

Note

A Right to Decide Not to Be a Legal Father: *Gonzales v. Carhart* and the Acceptance of Emotional Harm as a Constitutionally Protected Interest

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Introduction

Since the fall of 2004, Matthew Dubay and Lauren Wells had been romantically involved.¹ Before engaging in sexual intercourse, Dubay and Wells discussed their procreative intentions.² After Dubay told Wells that he was opposed to being a father, she responded that she was infertile and that she would use contraception as a precaution.³ Shortly after the relationship dissolved, however, Wells informed Dubay that she had become pregnant with his child.⁴ Dubay reiterated his desire not to be a father, but Wells carried the child to term and gave birth in 2005.⁵ Wells commenced paternity proceedings against Dubay, which prompted Dubay to challenge the state parent-

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¹ *Dubay v. Wells*, 506 F.3d 422, 426 (6th Cir. 2007).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

age law as a violation of his rights under the Equal Protection Clause.⁶ The district court dismissed Dubay's case for failure to state a cognizable claim.⁷ Ultimately, the Sixth Circuit affirmed the district court's ruling.⁸

On February 19 and March 19, 1999, Sharon Irons allegedly engaged in oral sex with Richard Phillips, a man with whom she had been in a relationship since January.⁹ These were the only sexual acts in which the couple had engaged. In May, Phillips and Irons ended their relationship after Irons revealed she was still married, not divorced as she had led Phillips to believe.¹⁰ Eighteen months later, Phillips discovered through a petition to establish paternity that he had unknowingly fathered a daughter, Serena, who was born on December 1, 1999.¹¹ Phillips sued Irons and claimed she "intentionally engaged in oral sex with [him,] so that she could harvest [his] semen and artificially inseminate herself."¹² Ultimately, the appellate court dismissed Phillips' claims of conversion of his semen and fraudulent misrepresentation, but it remanded the case to the trial court to allow him to proceed on a claim of intentional infliction of emotional distress ("IIED").¹³

Under the current child support scheme most states employ, if a child is born out of wedlock, the child's biological father is required to pay a portion of his income to the child's mother.¹⁴ Although this system appears benign in its attempt to ensure that a child is financially supported, it also removes a father's ability to make decisions about his own life by compelling him to recognize each time he writes a child support check that he has fathered a child. Such emotional and psychological harm results in the infringement of the father's constitutional right to privacy in procreative matters.

The examples above show the unfairness in the current constitutional scheme regarding a male's rights concerning legal parenthood and the ensuing responsibility. Recognition of the inequities of the

⁶ *Id.* at 427. See also Judith Graham, *Unwilling Father Tests Men's Rights*, CHI. TRIB., Mar. 10, 2006, at C3 (giving media attention to the *Dubay* case).

⁷ See *Dubay*, 506 F.3d at 427.

⁸ *Id.* at 434.

⁹ *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at *1 (Ill. App. Ct. Feb. 22, 2005).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; see also Adrienne D. Gross, *A Man's Right to Choose: Searching for Remedies in the Face of Unplanned Fatherhood*, 55 *DRAKE L. REV.* 1015, 1045-52 (2007) (discussing the legal issues presented in *Phillips*).

¹³ See *Phillips*, 2005 WL 4694579, at *5-6.

¹⁴ See, e.g., *Douglas R. v. Suzanne M.*, 487 N.Y.S.2d 244, 245 (N.Y. Sup. Ct. 1985).

child support system, however, has not been limited to cases brought in American courts; it has also been the subject of suits brought in international courts,¹⁵ and it has even influenced popular culture.¹⁶

Biological fathers have attempted, in various and creative ways, to assert a right not to pay child support.¹⁷ Such claims, however, have repeatedly failed for public policy reasons.¹⁸ The failure of such claims is perhaps most questionable in contraceptive fraud cases like those above, where a woman has lied about the use of birth control or has misrepresented her ability to have children yet was still able to require her partner to pay child support.¹⁹

This Note argues that courts should recognize a privacy right to decide not to be a legal father.²⁰ Such a privacy right is derived from the right to procreative autonomy as already established by *Griswold v. Connecticut*,²¹ *Eisenstadt v. Baird*,²² *Roe v. Wade*,²³ and their prog-

¹⁵ See, e.g., *Evans v. United Kingdom*, 43 Eur. Ct. H.R. 409, 412 (2007).

¹⁶ See, e.g., KANYE WEST, *Gold Digger*, on LATE REGISTRATION (Roc-a-Fella Records 2005) (singing about a hypothetical child's mother who will collect child support from him for eighteen years); Rants of a Mad Nerdess, http://darcymoschenross.blogspot.com/2007_11_01_archive.html (Nov. 21, 2007, 00:49 EST) (describing an anonymous postcard posted on PostSecret that read "I artificially inseminated myself with a condom you had thrown out."). PostSecret is "an ongoing community art project where people mail in their secrets anonymously on one side of a homemade postcard." PostSecret, <http://postsecret.blogspot.com/> (last visited Sept. 27, 2008).

¹⁷ See, e.g., *Child Support Enforcement Agency v. Doe*, 125 P.3d 461, 472 (Haw. 2005) (rejecting one father's claim that his paying child support constituted involuntary servitude in violation of the Thirteenth Amendment); see also *United States v. Ballek*, 170 F.3d 871, 874 (9th Cir. 1999) (same). For novel claims proposed in academia, see WILLIAM MARSIGLIO, *PROCREATIVE MAN* 175–83 (1998) (discussing option of pre-sexual intercourse contract model); Jeffrey D. Devonchik, *When the Father Is the Victim: A Constitutional Recourse for Fathers of Aborted Children*, 2 FLA. COASTAL L.J. 141, 142 (2001) (advocating for the use of IIED tort claim by would-be fathers); Gross, *supra* note 12, at 1046 (discussing claim of IIED).

¹⁸ See Gross, *supra* note 12, at 1027–28; see also, e.g., *Wallis v. Smith*, 22 P.3d 682, 685–86 (N.M. Ct. App. 2001) (holding that contraceptive fraud claim contravened public policy because of state's interest in child support); *Welzenbach v. Powers*, 660 A.2d 1133, 1135 (N.H. 1995) (holding that public policy favoring privacy of family matters outweighs right to cause of action for IIED or misrepresentation).

¹⁹ See, e.g., *Douglas R.*, 487 N.Y.S.2d at 244–46 (rejecting fraud and misrepresentation claims even though woman removed intrauterine device without informing her male sexual partner). *But see* *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at *5 (Ill. App. Ct. Feb. 22, 2005) (permitting claim of IIED where woman used semen from oral sex to impregnate herself).

²⁰ This Note uses the "right to decide not to be a legal father" and the "right to decide not to be a legal parent" as shorthand for the right not to be compelled by the State to give up one's right to procreational autonomy by being forced by the State to undergo the emotional reaction of being a parent.

²¹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

²² *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

²³ *Roe v. Wade*, 410 U.S. 113 (1973).

eny. While considering policy is an important part of crafting constitutional doctrine, this Note maintains that policy should shape how a right is applied rather than whether a right exists. Therefore, although the right not to be a legal father has not been recognized in prior cases because of potential policy implications,²⁴ this Note argues that courts should first find that a right exists and then determine how to apply it. Admittedly, applying the right not to be a legal father may be difficult, and the right might legitimately be outweighed by policy interests and competing constitutional rights; however, this Note suggests that men seeking relief from child support payments after having expressed pre-conception a desire not to father a child *might* be able to enforce this right.

Part I of this Note demonstrates that based on the Supreme Court's decisions in *Eisenstadt* and *Roe*, there is a substantive due process right to *decide* whether to become a parent. This Part also argues that the progression of case law shows a movement toward greater recognition of such a right to autonomous procreational decisionmaking, which consists of both the right to procreate and the right not to procreate. Part II of this Note argues that because the right to *decide* whether to become a parent emphasizes autonomous choice, it is distinct from the right not to be a biological parent. Part II also argues that imposing legal parenthood in child support cases on the basis of biological parenthood violates the right to decide not to be a legal parent. In addition, Part II uses the judicial state action doctrine to address one of the main counterarguments to claims that legal declarations of paternity violate a man's right to decide not to be a legal father. Part III of this Note argues that, if the right to decide not to be a legal parent is not outweighed by other considerations, the Supreme Court could apply such a right by creating a narrow affirmative defense for biological fathers who expressed pre-conception a deep desire not to be a father. Part III then applies this potential affirmative defense in the context of the *Dubay* case. Finally, Part III shows that recognizing a man's right to decide not to be a legal father does not inherently require that children be left unsupported.

