Journal of Gender, Social Policy & the Law

Volume 20 | Issue 3 Article 5

2012

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Recommended Citation

Jacobs, Melanie B. "Intentional Parenthood's Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy." American University Journal of Gender Social Policy and Law 20, no. 3 (2012): 489-508.

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INTENTIONAL PARENTHOOD'S INFLUENCE: RETHINKING PROCREATIVE AUTONOMY AND FEDERAL PATERNITY ESTABLISHMENT POLICY

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INTRODUCTION

While biology, birth, and the marital presumption are still the traditional bases on which legal parentage is established, intent is playing an ever-increasing role in parentage determinations. Most significantly, intent has been used as a proxy for biology to establish legal parentage.[1] Conversely, intent has also been critical in recognizing the right of a party *not* to procreate or have the responsibilities that flow therefrom. The increased recognition of intent within the parentage law puzzle creates a greater contrast with the use of biology alone to establish paternity, especially

* Professor, Michigan State University College of Law. Thanks to Nancy Polikoff for inviting me to participate in a fabulous and timely conference, "The New 'Illegitimacy': Revisiting Why Parentage Should Not Depend on Marriage," to my friends and colleagues at the conference who shared their thoughtful feedback, and to the staff of the *American University Journal of Gender, Social Policy & the Law* for their assistance finalizing this Essay. And love and thanks to Shane and Jacob Broyles, for supporting me every step of the way.

1. *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d. 280, 293 (Ct. App. 1998) (holding that a husband and wife, neither of whom were genetically related to their daughter, were her legal parents because of their intent to conceive and raise her).

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those cases initiated by a state's IV-D agency (the agency charged with establishing paternity judgments and child support orders).[2]

The relationship between intent, conception, and procreation has created a gulf of inconsistency between how legal parentage is determined in the assisted reproductive technologies (ART) context compared with the traditional paternity establishment context. In the paternity establishment context, if an unmarried man and woman have sex and the woman becomes pregnant, the man will likely be adjudicated the child's legal father regardless if he had any intent to conceive or procreate a child.[3] By contrast, a man who has actively participated in the process of conception via in vitro fertilization has routinely been permitted to change his mind regarding subsequent use of the embryos in an attempt to protect his procreative liberty.[4]

In this Essay, I challenge why a man who has no intent or desire to be a father should be adjudicated a legal father—with subsequent legal responsibilities—and whether courts and legislatures are applying procreative autonomy equally to all constituents. Arguably, moral disdain for poor adults who conceive out of wedlock has resulted in forced fatherhood for primarily low-income individuals, whereas wealthier men who use assisted reproductive technologies have greater protection of their procreative freedom. Men who engage in non-marital sex that results in a child will likely be required to pay a "tax"—child support—while a man who engages in non-coital procreative activities is often alleviated of such a burden.

Although procreation through intercourse is necessarily different than procreation achieved using ART, I question the difference in legal treatment of the persons involved. Furthermore, this Essay illustrates that as the laws of parentage broaden, we call into question traditional parentage doctrines. Notably, family law permits deviation from the two-parent model for wealthier individuals who choose parenthood by choice through ART but imposes unwanted parenthood on many men in the interest of the public fisc. Applying the principles of procreative autonomy equally, it is hard to reconcile parentage by intention and parenthood by

2. *See* 45 C.F.R. § 309.05 (2010) ("IV-D services are the services that are authorized or required for the establishment of paternity, establishment, modification, and enforcement of support orders, and location of noncustodial parents under title IV-D of the Act.").

3. *See, e.g.*, Dubay v. Wells, 506 F.3d 422, 431-32 (6th Cir. 2007) (holding that the Michigan Paternity Act did not violate a putative father's equal protection or due process rights, even though he had expressed to the child's mother that he had no desire to be a father, and she assured him of her infertility and use of contraception).

4. *See, e.g.*, A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000) (holding that a former husband's procreative liberty interest prevented his former wife from implanting embryos against his will).

imposition.

As Professor John Robertson wrote in *Children of Choice*, "At the most general level, procreative liberty is the freedom either to have children or to avoid having them."[5] Procreative liberty is often discussed as encompassing two parts: the freedom to reproduce and the freedom to avoid reproduction.[6] Most of the Supreme Court's procreative liberty jurisprudence has focused on the right to avoid procreation, but in *Skinner v. Oklahoma*,[7] the Court explicitly affirmed the fundamental right to procreate. Specifically, the Court held unconstitutional a state statute that proscribed compulsory sterilization for a habitual criminal.[8] The Court reasoned, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race . . . . Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."[9]

The Court has focused greater attention on the right to avoid procreation. Traditionally, avoiding procreation either meant abstaining from sex, using contraception to prevent conception, or abortion. The Supreme Court has reaffirmed the right to avoid procreation numerous times in the past few decades. Beginning with *Griswold v. Connecticut*, the Court held that married couples have the right to avoid reproduction through use of contraception.[10] Several years later, in *Eisenstadt v. Baird*, the Court clarified that the right to avoid reproduction extended to individuals, not just to married couples.[11] One year later, in *Roe v. Wade*, the Court said that a woman's right to an abortion—the right to avoid reproduction after conception—is a constitutionally protected right.[12] While the Court's abortion jurisprudence has evolved in the past thirty plus years, the essential holding in *Roe*—a woman's right to an abortion—remains

5. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22 (1994).

6. *Id.* at 25 (analyzing two types of procreative liberty).

