

THE PRICE OF PLEASURE: CHILDREN HURT TOO

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I. INTRODUCTION

Shari Motro, in her articles entitled *The Price of Pleasure* and *Preglimony*,¹ asks us to reconceptualize conception. She proposes, at least idyllically,² substantial reforms to the laws on male responsibilities to females for harms caused by human conception via consensual sex.³ Her goal is to minimize the “fundamental gender imbalance.”⁴ A man who engages in sex leading to conception is currently not legally obligated to compensate his female partner for harms associated with pregnancy, including psychological injuries, lost wages, maternity clothes, or childbirth classes.⁵ The status quo resembles an unfair “one-size-fits-all”⁶ approach, Motro says, and requires the woman to shoulder all the burdens of accidental pregnancy⁷ in the absence of a marital relationship.⁸ The current legal default regime treats “lovers as strangers” and pregnancy as a woman’s problem.⁹ Motro argues for a new paradigm that holds men responsible for the burdens of pregnancy of their unmarried lovers.¹⁰

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¹ See generally Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010) [hereinafter *The Price of Pleasure*]; Shari Motro, *Preglimony*, 63 STAN. L. REV. 647 (2011) [hereinafter *Preglimony*].

² *Preglimony*, *supra* note 1, at 650 (characterizing her own proposals as “utopian”).

³ *The Price of Pleasure*, *supra* note 1, at 956 (“Again, this Article is concerned with pregnancies that result from sex that is consensual and involves no fraud or deceit.”). At times, even with fraud or deceit, similar responsibilities remain. *Id.* at 945 n.117 (child support for the biological parents operate “without reference to . . . fault”).

⁴ *Id.* at 918, 921.

⁵ *Id.* at 929–31.

⁶ *Preglimony*, *supra* note 1, at 662.

⁷ *The Price of Pleasure*, *supra* note 1, at 918 (“[S]ome have little sympathy for the accidentally pregnant”).

⁸ *Preglimony*, *supra* note 1, at 656.

⁹ *The Price of Pleasure*, *supra* note 1, at 921, 976.

¹⁰ Motro proposes two approaches to damages. Pregnancy-related obligations may be based on 1) a standard founded on actual costs of pregnancy adjusted for common variables such as length of pregnancy and the age of the woman; or 2) the individual costs of each pregnancy. Courts might calculate the costs of pregnancy under the latter approach in various manners, including an equal division of costs, a division of costs based on differences in wealth, or cost divisions on a case-by-case approach. *Id.* at 963–64. See also *Preglimony*, *supra* note 1, at 667 (sex prompting conception creates a “special relationship that demands its own category”).

For Motro, marriage is an inadequate cure to the current legal presumption disfavoring pregnant women.¹¹ She opines that marriage does not effectively “regulate the vulnerabilities that come along with reproduction”¹² and fails “as society’s main mechanism for safeguarding the interests of the accidentally pregnant”¹³ Motro proposes “something that falls in between that of complete strangers and that of spouses, unless they agree otherwise.”¹⁴ Sexually active couples would be free to opt-out,¹⁵ because “casual lovers . . . should be permitted to set their own rules.”¹⁶ Couples desiring “a no-strings-attached encounter,” that is “those who expect to have no responsibilities vis-à-vis each other should pregnancy occur,” would be free from obligations.¹⁷

Motro supports a novel legal status for lovers who do not expressly opt-out, finding that theories like unjust enrichment¹⁸ or an equity-based approach¹⁹ sustain pregnancy-support claims. According to her, sex implies a promise²⁰—“an agreement to assume mutual obligations of support [where] communication can be inferred.”²¹ Motro supports the enforcement of such an unspoken pact in the event of breach, “when the promise is broken and pregnancy support is not forthcoming”²²

Motro draws from tort and contract principles used by those involved in “controlled sadomasochism,”²³ focusing on the prevalence of liability waivers.²⁴

¹¹ *Preglimony*, *supra* note 1, at 660 (“A pregnant woman married to the man with whom she conceives is thus marginally safer than a pregnant woman who is unwed”).

¹² *The Price of Pleasure*, *supra* note 1, at 952.

¹³ *Id.* at 953. *See also id.* at 956 (“Since marriage does not always link intercourse, procreation, and responsibility, and since it does not always fill the void by binding a man to the woman with whom he conceived, the blinkered reliance on marriage to solve the problem is misplaced.”).

¹⁴ *Id.* at 940.

¹⁵ *Id.* at 950 (law should “plac[e] the burden to opt-out on that those who prefer a no-strings-attached rule”).

¹⁶ *Preglimony*, *supra* note 1, at 657.

¹⁷ *Id.*

¹⁸ *Id.* at 670.