I. The Right to Autonomous Procreative Decisionmaking

Roe, *Griswold*, and the other cases involving contraception and abortion stand for the proposition that there is a constitutional right to make one's procreative decisions free from undue interference by the

²⁴ See *supra* note 18.

State. This right, which stems from the same cases that created the broad right to privacy,²⁵ is actually a bundle of two rights: the right to procreate and the right not to procreate.²⁶

A. *Origins of the Right to Procreative Autonomy*

The right to procreative autonomy has its roots in *Skinner v. Oklahoma*,²⁷ where the Supreme Court declared unconstitutional a law that sterilized criminals to prevent transmission of criminal tendencies.²⁸ Although the statute was struck down on equal protection grounds, the Court's opinion held that the law "deprive[d] certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring."²⁹ This established the first portion of procreative autonomy, the right to procreate.

The second component, the right not to procreate, was first recognized in *Griswold v. Connecticut*, where the Supreme Court invalidated a state law that prohibited the dissemination or use of contraceptives.³⁰ There, the Court declared a right to privacy, but limited that right to the context of marriage.³¹ After detailing a number of substantive due process rights not enumerated in the Constitution, the Court concluded that the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments created various zones of privacy, of which marital privacy was one.³²

The Supreme Court expanded the right not to procreate beyond the bonds of marriage when it struck down a law that prohibited the provision of contraception to unmarried persons in *Eisenstadt v.*

²⁵ The right to privacy has also been applied in a number of other contexts that distinguish it from the narrower right to procreative decisionmaking. *See, e.g.*, *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 276–79 (1990) (finding that a right to die is included in right to privacy); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (finding a privacy right to possess obscene material); *Katz v. United States*, 389 U.S. 347, 353 (1967) (holding that eavesdropping on phone booth conversation violated right to privacy).

²⁶ *Cf.* I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1139–46 (2008) (unbundling the rights not to procreate).

²⁷ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

²⁸ *Id.* at 541.

²⁹ *Id.* at 536.

³⁰ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

³¹ *Id.* at 485–86 (stating that a search for contraception in marital bedrooms "is repulsive to the notions of privacy surrounding the marriage relationship" and that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred" (emphasis added)).

³² *Id.* at 484.

Baird.³³ The Court's language emphasized the personal nature of the right to procreational autonomy: "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."³⁴ Although the Court's opinion had the effect of expanding the right not to procreate to the right to avoid *biological* parentage, nothing suggests that the underlying rationale in *Eisenstadt* was biological in nature.

In *Roe v. Wade*, the Supreme Court further extended the right not to procreate beyond protecting the use of contraception to include a fundamental right to abortion.³⁵ There, the Court again utilized the rhetoric of procreational autonomy when it described the conferred right as one of privacy "broad enough to encompass a woman's *decision* whether or not to terminate her pregnancy."³⁶

Although the Supreme Court alluded to the autonomous rights rationale in *Roe*, it did not explicitly recognize that the Constitution protects the woman's decisionmaking process until *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³⁷ There, the Supreme Court eloquently restated the scope of a woman's right to elect an abortion:

These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State.³⁸

The Court's decision in *Casey* did three things. First, it reaffirmed *Roe*.³⁹ Second, it changed the standard of review to the undue

³³ See *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (striking down law on equal protection grounds).

³⁴ *Id.* at 453.

³⁵ See *Roe v. Wade*, 410 U.S. 113, 162–64 (1973).

³⁶ *Id.* at 153 (emphasis added). For a full discussion of why *Roe* furthered a right to procreative autonomy, not merely a right to protect one's body from intrusion by the government, see *infra* Part II.B.

³⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

³⁸ *Id.* (emphasis added).

³⁹ See *id.* at 846.

burden test for laws that implicate the abortion decision.⁴⁰ Finally, and most relevant to this Note, the Supreme Court emphasized the role of personal decisionmaking in the constitutional protection of procreational autonomy.⁴¹ In its analysis of the spousal notification law, which required a wife to tell her husband before receiving an abortion, the Court in *Casey* found that a husband had no right to counsel his wife not to get an abortion before she exercised “her personal choices.”⁴² The *Casey* Court struck down this spousal notification provision not because it physically obstructed the wife’s right to an abortion, but rather because it infringed upon her decisionmaking capabilities.⁴³ In comparison, the Court in *Casey* upheld a twenty-four-hour informed consent waiting period precisely because of a significant state interest in enhancing a woman’s decisional capacity by providing her with additional information and time for reflection.⁴⁴

Most recently, in *Gonzales v. Carhart*,⁴⁵ the Supreme Court purported to protect a woman’s right to autonomous choice by defining the bounds of informed consent. In *Gonzales*, the Court upheld the Partial-Birth Abortion Ban, a federal law that prohibits physicians from utilizing a specific method to perform an abortion.⁴⁶ There, the Court concluded that a doctor’s disclosure of risk was inadequate to protect autonomous decisionmaking because the doctor used dispassionate medical language to describe the procedure.⁴⁷ Although it is debatable whether the Court’s decision *actually* protected procreative choice, the Court deferred to Congress’s finding that well-informed women would not choose this type of procedure and thus could not make an autonomous decision.⁴⁸

⁴⁰ *Id.* at 874–77. The undue burden test, which remains the standard employed for evaluating laws that may impinge on a woman’s right to abortion, requires a law not to have the “purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” *Id.* at 877; accord *Gonzales v. Carhart*, 127 S. Ct. 1610, 1635 (2007) (applying undue burden test to a ban on a specific abortion procedure).

⁴¹ See *Casey*, 505 U.S. at 857 (finding that *Roe* was a rule of personal autonomy and bodily integrity in addition to an example of liberty).

⁴² *Id.* at 898.

⁴³ See *id.*

⁴⁴ See *id.* at 885–87 (“The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision.”).

⁴⁵ *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

⁴⁶ *Id.* at 1639.

⁴⁷ See *id.* at 1634 (noting that doctors do not explain the particular abortion procedure to their patients in unambiguous or graphic terms).

⁴⁸ See *id.*

B. *Why the Roe Progeny Is About Procreative Autonomy*

Although some have argued that *Roe* stands merely for a right to bodily integrity,⁴⁹ the Supreme Court's holding in *Roe* stands more generally for the right not to be a parent for four reasons. First, *Roe* explicitly rejected the argument that a woman's body was inviolable by the State. Second, *Casey* interpreted *Roe* as supporting a right to procreational autonomy. Third, there is no affirmative duty for states to provide abortions. Finally, *Gonzales* simultaneously restricted bodily integrity while arguably enhancing procreative decisionmaking.

Roe explicitly rejected the argument that a woman's body was beyond the reach of the State because the Supreme Court held that the right to abortion was not absolute in light of the State's interests in "safeguarding health, in maintaining medical standards, and in protecting potential life."⁵⁰ In declining the invitation to recognize an unqualified right, the Court relied on precedent regarding vaccination and sterilization laws for the proposition that the government may intrude into a person's bodily domain.⁵¹ Therefore, the Court must have been framing the right to abortion in terms of a theory other than bodily integrity. This Note argues that procreational autonomy was the theory underlying the *Roe* decision.

The Supreme Court's decision in *Casey* builds upon the idea that procreational autonomy was the framework for *Roe* because the *Casey* Court used powerful language to contrast *Roe*'s emphasis on decisionmaking with its concerns for a woman's bodily integrity.⁵² When discussing and reaffirming *Roe*, the *Casey* Court gave substantial weight to the liberty interest.⁵³ Furthermore, the Court twice defined the first "essential holding of *Roe*" as an acknowledgment of procreational autonomy when it separately referred to the interests in physical privacy and procreational autonomy.⁵⁴ The *Casey* Court juxtaposed a woman's right to undertake the procedure—the bodily in-

⁴⁹ Such an argument tends to draw on the fact that until recently, reproductive decisions have been almost exclusively tied to the body's inviolability. See Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1112 (1998). See generally Sonia Suter, *The "Repugnance" Lens of Gonzales v. Carhart and Other Theories of Reproductive Rights: Evaluating Advanced Reproductive Technologies*, 76 GEO. WASH. L. REV. 1514 (2008) (discussing bodily integrity as rationale for abortion, contraception, and reproductive technology decisions).

⁵⁰ *Roe v. Wade*, 410 U.S. 113, 154 (1973).

⁵¹ See *id.*

⁵² See *supra* text accompanying note 38.