7. 316 U.S. 535, 541 (1942) (holding that mandatory sterilization of one convicted of stealing chickens and armed robbery was unconstitutional because it violated equal protection).

8. *Id.* at 541.

9. *Id.*

10. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a Connecticut law that forbids the use of contraceptives violates the marital right of privacy).

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

12. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that an outright ban on abortion unconstitutionally infringed on a woman's privacy right, but concluding that certain limitations on abortion are constitutional).

intact.[13] Professor Robertson explains, "[D]eprivation of the ability to avoid reproduction determines one's self-definition in the most basic sense . . . . It . . . centrally affects one's psychological and social identity and one's social and moral responsibilities. The resulting burdens are especially onerous for women, but they affect men in significant ways as well."[14]

Inherent within the definition of procreative liberty that embraces the freedom to have children or not is the concept of intent: does a person intend to have a child or intend not to have a child? A woman has the legal right to choose whether to carry a child to term upon learning that she is pregnant; a man has no such corresponding right. Allow me to clarify at the outset that I am *not* arguing for men to have the right to interfere with a woman's abortion right: either to force a woman to have one or preclude her from obtaining one. Rather, I am challenging why a man who has no intent or desire to be a father should be adjudicated a legal father against his will. This Essay is part of a larger inquiry in which I challenge why biology and the marital presumption, rather than intent, create greater rights to legal parentage.

The increased use of ART to conceive children has resulted in an increased reliance on intention to establish parenthood. Through ART, we can fully appreciate the distinction between conception and procreation: as I will discuss shortly, a couple may use in vitro fertilization to conceive and create embryos and yet they may decide not to procreate or one member of the couple may decide that procreation should not occur. In fact, abortion works similarly to protect a woman's right to avoid procreation once conception has already occurred. This is an important right that I fully support, but it illustrates the separation between conception and procreation. A woman who chooses to continue a pregnancy has made a conscious choice to procreate. She may ultimately decide not to parent, but she has exercised her right to procreate.

A father has no corresponding right. He has neither the ability to force a woman to abort nor to prevent her from aborting. In essence, once conception has occurred, he no longer has a negative procreative right, only the woman does. Fathers have challenged paternity laws as violations of their due process and equal protection rights, including their right to procreational autonomy.[15] The equal protection challenges are generally

13. *See* Gonzales v. Carhart, 550 U.S. 124, 124-25 (2007) (upholding Congress's Partial Birth Abortion Ban Act of 2003 as a legitimate exercise of the State's power to restrict abortion after viability in accordance with the central holding of *Roe*).

14. ROBERTSON, *supra* note 5, at 24.

15. *E.g.*, Dubay v. Wells, 506 F.3d 422, 429 (6th Cir. 2007) (citing *N.E. v. Hedges*, 391 F.3d 832, 835 (6th Cir. 2004), for the proposition that, "the right to privacy . . . does not encompass a right to decide not to become a parent after conception and

framed as trying to have the same right as a woman to choose to be, or not to be, a parent; those claims have been uniformly unsuccessful.[16] Given recent developments in ART and various situations in which men have been able to assert a negative procreative right or right not to parent,[17] men facing a paternity suit may have new claims and could argue that the differential treatment of fathers in the traditional paternity context contrasted with the ART context has no rational basis. Due to the deference and protection given to known sperm donors or male in vitro fertilization (IVF) donors who withdraw their consent, men who had no intent to procreate through intercourse may be able to argue that they are not being treated equally under the law and that paternity statutes do, in fact, violate their equal protection. As intentional parenthood's influence grows, we should rethink the constitutionality and legitimacy of the current system.

For purposes of this Essay, I broadly interpret procreative liberty as the intent to choose to legally parent children or choose not to legally parent children. In the context of ART, distinctions can be made between genetic, gestational, and legal parents. For instance, the 2000 Uniform Parentage Act (UPA) recognizes a distinction between genetic and legal parenthood.[18] With the growing use of sperm and egg donors, more parents are legal parents because of their actions in intending to bring about the birth of a child, rather than their genetic makeup.[19] Arguably, then, procreative autonomy applies not merely to genetic parenthood but to legal parenthood.

A further assumption in this Essay is that the act of fertilization or conception is distinct from the act of procreation. Throughout history, the act of conception (a sperm that fertilizes an egg to form an embryo) could not reliably be separated from the act of procreation (the freedom to have children). If a man and woman had sex and an egg was fertilized, conception automatically led to procreation (assuming a pregnancy to term). Now, ART allows us to separate voluntary acts that result in

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birth").

16. *See, e.g.*, *id.* at 430-31 (holding that the Michigan Paternity Act is rationally related to the legitimate purpose of ensuring support for minor children born out of wedlock).

17. *See, e.g.*, Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (holding that one has the right to avoid procreation after a human embryo is intentionally created outside of the womb).

18. The UPA provides that "[a] donor is not a parent of a child conceived by means of assisted reproduction." UNIF. PARENTAGE ACT § 702 (amended 2002), 9B U.L.A. 355 (2001).

19. *See, e.g.*, A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000) (invalidating an agreement between an IVF clinic and a formerly married couple concerning the disposition of the couple's frozen embryos because the agreement no longer represented the intent of the couple and would compel one donor to become a parent against his will).

conception and voluntary acts for the purposes of reproducing. While the acts may be related, they are not the same.

