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(In)Equality: Men's Rights and Duties Regarding Abortion

Abstract

The Fourteenth Amendment to the United States Constitution provides the guarantee of Due Process.² The right to privacy developed under the Due Process clause and has worked to establish and safeguard the rights of people to make personal procreative choices and to choose whether to use contraceptives during sexual engagements.³ Before that, the United States Supreme Court had proclaimed that procreative ability is “[o]ne of the basic civil rights of man.”⁴ Then, perhaps most notably in the history of procreative choice rights, the right to privacy worked to establish and safeguard a woman’s separate right to have an elective abortion.⁵ At first glance, the trajectory of people’s rights regarding procreative choice appears to favor full autonomy.

However, the Supreme Court has held that the privacy rights of women to choose whether to abort a pregnancy outweigh whatever constitutional rights men have, even in the realm of marriage, regarding their own procreative choice.⁶ Therefore, the duality of the guaranteed protections provided by the Fourteenth Amendment with respect to procreative choice and the right to an abortion creates a paradox for men: Men have the right to make personal decisions regarding their own procreation up to the point of choosing whether to engage in sexual activity that might lead to a subsequent pregnancy, while simultaneously lacking any right to make decisions regarding their own procreation once, consequent to their decision to engage in such

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² U.S. Const. amend XIV.

³ See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁴ *Skinner v. State of Okla. ex rel Williamson*, 316 U.S. 535, 541 (1942).

⁵ *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992).

⁶ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976).

sexual activity, conception occurs.⁷ That framework may appear to work well enough. However, the paradox lies in the fact that women currently have an absolute, sacrosanct right to make personal procreative choices *subsequent* to their impregnation, which abrogates men's rights to make similar personal choices *before or after* conception.⁸ Therefore, men do not have any meaningful rights to make procreative choices for themselves, except that they may choose to either remain celibate, only engage in sexual activities that cannot result in pregnancy, or use a contraceptive at the risk of its failure. Women, on the other hand, are free to engage in any sexual activity with or without contraception and are provided an "escape route" if they subsequently choose to not bear a child conceived.⁹ Women are also free to choose to carry a child to term without regard to whether the father wants to be a father, and impose on him all of the parental responsibilities of fatherhood without his acquiescence.¹⁰

Recognizing the many nuances of particular situations and sexual relationships, this paper is limited in scope to situations involving two adults who engage in consensual sexual activity. Part I of this paper examines the Supreme Court's jurisprudence regarding people's Fourteenth Amendment right to make procreative choices. Specifically, it highlights the substantial interest people have in making such choices and points out that the right is not limited to men or women but is universally applicable. Additionally, Part I identifies several options people have when making procreative choices and how men and women are similarly situated when making those choices. Part II discusses women's right to have elective abortions and the disparity it creates by giving women the power to override their male counterpart's procreative choices before or after

⁷ Lisa Lucile Owens, *Coerced Parenthood as Family Policy: Feminism, the Moral Agency of Women, and Men's "Right to Choose"*, 5 ALA. C.R. & C.L. L. REV. 1, 18 (2013).

⁸ *Id.*

⁹ Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate his Interests in and Obligations to the Unborn Child*, 7 J.L. & POL'Y 1, 4 (1998).

¹⁰ *Id.*

conception. Part III presents situations wherein the disparity between women's rights to have elective abortions and men's rights to make procreative choices conflict with each other. This section also further illustrates the fact that when conflicts arise, it is the will of the pregnant mother that dictates the outcome. Because men whose sexual partners abort their pregnancies do not incur any additional duties, Part IV only explores the duties thrust upon men when they are made fathers against their wills. Part V presents several proposed remedies, and concludes that the best way to reconcile men's and women's rights is to eliminate women's rights to have elective abortions, but that the most practical, realistic remedy is to require women to show cause as to why an abortion is necessary before they can get one, and allowing men a similar opportunity to show cause as to why they should not be considered the child's legal father before they can extinguish their own parental responsibilities.

