiving a child. Under the proposed rule, these men could not raise the consent defense given that it is limited only to those who did not consent to intercourse or self-insemination. By limiting the rule in this way, it would protect only those men who would otherwise be deprived of their reproductive choice should they be forced to pay child support for the resulting child. After all, those men who willingly engaged in sexual intercourse with a woman, despite what they may have been lead to believe about her ability to conceive a child, were still very much in a position to protect themselves from becoming fathers. Not only could they have chosen to use contraception, but they also could have elected to simply abstain from sexual intercourse. Accordingly, under this proposal, the law would remain unchanged in those jurisdictions that have held men liable for child support despite the mother’s misrepresentation that she was on birth-control and/or was sterile.

Second, men like Jhordan C., discussed earlier, who consent to a woman using their sperm to artificially inseminate herself without the assistance of a licensed physician (referred to as “home insemination” in the proposed rule) would continue to be liable for the support of the resulting child. Indeed, such men would be foreclosed from arguing that they never consented to be a father and thus, should be relieved of the legal obligations of fatherhood. Again, the consent defense I propose above would not cover claims that a man did not consent to fatherhood in general, but only that he never consented to the specific act of intercourse or self-insemination that produced the child. Thus, the defense would not alter the current rule that, if a man wishes to donate sperm to someone yet escape all legal obligations to the child, the insemination must be performed by a licensed physician.

B. PROVING LACK OF CONSENT

Second, under the proposed rule, the burden of proving lack of consent

230 Evans, supra note 229, at 1047 (“Child support obligations attach immediately upon birth, without regard to whether fatherhood was desired or conception occurred through the mother’s deceit as to her fertility or use of birth control.”).
231 See supra notes 216-221 and accompanying text.
232 See supra note 215 and accompanying text.
would fall on the biological father, and he would have a rather heavy burden. Specifically, to successfully avoid child support obligations on the basis of lack of consent, a biological father would have to prove by clear and convincing evidence that he never consented to the act in question (again, intercourse or self-insemination, depending on the facts of the case). The purpose of this heightened standard would, again, be to not only protect against fraudulent claims, but also minimize frivolous claims that would only serve to waste judicial resources. Generally, under the clear and convincing standard, a party “must convince the trier of fact that it is highly probable that the facts he alleges are correct.”

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

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

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235 See, e.g., Ashley Hedgecock, Comment, Untying the Knot: The Propriety of South Carolina’s Recognition of Common Law Marriage, 58 S.C. L. Rev. 555, 565 (2007) (“In reality, the high burden of proof imposed on a claimant alleging common law marriage successfully sorted fraudulent claims from legitimate ones.”).
236 Chandler v. Central Oil Corp., Inc., 853 P.2d 649, 652 (Kan. 1993). Called the “last-in-time marriage presumption,” this doctrine applies in cases where a former spouse claims some kind of spousal benefits on the basis that, even though the other spouse remarried, there was no evidence of divorce from the former spouse. See Peter Nash Swisher & Melanie Diana Jones, The Last-in-Time Marriage Presumption, 29 Fam. L.Q. 409 (1995).
237 See supra notes 71-76 and accompanying text.
victims would be fairly easy to dispose of under the consent defense.

Adult men, on the other hand, who claim the child was a product of nonconsensual sex/insemination would have to resort to other evidence to meet this high burden of proof. For this reason, the burden may be quite difficult to meet in a number of cases. Consider, for example, the case of S.F., discussed above, where the father had evidence that the mother had told acquaintances that she had sexually assaulted S.F. while he was sleeping.\textsuperscript{238} Now it could be that a court finds that the mother’s admission of sexual assault is sufficient evidence to prove by clear and convincing evidence that the father did not consent. Then again, a court might be skeptical of such evidence given the danger of collusion. Specifically, a mother and father could agree to both claim sexual assault on the part of the mother whereby the child would continue to collect welfare benefits and yet the father need not reimburse the state.\textsuperscript{239} Admittedly, the threat of collusion poses a difficult issue relating to proof. Hopefully, however, the threat of being charged with sexual assault would discourage most mothers from going along with such a scheme. Further, the father should be dissuaded from bringing such a claim given that, as discussed more fully below, should the consent defense succeed, he would lose all parental rights \textit{vis à vis} the child.\textsuperscript{240}

However, in cases where a mother denies any claims of sexual assault or nonconsensual self-insemination, the father would have a much harder time satisfying his burden. Given that most acts of sexual intercourse, sexual assault and, presumably, self-insemination do not take place in public, absent some kind of admission from the mother, it would be almost impossible for courts to decide whether or not the manner in which a child was conceived was done with the biological father’s consent. Nonetheless, the failure of the consent defense to cover those more questionable cases may send a message to potential fathers to not put themselves in positions of vulnerability—such as passing out drunk in a woman’s home\textsuperscript{241} or trusting relative strangers to dispose of one’s semen.\textsuperscript{242}