¹⁹ *The Price of Pleasure*, *supra* note 1, at 956.

²⁰ *Preglimony*, *supra* note 1, at 669 (“Sex implies a baseline level of responsibility—a promise.”).

²¹ *The Price of Pleasure*, *supra* note 1, at 957.

²² *Preglimony*, *supra* note 1, at 670. Motro references tenets of contract law throughout *The Price of Pleasure*, proposing a new legal status in which “partners who conceive [are] recognized under the rubric of a distinct legal relationship” *Supra* note 1, at 957. However, whether Motro intends to ground her proposal in contract law or tort law is unclear. Motro explains in detail that sex creates an enforceable agreement, but then states that “[t]he implicit assumption at work is that absent the agreement, parties would be responsible toward each other.” *Id.* at 950.

²³ *The Price of Pleasure*, *supra* note 1 at 921, 949. Motro’s focuses on “[s]adomasochism as a [m]irror” on agreements to waive liability for acts that would otherwise constitute intentional torts. *Id.* at 949–51.

She suggests that contracts regarding sadomasochism can inform a new approach to the law of conception because such contracts similarly recognize “that intimacy involving inherently unequal risks demands explicit discussion regarding the allocation of potential consequences.”²⁵

Motro uses sadomasochism to illustrate that contract law can (and does) apply to many sexual relationships.²⁶ She suggests that risks of malfunctioning sadomasochism equipment can “mirror” other risks of sexual behavior, including pregnancy.²⁷ Motro explains that individuals who engage in sadomasochism often sign agreements indicating that the involved parties will be free from liability in the event that devices fail or that there is a mistake or accident.²⁸

Motro argues that the use of contract law can similarly apply in certain sexual encounter settings outside of sadomasochism, including where an unmarried man and an unmarried woman conceive a child when the two previously agree that the man will be wholly or partly liable for the costs of the woman’s pregnancy, and where an unmarried man and an unmarried woman conceive a child but the couple has not previously discussed who is liable for the costs of the woman’s pregnancy.²⁹

Unfortunately, Motro does not explore the implications of her proposal beyond these scenarios.³⁰ Would conception trigger pregnancy-support obligations when one sexual partner is married and one sexual partner is unmarried?³¹ Does it matter if the unmarried partner is male or female? And what if both partners are married to others? If a marriage or dissolution of marriage occurs after conception but prior to birth how should pregnancy-support obligations then operate?³²

Motro’s proposal is limited not only by her identification of the couples involved, but also by her limited focus on the ensuing harms. Motro focuses on

²⁴ *Id.* at 949–50.

²⁵ *Id.* at 950.

²⁶ *Id.*

²⁷ *Id.* at 949–51.

²⁸ *Id.* at 951.

²⁹ *Id.* at 937–39.

³⁰ *Id.* at 951 (recognizing that her proposal is imperfect). But Motro identifies other imperfections, such as the difficulty in valuating the burdens women endure during pregnancy and whether positive benefits bestowed on women during pregnancy (including “unparalleled opportunities for personal growth, healing and joy”) should offset the pains of pregnancy. *Id.* at 929, 963.

³¹ *See, e.g.,* *GDK v. Dep’t of Family Services*, 2004 WY 78, ¶ 4, 92 P.3d 834, 835 (Wyo. 2004) (“TAK, mother of the children in question, was married to GDK, appellant herein, at the time her children, DDK and MK, were born; however, she had a relationship with JMW and was living with him at the time of both births. Genetic testing established that JMW was the biological father of the children.”).

³² *See, e.g., In re State*, Div. of Child Support Enforcement, *ex rel.* NDB, 2001 WY 118, ¶¶ 3–9, 35 P.3d 1224 (Wyo. 2001) (appellant impregnated mother who subsequently married appellee during her second trimester); *Nebraska ex rel. Clanton v. Clanton*, 1996 WL 456037, at *1 (Neb. Ct. App. Aug. 13, 1996) (divorce preceded birth).

pregnancies leading to abortion, miscarriage, or birth.³³ She does not discuss whether lovers should be liable for other harms stemming from sex, including sexually transmitted diseases.³⁴ Should the law comparably treat “lovers as strangers” in pregnancy and infectious disease settings?³⁵

Most curious for us is Motro’s utter failure to discuss the children in the birth setting.³⁶ Her (utopian) proposals attempt to separate horizontal relationships (between sexual partners) from vertical relationships (between children and

³³ *The Price of Pleasure*, *supra* note 1, at 921.