I. Right to Procreative Choice

Perhaps one of the most controversial decisions ever rendered by the Supreme Court was that issued in *Buck v. Bell*, wherein Chief Justice Holmes validated a state statute mandating the involuntary salpingectomy of a woman who was deemed "feeble-minded."¹¹ Although that case is still not quite a century old and has never been overturned, the Court's holding has since widely been regarded as archaic.¹² Despite that, the Court in *Skinner v. State of Oklahoma ex rel. Williamson* struck down a state statute mandating the sterilization of habitual criminals.¹³ Although the Court had much to say about the liberty interests of procreation, going so far as to call it ". . . one of the basic civil rights of man," the Court reached its conclusion not on the egregiousness of depriving one of such a right, but on the grounds that the state's statute was not

¹¹ *Buck v. Bell*, 274 U.S. 200, 205 (1927).

¹² Marshall B. Kapp, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* by Adam Cohen, Fla. B. J., Aug. 2016 at 68.

¹³ *Skinner*, 316 U.S. at 541.

narrowly tailored to achieve its stated interest.¹⁴ Taken together, these cases illustrate that procreative ability is a fundamental right under the United States Constitution, and that in order to infringe on that right, a state action must endure strict scrutiny of the Court. Importantly, procreative rights were not limited to either men or women but were made applicable to everyone. Moreover, the Court left open the possibility of government interference with the right to procreative ability as long as the government can establish a compelling interest and a narrowly tailored means to achieve that interest.

The Supreme Court later held that the right to privacy under the Fourteenth Amendment also protected married couples' decisions to use contraceptives.¹⁵ That right was later extended to unmarried couples as well on the basis of Equal Protection.¹⁶ Again, rights regarding the use of contraceptives were not limited to either men or women but were made applicable to everyone.¹⁷ And because the right arose under substantive due process, the right was established as a fundamental right, requiring strict scrutiny for governmental interference.¹⁸

Overall, the Court has recognized the significant interests people have in controlling their own reproduction. Indeed, Justice Brennan phrased it aptly: "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."¹⁹ Justice Brennan's choice of words were deliberate, as "beget" is defined as "to father [or] sire."²⁰ Such deliberateness to include a term exclusive to fatherhood presents an undisputable fact that men, as well as women, have a constitutionally protected right to make

¹⁴ *Id.* at 541.

¹⁵ *Griswold*, 381 U.S. at 485.

¹⁶ *Eisenstadt*, 405 U.S. at 453.

¹⁷ *Griswold*, 381 U.S. at 485.

¹⁸ *Id.*

¹⁹ *Eisenstadt*, 405 U.S. at 453.

²⁰ *Beget*, THE AMERICAN HERITAGE DICTIONARY (3rd ed. 1993).

procreative decisions for themselves. Troubling though is that the same phrase was echoed in *Planned Parenthood of Southeastern Pennsylvania v. Casey* when the Court decided that women's rights to have elective abortions trump any rights men might have.²¹

Nonetheless, both men and women have the right to make such choices as to whether to engage in sexual activity, whether to use contraceptives, and what particular sexual activities to engage in. However, in modern times, scholars generally, but arguably incorrectly, accept that engagement in sexual activity is a “. . . human need worthy of fulfillment . . .” even when such activity diverges from “. . . heterosexual, procreative, and marital forms . . .”²² In other words, society has now fully embraced, and seemingly encourages, the idea of promiscuity. Therefore, society would not likely be prepared to consider abstinence or celibacy a reasonable approach to procreative choice, but it certainly is a viable approach for anyone who has the self-discipline to refrain from sexual activity.²³ Even assuming that people will choose to engage in sexual activity, their procreative choice is not limited to that decision alone; contraceptives, while susceptible to failure, are a useful tool for people wanting to avoid parenthood. According to the Center for Disease Control, a wide range of contraceptives are available with varying degrees of effectiveness (from around 75% to almost 100%).²⁴ However, among the fifteen contraceptive methods they list, only two of them are for men: condoms and vasectomies, which may suggest that men have more limited options than women.²⁵ Finally, men and women have control over which sexual activities they engage in. Planned Parenthood has identified what they call “outercourse” and says

²¹ *Casey*, 505 U.S. at 834.

²² Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 817 (2007).

²³ *Abstinence and Outercourse*, Planned Parenthood, (last visited March 15, 2019), <https://www.plannedparenthood.org/learn/birth-control/abstinence-and-outercourse>.

