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MALE REPRODUCTIVE AUTONOMY: UNPLANNED FATHERHOOD AND THE VICTORY OF CHILD SUPPORT

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I. Introduction

The Fourteenth Amendment to the United States Constitution provides "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[2] In other words, United States citizens are entitled to due process and equal treatment under the law, and may only be denied if the government has a narrowly tailored and compelling state interest.[3] This article will explore two issues: (1) what happens when one gender has received more constitutional protections for reproductive rights and autonomy; and (2) whether the government is actively discriminating by denying men the right to bodily integrity and reproductive autonomy?

The right to bodily integrity is often recognized as one of the oldest fundamental rights in American jurisprudence.[4] Although not explicitly articulated in the text of the United States Constitution, the right to bodily integrity is arguably protected in the Fourth Amendment, Eighth Amendment, and even in common law doctrines.[5] The notion of bodily integrity, however, is most often inferred from the Fourteenth Amendment's Due Process Clause.[6] In *Washington v. Glucksberg*, the Supreme Court of the United States held, "the 'liberty' specially protected by the Due Process Clause [of the Fourteenth Amendment] includes the right . . . to bodily integrity..."[7] The liberty interest espoused in *Glucksberg* protects men and women from unwarranted governmental intrusions, and entitles both genders to bodily integrity.[8] However, while reproductive and parental rights have expanded for women, they have been drastically reduced for men.[9]

Male reproductive autonomy is non-existent.[10] Recently, fathers, have not been successful when petitioning the court for custody and visitation rights.[11] Fathers' rights have continually been weakened in the court system with respect to reproductive rights, custody proceedings, and adoptions.[12] Despite the predominance of men on the Supreme Court, fathers' rights have often been viewed as irrelevant and insignificant.[13] To protect the constitutionally recognized liberty interests of all citizens, the lack of fathers' rights must change. In *Lawrence v. Texas*, the Supreme Court of the United States held, "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[14] Therefore, men and women both deserve constitutional protection under the Fourteenth Amendment with respect to reproductive autonomy.[15] Ultimately, at the center of autonomy cases is largely the bodily integrity right, coupled with the right to make intimate and important decisions.[16]

Reproductive rights jurisprudence and the right to protect one's health are at the forefront of safeguarding an individual's right to autonomy.[17] Fathers perceive that they either have no rights or minimal rights with regards to reproductive decision-making and the parenting of their children.[18] Unfortunately, the only constitutional norm involving fathers' rights is that those "rights" are a misnomer.[19] It is critical to recognize gender challenges and stereotypes without demeaning motherhood and the role women play in reproductive rights.[20] However, the fact remains, the negative bias against fathers makes the perception of "no rights" difficult to argue.[21] Moreover, this bias creates an impossible

hurdle for men in exercising both reproductive and parental rights.[22]

If the court system determines that men have less reproductive rights than women, it would open Pandora's Box to many constitutional infringements. Affording fathers fewer rights than mothers regarding reproduction, autonomy, and parenthood may unleash an evil, impossible to be undone.

Part I of this article will examine the negative societal bias placed on men, and whether it affects the Court's approach when rendering decisions on reproductive rights, family, and parental decisions. Part II will examine the constitutional framework on prior cases, such as *Stanley v. Illinois*,[23] *Quilloin v. Walcott*,[24] and *Lehr v. Robertson*,[25] regarding father's rights, gender discrimination, and illegitimacy. Part III will discuss *Phillips v. Irons*,[26] a 2005 case that significantly diluted male reproductive rights, and also suggested possible remedies in unorthodox situations. Lastly, Part IV will examine the role of child support, the criticism of child support in instances of unplanned pregnancies, and the "male abortion" option. Ultimately, the question remains whether male reproductive autonomy is entitled to the same standard of constitutional protection as female reproductive autonomy or whether women are entitled to more rights because reproductive autonomy is generally viewed as a woman's right.

Ii. Negative Societal Bias, Fatherhood, and Reproductive Rights

The Constitution protects, in some measure, each person's autonomy in making decisions about family, parenthood, and procreation.[27] The question remains, however, whether this reproductive decision-making is equal for men and women. Many fathers are skeptical that their rights will be adequately heard in court because their interests have frequently been unrecognized and unsupported.[28] Oftentimes, this cynicism derives from the negative societal bias that many fathers encounter.[29]

While marriage confers greater legal consideration for fathers, the state recognizes their vows, and not their parenting.[30] However, this negative view is not an entirely accurate depiction of the Court's recent decisions.[31] For example, in 2003, the Supreme Court recognized broad concepts of shared parenting and gender-neutral support of both mothers and fathers.[32] Nonetheless, this negative view suggests that stereotypes relating to fathers are present despite changing constitutional norms.[33] Unfortunately, the Court has used negative stereotypes about fathers when rendering decisions on male reproductive rights and fatherhood.[34] As a result, the discussion of reproductive rights is typically incomplete because a vital element often lacking – the voice of the male.[35] Consequently the reproductive rights movement should be carefully examined and scrutinized.[36] The assumption of women as nurturing juxtaposed with the assumption of men as unable to be caregivers, continues to cause fathers' trouble when seeking equality for reproductive autonomy and procreative rights.[37]