³⁴ *Id.* at 918 n.7 (suggesting that infectious diseases may similarly “tend to harm women more than they harm men”). Motro does not indicate where or whether sexually transmitted infections fit within her proposal. *Id.*

³⁵ *See, e.g.*, *Doe v. Roe*, 598 N.Y.S.2d 678, 681 (N.Y. Just. 1993) (“[P]ersons who engage in *unprotected sex*, at a time of the prevalence of sexually transmitted diseases, including some that are fatal, assume the risk of contracting such diseases. Both parties in an intimate relationship have a duty to adequately protect themselves. When one ventures out in the rain without an umbrella, should they complain when they get wet?”). *But cf.* *Meany v. Meany*, 639 So. 2d 229, 234 (La. 1994) (“the duty of [an] infected party, who knows, should know, or should suspect that he or she is infected with a sexually transmitted disease is either to abstain from sexual contact with others or, at least, to warn others of the infection prior to having contact with them”).

³⁶ Children are not much discussed by Motro, however a footnote acknowledges that an attempt to disentangle the benefits of pregnancy support from the benefits of child support can yield “arbitrary” results. *The Price of Pleasure*, *supra* note 1, at 966 n.198. Yet Motro evidently believes that as with mother and child well-being, expectant mother and potential child well-being can also be separated. *Id.* We believe this is at best a herculean task prior to birth.

Our concerns are not limited to the unrecognized interests of children (and potential human life). For example, while we agree with Motro that “a default that gives no consideration whatsoever to nonviolent men’s interest in knowing about a pregnancy goes too far,” we think she does not go far enough with her suggestion that women need notify such men of their pregnancies only after the men have registered publicly as putative fathers following intercourse. *Id.* at 958–59. Elsewhere, Professor Parness has urged that governments require mothers to inform unwed nonviolent fathers of their (actual or possible) children when the mothers seek adoption placement or safe haven refuge (as here there can be strings attached—including waivers of (possible) privacy interests). *See* Jeffrey A. Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 WAYNE L. REV. 641, 670–71 (2008).

parents).³⁷ We suggest a different approach when there are children, accepting Motro's invitation for conversation.³⁸

II. THE MALE LOVER'S INEXTRICABLY LINKED DUTIES TO MOTHER, FUTURE OFFSPRING, AND CHILD

Support payments awarded to a pregnant woman can help both the woman and potential child.³⁹ Support awards will often be influenced by the cost of necessities that are jointly consumed by mother and potential child, the proportions of which are indeterminable.⁴⁰ Effectively, support does not always flow directly and exclusively to the designated beneficiaries.⁴¹ Like Motro says, human beings are "inescapably interdependent."⁴² "Hidden child support" can appear in present and former partner maintenance awards just like "hidden alimony" can appear in child support awards.⁴³ Common sense suggests that maintenance and pregnancy

³⁷ Until and unless a child is born, Motro argues that "a man's economic responsibility should be conceptualized as a responsibility toward the woman herself." *The Price of Pleasure*, *supra* note 1, at 919. *See also id.* at 930–31 (criticizing existing laws for framing pregnancy "obligations as an element of a man's child support obligations or as part of a parentage order, not as a duty toward[] the woman in her own right"); *Preglimony*, *supra* note 1, at 669 (analogizing a man's obligation toward his pregnant lover "to the support obligations of a breadwinner toward a dependent spouse").

³⁸ *The Price of Pleasure*, *supra* note 1, at 919 ("The goal of this Article is to start a conversation . . . virtually no one has focused on the legal relationship between unmarried sexual partners who conceive"). *See also id.* at 958 (hoping to start a conversation within the range of possible parameters she sets out); *Preglimony*, *supra* note 1, at 649 ("Current scholarship on the legal relationship between unmarried lovers who conceive is virtually nonexistent, judicial commentary on the scope of unwed fathers' pregnancy-related obligations is sparse, and many state courts have been silent. Uncertainty abounds, leaving unmarried lovers who conceive to muddle through on their own. . . . Today, with over one-third of births and two-thirds of abortions occurring outside of marriage, the status is quite untenable."). Incidentally, as demonstrated by later references, we find some scholarship (including our own), as well as some helpful state judicial and legislative actions.

³⁹ *See, e.g.*, Ira Mark Ellman, *A Case Study in Failed Law Reform: Arizona's Child Support Guidelines*, 54 ARIZ. L. REV. 137, 145 (2012) (policy choices about child support are "further complicated by the fact that minor children do not live alone, and that members of their household necessarily sharing a living standard. So the cost of providing the child a safe place to live . . . necessarily includes the cost of providing that home to the custodial parent, and perhaps to others in the child's household as well.").

⁴⁰ *See, e.g.*, Ira M. Ellman & Sanford L. Braver, *Lay Intuitions About Child Support and Marital Status*, 23 CHILD & FAM. L.Q. 465, 466 (2011) ("the law may distinguish transfers of income between households by their label—'alimony' or 'child support'—but the reality of household economics makes those labels largely meaningless.").