²⁴ *Effectiveness of Family Planning Methods*, Center for Disease Control, (last visited March 15, 2019), https://www.cdc.gov/reproductivehealth/contraception/unintendedpregnancy/pdf/Contraceptive_methods_508.pdf.

²⁵ *Id.*

of it: “Many couples want to be sexual with each other without having vaginal sex and/or risking pregnancy. Outercourse can prevent pregnancy the same way abstinence does: by keeping sperm away from an egg.”²⁶ Obviously, there are a plethora of alternative sexual activities a couple may engage in to achieve outercourse.

Given that men and women have a constitutionally protected right to make procreative choices and the apparent abundance of resources and methods available to men and women to prevent pregnancy if they so choose, one may reasonably conclude that men and women have equal footing in the decision-making process. Things become unequal, however, when despite one party’s efforts to prevent a pregnancy or a lack of effort from either party, a pregnancy results from their sexual activities and one of the parties, in opposition to the other, does not want to become a parent.

II. Right to Abortion

Most people are familiar with or have at least heard about the Supreme Court decision in *Roe v. Wade*. In that case, the Court established a trimester framework which granted pregnant women the absolute right to have elective abortions during the first trimesters of their pregnancies, limited state regulation of abortions during the second trimesters to make them safe for mothers, and allowed full state interference with the right to have elective abortions during the third trimesters except for situations wherein the mothers’ life or health would be at risk if denied an abortion.²⁷ That framework was replaced by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which limited state regulation of abortions before viability of the fetus to make them safe for mothers, and granted states the authority to interfere with that right post viability except for

²⁶ Abstinence and Outercourse, *Supra* note 23.

²⁷ *Roe*, 410 U.S. at 164-65.

situations wherein the mothers' life or health would be at risk if denied an abortion.²⁸ Interestingly, the specificity with which the Court gave direction regarding the state's ability to interfere with this right was a departure from the usual strict scrutiny standard applied to other substantive due process rights.

The Court in both cases reasoned that a pregnant woman's right to have an abortion was an extension of her right to make procreative decisions established under the penumbral right to privacy, but limited the state's ability to claim a compelling interest in anything other than the interest in the life of the fetus post-viability.²⁹ Also, the text of the opinions is clear: the right to an abortion is a woman's right. Apparently, despite the obvious conflict between men's rights to make procreative decisions and women's rights to have elective abortions, any interest the state has in preserving a father's right to procreate fails to present a compelling government interest that satisfies strict scrutiny. To be sure, another holding of *Planned Parenthood of Southeastern Pennsylvania v. Casey* was that a married woman need not notify her husband of her intent to have an abortion.³⁰ Therefore, once conception occurs, women get to choose whether they will become mothers and whether their partners will become fathers. This holding again abrogates any right to procreative choice the father-to-be may have had before or after their sexual engagement.

Owens, a proponent of a more equal structure, acknowledges the palpable inequality between women's abortion rights and men's procreative choice rights, and rightly declares that "fatherhood is relegated to a background aspect and secondary status."³¹ She goes on to discuss the history of feminism in the United States, pointedly asserting that modern feminism has abandoned its original goal of female equality in favor of pursuing more advantageous outcomes

²⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

²⁹ *Id.* at 849.

³⁰ *Id.* at 893-94.

³¹ Owens, *supra* note 7, at 5-6.

for women regardless of equality with men. Such pursuits led to the current imbalance of power in procreative choice rights.³² Jackson, another proponent of change from the status quo, identifies the disparity by highlighting the fact that a father-to-be has no right to know about the mother's pregnancy or decision to abort, and he continues by suggesting the absurdity of considering whether a father may force an abortion upon an unwilling mother.³³ The gist of these arguments is that women have unbridled power to make procreative decisions for themselves and for their sexual partners, and that some implementation of policy is needed to level the playing field. With the overwhelmingly clear reality that men's procreative choice rights mean nothing once a pregnancy ensues from his sexual activities, one cannot help but ask why women were given such latitude in the decision to abort a pregnancy or birth a child without the input of her sexual partner.