⁵³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–48 (1992).

⁵⁴ See *id.* at 846.

tegrity interest (represented in plain font)—with the right of the woman to be unhampered by the State in her decisionmaking (represented in italics) when it wrote that *Roe* is “a recognition of the right of the woman to *choose to have an abortion before viability* and to obtain it without undue interference from the State.”⁵⁵ The *Casey* Court again contrasted the interests when it wrote, “Before viability, the State’s interests are not strong enough to support a prohibition of abortion *or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.*”⁵⁶ Therefore, while the *Casey* Court undeniably saw the bodily integrity elements of the abortion decision, it sought to protect the right to decide whether to become a parent.⁵⁷

Similarly, the “right to abortion” declared in *Roe* is not the right to receive an abortion, but instead, consistent with the autonomous choice theory, it is the right to elect an abortion. States continue to have no affirmative duty to provide facilities that perform abortions.⁵⁸ Nor do states participating in Medicaid or other federal low-income assistance programs have to fund an abortion, even one that is medically necessary, if federal law does not reimburse the state for the expenditure.⁵⁹ Therefore, the constitutional right must protect the process of decisionmaking rather than provide a right to state-sponsored abortion.

Finally, *Gonzales* itself illustrates how notions of bodily integrity and autonomous decisionmaking are separable. There, the Supreme Court diminished the role of bodily integrity by quite literally restricting what procedures a woman could elect to have done to her body.⁶⁰ Simultaneously, however, the Court saw itself as enhancing protection for choice because it leveled the playing field as to what information a woman must be able to consider when making a decision.⁶¹ One must conclude, therefore, that the rights to bodily integrity and to procrea-

⁵⁵ *Id.* (emphasis added).

⁵⁶ *Id.* (emphasis added).

⁵⁷ *See id.* at 852–53 (discussing the bodily integrity interest in the right to abortion that a woman has to avoid the physical pains of pregnancy); *see also id.* at 852 (stating that *Griswold*, *Eisenstadt*, and *Casey* protect the right to liberty that concerns “not only the meaning of procreation but also human responsibility and respect for it”).

⁵⁸ *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 507–11 (1989).

⁵⁹ *Harris v. McRae*, 448 U.S. 297, 317–18 (1980).

⁶⁰ *See Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007).

⁶¹ *See supra* text accompanying notes 47–48. Although a restriction of information is not often viewed as allowing for more informed decisionmaking, consider that the law similarly prevents information that is unreliable—such as evidence that is hearsay, irrelevant, or more prejudicial than probative—from being considered by a jury. *See FED. R. EVID.* 402, 403, 802.

tional autonomy are distinct and that *Roe* and its progeny emphasize protecting procreative autonomy, not just bodily integrity.

II. How Declarations of Legal Paternity Infringe on a Father's Right to Procreational Autonomy

Because a father has a right not to procreate, and because a declaration of legal paternity can cause emotional harm that burdens a father's ability to define himself and his procreational realm, a declaration of legal paternity may violate the father's right to procreational autonomy. Although biological and legal parenthood are often vested in the same person, this need not be the case. Moreover, when the Supreme Court speaks of a right not to procreate, it is actually combining the right to decide not to be a legal parent with the right not to be a biological parent. While the latter is a right where the woman's interest outweighs the man's, the former is held equally by both parents. Therefore, because legal declarations of paternity can impose psychological burdens and other emotional harms on a man seeking not to define himself as a father, a fact the Supreme Court has recognized, such declarations violate the man's right to procreational autonomy.

A. Biological Parenthood and Legal Parenthood as Severable Concepts

When asked to imagine a father, most people picture an amalgamation of three different types of "father": biological, social, and legal.⁶² It is at different points in a child's life, however, that a male becomes each of these constructions.

First, and perhaps most intuitively, a male becomes a child's biological father at the moment when the child is born. Here, a male is a child's father because he is the male-gamete provider.⁶³ To say that a male is a child's biological father does not say much of their interactions, however, because the male may not know of the child's existence or, in the case of sperm donors, even have met the mother.

Second, under a social definition, a person fathers a child when he acts according to a "patterned set of parenting behaviors [that] re-

⁶² Cf. Richard Collier, *A Hard Time to Be a Father?: Reassessing the Relationship Between Law, Policy, and Family (Practices)*, 28 J.L. & Soc'y 520, 520-21 (2001).

⁶³ Cf. Scott Coltrane, *Fatherhood and Marriage in the 21st Century*, 80 NAT'L F. 25, 27 (2000); see also E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 102 (2006) (discussing the constitutional relevance of biological parentage).

flects a society's ideals about the rights and obligations of men in families."⁶⁴ Such a set of values and expectations has been "institutionalized within family, religion, law, and culture."⁶⁵ For example, a man fathers when he teaches his daughter to ride a bicycle, attends his son's school band concert, or sends his teenager to bed as a disciplinary act.

Finally, a male is a father when he takes on the legal obligations, duties, privileges, and responsibilities of fatherhood.⁶⁶ Although many children have a legal father as the result of a declaration on their birth certificates, others have fathers as the result of filiation hearings, where a court issues a ruling that a particular male is a given child's father.⁶⁷ Thus, legal parenthood is distinguishable from biological and social parenthood because it does not have a correlation with a person's actions; a man is a legal father if the law says he is.⁶⁸

The three forms of parenting interact with one another and, in some cases, cause a parent in one role to assume another role. For instance, a male may become a child's legal father through adoption after expressing a desire to act as a "good" social father.⁶⁹ Divorce hearings, however, can deny biological fathers (and sometimes social fathers) the status of legal father.⁷⁰ Similarly, courts deny rapists the status of legal fatherhood, despite biological parentage.⁷¹ Although sperm donors also are biological fathers, they too are not permitted to be legal fathers, nor are they expected to fulfill the roles of social fa-

⁶⁴ Coltrane, *supra* note 63, at 27.

⁶⁵ *Id.*

⁶⁶ A legal father must provide medical and other financial support for his child, as well as other benefits that accrue to the child of a father, such as the right to an inheritance and certain benefits for dependents. See Gross, *supra* note 12, at 1030.

⁶⁷ In a filiation hearing, a mother seeks to establish a particular male is a child's father, often in order to collect child support from him. Cf. UNIF. PARENTAGE ACT § 104 (2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf>. For information on paternity proceedings and who can be presumed a legal father, see generally *id.*

⁶⁸ See *id.* § 102 (defining classes of men held to be legal fathers); see also MARSIGLIO, *supra* note 17, at 136 (discussing five groups of men presumed to be legal fathers); Cohen, *supra* note 26, at 1140–41 (describing difference between legal parenthood and other types of parenthood).

⁶⁹ See Kathryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733, 760 (1994) (noting that legal fatherhood in context of adoption law requires a "willed decision").

⁷⁰ See generally ROSS A. THOMPSON, *The Role of the Father After Divorce*, FUTURE OF CHILD.: CHILD. & DIVORCE, Spring 1994, at 210 (describing the different roles fathers may play after divorce, including if legal rights are terminated).

⁷¹ See Spitzko, *supra* note 63, at 115–17 (noting that rapists do not have the right to maintain relationships with children).

thers.⁷² Finally, if a woman bears a child while married, her husband may be presumed to be the father regardless of whether another man claims to be the child's biological father.⁷³ These examples illustrate not only the interaction between the different types of parenthood but also that legal fatherhood is different from biological and social fatherhood.

B. The Right Not to Procreate: A Right to Decide Not to Be a Legal Parent and a Right Not to Be a Biological Parent

Just as the right to procreative autonomy contains both the right to procreate and the right not to procreate, the right not to procreate includes both the right not to be a biological parent and the right to decide not to be a legal parent. While the Supreme Court has concluded (and rightfully so) that a father's right not to be a biological parent is outweighed by a mother's right to be a biological parent *and* by her right to bodily integrity,⁷⁴ courts should find that the father and mother are on equal ground in terms of the right to decide not to be a legal parent.⁷⁵

This Note concedes that the right to abortion—defined narrowly as the right to terminate a fetus—is a component of the right not to be a biological parent and is founded on a theory of bodily integrity.⁷⁶ In fact, the Supreme Court said as much in *Danforth v. Planned Parenthood of Central Missouri*,⁷⁷ when it struck down a state law that required spousal consent for an abortion.⁷⁸ After noting that obvi-

⁷² See UNIF. PARENTAGE ACT § 702; Lauren Streicher, *Sperm Banks Follow Rigid Donor Guidelines*, CHI. SUN-TIMES, June 3, 2005, at 59 (describing the lack of legal rights of donor fathers); see also Davan Maharaj, *What Makes a Parent? Courts Often Decide*, L.A. TIMES, Mar. 29, 1998, at A1.