According to the views of many fathers, the family law system is deeply biased against them, providing unequal treatment regarding procreation, family, and parenthood.[38] Furthermore, partiality against fathers represents a highly visible sign of negative societal bias about men's caregiving abilities that contradict the legal preference of gender equality.[39] Although the supposed legal standard is "shared parenting," it remains the common assumption that "women are advantaged in custody proceedings even when men are equal or more involved caregivers."[40]

Moreover, another example of men's care and fathers' rights being consistently ignored is in data collection regarding childcare.[41] According to *Fast Facts on Welfare Policy*, data collection about childcare continues to focus on the role of the mother.[42] Specifically, "[d]ata on child care arrangements were obtained by conducting interviews with the adult most knowledgeable about the child. Since this person was most often the mother (71.5 percent), the term 'mother' [was] used . . . to refer to this respondent."[43] Thus, according to the same statistics, only 29.5% of fathers are most knowledgeable about their child.[44] Although a specific research methodology was never mentioned on how data was collected, these statistics only heighten the negative stereotype and societal bias against male reproductive rights and fatherhood.[45] Consequently, the Court will continue to use this rationale when rendering decisions about reproduction and procreation.

The perception that fathers have minimal reproductive rights seems ironic considering the dominance of male judges on the bench.[46] However,

fathers continue to believe they have no rights in reproductive decision-making or parenting their children.[47] In fact, many fathers believe their only "right," as consistently adopted by the Court, is the right to pay "obligations, particularly financial obligations [that] are unfairly placed upon them."[48]

The next question to address is the definition of fatherhood, and what role, if any, fatherhood plays in determining reproductive rights. Some fathers argue for a genetically-based definition of fatherhood to correct the negative societal bias.[49] This definition recognizes that the fundamental rights of biological fathers must be respected.[50] An example of this genetically-based definition is articulated in *Elk Grove Unified School District v. Newdow*.[51]

In *Newdow*, the plaintiff, Michael Newdow, advocated for a presumption in favor of joint physical custody for non-marital or divorced fathers based on genetic parenthood, and claimed that it was a constitutional entitlement.[52] Newdow, a divorced father, sued his daughter's school district on behalf of himself and his daughter as his "next friend."[53] He claimed that the words "under God" in the pledge of allegiance constituted an infringement of First Amendment rights. I would add a footnote and cite this assertion as *Id.* at 1. Even though Newdow was his daughter's biological parent, the Court determined that Newdow lacked standing, literally had no right to be heard.[54] This decision is important because it stands for the proposition that a status of a noncustodial father will trump the legal standard of "shared parenting."[55] In addition, although it was not specifically articulated, the societal bias of a father being an atheist could have been perceived negatively, and thus could have also affected the Court's decision.

Other fathers argue that caretaking should be supported by using a functional or relational definition that centers on nurture.[56] Following a modern definition of nurture would help to discard outdated stereotypes about men as incompetent caregivers, as well as patriarchal norms of status based on genetic and economic fatherhood.[57] Constitutional norms of fatherhood need a paradigm shift from genetic-based definitions to nurture-based.[58] Until this change is recognized, society's negative bias on fatherhood and male reproductive autonomy will continue to affect the Court's decision-making process.

Iii. Fatherhood Cases: The Good, The Bad, And The Ugly

Throughout legal history, great emphasis has been placed on women's procreative and reproductive rights.[59] The constitutional framework of privacy in regard to reproductive rights has generally, if not always, expanded the rights of women.[60] However, men have been silenced throughout the procreation debate although they have been recognized as having similar privacy interests under the Fourteenth Amendment's substantive due process clause.[61] Although this right under substantive due process was explicitly acknowledged in *Lawrence*, a similar right should be extended in the context of male reproductive autonomy.[62] While the holding in *Lawrence* may seem remote from the definition of fatherhood and reproductive autonomy, the rationale derived from *Lawrence* is extremely important.[63]

Lawrence is grounded in constitutionally recognized liberty interests, which encompass both autonomy and relational ties.[64] According to Justice Kennedy, "Liberty presume[d] an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[65] It is, therefore, important that men are recognized as having similar reproductive rights when compared to women. If not, the general principle of liberty, as indicated in *Lawrence*, will be disregarded. Thus, fatherhood and male reproductive autonomy must be recognized as a fundamental constitutional consideration that is equivalent to its female counterpart.