As previously stated, the Court in *Casey* held that the privacy right emanating from the Fourteenth Amendment provides the basis for a woman's right to make procreative choices and have an elective abortion.³⁴ But more at the center of the reasoning, the Court goes on to explain that the state cannot proscribe abortion "because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear."³⁵ That fact is not ignored. Recognizing the physical hardship and demands upon a pregnant woman's body, one scholar avers that such physical hardship is temporary and ".should not lead to a conclusion that women are the only ones given choices in the matter."³⁶ She also asserts that most women who

³² *Id.* at 12-13.

³³ Michael L. Jackson, *Fatherhood and the Law: Reproductive Rights and Responsibilities of Men*, 9 TEX. J. WOMEN & L. 53 (1999).

³⁴ *Casey*, 505 U.S. at 852.

³⁵ *Id.*

³⁶ Owens, *supra* note 7, at 23.

have abortions do so in order to avoid parentage, not for bodily integrity, and that they are “. . . allowed to weigh [their] own, personal, selfish, reasons against having or not having the child.”³⁷

Overall, women are afforded the right to have elective abortions because of their biological positions which make them alone carriers of unborn children. They are allowed to consider whatever they deem relevant in making that decision, and they need not consult with or even inform their male counterparts. Whatever one thinks of the righteousness of women having the right to have elective abortions, it cannot reasonably be argued that such a right does not completely abrogate men’s rights to make procreative choices. The only argument that comes close to reasonable is that men cede to women the ability to choose whether to have an abortion or carry a child to term upon copulation. But even the proponent of that argument recognizes the disparity and suggests that a woman’s right to have an abortion is separate from a man’s right to procreative choice, and that the woman’s decision should not displace the man’s right.³⁸

III. When Conflicts Arise

A woman’s choice to have an abortion or carry a child to term does not always conflict with a man’s right to procreative choice. There exist only two situations wherein a conflict arises: when (1) a pregnant woman wants to have an abortion, but the father wants to parent the child conceived, or when (2) a pregnant woman wants to birth and parent a child conceived, but the father wants to avoid parentage.³⁹ Therefore, anytime a man’s right to procreative choice is not infringed upon, it is only by happenstance that his sexual partner’s desires concerning an unborn child are in accord with his own. That is true because when either of the two scenarios of conflict unfold for a couple, the desire of the woman always prevails.

³⁷ *Id.* at 20, 23.

³⁸ *Id.*

³⁹ *Id.* at 27.

Considering the father-to-be who wants to parent an unborn child against his sexual partner's desire to abort her pregnancy, one must realize that he often may not ever know of the pregnancy to begin with. As previously mentioned, the Court in *Casey* refused to uphold a provision of a state statute requiring a married woman to notify her husband of her intent to have an abortion before she could get one.⁴⁰ Among the many considerations of the Court were their findings that most married women discuss such matters with their husbands without compulsion and that compelling married women to discuss such matters with their husbands could lead to domestic violence or the husband's disclosure of his wife's pregnancy in violation of her privacy interests.⁴¹ The crux of these considerations lie in the potential for a spousal notification requirement to create "substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability."⁴² One critic of the Court's reasoning expresses that it is illogical because it allows a woman to make a unilateral decision without even consulting with her husband in violation of his right to make procreative choices. Also, there are other laws that already provide safeguards against domestic violence, and a husband's exercise of his First Amendment right to free speech in protecting his interest in procreative choice is just as important, if not more, than his wife's privacy interest.⁴³ However illogical this policy is, it is the current law, and one cannot reasonably argue a notification requirement ought to exist for an unmarried father-to-be when such attempts to protect fathers' rights have already utterly failed even within the realm of marriage. That is not to say, however, that one could not reasonably argue that the current law is unreasonable and is due to be overturned.

⁴⁰ *Casey*, 505 U.S. at 887-91.

⁴¹ *Id.*

⁴² *Id.* at 837.

⁴³ Jackson, *supra* note 33, at 74.