⁷³ See *Michael H. v. Gerald D.*, 491 U.S. 110, 124–25 (1989) (upholding presumption of a child's legitimacy and applying it to reject standing of unwed man claiming to be child's father).

⁷⁴ *Danforth v. Planned Parenthood of Cent. Mo.*, 428 U.S. 52, 69–71 (1976).

⁷⁵ It is not surprising that the Supreme Court did not raise this issue in *Griswold* or the contraceptive progeny because the women who asserted their rights not to be biological parents in those cases were successful. The Court did not reach the issue of legal parenthood for the simple reason that there was no child. It was not until *Danforth*, 428 U.S. 52, that the Supreme Court was confronted with a situation where the Court's decision led to the birth of a child and, hence, that the right not be a legal parent was considered.

⁷⁶ The right to abortion is not the only component of the right not to be a biological parent. For instance, the right to use contraception is similarly an element of the right not to be a biological parent. See *supra* text accompanying notes 27–34.

⁷⁷ *Danforth*, 428 U.S. 52.

⁷⁸ *Id.* at 69–72. This case is distinguishable from the provision in question in *Casey*, which involved spousal notification rather than spousal consent. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992).

ously only one view may prevail when partners disagree over the abortion decision, the Court wrote that “[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.”⁷⁹ In doing so, however, the Court actually stated two separate propositions: (1) before taking into account the fact that the fetus resides inside the mother, the rights of the marriage partners are in equipoise; and (2) the bodily integrity interest is the deciding factor in an abortion case.⁸⁰ While the dissent agreed with the first proposition, it explicitly criticized the majority for misreading into *Roe* a bodily integrity interest.⁸¹

The plurality and dissent are both correct, albeit for different reasons. The *Danforth* Court was justified in finding that a woman has a superior interest regarding the right to avoid *biological* parentage given the imposition on the woman of requiring her to endure a pregnancy. At the same time the dissent was correct that both potential parents enjoy a right to avoid *legal* parentage based on *Roe*’s rejection of the bodily integrity rationale.⁸²

When the biological element no longer factors into a decision to terminate a potential life, courts have concluded, much like the *Danforth* analysis, that the would-be parents are deadlocked in terms of their legal rights. In *Davis v. Davis*,⁸³ for example, the Tennessee Supreme Court was tasked with determining what was to happen to a couple’s frozen embryos after their divorce.⁸⁴ While Mary Sue Davis wanted to donate a fertilized egg to another couple, Junior Davis was adamantly opposed and wanted the embryos discarded.⁸⁵ The Tennessee Supreme Court held that as “entirely equivalent gamete-providers,” both the husband and wife had the dual rights of procreative autonomy: the right to procreate and the right not to procreate.⁸⁶ This ultimately weighed in Junior’s favor because his opposition to having

⁷⁹ *Danforth*, 428 U.S. at 71.

⁸⁰ *See id.*

⁸¹ *See id.* at 93–94 (White, J., dissenting).

⁸² Years later, the *Casey* Court implicitly recognized the dissent’s argument in *Danforth* when it emphasized that the right to privacy is individual in nature and wrote that “[t]he Constitution protects individuals, men and women alike, from unjustified state interference.” *Casey*, 505 U.S. at 896.

⁸³ *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

⁸⁴ *See id.* at 589. Although *Davis* is a state court decision, it has been cited widely for its logic. An August 21, 2008, LEXIS Shepard’s Report found references to *Davis* in opinions from sixteen states and from the Fourth and Sixth Circuits, as well as in 501 law review articles.

⁸⁵ *Id.* at 590.

⁸⁶ *See id.* at 601.

a child without biological parental involvement outweighed Mary Sue's intent to donate.⁸⁷ This example illustrates that courts have already begun distinguishing the right to decide not to be a parent from the right not to be a biological parent.

C. *How a Paternity Declaration May Cause Significant Psychological, Moral, and Sociological Consequences*

A declaration of paternity in the context of child support may unconstitutionally burden a male's right to decide not to be a legal parent by imposing emotional and psychological harms on the legal father. That many courts have viewed such a claim skeptically⁸⁸ is the product of the underestimated emotional impact that the requirement to pay child support has on a male who desires not to define himself as a father. Such harm, however, both has factual foundations and has been alluded to in a number of Supreme Court opinions.

1. *Factual Support*

Data collected in reference to a biological father's attitudes about abortion show a complex array of moral, sociological, and emotional reactions. One study demonstrated that men who contemplate a partner's impending abortion experience emotions that range from responsibility and relief to anxiety, fear, and grief.⁸⁹

Unintended pregnancies also implicate notions of parenthood. In fact, evidence suggests that there may be a strong psychological association between positive fathering (as defined by social norms) and whether a pregnancy was intended.⁹⁰ Some men even experience different psychological and physiological reactions based on whether a

⁸⁷ See *id.* at 604; see also Gross, *supra* note 12, at 1037–41.

⁸⁸ See, e.g., *Rivera v. Minnich*, 483 U.S. 574, 580 (1987) (“[T]he putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law.”); *Child Support Enforcement Agency v. Doe*, 125 P.3d 461, 469 (Haw. 2005) (“[The Parentage Act] does not implicate the father's fundamental rights, but rather the father's economic interest.”); see also *supra* notes 17–19.

⁸⁹ See MARSIGILIO, *supra* note 17, at 114–16. Even contradictory emotions may be experienced simultaneously. See *id.* Such evidence is consistent with other studies that have concluded that men have intense emotional reactions to abortion that derive from a father's views on the role of a parent and the mystery of life. See, e.g., D. Naziri, *Man's Involvement in the Experience of Abortion and the Dynamics of the Couple's Relationship: A Clinical Study*, 12 EUR. J. CONTRACEPTION & REPROD. HEALTH CARE 168 (2007).

⁹⁰ See INST. OF MED. COMM. ON UNINTENDED PREGNANCY, THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES 76 (Sarah S. Brown & Leon Eisenberg eds., 1995); Natasha J. Cabrera et al., *Fatherhood in the Twenty-First Century*, 71 CHILD DEV. 127, 132 (2000).

pregnancy was wanted or unwanted.⁹¹ Such physical responses, called the couvade syndrome, include many of the same pains and behavioral changes that occur during a pregnancy.⁹² Although the pains of pregnancy themselves are irrelevant to an analysis premised on autonomous choice rather than on bodily integrity, the presence of those pains in men suggests that biological fatherhood gives rise to deep and intricate reactions. There is no reason to believe that a biological father, compelled by the State to legally acknowledge his biological parenthood, feels any less of a moral quandary because the acknowledgement is related to a living child rather than to an unborn fetus.

Second, biological fathers who seek to absolve themselves of their roles as fathers not only are subject to legal repercussions but also are considered “deadbeat dads” deserving of ridicule and disdain.⁹³ Public misunderstanding of the reasons why fathers fail to provide child support and parental involvement further exacerbates the social condemnation of fathers.⁹⁴ Although the common assumption is that such fathers abandon their children to avoid responsibility, in practice, financial considerations and their partners’ preferences play a significant role in governing paternal behavior.⁹⁵

Finally, many articles suggest that a reason for requiring child support from biological fathers is to attempt to create an additional, nonfinancial relationship between the parent and child.⁹⁶ Such a goal is supported by researchers who believe that with economic support come other socio-emotional bonds.⁹⁷ If the alternative were true—that child support were merely financial support for the mother—

⁹¹ See MARSIGLIO, *supra* note 17, at 113–14.

⁹² *Id.* at 113 (describing symptoms such as nausea, bloating, and changes in appetite and sleep habits).

⁹³ See, e.g., Ronald B. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. POL’Y ANALYSIS & MGMT. 44, 44 (1998) (“The public perceives noncustodial fathers who do not pay child support as ‘deadbeat’ dads who can afford to pay child support but choose not to, depriving their former families of desperately needed income.”).

⁹⁴ See *id.* at 44–45; Stephen Baskerville, *The Politics of Fatherhood*, 35 POL. SCI. & POL. 695, 695–96 (2002).

⁹⁵ See Mincy & Sorensen, *supra* note 93, at 44 (“[A] lack of income is a significant barrier to child support payments for 16 to 33 percent of young noncustodial fathers.”); Baskerville, *supra* note 94, at 695–96.

