

THE PRICE OF PLEASURE

Shari Motro*

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Love wasn't free, it came with great strings attached. It was free for men but not for women, same as it ever was.

— Joni Mitchell¹

INTRODUCTION

Condoms break. Diaphragms malfunction. Even hormonal contraceptives are not 100 percent effective. More than three million American women become pregnant unintentionally every year,² and the rate of unin-

* Associate Professor of Law, University of Richmond. I am thankful to Kerry Abrams, Susan Appleton, Anita Bernstein, June Carbone, Mary Heen, Jennifer Hendricks, Ann Hodges, Holning Lau, and Carl Tobias for their helpful comments on earlier versions of this Article. I am especially grateful to Corinna Lain, James Gibson, and Robin West for their insights on multiple drafts of this piece and for their extraordinary support. In developing my ideas, I also benefitted from suggestions made at law faculty workshops at the University of Richmond, Seton Hall, and the Virginia Junior Faculty Forum, and at the Emerging Family Law Scholars, Law and Society, and Southeastern Association of Law Schools Annual conferences. For research support and inspiration I am thankful to Brooklyn Law School, the University of Richmond School of Law, and the Virginia Center for the Creative Arts.

¹ JONI MITCHELL: WOMAN OF HEART AND MIND (Eagle Rock 2003) (DVD's extra features).

² GUTTMACHER INST., FACTS ON PUBLICLY FUNDED CONTRACEPTIVE SERVICES IN THE UNITED STATES 1 (2009), available at http://www.guttmacher.org/pubs/fb_contraceptive_serv.pdf.

tended pregnancy is especially high among young unmarried women.³ What is the legal status of unmarried lovers who conceive?

Under current law, a woman who becomes pregnant with a man to whom she is not married is essentially on her own. Most states do require an unwed father to reimburse the mother of his child for certain birth and pregnancy-related medical expenses as part of his child support obligations or in connection with a paternity proceeding. But the law generally disregards the physical, financial, and professional toll pregnancy takes on the woman herself.⁴ And where pregnancy ends in abortion, the man has no obligations whatsoever. The law thereby reinforces a fundamental gender imbalance: pregnancy is a woman's problem.

Thus far, the law's main answer to this imbalance has been to expand women's reproductive choices by ensuring their access to contraception and freedom to terminate an unwanted pregnancy. With reforms on these fronts, some have little sympathy for the accidentally pregnant. Sexual liberation comes with responsibility, the argument goes. A sexually active woman⁵ who does not want babies should use protection. If she fails to prevent pregnancy, and chooses not to abort, she should deal with the consequences. Demanding that men support "irresponsible reproduction"⁶ that they are powerless to prevent once conception occurs amounts to women wanting to have their cake and eat it.

Yet reproductive choice is not the answer, because contraception and abortion alike tend to harm women more than they harm men.⁷ Effective

³ Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAM. PLAN. PERSP. 24, 27 (1998), available at <http://www.guttmacher.org/pubs/journals/3002498.pdf>; Melinda Beck, *The Birth-Control Riddle*, WALL ST. J., Apr. 20, 2010, at D1 ("One out of every two American women aged 15 to 44 has at least one unplanned pregnancy in her lifetime. Among unmarried women in their 20s, seven out of 10 pregnancies are unplanned."); see also Rob Stein, *New Debate on Sex Education as Teen Pregnancies Head Back Up; in First Jump Since 1990, Rate Continues to be Highest for Minorities*, WASH. POST, Jan. 26, 2010, at A4.

⁴ See *infra* Part I.A.2.

⁵ Because the focus of this Article is on pregnancy, "sex" or "sexual relations" generally refers to penile-vaginal penetration. There are, of course, many other types of sex. See Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 BERKELEY J. GENDER L & JUST. 267, 286-87 (2008) ("[Family law's] preoccupation with penile-vaginal penetration—not the usual route to orgasm for women—communicates the irrelevance of female sexual pleasure. . . . Family law thus constructs male orgasmic pleasure as worthy of concern and naturalizes anorgasmic sexual experiences for women.").

⁶ Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 340 (1996) (defining "irresponsible reproduction" to include conception outside of wedlock and abortion).

⁷ Although it falls outside the scope of this Article, it is worth noting that whereas both genders must contend with the risks of contracting a sexually transmitted disease, some studies indicate that women are more vulnerable to infection. See, e.g., Women's Health, STDs & Women: What Causes STDs?, <http://www.womens-health.co.uk/www.std-women.html> (last visited Aug. 28, 2010) ("The reason women are more vulnerable to infection than men is because the surface area which is exposed is larger in women. The vagina serves as a type of reservoir which lengthens the time of contact with infectious fluids. Tiny, micro-injuries, which can absorb these fluids into the blood, are more common in women than men as well. . . . The complications caused by STDs tend to be more severe for women.").

birth control—like hormonal contraception—poses serious risks to women’s health and well-being, as does abortion.⁸ Women’s freedom to choose between taking an unwanted pregnancy to term and terminating it, between the risks of condoms or of hormones, is hardly an unalloyed blessing. Only women bear the consequences on their own flesh.

At its core, the problem with the legal status quo is that it treats all sexual partners who conceive as legal strangers. In reality, though some pregnancies do result from casual encounters, others result from intercourse that happens in the context of a relationship in which the expectation is that the couple will deal with the consequences of pregnancy together. Between the two extremes lie connections in which parties’ expectations are unclear or inconsistent. A legal regime that treats all conceptions as if they result from no-strings-attached sex fails to protect the more vulnerable party and sets up the wrong incentives. No-strings-attached sex isn’t wrong in itself, it’s only the wrong default.