For example, consider *In re Marriage of Buzzanca*: a husband and wife who both suffered from infertility utilized a sperm donor and an egg donor to create embryos, and had them transferred to a gestational surrogate.[20] Conception occurred upon successful creation of the embryos.[21] Arguably, however, the couple chose to procreate when they proceeded to have the embryos transferred to the gestational surrogate.[22] While the surrogate was pregnant, the couple filed for divorce.[23] After the child's birth, the husband tried to claim he was not the legal parent of the child because he was not genetically related to the child.[24] The *Buzzanca* court held that the husband and wife were the child's legal parents regardless of genetics because the parties consented to medical procedures with the intent to procreate a child.[25] Thus, the court relied on the intent of the parties to determine parentage.[26]

The relationship between intent, conception, and procreation has created a dramatic inconsistency between how legal parentage is determined in the ART context compared with the traditional paternity establishment context. In the paternity establishment context, if an unmarried man and woman have sex and the woman becomes pregnant, the man will likely be adjudicated the child's legal father regardless if he had any intent to conceive or procreate a child.[27] Even if he believed the woman was using contraception or was infertile, he will have no defense against an action for paternity.[28] His intent is irrelevant. I have highlighted in a previous work

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20. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d. 280, 282 (Ct. App. 1998) (holding that the persons who intended to parent the child—John and Luanne—were the child's parents because of their intent and, further, that no other legal procedures, such as adoption, were necessary to establish their legal parentage).

21. *Id.*

22. *Id.*

23. *Id.* at 282-83.

24. *Id.*

25. *See id.* at 292 (analogizing to the statute governing artificial insemination, which makes a husband the lawful father of a child if he consents, and concluding that both intended parents are Jaycee's legal parents because of their consent to the medical procedures used to cause Jaycee's conception and birth).

26. *See id.* at 293 (referring to *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), where the California Supreme Court focused on intent as the deciding factor in a child custody case).

27. *See, e.g.*, Dubay v. Wells, 506 F.3d 422 (6th Cir. 2007) (holding that Dubay owed child support to a woman when she became pregnant with his child after informing him that she was infertile and using contraception); *see also* Adrienne D. Gross, *A Man's Right to Choose: Searching for Remedies in the Place of Unplanned Fatherhood*, 55 DRAKE L. REV. 1015, 1015-25 (2007) (describing numerous legal theories that men have unsuccessfully pled to attempt to disclaim parentage).

28. In a most unusual case, a man alleged he did not even have sex with a woman but that she performed fellatio, saved the sperm and later self-inseminated with it, thus

that sometimes a biological father will be precluded from establishing his paternity because of application of the marital presumption or the Supreme Court's line of cases that require more than a biological connection to preserve paternal rights.[29] So, intent generally plays no role in paternity establishment, regardless of whether a man has intent to parent or not.

Federal paternity establishment law and policy overrides a man's right not to reproduce and his right not to parent.[30] In two other significant contexts, however, a man's right *not* to parent is given tremendous respect: (1) known sperm donors; and (2) ex-husbands who do not want ex-wives to use frozen embryos.[31] A man who unintentionally impregnates a single woman is given no such deference.

Using these three scenarios, I explore the interplay between intent and procreative liberty. In the two scenarios in which ART is used, a man's lack of procreative intent trumps legal parenthood; in other words, a man will not be a legal parent against his will. In the scenario in which conception occurs through intercourse, a man's intention not to conceive or procreate is given no deference.

Why are these cases treated so differently? Many argue that the best interests of the child dictate that a child have two parents; more specifically, the State has an interest in having two parents who can potentially support a child. Increasingly, though, in ART cases, courts and legislatures are moving from the two-parent paradigm often to preserve procreative autonomy. Whether those values should apply to traditional paternity establishment is the subject of the remainder of this Essay.

Federal paternity establishment policy is a reflection of the strict adherence to a two-parent paradigm.[32] It is predicated on wanting to eliminate the negative implications of "illegitimacy" and ensure that children have both a mother and father.[33] For many years, a child born out

becoming pregnant. He was adjudicated the child's father and ordered to pay child support. *See* Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579, at *1 (App. Ct. Ill. Feb. 22, 2005).

29. *See* Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006) [hereinafter Jacobs, *My Two Dads*] (discussing the comparative importance of marriage and biology in determining legal paternity).

30. Federal Parent Locator Service, 42 U.S.C. § 653 (2006).

31. *See* Katharine Baker, *Bargaining or Biology: The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 10 (2004) (discussing sperm donors' lack of parental rights).

32. *See* Jacobs, *My Two Dads*, *supra* note 29, at 823-24; Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 318 (2007) (discussing family law doctrine's emphasis on two parents).

33. *See* Jacobs, *My Two Dads*, *supra* note 29 at 823-24 (concluding that the Uniform Parentage Act was promulgated in response to Supreme Court rulings emphasizing the importance of two legal parents).

of wedlock only had one legal parent, the mother.[34] In fact, unwed fathers often had no rights or responsibilities to their biological children.[35] In the 1960s and 1970s, the Supreme Court rendered a number of opinions in which it determined that non-marital children were entitled to many of the benefits of marital children.[36] The Court made several rulings to protect the rights of children born out of wedlock, such as the right to receive child support,[37] sustain an action for wrongful death,[38] and recover under a state's worker's compensation law.[39]

In response to these Supreme Court decisions, and in an effort to equalize the rights of non-marital and marital children, the UPA was promulgated in 1973.[40] The Act's purpose was to establish a civil scheme whereby legal parentage would be established for non-marital children, allowing for corresponding child support obligations and custody benefits, and to ensure that a child has two legal parents to provide financial and emotional support.[41] Soon thereafter, Congress entered the paternity arena. As Professor Laura Oren has observed, "[e]ver since 1975, with increasing vehemence, federal policy has encouraged and, indeed, coerced the identification of the biological fathers of non-marital children."[42]

Paternity establishment and a child's corresponding entitlement to support and benefits are often based purely on biological connection.[43] Regardless of the father's intent or desire to parent, he will be adjudicated the child's legal father and will have all the responsibilities of fatherhood.