Moreover, one of the constitutional protections afforded to each individual is the concept of liberty. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court articulated, "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[66] One of the constitutional protections afforded to each individual is the concept of liberty. The definition of liberty in *Lawrence* by Justice Kennedy embraces constitutional protections of privacy in relationships.[67] As such, one of those relationships is between a father and his child.[68] Coincidentally, another similar relationship is between a man and his right to not have a child.

In the following line of cases, the Court has decided on existing constitutional doctrines about

fatherhood.[69] First, in some core fatherhood decisions in the 1970s and 1980s, the Court determined when the constitutional rights are triggered for unmarried fathers.[70] Second, the set of fatherhood cases reflect a deeply-rooted prejudice against unmarried fathers and perpetuates the assumption that fathers, and ultimately men, are "breadwinners" and not caregivers.[71] Two principles emerge from the fatherhood cases: "(1) biology plus something more, in the nature of intention or demonstration of nurture, even if minimalistic, is necessary to be recognized as a legal father; and (2) marriage, or maybe legitimacy plus marriage, trumps biological and social fatherhood."[72] The following three cases illustrate inconsistencies in the application of the nurture standard and the unjustified stereotypes about fathers and their ability to exercise reproductive rights.[73]

A. Stanley v. Illinois ("The Good")

State laws have discriminated against unwed fathers dating before the 1970s.[74] After *Stanley v. Illinois*, fathers saw a glimmer of hope for regaining equality in parenting and autonomy.[75] Unfortunately, this glimmer faded away after the Court decided *Quilloin v. Walcott* and *Lehr v. Robertson*.[76] Although *Stanley* does not provide a solution for unmarried biological fathers, it does serve as a useful tool for reproductive rights, autonomy, and fatherhood.[77] *Stanley* was the first case where the Supreme Court of the United States considered the custodial rights for an unmarried biological father.[78]

When Illinois mother Joan Stanley died, Peter Stanley ("Stanley") lost both his partner and his children.[79] According to Illinois law, "the children of unwed fathers become wards of the State upon the death of the mother."[80] Upon Joan Stanley's death, the State of Illinois initiated a dependency proceeding.[81] Although no determination was made as to Stanley's fitness, the children were declared wards of the state, and placed with court-appointed guardians.[82] This proceeding would not have taken place if Stanley were (1) a married biological father; (2) a married biological mother; or (3) an unmarried biological mother.[83] Thus, the Illinois law presumed that married parents and unmarried mothers were fit parents, while unmarried biological fathers were presumed to be unfit parents.[84] Stanley contested this presumption, claiming that he was a fit parent, and that he could not be deprived of the care, custody, and control of his children without Illinois actually determining that he was unfit.[85] Furthermore, Stanley claimed Illinois law violated Equal Protection by discriminating against him on the basis of him being an unwed father [86] The Illinois Supreme Court rejected this claim, however, after determining that "Stanley could properly be separated from his children upon proof of the single fact that he and the dead mother had not been married."[87] In *Stanley*, the State of Illinois insisted that "most unmarried fathers are unsuitable and neglectful parents."[88] The State further argued that unwed fathers are not presumed to raise their children, and therefore, individualized hearings are unnecessary to determine fitness.[89] Illinois explicitly argued that Stanley's "fitness or unfitness was irrelevant, because an unwed father was not a 'parent' whose existing relationship with his children must be considered . . ."[90]

This negative stereotype about fathers is apparent in many custody proceedings, and in defining the role of a father.[91] At the Supreme Court, both the majority and dissent expressed negative opinions about unwed fathers, and characterized them as uninterested in their children, and less connected to their offspring.[92] Ultimately, the Court held that because not all unmarried fathers are unfit to raise their children, Illinois' presumption against fitness of an unwed father was unlawful.[93] The State did not provide evidence to indicate that Stanley neglected his children.[94] The Court concluded that all parents are constitutionally entitled to a hearing on their fitness before their children are removed from their care and custody.[95] Any ruling to the contrary would contravene the State's articulated goal of family planning, reproduction and autonomy.[96] *Stanley* provides a positive outlook for fathers' rights and reproductive autonomy because the modern definition of nurture was impliedly adopted by the Court.[97] For reproductive rights for men to be protected, the Court should apply definitions of fatherhood that centers on nurture.