⁹⁶ See, e.g., Sara S. McLanahan & Marcia J. Carlson, *Welfare Reform, Fertility, and Father Involvement*, FUTURE OF CHILD.: CHILD. & WELFARE REFORM, Winter/Spring 2002, at 147, 157–58.

⁹⁷ See Thompson, *supra* note 70, at 224–26. A father is more likely to make child support payments to his ex-wife if the payments are coupled with visitation rights. *Id.* at 225. There is no reason to believe that such a connection is less likely for a child born out of wedlock than one born inside it.

studies would find no additional, nonfinancial benefits of the child support system. Because there are intangible emotional benefits to the child,⁹⁸ however, it is logical to infer that there also are emotional effects on the father. If the emotional effects are unwanted by the father, his right to avoid the emotional harms of parenthood has been burdened.

2. Precedential Support

In the line of cases about procreational autonomy, the Supreme Court implicitly determined that a father has constitutionally protected interests related to that father's decisions involving procreation. Although found in the unlikely case of a challenge to the ban on a particular abortion procedure, the final step necessary for the rights to be explicitly recognized was furnished by the Supreme Court in *Gonzales v. Carhart*.⁹⁹

Beginning with *Roe*, the Supreme Court recognized that the procreational autonomy being asserted by a woman was based not on any notion of bodily integrity but rather on the right to make one's own decisions.¹⁰⁰ In rejecting the bodily integrity argument in *Roe*, however, the Court noted that both psychological and emotional harms could result from compelling a woman to bring her child to term:

Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.¹⁰¹

The concerns described by the Court in *Roe* are not uniquely felt by a woman compelled to be a mother.¹⁰² Rather, the concerns asserted by the Court affect men and women alike and, therefore, the Court in *Roe* extended the right to decide not to procreate to both genders.

At numerous times since *Roe*, members of the Supreme Court have described the paternal interest in avoiding procreation not merely as economic but also as implicating significant emotional con-

⁹⁸ See McLanahan & Carlson, *supra* note 96, at 152–53.

⁹⁹ This Note argues *Gonzales* changed the way the Court views constitutional harms in the procreative context.

¹⁰⁰ See *supra* Part II.B.

¹⁰¹ *Roe v. Wade*, 410 U.S. 113, 153 (1976).

¹⁰² Notably, the obvious physical pains associated with childbirth were not one of the enumerated considerations in the Court's discussion of the right to autonomous decisionmaking. See *id.*

sequences. In *Danforth*, for example, when considering a spousal veto over abortion, all of the Justices recognized the burden on a father's psyche associated with childbirth. In the majority opinion, the Court wrote, in relation to the marital relationship, that the Court was "not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying."¹⁰³ In doing so, the Court signaled that a father has an emotional stake in a decision by his child's mother regarding an abortion.¹⁰⁴ Furthermore, the Court noted that the decision to have an abortion is one that causes "possibly deleterious" mental and physical effects that can profoundly affect a marriage (and presumably any romantic relationship).¹⁰⁵ Therefore, although the Court ultimately held that a woman's biological prerogative tipped the balancing of interests in favor of the woman's decision to have an abortion, the majority opinion did not discount the harms befalling the father because of that abortion.¹⁰⁶

The concurring opinion also recognized the father's emotional harms when it stated that the majority in *Danforth* actually understated the father's interest in the fetus.¹⁰⁷ Similarly, the *Danforth* dissent found untenable the majority's argument that the State could not delegate a power it did not have because, according to the dissent, the majority ignored the father's constitutionally protected interests.¹⁰⁸ Thus, although *Danforth* focused on a father's desire to create a connection with his biological child rather than to avoid such a relationship because of a desire not to procreate, all three opinions recognized the constitutional consideration that fatherhood bears non-tangible, emotional burdens and benefits.

After *Danforth*, the Supreme Court continued to wrestle with the appropriate weight to give to a father's procreative desires. Notably, in an opinion denying an injunction, Justice Stevens left open the possibility that a balancing test could be applied when considering a fa-

¹⁰³ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976). Although the Court was writing about a husband's marital interest, there is no reason to distinguish the Court's sentiment from one that would be expressed in a case involving an unmarried biological father. The Court says as much by citing to *Eisenstadt* for the proposition that the substantive due process right of privacy is held by the individual rather than the marital couple. *See id.* at 70 n.11.

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* at 70.

¹⁰⁶ *See id.* at 71.

¹⁰⁷ *See id.* at 90 (Stewart, J., concurring).

¹⁰⁸ *See id.* at 92-94 (White, J., dissenting).

ther's procreative rights. In *Doe v. Smith*,¹⁰⁹ the petitioner requested that the Supreme Court enjoin his wife's abortion based on the petitioner's prevailing under a balancing test set forth in *Danforth*.¹¹⁰ Although Justice Stevens ultimately supported the lower court's conclusion that the balance favored the mother, Justice Stevens accepted the trial court's understanding of *Danforth* as permitting a court to require a mother to carry a child to term if the father "demonstrate[s] clear and compelling reasons justifying such actions."¹¹¹ Thus, though not a powerful recognition of a procreative right for would-be fathers, the *Doe* decision is significant because it recognized that a balancing test considering a father's procreative interests was appropriate.¹¹²

Just one year earlier in *Rivera v. Minnich*,¹¹³ the Supreme Court also confronted the interplay of a father's biological and legal procreative rights in a case involving the constitutionality of the evidentiary standard of proof applied in paternity proceedings.¹¹⁴ There, the Court confronted the issue presented here—the emotive impact of child support.¹¹⁵ Without analysis, the Court summarily concluded that "the putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law."¹¹⁶ In doing so, the Court found that when a father contests paternity, he does so with the primary purpose of avoiding the financial obligations of parenthood.¹¹⁷ In nearly the same breath, however, the majority also recognized that a biological father's nonadmission of paternity represents an attempt to avoid the "training, nurture, and loving protection that are at the heart of the parental relationship protected by the Constitution."¹¹⁸ Though such

¹⁰⁹ *Doe v. Smith*, 486 U.S. 1308 (1988).

¹¹⁰ *See id.* at 1308.

¹¹¹ *Id.*

¹¹² The *Doe* decision finds additional support in the holding in *Danforth* because Justice Stevens voted with the majority in *Danforth* to invalidate the spousal veto provision. *See Danforth*, 428 U.S. at 101 (Stevens, J., concurring in part and dissenting in part). Therefore, one can infer that Justice Stevens's view as expressed in *Doe* is an appropriate understanding of what the *Danforth* majority had in mind when it discussed balancing the mother's and father's procreative rights.

¹¹³ *Rivera v. Minnich*, 483 U.S. 574 (1987).

¹¹⁴ *See id.* at 575.

¹¹⁵ *See id.* at 580.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.*

views are inconsistent, they indicate the Court's acknowledgment of the emotional impact fatherhood presents.

The dissent in *Rivera* further considered the procreative interests of fatherhood when it eloquently combated the majority's argument that a father's interest in contesting paternity is primarily financial.¹¹⁹ Similar to the argument put forth by this Note, Justice Brennan argued in dissent that a declaration of paternity might cause many men harm in their abilities to define their moral boundaries:

The judgment that a defendant is the father of a particular child is the pronouncement of more than mere financial responsibility. It is also a declaration that a defendant assumes a cultural role with distinct moral expectations. Most of us see parenthood as a lifelong status whose responsibilities flow from a wellspring far more profound than legal decree. Some men may find no emotional resonance in fatherhood. Many, however, will come to see themselves far differently, and will necessarily expand the boundaries of their moral sensibility to encompass the child that has been found to be their own. The establishment of a parental relationship may at the outset have fewer emotional consequences than the termination of one. It has, however, the potential to set in motion a process of engagement that is powerful and cumulative, and whose duration spans a lifetime.¹²⁰

The dissent also identified three legitimate, nonfinancial interests that a biological father may seek to protect when trying to avoid a declaration of paternity. First, a biological father who fails to pay child support to his child's mother faces the possibility of incarceration,¹²¹ which is perhaps the ultimate deprivation of liberty. Second, a biological father may be forced to reframe his own self-conception and challenge his own sense of morality if forced to legally acknowledge his child.¹²² Finally, society may view a biological father who tried to avoid a legal declaration of paternity as one who "sought to shirk responsibility for his actions."¹²³ In the dissent's view, the desire to avoid such consequences is a constitutionally protected interest that is distinct from any denial of property that may result from a paternity declaration.¹²⁴

¹¹⁹ See *id.* at 584–85 (Brennan, J., dissenting).