\section*{C. Accepting The Good with the Bad}

Finally, it is important to note that, under this proposed consent defense, men who succeed in proving lack of consent would not only avoid liability for child support, but would also lose all parental rights \textit{vis à vis} the child in

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\textsuperscript{238} See supra notes 4, 93-102 and accompanying text.
\textsuperscript{239} See supra Part II.
\textsuperscript{240} See infra Part V.C.
\textsuperscript{241} See supra notes 4, 93-102 and accompanying text.
\textsuperscript{242} See supra notes 6, 113-122 and accompanying text.
question. In other words, the availability of the consent defense presents these men with an important choice. They can elect to raise the defense, knowing that if they succeed they would sever all rights and responsibilities with the child. Or, should they wish to preserve their right to be the legal father of the child, they can forgo raising the consent defense.

The reason for requiring such an election is that, first, it would be entirely inequitable to allow a man to avoid supporting a child, yet at the same time, allow him to, as one court put it, “enjoy[] the benefits of his representation as the child’s father, including the child’s love and affection, his status as father in the place of the natural father, and the community’s recognition of him as the father.”\(^{243}\) Similarly, a man who as acted as the child’s father should be estopped from later attempting to avoid child support obligations simply by claiming lack of consent to the child’s conception/insemination.\(^{244}\) For these reasons, courts should impose time limits similar to those used when dealing with the husband of a woman who becomes pregnant via artificial insemination; namely, the husband can avoid parental obligations by raising lack of consent, but he must do so in a reasonable time after learning of the child’s birth.\(^{245}\)

Second, as discussed earlier, one of the biggest problems with the court’s application of strict liability to victims of sexual assault is that those men are potentially deprived on any meaningful choice when it comes to procreation.\(^{246}\) Again, the proposed rule would give men a choice. As such, those victims who nonetheless elect to father the resulting child have exercised their ability to choose, and that choice should be honored along with the all the legal obligations that choice entails. As the Supreme Court has made clear, a biological connection provides a father with an extremely valuable opportunity:

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

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\(^{244}\) Courts have used a similar estoppel approach when adjudicating claims by husbands that they never consented to their wives’ act of being artificial inseminated. See, e.g., Levin v. Levin, 645 N.E.2d 601 (Ind. 1994) (noting that estoppel is the proper remedy when “one party through his course of conduct knowingly misleads or induces another party to believe and act upon his conduct in good faith without knowledge of the facts”).

\(^{245}\) See supra note 180 and accompanying text.

\(^{246}\) See supra notes 165-171 and accompanying text.
This need to protect a biological father’s decision to parent the resulting child requires one additional point that should guide courts when applying the consent defense—the defense can only be raised by the father. Mothers should not be permitted to use the defense as a means of depriving a biological father of parental rights on the basis that he never consented to the conception. This limitation comports with the common law maxim, the Wrongful Conduct Rule: “[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party.” Thus, a mother should not be allowed to profit from her own wrong-doing; if the biological father, despite the mother’s actions, wishes to serve as the legal father, the fact that he did not originally consent should pose no bar to his claim.

Taken together, these limitations mean that the proposed consent defense should be reserved only for those men who 1) never consented to the conception/insemination that resulted in the birth of their biological child and 2) wish to have no relationship with the resulting child. After all, it is those men who will be most harmed should they be ordered to pay child support for the child they never wanted and which was conceived without their consent. Further, these limitations help protect against any fears that the consent defense will be improperly used by biological fathers seeking to evade child support obligations resulting from conscious choices they made.

CONCLUSION

Despite the noble policies upon which it is premised, the practice of holding biological fathers strictly liable for child support is not without its shortcomings. Most problematic, however, is the way in which men who never consented to the procreative act are nonetheless held strictly liable for the support of the resulting child. The time has come for courts to remedy this injustice and all the attendant problems this practice poses—not only to male victims of sexual assault, but also society as a whole. Quite simply, courts must adopt a consent defense that will better protect these men, yet at the same time, not open up child support proceedings to meritless claims. Striking this balance will ensure that a child’s interest in support, although very much a worthy consideration, is never read so broadly that it

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248 1A CJS, Actions, § 29, p. 386; see also Joseph H. King, Jr., Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law, 43 WM. & MARY L. REV. 1011 (2002)
effectively eviscerates a man’s ability to choose fatherhood. After all, when it comes to procreative freedom, “choice” is an essential ingredient, and as one feminist legal scholar deftly put it, “more is certainly better than less.”

\footnote{Katharine T. Bartlett, Gender and Law: Theory, Doctrine, Commentary 672 (1993)}