This Article argues that unless sexual partners explicitly agree otherwise, pregnancy should create a unique type of legal relationship. This relational default would come with certain obligations: in limited circumstances, a woman would be expected to communicate the fact of a pregnancy to the man with whom she conceived, and a man would be required to help support her during pregnancy and recovery. Child support obligations should kick in only once a child is born; until and unless this happens, a man’s economic responsibility should be conceptualized as a responsibility towards the woman herself.

The goal of this Article is to start a conversation about an issue that is critically relevant to our lives yet virtually absent from our laws. Commentary on current laws addressing the pregnancy-related obligations of “unwed fathers” is sparse and the scope of these provisions is uncertain. And while theorists have written extensively on rape, reproductive freedom, family leave policies, public funding for abortion, child support, and pregnancy discrimination in the employment context, virtually no one has focused on the legal relationship between unmarried sexual partners who conceive.

A number of scholars have begun to critique the law’s hands-off approach to sexual fraud.⁹ But these scholars do not focus on pregnancy in

⁸ See *infra* Part I.B.

⁹ See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 830–35 (1988) (arguing that the law is not at a point where deception is generally regarded as an impermissible inducement to sex); Jane E. Larson, “*Women Understand So Little, They Call My Good Nature ‘Deceit’*”: *A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 381 (1993) (arguing that the existing adjudicatory system demonstrates an absence of authentic consent required under sexual fraud); Michelle Oberman, *Sex, Lies, and the Duty to Disclose*, 47 ARIZ. L. REV. 871, 887–89 (2005) (“The post-seduction norm of nondisclosure [that enables sexual fraud] represents a degree of complacency with regard to bald-faced lying that is almost unparalleled in the common law governing

particular and they are unconcerned with otherwise consensual sex that involves no fraud or deceit. The work of scholars Linda Hirshman and Jane Larson does, like this Article, address the imbalance at the heart of the default code governing consensual heterosexual sex, but Hirshman and Larson do not focus on conception.¹⁰

Meanwhile, Martha Fineman has argued persuasively that instead of relegating responsibility for dependent care to the private sphere by subsidizing marriage and marriage-like relationships, society should assume collective responsibility for caretakers and their dependents.¹¹ But even if Fineman is right, so far the world in which we live by and large leaves many pregnant women to fend for themselves.¹² Unless and until society steps in more robustly, requiring men to shoulder more of the burden is preferable to the status quo.¹³ That is the focus of this Article.

The precise parameters of the legal status governing sexual partners who conceive should be designed following a robust public discussion that has yet to commence. What I provide here is a preliminary sketch that I hope will be useful in beginning that discussion. I aim to reconceptualize a

tort and contract.”); Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 893 (1996) (exploring the history of seduction under the law, and treatment of sexual fraud under the Field Codes).

¹⁰ Indeed, though Hirshman and Larson recognize and do much to expose the injustice of the current sexual default vis-à-vis all women, their proposal would make consensual sexual partners responsible towards each other only if they are engaged in a long-term relationship that involves some form of economic reliance or sacrifice. See LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 281 (1998) (introducing the authors’ proposal for a “statutory concubinage contract”).

¹¹ See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 230–33 (1995). The law should, she argues, support the vertical “Mother/Child dyad” rather than horizontal sexual affiliations (like husbands and wives). See *id.*

¹² See Rachel Benson Gold, *Recession Taking Its Toll: Family Planning Safety Net Stretched Thin as Service Demand Increases*, 13 GUTTMACHER POL’Y REV. 8, 11–12 (2010) (examining the recession’s harsh impact on women of reproductive ages and acknowledging that many women, even before the recession, were uninsured without sufficient public support to provide sufficient family planning support); Christie Campbell-Grossman et al., *Community Leaders’ Perceptions of Single, Low-Income Mothers’ Needs and Concerns for Social Support*, 22 J. COMMUNITY HEALTH NURSING 241, 254 (2005) (noting that even where support is available, it is “difficult to navigate, often unfriendly, culturally insensitive, and ineffective in meeting the needs of single mothers at times”). Indeed, even California, a state once touted for its “landmark healthcare programs,” Shane Goldmacher & Evan Halper, *Schwarzenegger’s Revised Budget Plan Is Expected to Eliminate Health Programs*, L.A. Times, May 13, 2010, <http://articles.latimes.com/2010/may/13/local/la-me-state-budget-20100513>, has proposed limiting the state’s Medicaid program for pregnant women by reducing eligibility requirements from 200 percent to 133 percent of the poverty level. Tom Eley, *U.S. States Slash Medicaid*, GLOBALRESEARCH.CA, Feb. 22, 2010, <http://www.globalresearch.ca/index.php?context=va&aid=17743>. But see California Access for Infants and Mothers Program, <http://www.aim.ca.gov> (last visited Aug. 28, 2010). To address the unmet needs of pregnant women, Democrats for Life have proposed a bill, the Pregnant Women Support Act, H.R. 6145, 109th Cong. (2006), aimed at supporting “women facing unplanned pregnancies, new parents and their children by providing comprehensive measures for health care needs, supportive services and helpful prenatal information and postnatal services.”

¹³ I explore Fineman’s theory in more detail in Shari Motro, *Preglimony*, 63 STAN. L. REV. (forthcoming 2011).

substantive issue; I do not address the ideal administrative mechanism for implementing the new paradigm I propose.¹⁴

Part I lays out the problem. A fundamental gender imbalance hovers in the background of nonprocreative heterosexual sex: Women get pregnant, men do not. Women's alternatives—celibacy, chemically-induced sterility, or other, less effective contraceptive methods with abortion as a last resort—do not correct the imbalance. The current legal default is both unfair and inefficient. It imposes a rule that contradicts many people's expectations, it exacerbates vulnerabilities, and it gives men who assume their partner will terminate an unwanted pregnancy no external incentive to prevent conception.