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34. *Id.* at 816.

35. *See* Baker, *supra* note 31, at 6 (discussing the refusal of several states to impose any duties of support on biological fathers, and noting that a court even refused to permit a child to have his paternity investigated).

36. Jacobs, *My Two Dads*, *supra* note 29, at 823.

37. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding that children born out of wedlock are constitutionally entitled to the same right of support as are children of married parents).

38. *See* Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding that it violated equal protection not to permit five children born out of wedlock to seek damages as a result of the wrongful death of their mother).

39. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) (holding that it violated equal protection not to permit two children born out of wedlock to sue under a worker's compensation law because the children, living in a house with their unwed mother and father and their father's four legitimate children from his marriage, comprised an intact family and were as dependent on their father's income as the legitimate children).

40. UNIF. PARENTAGE ACT prefatory n. (1973), 9B U.L.A. 378-80 (2001).

41. *See id.* (discussing the goals of the Uniform Parentage Act).

42. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 94 (2004).

43. *See* Baker, *supra* note 31, at 8-9 (analyzing the role of biology in determining a child's entitlement to child support).

Professor Katharine Baker has written, "much paternity law seems to be based on a strict liability theory for genetic contribution."[44]

Federal paternity establishment policies are not predicated on a two professionals scenario, but rather on a low-income mother who will require state assistance if the father does not pay child support.[45] Ironically, many of those mothers still require assistance, regardless of a support order, given that most men to whom the system is directed cannot afford enough child support to remove the mother and child from assistance.[46] Professor Leslie Harris has argued, "This evidence strongly suggests that the problem of childhood poverty cannot be solved simply by pursuing absent biological parents, mostly fathers, for child support. Yet the rhetorical and policy emphasis on this strategy effectively diverts discussion and attention from the question of our collective responsibility to provide for children economically, thus serving political ends."[47]

Despite protestations that federal paternity and child support policy unduly impinges on a man's procreative rights, courts and commentators rely on the argument that it is necessary for a child to receive child support from her or his father.[48] Unfortunately, though, the reality of child support collection and enforcement does not accord with our current system. Professor Daniel Hatcher has studied the federal policy of paternity establishment and child support collection and has concluded that the current model is largely a failure.[49] Like Professor Oren, Hatcher points out that poor mothers are forced to name absent fathers and sue them again and again to try to collect child support but the fathers are also poor and generally cannot afford to pay.[50] Moreover, the relationships between the mothers and fathers "can be obliterated through the process [and] [t]he hopes of children to have fathers who are supportive and involved in their lives are often dissolved."[51] Worse, Hatcher's analysis reveals that, "the net financial benefit to the government resulting from welfare cost recovery

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44. *Id.*

45. *See* Federal Parent Locator Service, 42 U.S.C. § 653 (2006) (requiring that mothers who receive welfare assistance cooperate with the state agency to establish paternity and support obligations or face the risk of losing a portion of the welfare grant unless good cause is established).

46. Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 476-77 (1996).

47. *Id.*

48. *Id.* at 477.

49. *See* 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, 1030-31 (2007) (discussing the expense of welfare and the failure of the current welfare program in assisting needy families).

50. *See id.* at 1031.

51. *Id.*

is minimal and may actually be negative."[52] So it is often inaccurate that paternity establishment with a corresponding child support order serves the best interests of children.

Below, I discuss the basic paternity establishment scenario and the current jurisprudence that rejects a man's claims that forced fatherhood violates his procreative liberties. Then, I contrast those claims with claims in the ART context and conclude that going forward, men may have a compelling argument against the current legal regime.

Scenario One: A Guy Walks Into a Bar . . . and Walks Out a Father Who Owes Child Support

A man meets a woman at a bar. Assume they are two professionals, meeting at the hotel bar in a city to which they have both traveled for a conference. They drink, they bond over their miles perks programs, and, ultimately, head upstairs and have sex. They are responsible professionals; the man uses a condom, which unfortunately breaks. A few weeks later, the woman learns she is pregnant. On the night of conception, over drinks at the bar, the man had confided that he never wants to have children (nor a relationship). The woman has had an interest in motherhood and, despite her reservations about her career and the emotional toll of going through this pregnancy without a partner, decides that this might be her best chance to have a child; thus, she chooses to proceed with the pregnancy. She has the business card of the man, and when she calls to share the news, he is completely taken aback and says, "You know I don't want anything to do with the baby, right?"

Regardless of the fact that the woman was aware of the man's desire not to procreate and his intent not to reproduce, her desire to have a baby is all that is legally relevant and if she does pursue child support, she will be able to obtain it. In fact, even if the parties sign a contract in which they agree that the man is not responsible for child support, that contract will be unenforceable as contrary to public policy.[53] He will be adjudicated the legal father and ordered to pay support, regardless of whether he has any

52. *See id.* at 1032 ("And there is little gain to counter the loss because welfare cost recovery is largely a fiscal failure. The goal is simple: reduce government spending by recouping the costs from the person who should have been providing such financial support in the first place, the absent parent . . . . Further, the small percentage of assigned support that is successfully collected is diverted from the children and their families when they most need it, decreasing their economic stability and increasing their likelihood of needing welfare again in the future.").