B. Quilloin v. Walcott ("The Bad")

After 1972, the Court distinguished between unwed biological fathers who were involved in raising

their children and fathers who did not assume their functional responsibilities for them.[98]

Quilloin addressed the constitutionality of Georgia adoption laws that denied any unwed father the ability to prevent the adoption of his illegitimate child.[99] In *Quilloin*, the child was born in December 1964 to unmarried parents, and remained in the custody and control of his mother, Ardell Williams Walcott, for his entire life.[100] Ardell Walcott subsequently married another man, and in March 1976, she consented to the adoption of the child by her husband, and her husband immediately filed a petition for adoption.[101] Although Mr. Quilloin was never found to be an unfit parent, as required in *Stanley*, the court granted the adoption despite his objection.[102]

In 1978, Georgia adoption laws prohibited adoption of a child born in wedlock without the consent of a living parent who had not surrendered rights or been adjudicated as an unfit parent.[103] In contrast, §§ 74-403 (3) and 74-203 of the Georgia Code required only the mother's consent for the adoption of an illegitimate child.[104] A father could have acquired authority to veto such adoption only if he had legitimated the child pursuant to § 74-103 of the Georgia Code.[105] Unless the father legitimates the child, the mother is the only recognized parent and therefore has *exclusive* authority to exercise all parental prerogatives, including the power to veto adoption of the child.[106] Since Quilloin did not petition for legitimation of his child at any time during the eleven years between the child's birth and the adoption petition, the Court held that denying him the right to object to the child's adoption did not constitute a deprivation of his due process rights.[107]

The Court's decision in *Quilloin* contradicts its decision in *Stanley* six years prior, and serves to weaken father's rights and decision-making abilities. The Court concluded that the Due Process Clause would not be offended "[i]f a State were to . . . breakup a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[108] This rationale is inconsistent with the holding in *Stanley* where the Court established that a biological parent could not have their rights deprived unless he or she was determined to be unfit.[109]

Furthermore, the majority in *Quilloin* relied on the state's public policy, which generally held, "rearing children in a family setting . . . might be thwarted if unwed fathers were required to consent to adoptions."[110] The Court has yet again inconsistently applied a standard that only serves as a detriment to unwed biological fathers. In *Stanley*, the Court held "[p]rocedure by presumption is always cheaper and easier than individualized determination . . . [b]ut . . . it needlessly risks running roughshod over the important interests of both parent and child."[111] However, assuming the state's policy would be thwarted if unwed fathers were required to consent is the same "procedure by presumption" that the Court mentioned six years prior.[112] Because the Court's rationale in *Quilloin* had a detrimental effect on male reproductive rights, family, and parenthood, and conflicts with its precedential decision in *Stanley*, the case was wrongly decided.

C. *Lehr v. Robertson ("The Ugly")*

In *Lehr*, the Court used negative stereotypes about fathers to deprive Lehr of the opportunity to establish the same parental right that was automatically afforded to mothers.[113] *Lehr* thus established an impossible hurdle for male reproductive rights, family, and parenthood.

On November 9, 1976, Jessica was born out of wedlock to Lorraine Robertson and Jonathan Lehr.[114] Eight months later, Ms. Robertson married Richard Robertson.[115] When Jessica was two years old, the Robertsons filed a petition for adoption, and on March 7, 1979, and the court entered an order of adoption.[116] Lehr claimed that the Due Process Clause guaranteed him an absolute right to notice and an opportunity to be heard before his child was adopted.[117] The Court disagreed, however, because Lehr never entered his name in the putative father registry, as required by the State of New York.[118]

According to New York law, "A man who files with that registry demonstrates his intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that child."[119] New York law further required notice of an adoption proceeding to several classes of possible fathers, but Lehr never qualified as a member of any of those classes.[120] The Court determined that because Lehr never established a custodial, personal,

or financial relationship with Jessica, that he was not entitled to notice that his child was being adopted by someone else, even though he was her biological father.[121]

In *Lehr*, the Court further skews the established approach from *Stanley* to determining father's rights. Due process does not entitle actual notice to every putative father or adoptive parents.[122] However, the State must make a reasonable opportunity to identify the putative father and give him adequate notice.[123] Unfortunately, the Court provided no inquiry of whether the mother knew the biological father and his location.[124] Most importantly, the majority and minority disagreed over whether Lehr ignored the child until recently, or, as Lehr claimed, had consistently attempted to establish contact with her but was unable because of the mother.[125] This was an incorrect decision by the Court. Instead of placing more weight on the nurture-based relationship of a father and his child, the Court completely rejected the notion that a biological connection provided the father with any constitutionally recognized interests.[126] Similar to many decisions about fathers' rights, this decision deprives an unwed biological father of protected interests that are afforded to the mother.[127]

Iv. Unplanned Fatherhood: Is Public Policy the Correct Application With Fraud and Deceit?