Part II builds on the work of Robin West to identify the core problem underlying the current legal treatment of sexual partners who conceive. According to West, modern American jurisprudence views human beings as essentially separate individuals whose primary value is autonomy, when in fact human beings are essentially connected as well as separate. The law privileges autonomy and privacy but human happiness also demands relationship and mutual responsibility. Viewing the legal status quo through this prism reveals its essential flaw: the law treats lovers as strangers.

After introducing this framework, Part II illustrates how the same individualistic framework that leaves a woman to deal with an unwanted pregnancy alone also gives her almost complete license to disregard a man's interest in the fate of his offspring. A woman has no obligation (outside the limited context of adoption) to notify the man with whom she conceived of conception, abortion, or the birth of his child. Pregnancy thus makes both men *and* women vulnerable—radically vulnerable—in radically different ways.

Part II concludes with a comparison between codes adopted by some practitioners of controlled sadomasochism (S/M) and the default law governing mainstream heterosexual relations. Like mainstream sex, S/M encounters involve unequal risk. But S/M codes explicitly recognize the risks and some practitioners formally agree on a no-liability rule governing unavoidable accidents. The current default imposes a similar no-liability rule on all partners who conceive, only *without* the explicit consent that is central to many S/M practices.

Finally, Part III proposes a new, relationship-centered paradigm for the legal treatment of sexual partners who conceive. Unless a pregnancy results from sexual fraud or coercion, or the parties agree to a no-strings-attached rule, pregnancy should create a legally cognizable relationship status. This status would require a minimal duty of communication and material support between sexual partners who conceive regardless of whether the pregnancy ends in birth, abortion, or miscarriage.

¹⁴ In my next piece I will address the practical aspects of this project in more detail by proposing a first step towards comprehensive preglimony recognition through tax reform. *See id.*

I. THE MYTH OF FREE LOVE

The typical American woman wants two children.¹⁵ This means that she will spend “about five years pregnant, postpartum or trying to become pregnant, and three decades—more than three-quarters of her reproductive life—trying to avoid pregnancy.”¹⁶ But no birth control method is fool-proof. Half of pregnancies are unintended, and half of these end in abortion.¹⁷ How does pregnancy affect a woman’s life and what are her sexual partner’s responsibilities towards her? As we shall see, the conceptual paradigm undergirding the law’s approach to pregnancy vastly underestimates its effects on women’s lives.

A. *The Mismatch Between Life and Law*

1. *Pregnancy’s Effects on Women’s Lives.*—“[I]n sorrow thou shalt bring forth children.”¹⁸ Pregnancy as punishment—this is our story of origin. At the opposite extreme, modern culture tends to sentimentalize “expectant motherhood”—airbrushing away the pain and danger that are often bundled with its joys. None of these descriptions does justice to the complexities of gestation and childbirth, which vary dramatically from woman to woman. For most, pregnancy is neither an illness nor is it no big deal¹⁹ (although some working women still feel pressured to pretend it is just that).

Pregnancy is often a profoundly transformative experience, an earthquake in a woman’s life. And women report feeling many things at once during labor and delivery—empowered and terrified, ecstatic and exhausted, uplifted and radically vulnerable.²⁰ For many mothers, the joys of childbearing unquestionably outweigh its challenges. Indeed, some women report experiencing a “hormone high” during pregnancy and delivery, describing childbirth itself as orgasmic.²¹ But all pregnancies, even wanted

¹⁵ GUTTMACHER INST., *supra* note 2, at 1.

¹⁶ *Id.*

¹⁷ *Id.* at 1, 4 (“About half of all pregnancies in the United States each year—more than three million—are unintended. By age 45, more than half of all American women will have experienced an unintended pregnancy, and about one-third will have had an abortion.”).

¹⁸ *Genesis* 3:16 (King James).

¹⁹ See Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 342 (2010) (suggesting that “the idea of a health exception [to abortion regulations], however broad or narrow, incorporates an implicit distinction between normal pregnancy and the complications of pregnancy,” and that the “distinction renders the inherent risks and physical burdens of all pregnancies invisible”).

²⁰ See CHRISTIANE NORTHRUP, *WOMEN’S BODIES, WOMEN’S WISDOM* 477–94 (1998); THE BUSINESS OF BEING BORN (Barranca Productions 2008); Welcome to Orgasmic Birth, <http://www.orgasmicbirth.com> (last visited Aug. 28, 2010).

²¹ For resources on the pleasure of birth, see Welcome to Orgasmic Birth, <http://www.orgasmicbirth.com> (last visited Aug. 28, 2010).

and overall enriching pregnancies, affect women's health, freedom, and professional capabilities in ways that temporarily diminish their ability to take care of themselves. As Sylvia Law put it,

The power to create people is awesome. Men are profoundly disadvantaged by the reality that only women can produce a human being and experience the growth of a child in pregnancy. Pregnancy and childbirth are also burdensome to health, mobility, independence, and sometimes to life itself, and women are profoundly disadvantaged in that they alone bear these burdens.²²

As we shall see, the law recognizes only a fraction of these burdens.

When a pregnancy progresses normally and is taken to full term without complications, its physical effects are relatively well known, though euphemisms used to describe them (“discomforts,” “morning sickness,” “the baby blues”) are part of what some pregnant women see as the great conspiracy of silence around pregnancy.²³ Morning sickness is sudden, uncontrollable nausea and vomiting every day, sometimes *all* day, for months.²⁴ Other routine “aches and pains” include back and abdominal pain, chronic fatigue, anemia, insomnia, swollen feet, breast tenderness, leg cramps, shortness of breath, mood swings, headaches, dizziness, bleeding and swollen gums, heartburn, vulvar burning, urinary tract infections, constipation, and hemorrhoids.²⁵ When complications arise, pregnancy can be debilitat-

²² Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955–56 (1984).