⁴¹ *The Price of Pleasure*, *supra* note 1, at 931 ("a child's prebirth health cannot be disentangled from the health of his or her expectant mother").

⁴² *Preglimony*, *supra* note 1, at 658–59.

⁴³ Ellman & Braver, *supra* note 40, at 466–67 ("Quite obviously, neither the effort to resist 'hidden alimony' in child support nor the implicit recognition of 'hidden child

support are largely shared in parent-child households.⁴⁴ A male lover's duties to a female partner as well as to present and future offspring are inextricably linked,⁴⁵ making conversations about the price of pleasure impossible without discussions of future offspring and children.⁴⁶

We suggest expanded obligations and opportunities for prospective fathers that would serve the betterment of potential human life, children and women. Children and mothers would benefit from expanded obligations of male support prior to birth,⁴⁷ addressed in Part III. In Part IV, we address the benefits created by enhanced opportunities for voluntary paternity acknowledgements of children not yet born. Finally, in Part V, we explore the imprecise parameters of the "unitary family" concept, concluding that American states might obligate a man (and another woman) to support a woman as well as her future offspring and child born of sex,⁴⁸ sometimes even if there was no sex between them. Here we favor statutory laws that create contractual-type duties.

support' in alimony resolves the tension between the economic realities of household finances and the legal fiction that alimony and child support dollars affect only the obligor's former spouse of the obligor's child, respectively, but never both.").

⁴⁴ See, e.g., *id.* at 18, 35–36 (alimony experiments, involving the survey of 356 individuals selected randomly from the Pima County (Tucson, Arizona) jury panel, found that respondents are "more likely to award alimony to a former partner who has primary custody of the couple's minor children, even though that parent is already collecting child support.").

⁴⁵ Similarly, at times claims of intentional infliction of emotional distress and privacy violations cannot be separated from claims of sexual harassment. See, e.g., *Maksimovic v. Tsogalis*, 687 N.E.2d 21, 21–22 (Ill. 1997) (common law tort claim "inextricably linked" to claim of sexual harassment must be litigated together in the Illinois Human Rights Commission which had, at the time, exclusive jurisdiction over the harassment claim).

⁴⁶ See *The Price of Pleasure*, *supra* note 1, at 977 (stating "the true price of pleasure" involves a pregnancy resulting from consensual sex where neither of the partners "want children" or, more appropriately, where neither partner wishes pregnancy). Motro wishes more couples to discover their "true desires" through conversations, envisioning that such conversations only involve the relationships between the men and women themselves. See *id.*

⁴⁷ Prebirth conduct by an unwed potential father toward a pregnant woman needing support directly impacts upon the welfare of any future child as well as any future mother. See, e.g., *In re Adoption of Doe*, 543 So. 2d 741, 746 (Fla. 1989). See also Jeffrey A. Parness, *Pregnant Dads: The Crimes and Other Misconduct of Expectant Fathers*, 72 OR. L. REV. 901, 916 (1993) [hereinafter *Pregnant Dads*].

⁴⁸ See *Michael H. v. Gerald D.*, 491 U.S. 110, 129–30 (1989).

III. ENHANCED MALE PARENTAL AND QUASI-PARENTAL OBLIGATIONS PRIOR TO BIRTH

The law often treats expectant fathers as strangers to expectant mothers.⁴⁹ Similarly, expectant fathers are often treated as strangers to their potential offspring.⁵⁰ Reforms creating legal duties of expectant fathers to expectant mothers, as in Motro's proposal, should necessarily include discussions of duties that these same expectant fathers owe their potential offspring. Unfortunately, Motro concludes: "Child support obligations should kick in only once a child is born; until and unless this happens, a man's economic responsibility should be conceptualized as a responsibility towards the woman herself."⁵¹

The fact that a man is not yet a parent of a fetus should not relieve him of parental or quasi-parental support responsibilities. As the Florida Supreme Court said, a "father's argument that he has no parental responsibility prior to birth . . . is legally, morally, and socially indefensible."⁵² Beyond support, special statutes should also address physical harm that expectant fathers inflict upon their unborn.⁵³ An expectant father who assaults his pregnant lover, for instance, should face possible prosecutions distinct from the assault against the mother and distinct from other third party liability for fetal injury.⁵⁴ Current crimes such as supplying illegal drugs to an expectant woman should also carry enhanced penalties when potential human life is knowingly endangered by expectant fathers.⁵⁵

Laws outside the child support and criminal law context should also hold expectant fathers accountable for their harmful pre-birth conduct. The Supreme Court of Florida, for example, held that a father who abandons his potential offspring terminates his right to participate in any later adoption proceeding.⁵⁶ The

⁴⁹ *The Price of Pleasure*, *supra* note 1, at 921 (for unwed sexual partners, as "modern American jurisprudence views human beings as essentially separate individuals whose primary value is privacy The law privileges autonomy and privacy . . . [and not] relationship and mutual responsibility [T]he law treats lovers as strangers.").