Even when men are made aware of their sexual partners' pregnancies and intentions to abort, the Supreme Court has made clear that they do not have any power whatsoever to prevent the pregnant woman from having an abortion.⁴⁴ Using the same rationale from *Roe v. Wade*, which led the Court to prohibit governmental interference with a woman's right to have an elective abortion before viability, the *Danforth* Court decided that to require a father's consent to an abortion would operate as a delegation of authority from the state of an authority the state did not possess, and therefore could not delegate.⁴⁵ However, just as the decision in *Casey* ignores the procreative choice rights of men in deciding to abort, and expresses that men need not even know of their partners' pregnancies and intentions to abort,⁴⁶ so too does the decision in *Danforth*. The fact that men have a right to make procreative choices should stand on its own, apart from any separate interest the state might have, and both fathers and the state should be able to take actions necessary to protect the right to procreative choice. On the other hand, to give fathers the ability to override mothers' decisions by refusing to consent would essentially create an imbalance of power from the current situation by tilting the scales more in favor of men and detracting from the procreative choices of women who want to abort their pregnancies when a conflict arises.⁴⁷ That is not to say however, that a mere notification requirement would create the same problem, as it would only allow men an opportunity to protect their interests by influencing, not dictating, the decision-making process.

The argument in favor of at least requiring notification is bolstered by the fact that many states require notification to parents and a hearing in adoption proceedings involving their children, such as the statutory requirement at issue in one Minnesota case, wherein a father attempted to

⁴⁴ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69 (1976).

⁴⁵ *Id.*

⁴⁶ Jackson, *supra* note 33, at 75.

⁴⁷ *Id.* at 87.

invoke his parental rights to prevent the adoption of his child.⁴⁸ Even though there are certain things men must do under that statute to be entitled to notification, like be married to the mother, support the child, or file a paternity action within a specified period;⁴⁹ one could not seriously argue that such laws serve any other purpose than to protect the parental rights of fathers whose counterpart would place their child up for adoption, thereby trampling their rights and interests in their children. How much more of an assault to a father's rights is it to allow a pregnant mother to stifle the potential life of an unborn child without so much as giving the father an opportunity to be heard on the matter? The only difference is that in one case, the mother chooses to birth the child before disposing of her parental responsibility, and in the other, she chooses to dispose of her parental responsibility before she births the child. If the father should have a say in the former, he ought to also have a say in the latter. The fact that he does not even have a right to know about the latter only further illustrates the lack of meaningful procreative choice rights men have between the moment of conception and the point of viability, wherein the mother has all the power and rights to do as she alone chooses. Moreover, the mother would have the absolute right to choose. Even if the father had a right to know he would still be limited by his (in)ability to persuade her.

Conversely considering the father-to-be who does not want to be a father, the same rule established in *Danforth*, that a man cannot prevent a woman from having an abortion also established that a man cannot compel a woman to have an abortion.⁵⁰ Indeed, the mere suggestion to give men such authority shrills with a repulsive reverberation. After all, "it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy."⁵¹ Additionally, even discounting the mother's physical condition during pregnancy

⁴⁸ *Heidbreder v. Carton*, 645 N.W.2d 355 (Minn. 2002).

⁴⁹ MINN. STAT. § 259.49 (2000).

⁵⁰ *Danforth*, 428 U.S. at 69.

⁵¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 896 (1992).

and child birth, giving men power to compel an abortion would tilt the scales too far in the other direction the same way it would to allow men to prevent an abortion. Nonetheless, the Court's short-sighted emphasis on the mother's pregnancy fails to adequately consider the long-term implication parenthood has on men, regardless of whether they wanted or intended to take on or avoid fatherhood.⁵²

Unlike the scenario where a man wants to father a child but the mother is given the power to unilaterally choose to abort without even notifying the father of her pregnancy, the state very much encourages mothers who choose to birth their children to notify the fathers and usher them into parenthood without even a thought of their desires or intentions.⁵³ Assuming the mother notifies the father during her pregnancy of his impending parenthood, he may have the opportunity to voice his concerns and even to persuade the mother to abort or place the child for adoption. Still, what he cannot do is remove himself from the reality that he is at the submission of the mother's will; whatever she decides, she decides for both of them.