53. *See* Kristine M. v. David P., 37 Cal. Rptr. 3d 748, 749 (Ct. App. 2006) (holding that if the father voluntarily terminates his parental rights with the mother's approval as a matter of convenience to guarantee no contact between the father and child and to obviate the father's support obligation, public policy will intervene to "protect the child's continued right to support").

contact with the child.[54]

Paternity laws certainly have not gone unchallenged. A 2004 Sixth Circuit case provides one example of the types of challenges some men have brought in their efforts not to have their paternity established (and corresponding support order entered). In *N.E. v. Hedges*, the biological father alleged that his substantive due process rights, specifically, procreative privacy rights, were violated by Kentucky's paternity establishment and child support order statute.[55] The court rejected his claim and held that the statute establishing paternity and enforcing a child support obligation does not violate his substantive due process rights.[56] The court stated:

> Plaintiff has identified no action taken by a state actor that impacted in any way his choice to father a child. As he complains of actions taken under the Commonwealth's statutes that permit the establishment of paternity and the imposition and enforcement of child support obligations, the Court sees no evidence that the state required him to engage in the sexual activity that resulted in the conception of his son. Further he has identified no action taken by a state actor that interfered in any way with his choice to use or not to use contraceptive methods—or additional contraceptive methods, as the case may be—during sexual activity to avoid his sexual partner's resulting pregnancy.[57]

The court's language is fascinating: although it opined that no state actor impacted the plaintiff's choice to father a child, the paternity statute does just that.[58] The state-enacted paternity statute imposed fatherhood and a financial obligation because of his biological relationship to the child.[59] The man made a choice to have sex; he did not have the intent to conceive a child and certainly not the intent to procreate or rear a child. The court truly got to the heart of the matter, "Child support has long been a tax fathers had to pay in Western civilization.[60] For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring—even if unwanted and

54. *Id.* at 752-53.

55. 391 F.3d 832, 834 (6th Cir. 2005); *see also* Rivera v. Minnich, 483 U.S. 574, 580 (1987) (holding that a preponderance of the evidence standard satisfies substantive due process in paternity proceedings and that a . . . "putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law").

56. *Hedges*, 391 F.3d at 843.

57. *Id.*

58. *See* KY. REV. STAT. ANN. § 406.021 (West 2011) (providing that a county attorney or the Cabinet for Health and Family Services may bring about an action to determine paternity "upon complaint of the mother, putative father, child, person, or agency substantially contributing to the support of the child").

59. *Id.*

60. *Hedges*, 391 F.3d at 836.

unacknowledged—remains constitutionally sufficient to support paternity tests and child support requirements."[61] Finally, the court concluded, "Reproduction and child support requirements occur without regard to the male's wishes or his emotional attachment to his offspring."[62]

The court's opinion highlights the gross inconsistency between paternity establishment and cases in which intent is used to establish legal parentage or preserve the right not to procreate. The court seemingly embraces the "assumption of the risk" approach to parenthood that is generally used in tort; essentially, if a man has sex with a woman, regardless of his intent not to conceive, he will be liable for child support if a child is born. As the *Hedges* court wrote, child support is a tax fathers have to pay. But not all fathers have to pay this tax; if N.E. had given his sperm to the child's mother so that she could conceive, he would be relieved of parental responsibility.

It is hard to believe that our legal system of paternity should be predicated on punishing people for having sex. That reasoning was explicitly refuted by the Supreme Court in *Eisenstadt v. Baird*, in which the Court invalidated a Massachusetts statute that prohibited single individuals from accessing contraception.[63] In refuting the rationale that the Commonwealth was, in part, attempting to deter premarital sex by enacting the law, the Court wrote, "[I]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication."[64] Ironically, that is exactly the way in which federal paternity establishment works.

Hedges illustrates the legal discrepancy of determining parentage after intercourse versus after the use of ART procedures: courts can presume a level of intent in traditional parentage cases that is not apparent in ART cases. The *Hedges* court conflates sexual conduct, conception, and child rearing, but they are three distinct activities.[65] Moreover, it is highly problematic to infer the intent to conceive and procreate a child from the intent to have sex.

Scenario Two: A Woman Walks into a Bar . . . and Walks Out a Single Mother

Let us vary the facts: the same woman is anxious to have a baby. She is single and successful and while the right partner may not have appeared in

61. *Id.*

62. *Id.*

63. 405 U.S. 438 (1972).

64. *Id.* at 448.

65. *See Hedges*, 391 F.3d at 834-36 (maintaining the importance of the biological father's child support duties regardless of lack of intent to father a child).

her life, she very much would like to be a mother. If our single woman used sperm from an anonymous donor, there would be no question about her single parent status and the donor's lack of legal parentage. A donor donates sperm with the express intent that his sperm will be used for conception even though he has the intent not to assume parental status. His actions are likely more voluntary than the man who has sex: the man who has sex has the intent to have sex and nothing more. The donor voluntarily intends to conceive but no intent to procreate and parent a child. The UPA supports that a sperm donor has no legal status as a parent.[66]

But let us vary the facts again so that the scenario is more similar to the first: a woman meets a handsome professional at a bar and asks him to be a sperm donor. He makes it clear he has no desire to be a parent and they agree that he will not assert parental rights and she will not pursue any parental obligation against him, specifically child support. She changes her mind a few years later, when she realizes daycare is nearly as expensive as private high school, but the court agrees that the man's lack of intent to parent means that he cannot now be adjudicated the father. She can be a single mother.