⁵⁰ *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (noting that for unwed sexual partners who conceive, the mother is always a legal parent at birth while the father can only become a parent under law by developing custodial, emotional or financial ties).

⁵¹ *The Price of Pleasure*, *supra* note 1, at 919. *But see id.* at 931 ("child support begins in utero").

⁵² *In re Doe*, 543 So.2d at 746 (further stating that such an argument "is not a norm that society is prepared to recognize").

⁵³ *Pregnant Dads*, *supra* note 47, at 914–15.

⁵⁴ *See, e.g.*, CAL. PENAL CODE § 187(a) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought"). An exception is made, however, for the expectant mother. CAL. PENAL CODE § 187(b)(3) (when "mother of fetus" is involved, there can be no murder of the fetus). *See also Fetal Homicide Laws*, NAT'L CONF. STATE LEGISLATURES, (updated April 2012), <http://www.ncsl.org/issues-research/health/fetal-homicide-state-laws.aspx> (at least 38 states have fetal homicide laws).

⁵⁵ *Pregnant Dads*, *supra* note 47, at 915.

⁵⁶ *In re Doe*, 543 So. 2d at 749 ("We hold that the failure of respondent natural father to provide prebirth assistance to the pregnant mother, when he was able and assistance was

court found abandonment could be based on the future father's failure to pay "monies toward prenatal medical bills, food, or medications"⁵⁷ or otherwise to provide "meaningful, repetitive and customary support"⁵⁸ to the mother prior to birth. Male failure to provide pre-birth support should also be considered in other post-birth settings, such as marriage dissolution and male-initiated paternity actions. The use of domestic violence fetal protection orders to deter injurious conduct by lovers is yet another alternative.⁵⁹ Lastly, there should be some, though limited, tort claims available to children against their fathers for birth disabilities arising from harmful pre-birth conduct.

Legal obligations of expectant fathers to their unborn children (both monetary and nonmonetary) are necessarily tied to the well-being of their pregnant counterparts. Parental or quasi-parental responsibilities of men prior to birth serve the betterment of expectant mothers and also embody "the price of pleasure."⁶⁰ Conversations about pregnancy-related duties of a man as lover should not be separated from conversations about pregnancy-related duties of a man as potential father.

IV. PATERNITY ACKNOWLEDGEMENTS PRIOR TO BIRTH

There can be pre-birth paternity rights as well as obligations. Paternity laws allow recognition of fatherhood at the time of birth. This recognition benefits the mother-father relationship as well as the father-child relationship.⁶¹ Pre-birth voluntary paternity acknowledgments, available to expectant fathers, would

needed, vested respondent natural mother with the sole parental authority to consent to the adoption of the child and removed from the natural father the privilege of vetoing the adoption by refusing to give consent.").

⁵⁷ *Id.* at 747 n.3 (adopting the court findings from *In re Adoption of Doe*, 524 So. 2d 1037, 1042 (Fla. Dist. Ct. App. 1988)).

⁵⁸ *Id.*

⁵⁹ *See, e.g., Gloria C. v. William C.*, 476 N.Y.S.2d 991 (N.Y. Fam. Ct. 1984) (permitting a pregnant woman, who had been assaulted earlier by her husband, to obtain an order of protection on behalf of her four month old fetus).

⁶⁰ *See generally* Ellman, *supra* note 39. Such responsibilities sometimes only significantly affect the well-being of the child. For instance, a posthumous child may be entitled to the social security benefits of a deceased father upon proving (1) that the child's father was an insured individual and (2) that "such insured individual was living with or contributing to the support of the applicant at the time such insured individual died." *See* 42 U.S.C. § 416; *see also* Parsons for Bryant v. Health & Human Services, 762 F.2d 1188, 1190 (4th Cir. 1985) (posthumous child was entitled to social security benefits of deceased father because of quasi-parental support existed at the time of the father's death).