A dilemma many courts encounter is determining the best approach for unplanned fatherhood due to fraud and deceit by the mother.[128] According to Lisa Belkin, contributing writer on family and parenting for the New York Times:

> It seems dicey for women to argue that our distinct biology gives us special rights, considering our long history of being discriminated against based on that same biology. And I wonder about the practical costs of excluding men. The assertion that women have unquestioned dominion over reproductive decisions seems to help cement the notion that fathers are minor players in the life of a family.[129]

An interesting conflict with respect to a man's right to father or not father, a child is created when the mother has impregnated herself despite assurances that she was unable to become pregnant.[130] In 2005, the Illinois Appellate Court addressed the question of whether the interests of the child always outweigh those of the father.[131] The "best interest of the child" standard always compels the court to answer in the affirmative.[132]

In cases of fraudulent conception, what rights are available for the unplanned father?[133] Recent cases express that public policy creates significant hurdles to economic recovery for men irrespective of whether the woman acts with malice.[134] Public policy concerns constantly overshadow a man's desire of recovery for deception by a woman.[135] The public policy issues that have affected male reproductive rights are child support and the "best interest of the child," both of which are meant to serve the economic interest of the child, and not the parent.[136]

A. Phillips v. Irons

In *Phillips*, the Illinois Appellate Court created a major obstacle for men's procreative rights.[137] *Phillips* weakened any potential to recover remedies in combating wrongs faced regarding unplanned fatherhood and the unwanted conception of a child.[138]

In January 1999, Richard Phillips ("Phillips") and Sharon Irons ("Irons") began dating.[139] Prior to dating, Irons told Phillips that she was divorced, and that her previous marriage was a "terrible mistake."[140] Shortly thereafter, Phillips and Irons became engaged to be married.[141] During their relationship, Phillips informed Irons that he wanted to have children, but only after they were married.[142] As such, Phillips and Irons discussed using condoms during sexual intercourse.[143] During the course of their relationship, the parties never engaged in vaginal intercourse, despite Irons revealing that she could not become pregnant.[144] However, Irons engaged in fellatio with Phillips three times.[145] Despite the consent between the parties, Irons "intentionally engaged in oral sex with [Phillips] so that she could harvest his semen and artificially inseminate herself."[146] As if impregnating herself were not outrageous enough, Phillips subsequently learned that Irons was still married to her former husband.[147] On May 23, 2003,

Phillips sought damages for (1) intentional inflection of emotional distress ("IIED"); (2) fraudulent misrepresentation; and (3) conversion.[148]

The Illinois Appellate Court dismissed the misrepresentation and conversion claims, holding that the only plausible cause of action for which Phillips was a claim of IIED.[149] The court determined that causes of action for fraudulent misrepresentation and conversion would not successful because (1) no business transaction was involved[150] and (2) Phillips had no expectation of his sperm being returned back to his possession.[151]

1. Intentional Infliction of Emotional Distress

To state a cause of action for IIED, Phillips must prove: (1) Irons's conduct was outrageous; (2) Irons intended to cause severe emotional distress; and (3) Irons's conduct actually caused severe emotional distress.[152]

First, Phillips asserted that Irons's conduct was outrageous because she lied about her infertility.[153] In addition, he asserted that although Irons consented to not becoming pregnant prior to their marriage, she surreptitiously and intentionally impregnated herself after oral sex.[154] The court determined that because no reasonable person would expect a pregnancy from the unorthodox use of Phillips's sperm, the conduct was extreme and outrageous. [155]

Second, Phillips proved that Irons intended to cause severe emotional distress.[156] Phillips argued that Irons used her scientific knowledge as a medical doctor to procure his sperm to successfully impregnate herself.[157] Furthermore, although Irons was aware of Phillips's wish to have children only *after* their marriage, Irons intentionally acted to contravene this desire.[158] The court determined, therefore, that Irons intended to cause Phillips severe emotional distress.[159]

Third, Phillips asserted that the conduct caused severe emotional distress.[160] The unintended pregnancy made Phillips so upset that he was nauseated and unable to eat.[161] Phillips testified that he felt "trapped in a terrible nightmare," and his ability to trust anyone has been obliterated.[162] The court agreed that Phillips's sentiments were not merely subjective, but objectively reasonable in light of how Irons' conduct has affected his life.[163] Because Phillips successfully satisfied every element to state a cause of action for IIED, the court ruled in his favor.[164]

2. Fraudulent Misrepresentation

Phillips argued that Irons fraudulently misrepresented herself regarding her inability to become pregnant.[165] The elements for fraudulent misrepresentation in *Phillips* are (1) a false statement of material fact by Irons, (2) known to be false by her, (3) intended to induce Phillips to act, (4) Phillips acted in reliance on the truth of the statement by Irons, and (5) damages resulted from such reliance.[166]

The court rejected this cause of action after determining that "the tort of fraudulent misrepresentation historically has been limited to cases involving business or financial transactions where plaintiff has suffered a pecuniary harm."[167] Since Phillips did not allege a financial loss or an economic injury, he could not successfully claim Irons conduct constituted fraudulently misrepresentation.