The only difference between these scenarios is the act of intercourse. As I have argued, intercourse, itself, does not represent the intent to conceive and procreate. In two recent state court opinions, even known sperm donors were held not to be legal parents regardless of their status as genetic parents.[67] In one case, the donor had no intent to be a parent (more akin to the traditional paternity cases).[68] In the other, the man appeared to have no intent to parent at the time of conception or gestation but changed his mind after the birth of the child.[69] I think both cases were correctly decided, and illustrate the widening gulf between basing parentage on the intent to procreate compared with the more traditional biological basis.

In *Ferguson v. McKiernan*, former romantic partners agreed that donor would provide sperm for the woman/mother to use for assisted insemination in a clinic.[70] The court recounted that the donation would feature all of the hallmarks of an anonymous donation, but for the important fact that the donor was known.[71] The parties agreed that the donor's role in the conception would remain confidential, that he would

66. *See* UNIF. PARENTAGE ACT § 702 (amended 2002), 9B U.L.A. 355 (2001) (stating that a donor is not the parent of a child conceived as a result of assisted reproduction).

67. *See In re* K.M.H., 169 P.3d 1025 (Kan. 2007); Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007).

68. *Ferguson*, 940 A.2d at 1238.

69. *In re K.M.H.*, 169 P.3d at 1029.

70. *Ferguson*, 940 A.2d at 1238.

71. *Id.*

have no custodial or visitation rights, and that the mother would not seek support.[72] For five years following the twin's births, neither party challenged the agreement; then, the mother sought child support.[73] The trial court, despite its dismay at the mother's dishonest behavior, entered a support order, consistent with what was in the best interest of the child and public policy.[74]

The Pennsylvania Supreme Court disagreed.[75] The court observed the vast continuum between a "mere sexual encounter" that produces a child via intercourse obligating the man to pay child support and anonymous sperm donation that creates no parental responsibilities.[76] The court found that the *Ferguson* facts most closely resembled the anonymous donation cases and ruled that the parties' original agreement was enforceable and that the trial court erred in imposing the child support order.[77] Even though anonymity was not preserved, the court did not wish to hinge its result on that distinction.[78] The court wrote that if such a distinction were tenable:

> It would mean that a woman who wishes to have a baby but is unable to conceive through intercourse could not seek sperm from a man she knows and admires, while assuring him that he will never be subject to a support order and being herself assured that he will never be able to seek custody of the child. Accordingly, to protect herself and the sperm donor, that would-be mother would have no choice but to resort to anonymous donation or abandon her desire to be a biological mother, notwithstanding her considered personal preference to conceive using the sperm of someone familiar, whose background, traits, and medical history are not shrouded in mystery. To much the same end, where a would be donor cannot trust that he is safe from a future support action, he will be considerably less likely to provide his sperm to a friend or acquaintance who asks, significantly limiting a would-be mother's reproductive prerogatives.[79]

Arguably, this approach places tremendous emphasis on a woman's procreative right—she can parent solo. But this approach also recognizes the importance of intent within procreative liberty, regarding both the right to choose to parent and the right to choose not to parent. By refusing to impose parental responsibilities on the donor, the *Ferguson* court validated the parties' original intent concerning the sperm donation and promoted the

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 1248.
76. *Id.* at 1246.
77. *Id.*
78. *Id.* at 1247.
79. *Id.*

procreative liberty of both parties.[80]

The Kansas Supreme Court has similarly recognized the procreative liberty rights of a single woman and a known sperm donor.[81] In *In re K.M.H.*, an unmarried woman wanted to become a parent using the sperm of a male friend.[82] There was no written agreement between the parties, but the woman contended that the "mutual pre-insemination intent of the parties" clearly demonstrated that the donor would not have any parental rights or responsibilities and that she would be the only legal parent.[83] After she gave birth to twins, the mother filed a petition to confirm the donor's lack of parental status; the donor filed an answer alleging that he was, indeed, the father of the twins and further acknowledged his financial responsibility.[84]

Relying on a Kansas statute that bars a donor from any parental status in the absence of a written agreement, the mother argued that the donor should not be able to establish his paternity.[85] The Kansas Supreme Court agreed and found that the particular provision of the statute was enacted "to prevent the creation of parental status where it is not desired or expected."[86] The Court noted a potential equal protection concern in that a woman will always be a parent under the statute but that a man will never be a parent unless there is a written agreement with the woman, but upheld the statute's constitutionality because of the statute's legitimate purposes.[87] Like the *Ferguson* court, the *K.M.H.* court concluded that the statutory bar against donor paternity "encourages men who are able and willing to donate sperm to such women by protecting the men from later unwanted claims for support from the mothers or the children.[88] It protects women recipients as well, preventing potential claims of donors to parental rights and responsibilities, in the absence of an agreement. Its requirement that any such agreement be in writing enhances predictability, clarity, and enforceability."[89]

These cases highlight that separating intercourse from conception may enable a man to avoid legal fatherhood (or that the woman can prevent the man from asserting paternity) and further highlights that the intent *not* to