⁶¹ Paternity recognition at birth need not involve a mother-father relationship. *See, e.g.,* Jeffrey A. Parness, *Arming the Pregnancy Police: More Outlandish Concoctions*, 53 LA. L. REV. 427, 445-47 (1992) (discussing the legal duties of prospective fathers, concluding that these are important to resolving questions of termination of rights and enforcing financial or other responsibilities prior to birth).

similarly benefit both the expectant mother and forthcoming child.⁶² Every state is already obligated (as a condition to the receipt of federal funds)⁶³ to provide most unwed fathers with an opportunity to acknowledge paternity at birth.⁶⁴

Considerable interstate disparities now exist, however, regarding pre-birth acknowledgements.⁶⁵ For example, South Carolina⁶⁶ and Texas⁶⁷ permit voluntary pre-birth paternity acknowledgments, while Colorado⁶⁸ and New York⁶⁹ explicitly

⁶² See, e.g., CAL. FAM. CODE § 7570 (a) (West 2004), which states:

There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including . . . social security, health insurance . . . and inheritance rights. Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development.

See also, e.g., *In re Perez*, 330 N.Y.S.2d 881, 886 (N.Y. Sur. Ct. 1972) (“By its very nature, wrongful death operates as a link to paternity only when the putative father during his lifetime is proved to have supported the child; without this no damage can be suffered in the wrongful death.”); *Pregnant Dads*, *supra* note 47, at 916 (allowing expectant mothers to bring paternity actions so that expectant fathers can be compelled to provide financial support for their unborn would serve the betterment of both the child-to-be and the mother-to-be); Ellman and Braver, *supra* note 40, at 466.

⁶³ Voluntary state participation in the federal Temporary Assistance for Needy Families program requires compliance with both the guidelines in Title IV-D of the Social Security Act and any accompanying federal regulations, including mandates on paternity establishment. Temporary Assistance for Needy Families Act, 42 U.S.C. § 601 (2006).

⁶⁴ 42 U.S.C. § 666(a)(2) (2006).

⁶⁵ See Jeffrey Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53 (2010).

⁶⁶ DIV. VITAL RECORDS, SOUTH CAROLINA DEP'T OF HEALTH AND ENVTL. CONTROL, PATERNITY ACKNOWLEDGMENT (containing a section entitled, “To Be Completed When Father Acknowledges Paternity Prior to the Birth of the Child”) (on file with authors). See also D.C. Code § 16-909.03(b)(1)(G) (“Each public and private birthing hospital in the District of Columbia shall operate a program that, immediately before and after the birth of a child, provides to each unmarried woman who gives birth at the hospital and the alleged putative father, if present in the hospital: The opportunity to acknowledge paternity voluntarily in the hospital.”).

⁶⁷ VITAL STAT. UNIT, TEXAS DEP'T STATE HEALTH SERVS., FORM NO. VS-159.1M, ACKNOWLEDGMENT OF PATERNITY (rev. Sept. 2005) (allowing paternity acknowledgment up to 300 days prior to birth) (on file with authors).

⁶⁸ HEALTH STAT. & VITAL RECORDS, COLORADO DEP'T OF PUB. HEALTH & ENV'T, VOLUNTARY ACKNOWLEDGMENT OF PATERNITY (rev. 2003) (form “may not be completed before the birth of the child”), available at http://www.cdphe.state.co.us/certs/paternity_acknowl.pdf.

⁶⁹ OFFICE OF TEMP. AND DISABILITY ASSISTANCE, NEW YORK STATE DEP'T OF HEALTH FORM NO. LDSS-4418, ACKNOWLEDGEMENT OF PATERNITY (rev. Aug. 1998)

bar them. Such prohibitions serve no significant purpose and deter many paternity acknowledgments without good reason. Men who acknowledge paternity are no more certain of their genetic ties shortly after birth than they are shortly before birth. Pre-birth acknowledgments are less costly and more convenient than post-birth paternity cases.⁷⁰ They prompt male obligations benefitting both mothers and their children.

State interests in pre-birth paternity acknowledgment should, however, give way to the constitutional privacy rights of expectant mothers early in pregnancy.⁷¹ But with third-trimester acknowledgments, there are generally no constitutional abortion rights.⁷² The facilitation of third-trimester paternity acknowledgments would lead to more parental and quasi-parental relationships benefitting both women and their future and actual offspring.

V. "UNITARY FAMILY" OBLIGATIONS

Generally, an unwed biological father has been recognized as having a constitutionally-protected interest in establishing a relationship with his child.⁷³ However, if a child is the product of adultery, states can give categorical preference to the mother's husband even though doing so forecloses the paternal interests of the genetic father.⁷⁴ In *Michael H. v. Gerald D.*, Gerald's wife had an adulterous affair and gave birth to a child who was the biological daughter of Michael H.⁷⁵ Michael sought to establish paternity and visitation rights through a California filiation action.⁷⁶ Michael was denied standing under a California statute that stated "the issue of a wife cohabiting with her husband, who is not impotent or

(explaining, "You may only sign an Acknowledgment of paternity **after** the birth of the child") (emphasis in original) (on file with authors).

⁷⁰ Some men, like soldiers, simply cannot be present at the births of their children, though they may be available to acknowledge beforehand.