²³ See, e.g., Lucy J. Puryear, *Understanding Your Moods When You're Expecting—The Conspiracy of Silence*, STORKNET, June 2008, <http://www.storknet.com/cubbies/pregnancy/moods-silence.htm>. Some courts have reinforced this trivializing view of pregnancy's symptoms. See, e.g., *Dormeyer v. Comerica Bank-Ill.*, 223 F.3d 579, 583 (7th Cir. 2000) (finding that employer did not violate the Pregnancy Discrimination Act even though the plaintiff's absenteeism was due to pregnancy illness, because the plaintiff was fired based on her absenteeism, not pregnancy); *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (finding that an employer did not violate the Pregnancy Discrimination Act by dismissing a pregnant employee who was suffering from severe and incapacitating “morning sickness” for her “chronic tardiness” the day before her paid maternity leave was set to begin); see also Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193 (1994) (discussing the *Troupe* case and Judge Posner's flippant view of pregnancy).

²⁴ Susan Renee Wilcox, *Pregnancy, Hyperemesis Gravidarum*, EMEDICINE, Jan. 13, 2010, <http://emedicine.medscape.com/article/796564-overview>.

²⁵ See generally WebMD, *Health & Pregnancy Guide, Common Pregnancy Pains and Their Causes*, <http://www.webmd.com/baby/guide/pregnancy-coping-with-discomforts> (last visited Aug. 28, 2010); Merck Manual of Medical Information, *Risk Factors that Develop During Pregnancy*, <http://www.merck.com/mmhe/print/sec22/ch258/ch258c.html> (last visited Aug. 28, 2010); see also Christiane Northrup, *A Woman's Nation: Reclaim Your Right to Birth Right*, HUFFINGTON POST, Oct. 16, 2009, http://www.huffingtonpost.com/christiane-northrup/c-section-or-natural-birt_b_323422.html (“According to the Centers for Disease Control (CDC), the number of maternal deaths in the United States is probably up to three times as high as the number reported in our national statistics because not all maternal deaths are classified as pregnancy-related on the death certificate. According to midwife Ina May Gaskin, who launched the Safe Motherhood Quilt Project to bring this issue to public attention, the maternal death rate has actually doubled in the UNITED STATES in the last 25 years. It was 7.5 per

ing, even life-threatening. Pregnancy complications include gestational diabetes, heart disease, hemorrhaging, jaundice, severe nausea and vomiting leading to weight loss and dehydration, itching all over the body, and blood pressure so high it causes seizures.²⁶

And every year hundreds of thousands of women worldwide die in childbirth.²⁷ The risks of death remain significant enough that surrogate mother contracts typically provide the woman carrying the fetus with life insurance.²⁸ But even “easy” births are rarely pain-free, including births in which pain-relief medication is administered—which itself comes with a host of risks.²⁹ Common experiences during vaginal labor and delivery (the least risky birth method) include abdominal cramping, hot and cold flashes, nausea, vomiting, indigestion, diarrhea, vaginal tears, and back, leg, perineal, and rectal pain. In many cases, the woman’s vulva, perineum, or both are surgically cut to prevent delivery lacerations.³⁰ This routine procedure, called an episiotomy, may interfere with a woman’s ability to enjoy sex after childbirth.³¹

More complicated births may require a cesarean delivery—major surgery that involves opening the woman’s abdomen and sometimes tempora-

100,000 live births in 1982. In 1999, that rate had risen to 13.2 deaths per 100,000 births. By 2005, it was up to 15.1 per 100,000 live births!” (footnotes omitted).

²⁶ See WebMD, Health & Pregnancy Guide, *supra* note 25; see also EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK 69–71 (1996) (describing the complicated physiological changes and physical exchanges between fetus and woman during even healthy pregnancies).

²⁷ See Columbia University, Mailman School of Public Health, Averting Maternal Death and Disability, <http://www.amddprogram.org> (last visited Aug. 28, 2010); UNICEF, THE PROGRESS OF NATIONS 48 (1997), available at <http://www.unicef.org/pon97>; see also Bharati Sadasivam, *The Rights Framework in Reproductive Health Advocacy—A Reappraisal*, 8 HASTINGS WOMEN’S L.J. 313, 343 (1997) (“A staggering 585,000 women worldwide die every year due to complications associated with pregnancy and childbirth.”). Amnesty International reports that “maternal mortality ratios have increased from 6.6 deaths per 100,000 live births in 1987 to 13.3 deaths per 100,000 live births in 2006.” AMNESTY INT’L, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA, SUMMARY 3 (2010), <http://www.amnestyusa.org/dignity/pdf/DeadlyDeliverySummary.pdf>. Maternal deaths are only the tip of the iceberg: “During 2004 and 2005, more than 68,000 women nearly died in childbirth in the USA. Each year, 1.7 million women suffer a complication that has an adverse effect on their health.” *Id.*

²⁸ See *infra* note 186 and accompanying text.

²⁹ See WebMD, Health & Pregnancy Center, Pregnancy and Signs of Labor, <http://www.webmd.com/baby/labor-signs> (last visited Aug. 28, 2010) (“[L]abor contractions usually cause discomfort or a dull ache in your back and lower abdomen, along with pressure in the pelvis. . . . Some women describe contractions as strong menstrual cramps.”); Lewis E. Mehl-Madrona & Morgane Mehl-Madrona, The Medical Risks of Epidural Anesthesia (Epidurals), <http://www.healing-arts.org/mehl-madrona/mmeidural.htm> (last visited Aug. 28, 2010).

³⁰ WebMD, Episiotomy and Perineal Tears—Overview, <http://www.webmd.com/baby/tc/episiotomy-and-perineal-tears-overview> (last visited Aug. 28, 2010).