80. *Id.* at 1248.
81. *In re* K.M.H., 169 P.3d 1025 (Kan. 2007).
82. *Id*. at 1029.
83. *Id.* at 1029-30.
84. *Id.* at 1029.
85. *Id.* at 1030.
86. *Id.* at 1041.
87. *Id.* at 1039.
88. *Id.*
89. *Id.*

parent will be judicially validated in certain circumstances. In both *Ferguson* and *K.M.H.* the parties intended that the known donor would not assume parental rights.[90] The court deemed the original intent not to parent as judicially sufficient to bar subsequent paternity adjudications of the sperm donors, despite both courts' reluctance to deviate from the two-parent paradigm.[91]

A perhaps tangential, but important, point to make is that women who have the means to conceive using anonymous sperm donation or who choose to ask a friend to donate sperm are given the legal protection to be single mothers, free from interference of a sperm donor who might change his mind and seek parental rights. Women from lower socio-economic backgrounds are not given the choice to be single mothers. A woman who receives public assistance is required to comply with the state IV-D agency and name the person (or persons) she believes might be the father of her child, and the state then pursues a paternity order for the purpose of obtaining a support order.[92] As discussed above, the process often harms the potential father-child relationship. More significantly, though, is that the rational basis asserted for imposed fatherhood is the importance of two parents, especially for financial support. Yet, if a woman uses the sperm of a known or anonymous sperm donor, she will be the only legal parent and only parent responsible for supporting the resulting child(ren). Thus, it seems the full breadth of procreative liberty applies to persons of financial means whereas lower income persons are unable to fully avail themselves of procreative liberty.

Scenario Three: A Husband Walks Out on His Wife and Their Embryos . . . and Will Not be a Father by Force

Here is the third scenario in which courts distinguish between the intent to conceive and the intent to procreate: the frozen embryo dispute cases. Imagine that a husband and wife want to have children. Unable to conceive naturally, they decide to pursue IVF. After successful sperm and egg retrieval, ten embryos are created, three of which are transferred to the wife's uterus and the remaining seven are cryogenically preserved. One

90. *Id.* at 1030; Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007).

91. *See In re K.M.H.*, 169 P.3d at 1041 (noting that "all that is constitutional is not necessarily wise. We are mindful of . . . the chance of the availability of two parents—and two parents' resources—to Kansas children"); *see also Ferguson*, 940 A.2d at 1248 ("This Court takes very seriously the best interests of the children of this Commonwealth, and we recognize that to rule in favor of the Sperm Donor in this case denies a source of support to two children who did not ask to be born into this situation. Absent the parties' agreement, however, the twins would not have been born at all, or would have been born to a different and anonymous sperm donor, who neither party disputes would be safe from a support order.").

92. Federal Parent Locator Service, 42 U.S.C. § 653 (2006).

embryo successfully implants in the uterine wall; unfortunately, the wife miscarries in her first trimester. The stress of infertility, IVF, and the miscarriage take a toll. By the time the wife has physically recovered such that she can consider another embryo transfer, the husband seeks a divorce and forbids her from using the embryos. Although the husband had intended to reproduce during the IVF process, he no longer wishes to reproduce now. Uniformly, courts have upheld his right not to procreate.

In *Davis v. Davis*,[93] a Tennessee court was the first to address a dispute between a divorcing couple's use of frozen embryos. The court balanced the right of the husband not to procreate against the wife's desire to donate the embryos.[94] At first, the wife wanted to use them, but during the litigation, she changed her mind and sought, instead, to donate them to another couple.[95] The court held that the husband's right not to procreate was paramount and that the wife could not use or donate the preembryos against his will.[96] The court explained, "Any disposition which results in the gestation of the preembryos would impose unwanted parenthood on him, with all of its possible financial and psychological consequences."[97] The reference to financial consequences demonstrates the court's particular concern with unwanted legal parenthood.

In *A.Z. v. B.Z.*,[98] the Supreme Judicial Court of Massachusetts balanced the wife's right to use preembryos and her right to procreate against her husband's right not to procreate. Although this couple had signed numerous forms in which the couple had said the wife could use the embryos in the event of separation, the court questioned whether the agreement was binding.[99] Moreover, the court said it would not enforce a prior agreement to enter into parenthood because that would run counter to the Supreme Court's stated right of "the freedom of personal choice in matters of marriage and family life."[100] The court further wrote:

> We derive from existing State laws and judicial precedent a public policy in this Commonwealth that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a

93. 842 S.W.2d 588 (Tenn. 1992).

94. *Id.* at 603.

95. *Id.* at 590.

96. *Id.* at 604.

97. *Id.* at 603.

98. 725 N.E.2d 1051 (Mass. 2000).

99. *Id.* at 1057. The court was concerned that the husband had signed several consent forms in blank and might not have intended his wife to use the pre-embryos after their separation. *Id.* The court further concluded that "even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will." *Id.*

100. *See id.* at 1059 (citing Moore v. East Cleveland, 431 U.S. 494, 499 (1977)).

> mechanism for forcing such relationships when they are not desired. This policy is grounded in the notion that liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship.[101]

Thus, the husband's intention not to parent trumped the wife's desire to parent. Moreover, the intent not to procreate was validated by the court even though this man had expressed the intent to procreate at an earlier point in time and had taken affirmative steps to procreate.[102] The court was clearly reluctant to impose unwanted parentage on someone who no longer had the desire to become a parent.[103] Ironically, at least at some point in the process, the plaintiff had wanted to become a parent and had taken steps in furtherance of his goal. He exercised a greater intent to procreate than the man who had no intent to procreate at any time, yet who was deemed the legal parent after conceiving a child through sexual intercourse.