⁷¹ See Jeffrey A. Parness, *Abortions of the Parental Prerogatives of Unwed Natural Fathers: Deterring Lost Paternity*, 53 OKLA. L. REV. 347, 347 (2000) (citing *R.R. v. M.H.*, 689 N.E.2d 790 (Mass. 1998)).

⁷² See *Roe v. Wade*, 410 U.S. 113, 163–64 (1973) ("If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.").

⁷³ See *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (finding in an adoption setting: "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development").

⁷⁴ See *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (holding that an extant marital relationship can trump an established relationship between a father and biological child).

⁷⁵ *Id.* at 113.

⁷⁶ *Id.* at 115.

sterile, is conclusively presumed to be a child of the marriage.”⁷⁷ Michael argued that the statute violated his federal constitutional rights.⁷⁸ In a plurality opinion, the U.S. Supreme Court held that a state may create a presumption of paternity in a husband that is not subject to rebuttal by a biological father in order to promote family integrity and preserve the family unit.⁷⁹ The Court further explained that precedent regarding fathers’ rights “rest . . . upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.”⁸⁰ Today, what might constitute a “unitary family” beyond a marital family is unclear.⁸¹ Even within marriage the concept is unclear, as marriages may not, as in the case of *Michael H.*, exist for the whole period of time between conception and birth.⁸²

What is clear is that the U.S. Constitution did not protect Michael’s right to disturb the marital family.⁸³ The dissent, however, recognized Michael’s federal constitutional interest in visitation with his child,⁸⁴ which we believe means there would be a need for a hearing on whether visitation should be ordered. The dissenting justices rejected the “unitary family” approach, criticizing the plurality for pretending that “tradition places a discernable border around the Constitution.”⁸⁵

⁷⁷ *Id.* at 115–17 (quoting CAL. EVID. CODE § 621(a)). Under earlier California law, however, a wife or husband could seek to rebut the presumption with “blood tests, but only if a motion for such tests is made, within two years from the date of the child’s birth,” where the wife alone can seek rebuttal “if the natural father has filed an affidavit acknowledging paternity.” *Id.* The statute has since been amended, rendering the martial presumption of paternity more rebuttable. See CAL. FAM. CODE § 7541(a) (West 2010) (“Notwithstanding Section 7540 [defining martial presumption], if the court finds the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.”).

⁷⁸ *Michael H.*, 491 U.S. at 115–16.

⁷⁹ *Id.* at 120 (Scalia, J., joined by Rehnquist, O’Connor, & Kennedy, J.J., with Stevens, J., concurring in the judgment) (“[T]he conclusive presumption not only expresses the state’s substantive policy but also furthers it, excluding inquiries into the child’s paternity that would be destructive of family integrity and privacy.”).

⁸⁰ *Id.* at 123 n.3.

⁸¹ See Anthony Miller, *The Case for the Genetic Parent: Stanley, Quilloin, Caban, Lehr, & Michael H. Revisited*, 53 LOY. L. REV. 395, 439–40 (2007) (“Justice Scalia’s ‘unitary family’ test does not resolve the issue of who falls within the definition of such a family.”).

⁸² See, e.g., *State v. EKB*, 35 P.3d 1224 (Wyo. 2001); *State ex rel. Clanton v. Clanton*, 1996 WL 456037 (Neb. App. 1996). In *Michael H.*, Justice Scalia described the “unitary family” as the “family unit accorded traditional respect in our society.” 491 U.S. at 124 n.3. But see Miller, *supra* note 83.

⁸³ *Michael H.*, 491 U.S. at 129 (where a “natural father’s unique opportunity conflicts with the similarly unique opportunity of the husband of marriage . . . it is not unconstitutional for the State to give categorical preference to the latter”).

⁸⁴ *Id.* at 143 (Brennan, J., dissenting).

⁸⁵ *Id.* at 137 (Brennan, J., dissenting).

Justice Stevens offered a distinct perspective, casting a critical vote in *Michael H.* Justice Stevens agreed with the dissent, stating “that a natural father might even have a constitutionally protected interest in his relationship with a child whose mother was married to and cohabitating with another man at the time of the child’s conception.”⁸⁶ However, he concurred in the judgment because California law accorded Michael a “fair opportunity” to show that his child’s “interests would be served by granting him visitation rights.”⁸⁷

In *Preglimony*, Motro opines that a pregnancy-support scheme should utilize a functional approach and not an approach based solely on marital or genetic ties.⁸⁸ The justices in *Michael H.* recognized that the United States Constitution sometimes permits states to impose a duty on husbands to support children born to their respective wives regardless of biological ties.⁸⁹ The significance of biological ties sometimes carries less weight than the interest in preserving a family. State interests in preserving the family in *Michael H.* trumped Michael’s constitutional opportunity interest in paternity, which the Fourteenth Amendment affords to many other unwed biological fathers.⁹⁰

At least some justices in *Michael H.* reasoned that states may also impose obligations on unwed men who have special relationships with women who bear their children. According to these justices, the State has a sufficient interest in preserving a unitary family, typified not only by the marital family but also by a “household of unmarried parents and their children.”⁹¹ States respect familial

⁸⁶ *Id.* at 133 (Stevens, J., concurring).