¹²⁰ *Id.*

¹²¹ *Id.* at 584.

¹²² See *id.*

¹²³ *Id.* at 585.

¹²⁴ See *id.*

A central and important distinction between the dissent and the majority opinion in *Rivera* is one of scope. Such a difference can be analogized to the progression of cases involving homosexual sodomy.¹²⁵ In *Bowers v. Hardwick*,¹²⁶ the Supreme Court defined the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal and have done so for a very long time.”¹²⁷ It is unsurprising that such question-framing led the Court to conclude that no such due process right existed.¹²⁸

In contrast, in *Lawrence v. Texas*,¹²⁹ the Supreme Court identified the issue as “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”¹³⁰ By recasting the right as one of personal freedom rather than proscribable conduct, the Court changed the inquiry to effect doctrinal movement.¹³¹ The *Lawrence* Court stated that the *Bowers* Court did not appreciate the privacy interest in question and that, by failing to do so, the *Bowers* Court restricted behavior that was central to a person’s self-definition.¹³² The significant jurisprudential change that followed was therefore the result of a shift in perspective, not in circumstance. In cases involving the right to decide not to be a legal father, courts have a similar opportunity to change their identification of the issue in

¹²⁵ This Note mentions the following cases not to define the realm of privacy but to demonstrate how a change in the scope of analysis may result in a different outcome.

¹²⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹²⁷ *Bowers*, 478 U.S. at 190.

¹²⁸ *See id.* at 196 (declaring no fundamental right to homosexual sodomy and upholding law under rational basis scrutiny).

¹²⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹³⁰ *Id.* at 564.

¹³¹ In contrast to the language used in *Bowers*, the *Lawrence* opinion opened with the following statement:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

Id. at 562.

¹³² *See id.* at 566–67.

question in order to modify the legal framework in which a decision is reached.

The Supreme Court may be moving closer to Brennan's dissenting view in *Rivera*. In *Gonzales v. Carhart*, for example, the Supreme Court gave its most recent approval of the consideration of psychological and emotional harms when determining a person's constitutional rights with respect to autonomous decisionmaking.¹³³ On the one hand, the majority opinion upheld a ban on a specific abortion method.¹³⁴ Because this decreased the potential options to a woman, the opinion arguably could be read as limiting a woman's decision-making ability. At the same time, however, because the holding was based on a woman's inability to fully inform herself about the procedure given doctors' use of dispassionate medical language to describe it, the Court saw itself as protecting procreative choice by preventing a would-be mother from facing what would otherwise be the unbearable emotional harm of an uninformed decision.¹³⁵ The Court further cited a would-be mother's regret of the choice to abort and the heaviness of the moral decision as reasons to augment protection of the personal decisional process.¹³⁶ Finally, the Court recognized that the magnitude of the harm from a decision to abort could not be realized fully unless a woman knew the full extent of the abortion procedure, including the graphic details, and thus truly could make an autonomous procreative decision.¹³⁷

The development of scientific and precedential support for emotional harm not only has changed the way courts approach constitutional law in the context of a biological abortion decision but also reflects profound differences in how the courts should view one's ability to conceive of oneself as a parent. Identity crises, psychological pains, and physical traumas that men may experience when they are forced to become legal fathers may be analogous to a woman's post-abortion regrets validated by the majority opinion in *Gonzales*. As a

¹³³ See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

¹³⁴ See *id.* at 1639.

¹³⁵ See *id.* at 1634 (noting that doctors will often not provide precise details but instead sanitize language about the procedure to inhibit "a decision so fraught with emotional consequence").

¹³⁶ See *id.*

¹³⁷ See *id.* ("It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: [the details of the abortion procedure].") This Note does not seek to attack or defend the *Gonzales* Court's definition of a well-informed decision but instead notes that the Court framed its opinion as enhancing a woman's decisionmaking capabilities by filtering out options about which the woman would have incomplete information. See *id.*

result, judges should consider such harms in the constitutional weight of private decisions about procreative autonomy.¹³⁸ Although the holding in *Gonzales* was used to restrict a woman's abortion options in contrast to expanding one's personal procreative rights, as this Note advocates, the distinction is irrelevant insofar as emotional harm is recognized as a legitimate constitutional interest. If emotional harm is recognized as such, because of scientific data both on the harms suffered by biological fathers of unwanted pregnancies and on the moral and social dilemmas that biological fathers may face if required to be legal fathers, and because of the Supreme Court's willingness to recognize that emotional harms may infringe on one's legitimate privacy right to procreative autonomy, the Supreme Court also should recognize that a biological father has a right to decide not to establish a legal relationship with his child.

D. The Final Step of Infringement: State Action

Even where there has been a violation of a person's constitutional rights, a person must demonstrate that action by the State caused the harm.¹³⁹ In the past, such a step has proven to be a stumbling block for fathers seeking to disclaim legal responsibility¹⁴⁰ because courts have described paternity proceedings as the determination of a factual issue—declaring a male to be a father is merely denoting his biological parentage—followed by the application of legal ramifications instituted by the legislature on the basis of that biological fact.¹⁴¹

Ironically, the answer to the state action problem comes from a law review article written to oppose a to-be father's veto of an abortion. The article argues that the state action issue can be resolved by

¹³⁸ The *Davis* court considered such harms when it balanced the interests in favor of Junior Davis's decision not to procreate. See *Davis v. Davis*, 842 S.W.2d 588, 603–04 (Tenn. 1992).

¹³⁹ See *Civil Rights Cases*, 109 U.S. 3, 17 (1883) (“[C]ivil rights . . . cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings.”).

¹⁴⁰ See, e.g., *Rivera v. Minnich*, 483 U.S. 574, 579 (1987); *Child Support Enforcement Agency v. Doe*, 125 P.3d 461, 468–69 (Haw. 2005) (finding no state action for privacy claim and only *de minimis* state action for liberty and property claims); *L. Pamela P. v. Frank S.*, 449 N.E.2d 713, 715–16 (N.Y. 1983) (noting that substantive right of privacy does not extend to conduct between private actors).

¹⁴¹ See *Rivera*, 483 U.S. at 579–80 (“Resolving the question whether there is a causal connection between an alleged physical act of a putative father and the subsequent birth of the plaintiff's child sufficient to impose financial liability on the father . . .”); see also *Child Support Enforcement Agency*, 125 P.3d at 470.

applying the Supreme Court's holding in *Shelley v. Kraemer*.¹⁴² Although the Court in *Shelley* was confronted with an issue of property rights, the Court noted more generally that "[s]tate action . . . refers to exertions of state power in all forms."¹⁴³ The *Shelley* Court also noted that action of state courts in enforcing substantive laws formulated by those courts may constitute state action if it results in a denial of rights guaranteed by the Fourteenth Amendment.¹⁴⁴ *Shelley* ultimately created the test for judicial state action when it asked whether, but for court enforcement, the deprivation of constitutional rights would not have occurred.¹⁴⁵ The principles of such a test could analogously be applied in the context of paternity proceedings. If a right to decide not to be a legal father were recognized, it naturally follows that a declaration of paternity would constitute a judicial action that causes a constitutional deprivation to occur, assuming that such a determination comported with the constitutional boundaries of the right. As a result, there would be state action in those cases involving a declaration of paternity despite the argument that such a statement is merely the announcement of a biological fact.

III. *Application of the Right to Decide Not to Be a Legal Father*

A. *One Possibility: An Affirmative Defense During a Paternity Proceeding*

Although this Note's primary purpose is to persuade courts to recognize the right of a biological father to avoid legal parenthood, the analysis does not end with the recognition of such a right.¹⁴⁶ Because rights are rarely absolute, once a right has been recognized, it must be weighed against competing rights and interests.¹⁴⁷ Many

¹⁴² *Shelley v. Kraemer*, 334 U.S. 1 (1948); see also Andrea M. Sharrin, *Potential Fathers and Abortion: A Woman's Womb Is Not a Man's Castle*, 55 BROOK. L. REV. 1359, 1386–89 (1990).

¹⁴³ *Shelley*, 334 U.S. at 20 ("And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of th[e] Court to enforce the constitutional commands.").

¹⁴⁴ See *id.* at 17. This is true even if "the judicial proceedings . . . may have been in complete accord with the most rigorous conceptions of procedural due process." *Id.*

¹⁴⁵ See *id.* at 19; see also Sharrin, *supra* note 142, at 1387.