³¹ The episiotomy “can impair sexual pleasure by irreversibly injuring clitoral muscles, replacing erectile tissue in the vulva with scar tissue, interfering with the capacity to produce natural lubrication, and making future intercourse painful.” Appleton, *supra* note 5, at 324. Appleton notes that despite these risks and the questionable efficacy of the episiotomy in aiding delivery, it remains “one of the most common medical procedures in the United States.” *Id.* at 323–24.

rily removing her intestines before making an incision into her uterus.³² Increasingly, C-sections are also preformed when they are not medically cessary; today, one-third of births in the United States are by cesarean.³³ The risks of the operation to the woman include bladder or bowel injury; major infections of the uterus, kidneys, or lungs; opening up of the incision scar; blood clots; and uterine damage rendering future childbirth dangerous.³⁴ The risk of maternal death is five to seven times greater when a woman gives birth by cesarean rather than through normal vaginal birth.³⁵

After childbirth, a woman may need days, weeks, or months to recover.³⁶ She may also suffer from long-term medical problems like diabetes, urinary or fecal incontinence,³⁷ and uterine, bladder, or kidney infections.³⁸ On the psychological side, approximately eighty percent of women recovering from childbirth experience mood dips (the “baby blues”) for up to two weeks following the delivery.³⁹ Hormonal changes during and following pregnancy can also produce more severe psychological symptoms which are now recognized as postpartum depression—a distinct clinical condition that manifests itself in prolonged sadness, panic attacks, paranoia, halluci-

³² D. Ashley Hill, *Cesarean Section*, CHILDBIRTHSOLUTIONS, 2000, <http://www.childbirthsolutions.com/articles/birth/cesarean/index.php>; WebMD, Health & Pregnancy, *Cesarean Section—Topic Overview*, <http://www.webmd.com/baby/tc/cesarean-section-topic-overview?page=2> (last visited Aug. 28, 2010).

³³ Northrup, *supra* note 25.

³⁴ eMedicineHealth, *Cesarean Childbirth*, http://www.emedicinehealth.com/cesarean_childbirth/article_em.htm (last visited Aug. 28, 2010).

³⁵ Northrup, *supra* note 25.

³⁶ *Compare* WebMD, Health & Pregnancy, *Cesarean Section—Topic Overview*, *supra* note 32 (“[I]t may take 4 weeks or longer to fully recover [after a C-section].”), *with* Hill, *supra* note 32 (“Many women recover [from a C-section] surprisingly quickly and leave [the hospital] after a few days.”). On recovery of the perineal area in particular, see Frederick R. Jelovsek, *Vaginal Conditions After Delivery*, WOMEN’S HEALTH RESOURCE, <http://www.wdxcyber.com/npreg14.htm> (last visited Aug. 28, 2010) (“One study that looked at how long, on the average, it took women to recover various functions after normal vaginal delivery found that the median time (time for 50% of subjects) ‘for perineal comfort in general (including walking and sitting) was 1 month (range, 0–6 months); 20% of women took more than 2 months to achieve general perineal comfort. For comfort during sexual intercourse, the median time was 3 months (range, 1 to more than 12 months); 20% of women took longer than 6 months to achieve comfort during sexual intercourse.’”).

³⁷ See Matthew D. Oldfield, *Long Term Prognosis of Women with Gestational Diabetes in a Multiethnic Population*, 83 POSTGRAD. MED. J. 426 (2007); Miranda Hitti, *Anal Incontinence Lingers After Vaginal Birth: More Common with Anal Sphincter Tear, Additional Births, and Increased Age*, WEBMD HEALTH NEWS, Dec. 10, 2004, <http://www.webmd.com/baby/news/20041210/anal-incontinence-lingers-after-vaginal-birth>.

³⁸ WebMD, Health & Pregnancy, *Postpartum Problems*, <http://www.webmd.com/baby/guide/postpartum-problems> (last visited Aug. 28, 2010).

³⁹ University of Michigan Depression Center, *Women and Depression, Postpartum Depression*, <http://www.depressioncenter.org/understanding/postpartum.asp> (last visited Aug. 28, 2010).

nations, eating disorders, and, in the most tragic cases, suicide or infanticide.⁴⁰

Pregnancy alters a woman's appearance as well. The rapid weight gain associated with pregnancy often leaves stretch marks and increases the risk of developing obesity.⁴¹ Hormonal changes can produce acne, dark blotches on the skin, leaking breasts, rashes, brittle nails, thinning hair, and hair growth in unusual areas.⁴² Pregnancy may also leave women with saggy breasts, varicose veins, and abdominal and vaginal scars.⁴³

A pregnant woman also faces restrictions on her freedom. These range from the relatively benign, such as dietary restrictions, exclusion from certain sports,⁴⁴ and the inability to travel, to the life-altering, such as prescribed bed rest lasting several months.⁴⁵ In addition, the "fetal rights" movement's legal victories have undermined pregnant women's medical decisionmaking freedom during pregnancy and delivery.⁴⁶

⁴⁰ *Id.*; Kevin Caruso, *Postpartum Depression and Suicide*, SUICIDE.ORG, <http://www.suicide.org/postpartum-depression-and-suicide.html> (last visited Aug. 28, 2010); Medline Plus, *Postpartum Depression*, <http://www.nlm.nih.gov/medlineplus/postpartumdepression.html> (last visited Aug. 28, 2010).

⁴¹ Sally Ann Lederman, *Pregnancy Weight Gain and Postpartum Loss: Avoiding Obesity While Optimizing the Growth and Development of the Fetus*, 56 J. AM. MED. WOMEN'S ASS'N 53, 53 (2001).

⁴² Univ. of Md. Med. Ctr., *Pregnancy Guide*, <http://www.umm.edu/pregnancy/000214.htm> (last visited Aug. 28, 2010).

⁴³ *See id.*; Andrea Thompson, *Breast-Feeding Isn't Such a Drag on Breasts*, MSNBC.COM, Nov. 2, 2007, <http://www.msnbc.msn.com/id/21599854>.

⁴⁴ *See* CATHARINE A. MACKINNON, *SEX EQUALITY* 395 (2d ed. 2007).