IV. Father's Duties

[T]he spouse has a real interest in the decision to abort. . . . [T]he state may legally obligate the male to support the child even though he may have desired that the mother procure an abortion. Similarly, he may fervently desire that the child be born and yet have no role in the decision to abort. Although these interests are strong, they do not justify state delegation of power to the spouse to defeat a woman's fundamental constitutional right.⁵⁴ After a mother chooses to abort a pregnancy, the would-have-been father incurs no duties beyond those he previously held (even if

⁵² Jackson, *supra* note 33, at 75.

⁵³ Owens, *supra* note 7, at 8.

⁵⁴ Hutton Brown, Miriam Dent, L. Mark Dyer, Cherie Fuzzell, Anita Gifford, Sam Griffin, A.G. Kasselberg, M.D., Jayne Workman, & Melinda L. Cooper, *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 712 (1986).

his procreative rights were circumscribed by the mother's decision to abort his child). However, after a mother chooses to bear a child, the father incurs substantial financial duties. For example, the financial requirements of a child during his or her lifetime may be more than \$100,000.00.⁵⁵ While a mother is not necessarily required to petition a court to establish child support payments from the father, the state aggressively encourages mothers to pursue such actions, especially if the mother qualifies for government financial assistance.⁵⁶ The state does so by significantly limiting the amount of available financial assistance to a mother unless she identifies the father and petitions the court to establish the father's paternity and force him to pay child support.⁵⁷ Some courts follow an "income shares approach" and take a father's financial situation into account only insofar as they can calculate a percentage of his income for him to pay as child support,⁵⁸ but they do not take into account a father's financial situation when he is desolate or otherwise unable to pay child support; instead, the state imputes an amount equal to what the state finds he has the capacity to earn and calculates a percentage of that as what he should pay.⁵⁹ To further illustrate the lack of concern the state has regarding a father's ability to satisfy his financial obligations, one state agency even goes so far as to declare, "It is important to establish parentage even if the alleged father is still in school, has no income, or has no health insurance."⁶⁰ Additionally, unlike alimony, which is subject to an ex-spouse's necessity of it and her remaining unmarried,⁶¹ child support is not subject to a father's ability to pay or made contingent upon a physical custodial parent's inability to financially support the child without help. Overall, federal and state legislation has

⁵⁵ Jackson, *supra* note 33, at 71.

⁵⁶ Owens, *supra* note 7, at 8.

⁵⁷ *Id.*

⁵⁸ 2 JUDITH S. CRITTENDEN AND CHARLES P. KINDREGAN, JR., ALABAMA FAMILY LAW § 22:9 (2d ed. 2018).

⁵⁹ *Id.* at § 22:18.

⁶⁰ VT. DEP'T. FOR CHILDREN AND FAMILIES OFFICE OF CHILD SUPPORT, CHILD SUPPORT IN VERMONT: A HANDBOOK FOR PARENTS 10, <https://dcf.vermont.gov/sites/dcf/files/OCS/Docs/OCS-Parent-Handbook.pdf>.

⁶¹ Ala. Code 1975 § 30-2-55.

made it virtually impossible for fathers to escape financial obligations to their children, even if they never intended to become fathers, they are not personally prepared to meet their obligations,⁶² or the mother does not need the father's help to support the child.

The child support guidelines in Alabama, which follow the "income shares approach" discussed above, is "based on the proposition that both parents have an obligation to contribute to the support of their minor children."⁶³ Even accepting that premise as true, it does not follow that if procreative choice is a fundamental, constitutionally protected right, then a mother can veto her sexual partner's decision to avoid parentage in the first place and thrust upon him the responsibilities of fatherhood. For it is only *after* a mother's decision that abrogates the father's right to procreative choice that he is thrown into the role of a parent and made to take up the burden and the associated financial obligations.

The problem here is that there are obvious, recognized conflicts between men's procreative choice rights and women's rights to have elective abortions. Before conception, sexual partners each have an opportunity to weigh their desires and interests regarding parenthood and take appropriate steps to avoid a potential pregnancy if they so choose. However, if conception occurs, men lose their rights, but certainly not their interests, regarding their own procreation, but women retain a right to make procreative choices for themselves and for their sexual partners.⁶⁴ The disparity has been justified by the sole fact that women experience pregnancy and men do not.⁶⁵ Even so, the fact remains that bodily integrity is invoked as a reason for women to have an absolute right to an abortion only after they have made procreative choices as to whether they want to be

⁶² McCulley, *supra* note 9, at 7.