¹⁴⁶ Although this Note applies the right not to procreate in the context of a biological father seeking to avoid the emotional consequences of legal parenthood, there is no reason such a right could not be extended to biological mothers as well. A biological mother may be opposed to abortion and thus bring a child to term in order to be raised exclusively by the father. However, such a scenario goes beyond the scope of this Note and presents additional problems of balancing biological and legal parenthood.

¹⁴⁷ When applying recognized rights, courts often utilize one of the various standards: strict scrutiny, intermediate scrutiny, rational basis, or balancing competing rights. See, e.g., Child

courts have held that policy considerations preclude recognition of a biological father's right not to conceive of himself as a father;¹⁴⁸ however, this Note maintains that policy considerations more appropriately should play a determinative role in courts' *application* of such a right. In applying the right of a biological father to avoid legal parenthood, a court could reasonably find that the societal interest in child support is so compelling, and that the current regime is so directed towards that interest, that such a right is a nearly empty constitutional protection.¹⁴⁹ Assuming that child support is an area where courts would accept a newly proclaimed right not to be a legal father, however, the following five-prong test could be an appropriate vehicle for courts to protect an individual's right to avoid legal parenthood.

A biological father should be permitted to disclaim legal fatherhood in a child support setting when the following elements are satisfied: (1) the biological father had expressed, before conception, a deep philosophical objection to being a father; (2) the biological mother believed or had reason to believe at the time of conception that the father had a deep philosophical objection to becoming a father; (3) the biological father believed and had reason to believe at the time of the conceptive conduct that the mother would terminate a pregnancy or that a pregnancy was impossible; (4) upon birth of the child, the father maintained his deep philosophical objection to becoming a father; and (5) the father can demonstrate actual emotional, psychological, or physical harm because he was forced to be a father. Such a test would be an affirmative defense in a filiation proceeding.¹⁵⁰

1. Expression of a Philosophical Desire Not to Become a Father

The first element requires a father not only to hold a deep philosophical desire not to become a father but also to express that desire to his partner. Two questions naturally follow: what constitutes a deep philosophical desire, and what constitutes an expression of that de-

Support Enforcement Agency v. Doe, 125 P.3d 461, 468–70 (Haw. 2005). The determination as to which test is appropriate is beyond the scope of this Note.

¹⁴⁸ See *supra* note 18.

¹⁴⁹ This Note does not seek to disregard the legitimate concerns for the well-being of a child, which have been the dominating principles governing family law decisions regarding parentage. See, e.g., Wallis v. Smith, 22 P.3d 682, 685 (N.M. Ct. App. 2001). It is possible that a child could be harmed by a biological father's nonadmission of legal paternity to such an extent that the child's interests outweigh the father's rights. Accordingly, this Note recognizes the importance of the analytical dissonance between the recognition of a right to decide not to be a legal father and the application of such right.

¹⁵⁰ For a description of filiation proceedings, see *supra* note 67.

sire? Although a precise definition of a deep philosophical desire is difficult, the Supreme Court provided guideposts for a draft of such a definition in its discussion of conscientious objector status in *United States v. Seeger*.¹⁵¹ In *Seeger*, the Supreme Court broadened the test for exempting oneself from active military experience because of a conscientious objection to include those holding “[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly [already] qualifying for the exemption.”¹⁵² Courts applying a similar standard to men seeking to exempt themselves from parenthood could limit the application of the right to decide not to be a legal father to those who truly have issues with paternal self-definition, rather than men who simply seek to avoid child support payments. Although issues of proof are often difficult, such an inquiry would require more than mere reluctance to be a father; it would require a significant and deliberate belief against fatherhood.¹⁵³ Such a showing could be made through either words or conduct, including, for example, through the use of contraception, although such use without more may be insufficient to satisfy the burden of proof.¹⁵⁴

The second component of this element of the affirmative defense, the expression of the desire not to be a father, draws from principles of both contract and tort law. Although some legal scholars have suggested that parties could prepare an actual sexual contract detailing their intentions regarding abortion and child support,¹⁵⁵ such a mechanism would be unrealistic. The use of consent principles is helpful, however, because contract law requires a meeting of the minds at the time of contract formation.¹⁵⁶ Any future performance that occurs, therefore, is based on the material representations made at the mo-

¹⁵¹ *United States v. Seeger*, 380 U.S. 163 (1965).

¹⁵² *Id.* at 176. Under the original 1940 Act allowing for conscientious objectors, someone need only have opposed the war because of “religious training and belief.” *Id.*

¹⁵³ Such a belief would not require the same level of permanence as does conscientious objector status. In other words, this element would not require the man to relinquish fatherhood permanently but only, after contemplation, to maintain that he is not currently at a point in his life where he wants a child.

¹⁵⁴ As proof of a person’s holding a deep philosophical objection to parenthood, this Note originally considered requiring the biological father to have taken contraceptive acts or to have had reason to believe no such acts were necessary. This Note rejected such a requirement, however, after concluding that not using contraception in even one isolated incident would bar biological fathers from exercising their right not to be a father. Therefore, this Note maintains that contraceptive use more properly serves as evidence of a man’s parental intent, which is to be weighed accordingly by a jury.

¹⁵⁵ See, e.g., MARSIGLIO, *supra* note 17, at 175–83.

¹⁵⁶ Cf. RESTATEMENT (SECOND) OF CONTRACTS § 20(2)(b) (1981) (applying an objective

ment of contract formation. In the scenario of a biological father seeking to disclaim legal fatherhood, a mother likewise may only have had a full understanding of a male's desire not to be a father if the male had expressed that desire fully and adequately before the sexual act. Of course, explicit statements between the parties are not required to form such a "contract," but the contract more properly could be formed by the conceptive conduct itself.¹⁵⁷ Similarly, in the realm of tort law, a woman can be said to assume the risk of an action only if she is made aware of the magnitude of any harm prior to undertaking that action.¹⁵⁸ Therefore, without a clear expression of a male's intent not to be a father prior to conceptive conduct, a woman cannot meaningfully be said to have appreciated the risk of such conduct.

2. *Actual or Reasonable Belief by Biological Mother of the Biological Father's Desire*

The requirement of an actual belief or reason to believe by the biological mother that the biological father desires not to be a father follows naturally from the first element of the affirmative defense. If a father expresses a desire not to be a father but does not do so in a way that conveys his true intention, then a woman can neither consent to the "contract" nor assume the risk of sexual intercourse. This element is satisfied by either a belief or a reason to believe by the biological mother, however, because the inquiry may focus on either the subjective belief of the woman or the objective adequacy of the male's expression. Thus, if a male's expression would not be objectively viewed as a deep preference not to have children but a woman never-

theory of interpretation that does not give effect to unreasonable, undisclosed subjective intentions of parties).

¹⁵⁷ See *id.* § 19(1) ("The manifestation of assent may be made wholly or partly by . . . acts or by failure to act."). But see *id.* § 19(2) ("The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."). See also Mary A. Totz, *What's Good for the Goose Is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141, 154-55 (1995) (advocating for an implied contract approach with procreative presumptions).

¹⁵⁸ See RESTATEMENT (SECOND) OF TORTS § 496B (1965) (refusing to allow plaintiff to recover for harm by defendant's negligent or reckless conduct if plaintiff expressly agrees to accept the risk of such harm). Additionally:

[A] plaintiff who fully understands a risk of harm to himself . . . caused by the defendant's conduct . . . , and who nevertheless voluntarily chooses to enter or remain . . . within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.

Id. § 496C.

theless believed that to be the case, the woman would properly have consented to the conceptive conduct under both a contract model and an assumption-of-risk model. Similarly, it would be unfair to allow a “heckler’s veto” simply because a woman did not understand a male’s objectively clear disclaimer regarding potential fatherhood. In reality, this element of the affirmative defense will almost always be satisfied if the first element is met.

3. *Biological Father’s Actual and Reasonable Belief that the Mother Would Terminate Pregnancy or that Pregnancy Was Impossible*

The third element of an affirmative defense based on the paternal right to procreative autonomy is that the biological father engaged in the sexual act with the belief that the mother would terminate any resulting pregnancy or that pregnancy was impossible. If such an element were omitted, a mother likely would be forced to give up her own procreative autonomy (probably unknowingly), and this Note certainly does not take the position that the putative father’s right always trumps the mother’s.