3. Conversion

Lastly, Phillips argued that Irons took sperm without his permission and converted it into her own use by impregnating herself.[168] To succeed in a cause of action for conversion, Phillips had to prove (1) he had a right to property, (2) he had a right to immediate and absolute possession of the property, (3) Irons assumed unauthorized control of the property, and (4) Phillips demanded possession.[169] Interestingly, Irons countered that Phillips delivered his sperm as a gift, and if he wanted to retain possession, he should have taken proper precautions, such as use a condom.[170]

In other jurisdictions, courts have recognized a property right in materials from the human body.[171] However, Phillips could not show that he had a right to immediate possession of his sperm.[172] Because Phillips did not expect the sperm to be returned to him, the court held that he was unable to satisfy the elements of a claim for conversion.[173]

B. Potential Solution: Sperm Donations

If a father attempts to eliminate or reduce child support payments due to unplanned fatherhood because of malicious acts of the woman, he is "seeking a remedy against the wrong person."[174] As such, the

only possible solution that would not "penalize" the father and the child is if the court treats these situations as sperm donations.

Had Phillips been a sperm donor in the "traditional" sense rather than gratuitously giving his sperm, he would have no liability for the child born as a result of his sperm.[175] Most state statutes protect sperm donors from potential liability, so they will continue donating sperm.[176] These statutes have been interpreted to apply to known and unknown consenting donors.[177] Public policy is critical for sperm donations, and therefore, the State will protect donors from liabilities and obligations for children born from their donation.[178]

To protect Phillips from liability for a child resulting from Irons's malicious acts, the Appellate Court of Illinois could have determined that Phillips was an unknown consenting sperm donor.[179] Phillips and Irons had a clear understanding that no children were to be born prior to their marriage.[180] However, Irons had other plans and impregnated herself with his sperm after engaging in oral sex.[181] Although eliminating or reducing child support would negatively affect the child, remedies must exist to protect men from liability in cases of malice and intentional wrongdoing. Many proponents of male reproductive rights have suggested that the male abortion I don't know if these quotes should be deleted, but the blog doesn't use this term – only the people who have commented on the blog used the term "male abortion" option is the only practical remedy.[182]

V. Child Support and the "Male Abortion"

This section raises and responds to three important questions in the debate of unplanned fatherhood, and attempts to provide possible remedies for unintended pregnancies without diminishing women's reproductive rights. First, if a man makes it clear, before a child is conceived, that he does not want to be a father, and a woman agrees that she will terminate an unintended pregnancy, should he have to pay child support if she changes her mind?[183] Second, if a couple find themselves unexpectedly expecting a child, and the mother wants to terminate but the father says he will take full responsibility for the baby after it is born, should he have a legal right to require her to carry the child to term?[184] Lastly, does a man have the right to: (1) contest paternity; (2) counterclaim against a woman's paternity claim; or (3) recover from a mother for a child for which he had never planned or desired?[185]

To address these issues, advocates suggested the "male abortion" as a possible remedy for men. Male reproductive rights advocates coined the term "male abortion" in the late 1990s as a way of bringing attention to the lack of male autonomy in procreation.[186] In *Dubay v. Wells*, the Sixth Circuit rejected any thought of a "male abortion," and consistent with other courts, held that a putative father was required to pay child support as a benefit to the child.[187]

When an unwed male and unwed female have sexual intercourse that results in pregnancy, the woman has several options:

> When a female determines she is pregnant, she has the freedom to decide if she has the maturity level to undertake the responsibilities of motherhood, if she is financially able to support a child, if she is at a place in her career to take the time to have a child, or if she has other concerns precluding her from carrying the child to term. After weighing her options, the female may choose abortion. Once she aborts the fetus, the female's interests in and obligations to the child are terminated.[188]

However, the unwed father's options are non-existent.[189] His responsibilities to the child can only be terminated with the female's decision to abort the fetus or with the mother's decision to give the child up for adoption.[190] Thus, he depends on the decision of the female in determining his potential fatherhood.[191]

Recent jurisprudence ensures the protection of a female's right to reproductive choices.[192] Unfortunately, the father does not enjoy the same rights.[193] Although the financial interests of the child are important, a putative father must have a voice in the debate of reproductive rights.[194]

VI. Conclusion

When a mother infringes upon a father's constitutional rights, the father has a cause of action under the Due Process Clause of the Fourteenth Amendment.[195] It is important that a mother's reproductive rights are not diminished at the expense of granting more expansive reproductive rights for a father. Nonetheless, a father should have more legal rights with respect to reproduction, procreation, and personal autonomy. When the court assumes that a mother will be a caregiver, she is automatically granted inherent rights. For example, a mother's role as a caregiver allows her to establish a biological connection to her child; this same biological connection has not been consistently legally recognized for fathers.[196] While the biological relationship between a mother and her child is clear, that same scientific clarity does not exist for fathers.[197]

Reproductive rights are "[a] person's constitutionally protected rights relating to the control of his or her procreative activities . . . Specifically the cluster of civil liberties relating to pregnancy, abortion, and sterilization, especially the personal bodily rights of a women in her decision whether to become pregnant or bear a child."[198] Based on the definition, reproductive rights are generally viewed as a woman's right, and does not explicitly provide similar rights for men. However, court systems should adopt a nurture-based approach in determining fatherhood in reproductive rights, personal autonomy, and parenthood. Ultimately, "[a] t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[199] If the role of a father is of any importance to families, his voice should be taken into consideration in the debate of reproductive rights, personal autonomy, and parenthood.