⁴⁵ Novelist Rachel Cusk's unsentimental account of her own first pregnancy paints the most evocative picture I have seen of the existential dread that can come along with pregnancy, even when the pregnancy is wanted and the woman has a full-fledged partner. She writes:

In the mornings, when I wake up, I observe the rising mountain of my stomach and have to fight surges of intense claustrophobia. With many weeks of pregnancy remaining I am marooned as far from myself as I will ever be. It is not just abstinence, stripped of the pleasure of the possibility of giving in to temptation, that grates on me; nor even the extremity of my physical transformation, nor the strange pains that accompany it, nor the surreally floundering being that writhes like a live fish in my stomach, nor the disempowerment I feel, the vulnerability to others' eyes and assumptions. . . . It is the population of my privacy, as if the door to my room were wide open and strangers were in there, riffling about, that I find hard to endure. It is as if I have been arrested or called to account, summoned by the tax inspector, isolated and searched. I am living not freely but in some curious tith. I have surrendered my solitude and become, for these nine months, a bridge, a link, a vehicle.

RACHEL CUSK, *A LIFE'S WORK* 33–34 (2001).

⁴⁶ CYNTHIA R. DANIELS, *AT WOMEN'S EXPENSE: STATE POWER AND THE POLITICS OF FETAL RIGHTS* (1993); RACHEL ROTH, *MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS* (2000); April L. Cherry, *Roe's Legacy: The Nonconsensual Medical Treatment of Pregnant Women and Implications for Female Citizenship*, 6 U. PA. J. CONST. L. 723, 732–33 (2004); Martha A. Field, *Controlling the Woman to Protect the Fetus*, 17 L. MED. & HEALTH CARE 114 (1989); Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 612–13 (1986); Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CAL L. REV. 1951, 1986 (1986); Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 COLUM. J. GENDER & L. 85, 103–08 (1997); *see also In re A.C.*, 573 A.2d 1235, 1253 (D.C. 1990) (vacating a lower court's judgment ordering a cesarean for a woman dying of cancer posthumously).

Finally, pregnancy transforms a woman's public identity. For some women, this transformation is exhilarating. For others, especially unmarried women whose pregnancy was unintended, it may bring shame. Pregnancy "is a sign of female sexuality," writes Catharine MacKinnon, "a brand of having had intercourse."⁴⁷ The derogatory term "knocked up" captures the many indignities to which unmarried pregnant women are subjected. In extreme cases, the change in public identity exposes women to more than just humiliation; pregnancy increases a woman's risk of being the target of violence.⁴⁸ One survey, for example, finds that pregnant women are sixty percent more likely to be beaten than women who are not pregnant.⁴⁹ Professor Reva Siegel captures some of the effects of pregnancy on a woman's personhood:

A woman may find that pregnancy comes to embody her social identity to others, who may treat her with love and respect or, alternatively, abuse her as a burden, scorn her as unwed, or judge her as unfit for employment. . . . Pregnancy, and the period of lactation that follows it, are not merely burdensome, disruptive, or even consuming forms of work. They amplify the gendered judgments and constraints to which women are already subject, exposing them to material and dignitary injuries having nothing to do with the physiology of

⁴⁷ MACKINNON, *SEX EQUALITY*, *supra* note 44, at 395.

⁴⁸ *See infra* notes 125–129 and accompanying text; *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 889 (1992) ("Mere notification of pregnancy is frequently a flashpoint for battering and violence within the family. The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy."); MACKINNON, *SEX EQUALITY*, *supra* note 44, at 395 ("Pregnancy is a distinctive site of physical and sexual abuse. Domestic battering increases during pregnancy. Widely available pornography that makes pregnancy into a sexual fetish targets pregnant women for sexual aggression.")

⁴⁹ *See* PAN AM. HEALTH ORG., *DOMESTIC VIOLENCE DURING PREGNANCY*, <http://www.paho.org/English/AD/GE/VAWPregnancy.pdf> (last visited Aug. 28, 2010). Pregnancy might also be the result of violence. Women in violent relationships are more likely to experience an unintended pregnancy because their partners are more likely to refuse to use condoms or to prevent them from using birth control pills—flushing them down the toilet or physically abusing the woman for using the pill. *See* HIRSHMAN & LARSON, *supra* note 10, at 274 (citing a study that found 29% of teenage mothers reported having had sexual intercourse as a result of physical force); *see also* M. Jocelyn Elders & Alexa D. Albert, *Adolescent Pregnancy and Sexual Abuse*, 280 *JAMA* 648, 648–49 nn.4–7 (1998) (noting that "sexual abuse is a common antecedent of adolescent pregnancy, with up to 66% of pregnant teens reporting histories of abuse"); Mary Ellsberg & Barbara Shane, *Violence Against Women: Effects on Reproductive Health*, 20 *OUTLOOK* 1, 3 (2002) ("Women who have been sexually abused are much more likely than non-abused women to use family planning clandestinely, to have had their partner stop them from using family planning, and to have a partner refuse to use a condom to prevent disease."); Gina Wingood & Ralph DiClemente, *The Effects of an Abusive Primary Partner on Condom Use and Sexual Negotiation Practices of African American Women*, 87 *AM. J. PUB. HEALTH* 1016 (1997); *DOMESTIC VIOLENCE AND BIRTH CONTROL SABOTAGE: A REPORT FROM THE TEEN PARENT PROJECT*, CENTER FOR IMPACT RESEARCH (Feb. 2000) (reporting the connections between teen pregnancy, domestic violence, and birth control sabotage).

reproduction, and entangling them in relationships that profoundly define their identity and life prospects.⁵⁰

All of these effects—from the routine to the exceptional—mean that pregnancy tends to interfere with a woman’s ability to provide for herself, if only temporarily.⁵¹ Unpredictable bouts of nausea and vomiting, frequent urination, memory loss, and difficulties concentrating affect the most resilient, dedicated workers.⁵² Self-employed women and those working on commission absorb the entire costs of the decline in their productivity. Pregnant employees may be in a better position, but not necessarily. Some employers accommodate their pregnant workers, others do not, and the Pregnancy Discrimination Act provides only limited protections.⁵³ Discrimination against pregnant women also is prohibited generally under Title VII as a form of sex discrimination,⁵⁴ but pregnant women continue to face exclusionary hiring practices,⁵⁵ pay decreases, demotions, and firings.⁵⁶ Every

⁵⁰ Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 374–75 (1992).