While the requirement that the father has an *actual* belief that the mother would terminate a pregnancy, or that pregnancy was impossible, is essentially *pro forma* because it can be fulfilled on the basis of the father’s testimony alone, the objective part of this element requires that the father also present sufficient evidence to convince a jury that the reasonable male similarly would have interpreted the mother’s statements as supporting such a belief. The reasonableness requirement acts as another check against the “deadbeat dad”; a male cannot simply argue that he inferred that pregnancy was impossible or that, if he and his partner had discussed the issue, the mother would have agreed to abort a fetus. Rather, the male must show that the woman unequivocally stated that she would not, or could not, carry a child to term.

4. *Post-Birth Maintenance of the Deep Philosophical Objection*

The fourth requirement of the affirmative defense, that the father maintain his deep philosophical objection to fatherhood after the birth of his child, is perhaps inherently satisfied simply by the biological father’s assertion of the affirmative defense. Although this element is fairly self-explanatory, its purpose is to remind the father of the proceeding’s goal; if the biological father wins, he will no longer be considered a father of the child in any other sense. As a result, the

biological father will not have visitation rights or any other privileges or responsibilities that accompany parenthood. To the extent practicable, this element also can be used to satisfy the doctrine of estoppel, so the biological father cannot later seek to re-establish any kinship with the child.

5. *Actual Emotional, Psychological, or Physical Harm Because the Male Was Forced to Conceive of Himself as a Father*

Finally, a biological father must demonstrate in some way that he is suffering as a result of being deemed a father. It is unquestionable that injury in emotional tort cases is often hard to define, and this is no different in the context of a paternity suit. Because the right to decide not to be a legal father is a constitutional right, however, the threshold for establishing such harm should be minimal and likely easily satisfied. Nonetheless, it is important to note that there must be actual harm, not simply a specter of future generalized harm. Such actual harm, however, may include the psychological, moral, and sociological consequences of fatherhood discussed *supra* in Part III.C. This element of the affirmative defense is crucial because it is such harm that gives rise to the very constitutional protection of the right to decide not to be a legal father itself.¹⁵⁹

Although the threshold for establishing actual harm is minimal, the problem with proving such harm has been left unresolved. When a person attempts to demonstrate emotional harm, typical evidentiary issues of credibility arise. Here, the problem is compounded because if the right to decide not to be a legal father is applied in the manner described in this Note, a court will be forced to rely on hearsay evidence to determine whether the elements of the affirmative defense have been satisfied. Of course, the risks of hearsay evidence can be minimized, particularly with respect to the fourth and fifth elements of the affirmative defense, if courts require parties to the proceeding to either attach affidavits to their pleadings or otherwise verify the accuracy of those pleadings.

B. *A Brief Application of the Affirmative Defense: The Dubai Case*

The facts as presented in the *Dubai* petition provide an easy example to demonstrate how the affirmative defense presented by this

¹⁵⁹ See *supra* Part III.A.

Note could fix some of the inequity of the child support system.¹⁶⁰ Under the current regime, Dubai is required to pay child support solely because he is the child's biological father.¹⁶¹ Taking the facts as described in Dubai's complaint as true,¹⁶² however, Dubai would likely be able to assert this new affirmative defense.

First, Dubai expressed to Wells his clear sentiment “[b]efore, during and after their physical relationship” that he did not want to have a child because of his and Wells' ages and their status as students.¹⁶³ Such a statement likely satisfies the first and second prongs of the test because it appears to be an actual and reasonable expression of Dubai's desire not to be a father and it appears adequate to create in Wells an actual belief, or reason to believe, that Dubai did not want to be a father. Second, as the District Attorney's brief concedes, Wells told Dubai that she was infertile,¹⁶⁴ thus satisfying the third prong of the test—that Dubai actually and reasonably believed pregnancy would be impossible. Presumably, Dubai would also maintain his objection relating to the child, and he must do so in order to fulfill the fourth element. Finally, for Dubai to satisfy the last element of the affirmative defense, there would need to be greater inquiry to determine whether Dubai had suffered any actual harm because he was forced to be a father. Assuming he had suffered harm, Dubai would satisfy all of the elements of the affirmative defense and thus could be relieved of his child support obligations.

C. Why Recognition of a Biological Father's Right to Decide Not to Be a Legal Father Does Not Require Children to Be Left Financially Unsupported

While this Note argues that the harm that the father seeks to avoid is emotional, there is obviously an economic component underlying paternity. This Note, however, defends the recognition of the due process right to decide not to be a legal father on two grounds.

¹⁶⁰ See *supra* text accompanying notes 6–7.

¹⁶¹ See *Dubay v. Wells*, 506 F.3d 422, 428 (6th Cir. 2007) (describing Michigan Parentage Act, which requires a judge to issue order of filiation declaring paternity and providing for child support if defendant is the father of the child).

¹⁶² The prosecuting attorney's brief admitted that the facts of the case were essentially undisputed. See Final Brief of Appellee at 6, *Dubay* 506 F.3d 422 (No. 06-2107), 2007 WL 2735359.

¹⁶³ Appellant's Final Brief on Appeal at 3, *Dubay*, 506 F.3d 422 (No. 06-2107), 2007 WL 2735358.

¹⁶⁴ See Final Brief of Appellee, *supra* note 162, at 6. Wells also told Dubai that she was using contraception. Appellant's Final Brief on Appeal, *supra* note 163, at 3.

First, such a judicial move may serve as an additional layer of deterrence against unprotected sex because a woman's heightened awareness that she may be solely financially responsible for a child will give her even more incentive to use safe sex practices.¹⁶⁵ In turn, this could result in a decrease in the number of unsupported children that are born. Furthermore, once a pregnant woman is in a situation in which the father would not be required to pay child support, she may more readily choose abortion, and thus the possibility of an unsupported child disappears.¹⁶⁶ The promotion of abortion certainly may not be a policy the State wishes to adopt; however, this argument militates towards a determination that other rights outweigh the due process right rather than a determination that no right should be recognized.

Second, the courts are fairly unified on the notion that the public policy interest behind child support payments is on behalf of the State in place of the child, not on behalf of the mother or father.¹⁶⁷ For that reason, the equitable policy is to shift the burden onto the State to support its own interest. Such burden-shifting would serve two functions. First, the burden-shift would ensure that all children would be properly supported because the problem of collecting child support from the impoverished or evasive father would no longer exist; instead, the State would assist in supporting the child. Second, the burden-shift would require the population, through its legislators, to decide what level of support the State should provide. This would help put the children of all single mothers (and fathers) in a more equal position while simultaneously forcing a political debate.

Conclusion

Although the Supreme Court has focused on protecting the procreative autonomy of women, the Court has not considered the right of procreative autonomy held by biological fathers. Although a woman's right to have an abortion gives her full autonomy over her procreative decisions, the impossibility for men to become pregnant has inhibited recognition of their similar decisionmaking rights. Although it is understandable that courts have construed the right to abortion as

¹⁶⁵ See Totz, *supra* note 157, at 179. This Note does not suggest that women may choose not to practice safe sex because the biological father is available to support the child, but it suggests instead that women may consciously fear the financial repercussions of childbirth if the biological father is unavailable *in addition* to the other burdens of childbirth.

¹⁶⁶ See *id.* at 179–80. This Note neither advocates for abortion nor takes a position against it. Instead, this Note assumes a legal environment where an abortion is permissible and an option that a woman may consider after learning of an unwanted pregnancy.

¹⁶⁷ See *supra* note 18.

evolving from a right to bodily integrity, after reviewing the relevant Supreme Court case law, it becomes evident that the Court's focus was on the ability of an individual to make uniquely introspective decisions regarding personhood—what the *Casey* Court referred to as “choices central to personal dignity and autonomy.”¹⁶⁸ Such choices should include whether to be a father to a child, which is distinct from whether to produce a child. It is such a realm of decisional privacy that this Note advocates protecting. As this Note has shown, the father-child relationship comes with significant moral, legal, economic, and sociological consequences. *Gonzales v. Carhart* provides the final step toward judicial recognition of the right to decide not to be a legal father by permitting the consideration of such emotional harm in the constitutional calculus.

There are significant complications in the application of the right to decide not to be a legal father. While these difficulties present a compelling argument to give little if any weight to the paternal right to avoid legal parenthood, the recognition of such a right is necessary to clarify the jurisprudence of procreative autonomy. Neither Sharon Irons nor Lauren Wells deserved child support. Moreover, both Richard Phillips and Matthew Dubay had real and intimate interests in avoiding declarations of paternity. Therefore, notwithstanding any complications, the courts should have more seriously considered the biological fathers' constitutional interest in avoiding the psychological, physical, and emotional harms of being declared legal fathers.

¹⁶⁸ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).