(Endnotes)

[1] LL.M. Candidate, American University Washington College of Law, 2012; J.D., North Carolina Central University School of Law, 2011; B.A., Kent State University, 2008. First, I would like to thank God for blessing me with my love for writing. Second, I would like to thank my family, friends, and professors for always encouraging me and motivating me to continue to pursue my dreams. Nothing would be possible without your love and support. Third, I would like to thank Professor Kia Vernon who encouraged me to publish this article. Lastly, I would like to thank the staff and editors of The Modern American for their roles in the development of this article. Your hard work is greatly appreciated.

[2] U.S. Const. amend. XIV, § 1.

[3] *Id.*

[4] B. Jessie Hill, Article, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 Tex. L. Rev. 277, 304 (2007).

[5] *Id.* at 305.

[6] U.S. Const. amend. XIV, § 1. See above comment in text about this citation — I'd use "Id."

[7] Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

[8] *See generally id.*

[9] Nancy E. Dowd, Article, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 Emory L.J. 1271, 1271 (2005).

[10] *Id.*

[11] *See id.* (Although fathers have not been successful in the court system when seeking custody of children and adoption, unmarried fathers have been negatively affected the most).

[12] Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perception of Patriarchy*, 95 Colum L. Rev. 60, 60 (1995).

[13] Dowd, *supra* note 8.

[14] Lawrence v. Texas, 539 U.S. 558, 575 (2003) (Court held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in the privacy of their home).

[15] Hill, *supra* note 3, at 325.

[16] Hill, *supra* note 3, at 305.

[17] *Id.*

[18] Dowd, *supra* note 8, at 1272-73.

[19] *See generally id.* at 1271.

[20] *Id.* at 1276.

[21] *See id.* at 1273.

[22] *See id.*

[23] Stanley v. Illinois, 405 U.S. 645 (1972).

[24] Quilloin v. Walcott, 434 U.S. 246 (1978).

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

[26] Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579 (Ill. App.).

[27] Jones OD., *Reproductive Autonomy and Evolutionary Biology: A Regulatory Framework for Trait-Selection Technologies*, 19 Am. J.L. & Med. 187 (1993), *available* at http://www.ncbi.nlm.nih.gov/pubmed/8010304 (last visited April 25, 2011).

[28] Dowd, *supra* note 8, at 1271.

[29] *Id.* at 1272.

[30] *Id.* at 1271.

[31] *Id.*

[32] *See, e.g.,* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

[33] Dowd, *supra* note 8, at 1271.

[34] *Id.* at 1272.

[35] Adrienne D. Gross, *A Man's Right to Choose: Searching for Remedies in the Fact of Unplanned Fatherhood*, 55 DRAKE L. REV. 1015, 1016 (2007).

[36] Dowd, *supra* note 8, at 1271.

[37] *See generally* Lehr v. Robertson, 463 U.S. 248 (1983).

[38] Dowd, *supra* note 8, at 1272.

[39] *See* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 921, 971 (2005).

[40] *Id.* at 970.

[41] *See* THE URBAN INSTITUTE, FAST FACTS ON WELFARE POLICY, http://www.urban.org/uploadedpdf/900706.pdf (last visited April 25, 2011).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Dowd, *supra* note 8, at 1272.

[47] *Id.* at 1273.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[52] *Id.* at 14. This assertion is from the footnote in the Dowd article – and is almost exactly word for word. Consider revising.

[53] *Id.* at 1.

[54] *Id.* at 18.

[55] *See generally id.*

[56] Dowd, *supra* note 8, at 1273.

[57] *Id.* at 1275.

[58] *Id.* at 1332.

[59] Gross, *supra* note 34, at 1016.

[60] *See id.*

[61] *See* Lawrence v. Texas, 539 U.S 558, 578 (2003) (holding that a "state sodomy statute unconstitutionally infringed substantive due process rights of privacy with respect to intimate relationships").

[62] Dowd, *supra* note 8, at 1294.

[63] *Id.*

[64] *Id.* at 1295. Again, too much quoting of the original author's words.

[65] *Lawrence*, 539 U.S at 562.

[66] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

[67] *Lawrence,* 539 U.S. at 562.

[68] *See Planned Parenthood,* 505 U.S. at 851.

[69] Dowd, *supra* note 8, at 1296.