⁵¹ For a discussion of pregnancy and work, see Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994).

⁵² See Saeed Ahmed, *Pregnancy Does Cause Memory Loss, Study Says*, CNNHEALTH.COM, Feb. 5, 2008, <http://www.cnn.com/2008/HEALTH/conditions/02/05/pregnancy.memory/index.html>; Univ. of Maryland Med. Ctr., *supra* note 42.

⁵³ For example, the Act covers only businesses with fifteen or more employees, see EEOC, *Facts About Pregnancy Discrimination*, <http://www.eeoc.gov/facts/fs-preg.html> (last visited Aug. 28, 2010), and even where it does apply, a plaintiff’s chances of success in litigation over its protections are slim. A plaintiff bringing a discrimination claim bears the burden of proving a causal link between her pregnancy and the adverse treatment she received. She must also show that the adverse treatment resulted from a policy adopted in order to disadvantage her rather than in spite of its disadvantage to her. This renders many cases difficult to litigate. See Joanna Grossman, *A Marked Increase in Pregnancy Discrimination Claims and Other Key Developments Illustrate the Continuing Struggle of Pregnant Workers—Including Pregnant Attorneys: Part Two in a Two-Part Series of Columns*, FINDLAW, Apr. 15, 2008, <http://writ.news.findlaw.com/grossman/20080415.html>.

⁵⁴ 42 U.S.C. § 2000e(k) (2006).

⁵⁵ See Jennifer Cunningham & Therese Macan, *Effects of Applicant Pregnancy on Hiring Decisions and Interview Ratings*, 57 SEX ROLES 497, 507 (2007) (providing empirical data showing that even where potential candidates offered “identical interview performances, raters [gave] less favorable hiring ratings to an applicant who [was] visibly pregnant”); see also *id.* at 497 (“[W]ith regard to pregnancy discrimination during the hiring process, several major companies have settled hiring discrimination charges [filed with the EEOC,] including Wal-Mart and Dillard’s Department Store.”); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 575 & n.37 (2010) (noting the escalation of pregnancy discrimination charges filed with the Equal Employment Opportunity Commission).

⁵⁶ See, e.g., *Rafeh v. Univ. Research Co.*, 114 F. Supp. 2d 396, 399–400 (D. Md. 2000) (granting an employer’s motion for summary judgment upon a finding that demotion of a pregnant employee was not discriminatory when based on her unsatisfactory performance during pregnancy); *Wellborn v. Spurlink*, 873 A.2d 884, 891 (R.I. 2005) (holding that a pregnant employee’s demotion to a “fill-in” position following her pregnancy amounted to discriminatory treatment); see also Lesley Alderman, *When the Stork Carries a Pink Slip*, N.Y. TIMES, Mar. 27, 2009, at B6 (noting the suspicion that in laying off new or expectant mothers, some employers are taking advantage of the “laxity” of Title VII by using the “dismal economy” as a subtext “to tacitly discriminate” against pregnant women).

delivery also entails a recovery period, and few employers provide paid maternity leave.⁵⁷

In sum, the consequences of pregnancy go far beyond the monetary charges of visits to the obstetrician/gynecologist and of the delivery room. Whether conception occurs in the context of a loving partnership or a casual encounter, whether it is intentional or accidental, whether the woman is rich or poor, young or old, healthy or sick—pregnancy is hardly ever a minor undertaking. Pregnancy changes everything from a woman’s pulse to the chemicals that influence her thoughts and feelings. It can present her with unparalleled opportunities for personal growth, healing, and joy and it can jeopardize her independence for years to come.

2. *The Current Law of Conception.*—Under the common law, men had no legal obligations towards the women with whom they conceived out of wedlock.⁵⁸ Today most states require unwed fathers to participate in at least a portion of the “reasonable expenses” of pregnancy.⁵⁹ Most cases dealing with the scope of these obligations focus on prenatal and birthing medical expenses.⁶⁰ But what about other costs? Should “reasonable ex-

⁵⁷ The Pregnancy Discrimination Act requires that employers hold open a job for a pregnancy-related absence the same length of time that jobs are held open for other employees on sick or disability leave, but it does not mandate paid maternity leave. 42 U.S.C. § 2000e(k). Recent U.S. Department of Labor data show that just eight percent of private sector employers nationwide provide paid family leave to care for newborns. INST. FOR WOMEN’S POL’Y RESEARCH, MATERNITY LEAVE IN THE UNITED STATES 3 (2007), available at www.iwpr.org/pdf/parentalleaveA131.pdf.

⁵⁸ See, e.g., *Jelen v. Price*, 458 N.E. 2d 1267, 1270 (Ohio App. 1983) (acknowledging that duties and financial responsibilities imposed by state paternity statutes on fathers of illegitimate children were “in derogation of the common law and must [therefore] be strictly construed” (citation omitted)); *People ex rel. Lawton v. Snell*, 111 N.E. 50, 51 (N.Y. 1916); *In re Cirillo’s Estate*, 114 N.Y.S.2d 799, 801 (N.Y. Sup. Ct. 1952).