⁶³ CRITTENDEN AND KINDREGAN, *supra* note 58, at § 22:9.

⁶⁴ Owens, *supra* note 7, at 21-22.

⁶⁵ *Casey*, 505 U.S. at 896 (quoting *Danforth*, 428 U.S. at 71).

parents.⁶⁶ While women get to consider their own financial stability, their own personal interests, their own future goals and ambitions, and the effect having a child would have on those things, they need not consider the same for fathers.⁶⁷ Yet, they are given the inviolable right to choose whether to bear children or extinguish their parental responsibilities by way of elective abortions, and if they choose to bear a child, they can then thrust parental responsibility upon unwilling fathers.⁶⁸ Such a standing policy is simply unacceptable in a society that values freedom and equality.

V. Reconciliation of Rights

One suggested approach to equalizing the rights of men and women involves an argument under the Equal Protection Clause of the Fourteenth Amendment. According to these arguments, women get to make procreative decisions until the point of viability and, because men are denied a similar opportunity to opt out of parenthood post-conception, men lack equal protection of the law.⁶⁹ The proposed solution is to simply give men, for a period comparable to that which women have to choose whether to procure an abortion, a right to choose whether to assume legal responsibility for a child they helped conceive.⁷⁰ While this idea may seem appealing, it fails to settle the disparity for at least two reasons.

First, even if men had the opportunity to divest themselves of parental obligation, such an arrangement only solves one of the two potential conflicts, namely when a pregnant mother wants to carry a child to term and the father does not want to be a father. This approach fails to resolve any possible conflict when the desires of the interested parties are reversed because, under this

⁶⁶ Owens, *supra* note 7, at 21.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Owens, *supra* note 7, at 17; McCulley, *supra* note 9, at 44-46.

⁷⁰ McCulley, *supra* note 9, at 44-46.

approach, a pregnant woman who wanted an abortion could still get one regardless of whether the father wanted to parent the child. Therefore, many men's rights would remain subject to violation without vindication.

Another reason this approach fails is because public policy tends to favor holding fathers financially accountable to their minor children, as is evidenced by the statutory schemes and state literature that highly encourage mothers to petition the courts to establish paternity and child support from fathers.⁷¹ As noted by one lawyer, "One reason fathers are held responsible is to discourage irresponsible actions."⁷² It should go without saying that if given the opportunity to shirk their parental obligations, many men would likely abuse such an opportunity, potentially leaving many mothers and children indigent. Even though proponents of this approach argue that this consequence does not justify the impediment that burdens unwilling fathers when they are coerced into parenthood,⁷³ one must realize that the vindication of men's procreative choice rights should not entail upsetting the right a child has to support from his or her parents.

Because of its failure to adequately remedy the current inequality in procreative choice between men and women and because the societal costs would likely provide a reason on their own to avoid this route, it would be a poor way to address the current situation. However, it is not the only possible way to rectify it.

Another potential solution lies in an argument that the state has an interest in the potential life of unborn children as to justify inhibitions to a mother's procurement of an abortion without the consent of the father of the child.⁷⁴ Using that interest as the launching pad, one lawyer argues

⁷¹ Owens, *supra* note 7, at 8-9; McCulley, *supra* note 9, at 5-6.

⁷² Jackson, *supra* note 33, at 87.

⁷³ Owens, *supra* note 7, at 9.

⁷⁴ Jackson, *supra* note 33, at 85.

that the state could assert a presumption in favor of the unborn child's life.⁷⁵ Under this approach, a mother who wanted an abortion would be precluded from procuring one if the father wanted her to birth the child, and a father would be precluded from avoiding fatherhood if the mother wanted to birth the child.⁷⁶ This concept seems to create equality between men's and women's procreative choice rights in that it requires their agreement for them to each avoid parentage and places them each on notice that in the event of a disagreement, the party in favor of parenting the child will prevail, but the approach has flaws.