[70] *Id.*

[71] *Id.* at 1297.

[72] *Id.*

[73] *Id.*

[74] *See* Stanley v. Illinois, 405 U.S. 645, 646 (1972).

[75] Shanley, *supra* note 11, at 71-72.

[76] *Id.*

[77] *Id.* at 70.

[78] *Id.*

[79] *Stanley*, 405 U.S. at 646.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *See id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 646-47.

[88] *Id.* at 654.

[89] *Id.* at 647.

[90] Shanley, *supra* note 11, at 71.

[91] Dowd, *supra* note 8, at 1298.

[92] *Id.*

[93] *Stanley*, 405 U.S. at 658.

[94] *Id.* at 649.

[95] *Id.* at 658.

[96] *Id.* at 652-53.

[97] *See generally* Shanley, *supra* note 11, at 71.

[98] *Id.*

[99] Quilloin v. Walcott, 434 U.S. 246, 247 (1978).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 248.
[104] *Id.*
[105] *Id.*
[106] *Id.* at 249.
[107] *See generally id.* at 253-56.
[108] *Id.* at 255. *See also* Smith v. Org. of Foster Families, 431 U.S. 816, 862-63 (1977).
[109] Stanley v. Illinois, 405 U.S. 645, 658 (1972).
[110] *Quilloin*, 434 U.S. at 252.
[111] *Stanley*, 405 U.S. at 656-57.
[112] *Id.*
[113] *See* Lehr v. Robertson, 463 U.S. 248 (1983).
[114] *Id.* at 250.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 251.
[119] *Id.* at 250-51.
[120] *Id.* at 251. ("New York law requires that notice of an adoption proceeding be given to several other classes of possible fathers of children born out of wedlock-those who have been adjudicated to be the father, those who have been identified as the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old.").
[121] *Id.* at 267-68.
[122] *Id.* at 272.
[123] *Id.* at 272-73.
[124] *Id.* at 273.
[125] Shanley, *supra* note 11, at 73.
[126] *Lehr*, 463 U.S. at 272.
[127] *See id.*
[128] *See generally* Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579, at *1 (Ill. App. 3d. Feb. 22, 2005).
[129] Lisa Belkin, *A Father's Reproductive Rights*, N.Y. Times, May 17, 2010, *available at* http://parenting.blogs.nytimes.com/2010/05/17/a-fathers-reproductive-rights/.
[130] *Phillips*, 2005 WL 4694579, at *1.
[131] Gross, *supra* note 34, at 1016.
[132] *Id.* at 1028.
[133] *Id.* at 1018.
[134] *Id.*
[135] *Id.* at 1027-28.
[136] *Id.* at 1029.
[137] *See generally id.* at 1017.
[138] *Id.*
[139] Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579, at *1 (Ill. App. 3d. Feb. 22, 2005).
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at *5
[150] *Id.*
[151] *Id.* at *6.
[152] *Id.* at *3.
[153] *Id.* at *2.
[154] *Id.*
[155] *Id.* at *3.
[156] *Id.* at *4.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at *5.
[166] *Id.*
[167] *Id. See also* Neurosurgery & Spine Surgery, S.C. v. Goldman, 339 Ill. App. 3d 177, 185-86 (Ill. App. Ct. 2003).
[168] *Phillips*, 2005 WL 4694579, at *5.
[169] *Id.* at *6.
[170] *Id.* at *5.
[171] *Id* at *6. *See also* Kurchener v. State Farm Fire and Casualty Co., 858 So. 2d 1220 (Fl. Dist. Ct. App. 2003).
[172] *Phillips*, 2005 WL 4694579, at *5.
[173] *Id.*
[174] Gross, *supra* note 34, at 1051.
[175] *Id.* at 1052.
[176] *Id.*

[177] *Id. See* McIntyre v. Crouch, 780 P.2d 239, 243 (Or. Ct. App. 1989) (interpreting the scope of the Oregon's statute to apply to unknown consenting donors). This "See McIntyre..." footnote comes straight from the footnote in the Gross article.

[178] Gross, *supra* note 34, at 1052.

[179] *Id.*

[180] *Phillips*, 2005 WL 4694579, at *1

[181] *Id.*

[182] Belkin, *supra* note 128.

[183] *Id.*

[184] *Id.*

[185] Gross, *supra* note 34, at 1017.

[186] Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to the Unborn Child*, 7 J.L. & POL'Y 1 (1998).

[187] *See* Dubay v. Wells, 506 F.3d 422, 431 (6th Cir. 2007).

[188] McCulley, *supra* note 185, at 4.

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.* at 54.

[193] *Id.*

[194] *Id.* at 54-55.

[195] *See* Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 776 (1996).

[196] *Id.* at 777.

[197] *Id.*

[198] *Black's Law Dictionary* 1330 (9th ed. 2009).

[199] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).