The UPA further exemplifies the importance of intention over biology in the context of ART.[104] Section 706 specifically addresses how parentage will be determined in the event of the parties' divorce or one party's withdrawal of consent. Subsection (a) provides that unless a former spouse specifically consented that if ART occurs after divorce s/he will be the parent, the default position is that the former spouse is not the parent of the resulting child.[105] Subsection (b) includes unmarried individuals and further clarifies that if an individual withdraws consent to assisted reproduction, that individual is not a parent of the resulting child.[106] The comment further explains, "[A] child born through assisted reproduction accomplished after consent has been voided by divorce or withdrawn in a record will have a legal mother under section 201(a)(1). However, the child will have a genetic father, but not a legal father. In this instance, intention, rather than biology, is the controlling factor . . . ."[107] At least nine states have adopted, exactly or in large measure, section 706 of the

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101. *Id.*

102. *See id.* at 1052-53 (remarking on the numerous fertility treatments that the husband and wife underwent between 1980 and 1991).

103. *Id.* at 1058.

104. *See* UNIF. PARENTAGE ACT § 706 cmt. (amended 2002), 9B U.L.A. 72 (Supp. 2011) (declaring that "intention, rather than biology, is the controlling factor" regarding liability in parentage following divorce or withdrawal of consent).

105. *Id.* § 706(a), 9B U.L.A. 72 (Supp. 2011) ("If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.").

106. *Id.* § 706(b) ("The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child.").

107. *Id.* § 706 cmt.

UPA.[108]

By separating genetic and legal parenthood in this context, the UPA embraces a broad view of procreative liberty; one that does not impose unwanted legal parenthood regardless of biological connection.[109] In addition, the UPA gives legitimacy to a family composed of a single mother and child.[110] Like the situation in which a single mother seeks to become pregnant using the sperm of a known donor, the UPA permits a woman to use embryos created with a former husband or partner to create a single parent family.[111] The procreative liberty of both individuals is thus protected: the woman may proceed with her desire to procreate and parent while the intent of the man not to procreate is also honored.

CONCLUSION

Deferring to procreative liberty, courts are embracing intentional parenthood as a means by which to determine legal parentage in lieu of biological connection. Intentional parenthood has been recognized both as a way in which to establish parenthood as well as a way in which to avoid the responsibilities of legal parentage.[112] As the use of ART increases, so, too, will the application of intentional parenthood.[113] As I have explored in this Essay, the dichotomy between establishing parenthood (or not) through intention and establishing parentage through biological connection is widening.

Federal paternity establishment policy is particularly inflexible and at odds with intentional parenthood doctrine.[114] Although supporters of the

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108. *E.g.*, ALA. CODE § 26-17-706 (2011); COLO. REV. STAT. § 19-4-106 (2011); DEL. CODE. ANN. tit. 13, § 8-706 (2011); N.M. STAT. ANN. § 40-11A-706 (2010); N.D. CENT. CODE § 14-20-64 (2011); TEX. FAM. CODE. ANN. § 160.706 (West 2011); UTAH CODE ANN. § 78B-15-706 (West 2011); WASH. REV. CODE ANN. § 26.26.725 (West 2011); WYO. STAT. ANN. § 14-2-906 (2011).

109. *See* UNIF. PARENTAGE ACT § 706 cmt. (stressing the importance of intention over biology).

110. *See id.* § 702 cmt. (explaining that a child may have no legally recognized fathers in situations where donors provided sperm for assisted reproduction by unmarried women).

111. *See id.* § 706 (describing the legal effects of the dissolution of a marriage on a child's parentage where a former spouse proceeds with assisted reproduction following divorce).

112. *See id.* § 702 cmt. (guaranteeing rights of parenthood to a family without a father); *see also id.* § 706 cmt. (allowing the biological father to abdicate any responsibility when the child was conceived using ART).

113. *See* UNIF. PARENTAGE ACT art. 7 prefatory n. (amended 2002), 9B U.L.A. 67 (Supp. 2011) (noting the rise in medical science over the last thirty years that results in thousands of children born in the United States due to ART and the growing need to clarify parentage of a child born under complicated ART circumstances).

114. *See* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 598-99 (2002) (addressing the conflict between the federal preference to preserve the "traditional

current legal system argue that a child must have two parents as a source of support, child support enforcement collection does not meet theoretical expectations and, in fact, may actually be harmful to the potential parent-child relationship as well as the relationship between the child's mother and father. Moreover, within the ART context, courts are validating single parent families. We are thus left with two distinct family law regimes: one in which deference is given to procreative liberty and private ordering family formation, and the other, in which, due largely to moral and financial concerns, no deference is given to such liberty and private ordering interests. Ultimately, the crucial difference between the two models is sexual intercourse but as I have argued, the intent to engage in sexual relations does not imply the intent to procreate.

Although courts have historically rejected claims that paternity statutes violate procreative liberty, those claims may have new traction when considered in light of the increased use of intentional parenthood within the ART context. Due to the deference and protection given to known sperm donors and male IVF donors who withdraw their consent, men who had no intent to procreate through intercourse may be able to argue that they are not being treated equally under the law and that paternity statutes do, in fact, violate their equal protection. Unlike the previous arguments that were framed as men not having a negative procreative right as compared to women, which has historically failed, the new argument would be compared with other men who have been allowed to preserve their negative procreative right. I acknowledge that it is unlikely that federal paternity policy will be changed anytime soon. But as intentional parenthood's influence grows, we should rethink the constitutionality and legitimacy of the current system.

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image of the marital couple bearing children" and developing useful policies to address intentional parentage).