It fails first because its premise that a state need not have a compelling interest, but must merely show some interest, in order to inhibit a woman's right to procure an abortion pre-viability⁷⁷ is incorrect under the current case law. As previously pointed out, *Planned Parenthood of Southeastern Pennsylvania v. Casey* made clear that the state cannot prohibit abortions before viability, and can only regulate them during that time to make them safe for the mother's health.⁷⁸ Additionally, it seems the Court in *Planned Parent of Central Missouri v. Danforth* already ruled on a similar argument when it said that requiring the consent of a woman's husband for her to get an abortion was impermissible.⁷⁹ Therefore, any statutory scheme to create a barrier to a woman's pursuit of an abortion before viability would fail upon a challenge.

Additionally, even if the Court recognized a state's interest in the potential life of unborn children, this approach does not make sense because in many circumstances, the state would remain unable to protect its own asserted interest. For example, if both the mother and the father wanted to avoid parentage, the mother could still get an abortion, thereby nullifying the state's

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Casey*, 505 U.S. at 846.

⁷⁹ *Danforth*, 428 U.S. at 69.

interest in the life of the child. Even if the standard were intermediate scrutiny, courts may have difficulty under this approach in finding that the state's actions are substantially related to achieving its asserted interest of protecting the lives of unborn children. However, intermediate scrutiny is not the standard and this approach certainly could not endure strict scrutiny.

Clearly, the procreative choice rights of men cannot be reconciled with the abortion rights of women under existing case law. However, "after four decades of the *Roe* decision and innumerable challenges to it at the legislative, executive, and judicial spheres, it is safe to say that in American jurisprudence, there is a strong tradition in preserving the woman's essential right to choose. . . ."⁸⁰ Therefore, if men's rights are ever to be recognized or preserved, the Supreme Court will have to revisit and restructure *Roe v. Wade* and its progeny.

Even by slightly altering the current framework to allow states to invoke interests beyond the life of the fetus *post*-viability as compelling interests to justify interference with a woman's right to an elective abortion, states could work to balance the interests of men and women. For example, a state could modify the approach discussed above involving a presumption in favor of the unborn child's life, invoke the interest of the child's life *pre*-viability as a compelling interest to interfere with a woman's right to have an abortion, and require that women seeking to procure abortions show cause as to why they should not be made to birth their children. Then, in the interest of preserving men's procreative choice rights, men could be given a similar opportunity to show cause as to why they should not be legally obligated to support children they help conceive. Such an approach borrows from the methods already discussed, but would alleviate the flaws associated with each. For example, women could not unilaterally choose to disregard the father's wishes because women would be required to present some amount of evidence that an abortion is

⁸⁰ Owens, *supra* note 7, at 15.

warranted. Likewise, men could not simply shirk their obligations to support their children without presenting evidence that warrants them doing so. Additionally, the state could protect its asserted interests in protecting unborn life by setting the standards of proof necessary for women to meet in order to procure abortions. Finally, women would not be completely barred from getting abortions, but their rights would be limited in a similar fashion as men's rights would be limited. This approach is likely the most practical and realistic method of reconciliation, even though there is another, better, more sensible solution.

However possible it might be for states to reconcile the rights and interests of men and women with regard to procreative choice and abortion, the most sensible solution is obvious: completely overturn *Roe v. Wade* and its progeny and allow states to prohibit medically unnecessary abortions. Because men and women are similarly situated in the decision-making process before they ever engage in sexual activity that might lead to pregnancy, that is the time they are most equal and that is the time they should each be deemed to be responsible for the consequences of their actions thereafter. Women and men do not generally engage in sexual activity without some knowledge of the associated risks of pregnancy.⁸¹ There is no rational reason to give women an advantageous right to shed the consequences of their sexual activity. So far, all of the proposed solutions assume the righteousness of giving women such a right in the first place. However, the best thing to do would be to completely eliminate any post-conception right for either parent to avoid parentage. This is especially so because of the multitude of contraceptive methods available to men and women who do not want to risk a pregnancy resulting from their sexual activities. To say that the physical state of pregnancy itself serves as the basis for giving women the ability to choose whether to birth a child or not is the

⁸¹ Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 915 (2011).

same as saying that the experience of the consequence provides the basis for choosing to not experience the consequence after risking its outcome. Such a statement is illogical, and the best possible solution is to hold both mothers and fathers completely and equally accountable for the children they conceive.