⁸⁷ *Id.* at 135 (Stevens, J., concurring). Four other justices held that Michael’s consent was unnecessary to the child’s adoption notwithstanding the biological ties. *Id.* at 143.

⁸⁸ *Preglimony*, *supra* note 1, at 694 (“Another reason for not requiring that the payor prove a genetic connection to the pregnancy is equitable.”). Motro draws from *Michael H.* to illustrate that “family law trends diminish the focus on blood ties for purposes of determining paternity in favor of more functional approaches.” *Id.*

⁸⁹ *Michael H.*, 491 U.S. at 120, 120, 124 (in upholding the constitutionality of California’s irrebutable presumption of paternity statute, the plurality explained that the conclusive presumption is a “fundamental principle of the common law” and reasoned that “the conclusive presumption not only expresses the State’s substantive policy but also furthers it, excluding inquiries into the child’s paternity that would be destructive of family integrity and privacy.”); *see also id.* at 132–33 (Stevens, J., concurring) (“the Federal Constitution imposes no obligation upon a State to ‘declare facts unless some legal consequence hinges upon the requested declaration.’”); *but see id.* at 158–60 (Brennan, Marshall, Blackmun, JJ., dissenting) (basing the unconstitutionality of the California irrebutable presumption statute on the Due Process rights of the natural father).

⁹⁰ *Lehr v. Robertson*, 463 U.S. 248, 263 (1983) (adoption setting).

⁹¹ *Michael H.*, 491 U.S. at 123 n.3 (Scalia, J., joined by Rehnquist, O’Connor, Kennedy, J.J., with Stevens, J., concurring in the judgment) (“Perhaps the concept [of the unitary family] can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships”). *Compare id.* at 144 (Brennan, J., dissenting) (“marriage is not decisive in answering the question of whether the Constitution protects the parental relationship under consideration” so that parental protections are afforded individual and not familial units).

integrity when they impose obligations upon men (or women) married to women who bear children. Likewise, respect for family integrity would be served by imposing obligations on men and women in quasi-marital relationships with women who bear their children, with such obligations beginning prior to birth. State recognition for certain non-marital family units would benefit many women as well as their future and actual offspring.

Would unwed sexual partnerships where pregnancies occur prompt “unitary family” status, thus triggering obligations to future offspring as well as between partners? Should such a status ever be afforded a non-marital opposite sex partnership where the male partner lacks genetic ties?

These hard questions we leave to others who we hope will join us and Professor Motro in conversation. We support statutory “unitary family” status for some unwed or un-unionized same sex female couples who intend to parent within a single home a child born of sex⁹² or of artificial reproduction to one of the partners, assuming there are no *Lehr* paternity interests in the sperm provider.⁹³

VI. CONCLUSION

In her two recent articles on pregnancy-support, Shari Motro argues that American laws should no longer treat “lovers as strangers” and urges that the relationship between an unwed heterosexual couple whose sexual encounter leads to pregnancy “demands its own legal category.”⁹⁴ Motro suggests a new paradigm that generally holds men responsible to women for the burdens of pregnancy, employing both contract and tort principles.

Any conversation about the price of sex to men who cause children to be born must include obligations to the children as well as to their mothers. Mothers and children are inextricably linked, as are the *Lehr* paternity opportunity interests of genetic fathers. We urge conversations about expanded obligations of prospective fathers that include new pre-birth monetary support obligations; enhanced opportunities for pre-birth voluntary paternity acknowledgments; and greater protections of “unitary” families into which children are born, which should include couples whose sex could never prompt a pregnancy. Let us heed Professor Motro’s call for conversation but let us talk about *all* who are interested in the price of pleasure.

⁹² See Jeffrey A. Parness, *Reforming American Paternity Procedures*, in MARK A. ROTHSTEIN ET AL., *GENETIC TIES AND FAMILY* 153–54 (2005).

⁹³ See, e.g., Jeffrey A. Parness, *Civil Unions and Parenthood at Birth*, 99 ILL. B.J. 473 (Sept. 2011), available at SSRN abstract = 1885780.

⁹⁴ *Preglimony*, *supra* note 1, at 667.