⁵⁹ See, e.g., CAL. FAM. CODE § 7637 (West 2009) (“The judgment or order may direct the father to pay the reasonable expenses of the mother’s pregnancy and confinement.”); R.I. GEN. LAWS § 15-8-1 (2008) (“The father of a child which is or may be born out of lawful wedlock is liable to the same extent as the father of a child born in lawful wedlock . . . for the reasonable expense of the mother’s pregnancy and confinement.”); VA. CODE ANN. § 20-49.8(A) (2009) (“A judgment or order establishing parentage . . . may direct either party to pay the reasonable and necessary unpaid expenses of the mother’s pregnancy and delivery or equitably apportion the unpaid expenses between the parties.”); *State ex rel. Reitenour*, 807 A.2d 1259, 1262 (N.H. 2002) (relying on N.H. REV. STAT. § 168-A:1 in finding that “[o]nce paternity has been established, the father of a child born out of wedlock is liable for the ‘reasonable expense of the mother’s pregnancy and confinement’”).

⁶⁰ See, e.g., *Coxwell v. Matthews*, 435 S.E.2d 33, 33–34 (Ga. 1993) (holding that a claim for \$15,459 in pregnancy and birth-related medical expenses may be made in an action to determine the paternity of a child and affirming the trial court’s order that the father reimburse the mother for the entire amount); *Sisneroz v. Polanco*, 975 P.2d 392, 398–99 (N.M. Ct. App. 1999) (holding that the mother of a child born out of wedlock had standing to seek reimbursement for pregnancy and birthing expenses while recognizing the trial court’s discretion to grant or deny pregnancy and birthing costs); *State ex rel. Dep’t of Health and Human Res. v. Carpenter*, 564 S.E.2d 173, 176 (W. Va. 2002) (requiring a birth father to reimburse the Department of Health and Human Resources for \$4,879 in birth and medical expenses paid on behalf of the mother); *Kathy L.B. v. Patrick J.B.*, 371 S.E.2d 583, 587 (W. Va. 1988) (requiring a child’s biological father to reimburse the mother for birth expenses); see also MASS. ANN.

penses” include lost wages?⁶¹ Forfeited tuition payments? What about childbirth classes?⁶² Maternity clothes⁶³—which can run to hundreds of dollars for a professional woman? A breast pump?

Judicial commentary on the scope of unwed fathers’ pregnancy-related obligations is sparse, scholarship on the topic is virtually nonexistent, and many state courts have been silent on the issue. What is clear is that almost all references to the question focus on expenses that directly benefit the future child. This is because states generally frame the obligations as an element of a man’s child support obligations⁶⁴ or as part of a parentage order,⁶⁵

LAWS ch. 209C, § 9 (LexisNexis 2000 & Supp. 2010) (“An order may be entered requiring a parent chargeable with support to reimburse the mother . . . for medical expenses attributable to the child or associated with childbirth or resulting from the pregnancy.”); N.D. CENT. CODE § 14-20-48 (2009) (adopting language from Section 621(d) of the Uniform Parentage Act); OKLA. STAT. ANN. tit. 10, § 7700-621 (West 2009) (same); TEX. FAM. CODE ANN. § 160.621 (Vernon 2008) (same); TEX. FAM. CODE ANN. § 160.636(g) (Vernon 2008) (“On a finding of parentage, the court may . . . on a proper showing, order a party to pay an equitable portion of all of the prenatal and postnatal health care expenses of the mother and the child.”); UTAH CODE ANN. § 78B-15-613 (2008) (adopting language from Section 621(d) of the Uniform Parentage Act); WASH. REV. CODE ANN. § 26.26.570 (West 2005) (same); WYO. STAT. ANN. § 14-2-813 (2009) (same); UNIF. PARENTAGE ACT § 621(d) (amended 2002) (“Copies of bills for genetic testing and for prenatal and postnatal health care for the mother and child which are furnished to the adverse party not less than 10 days before the date of a hearing are admissible to establish . . . that the charges were reasonable, necessary, and customary.”), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf>.

⁶¹ Many jurisdictions have been silent on the issue, but Minnesota, Montana, and Ohio—whose statutes are modeled on the Uniform Parentage Act—do not include lost wages as part of the reasonable expenses associated with the birth. See *Bunge v. Zachman*, 578 N.W.2d 387, 389 (Minn. Ct. App. 1998); *In re Paternity of W.L.*, 855 P.2d 521, 523–24 (Mont. 1993); *Jelen*, 458 N.E.2d at 1270. Lost wages are also not included in reasonable expenses of pregnancy in Arkansas. See *Taylor v. Finck*, 211 S.W.3d 532, 537 (Ark. 2005).

⁶² See *In re Baby Girl D.*, 517 A.2d 925, 929 (Pa. 1986) (construing the “reasonable lying-in expenses” language to mean that Lamaze classes, prenatal care, and sonograms are not chargeable to the adopting parents to reimburse for expenses on behalf of the natural mother). The court in *Taylor* relied on this holding in denying a birth mother reimbursement for such expenses from the birth father. 211 S.W.3d at 537.

⁶³ See *Taylor*, 211 S.W.3d at 537 (holding that lying-in expenses “normally would not include items such as maternity clothes, lost wages, or counseling”).

⁶⁴ See 750 ILL. COMP. STAT. ANN. 45/14 (West 2009); IOWA CODE ANN. § 600B.1 (West 2001); KY. REV. STAT. ANN. § 406.011 (West 1999); ME. REV. STAT. ANN. tit. 19-A, § 1552 (1998 & Supp. 2009); MASS. ANN. LAWS ch. 209C, § 9 (LexisNexis 2000 & Supp. 2010); MICH. COMP. LAWS ANN. § 722.712 (West 2002 & Supp. 2010); MISS. CODE ANN. § 93-9-7 (2004); NEB. REV. STAT. ANN. § 43-1407 (LexisNexis 2008); N.J. STAT. ANN. § 9:17-45 (West 2002); N.C. GEN. STAT. ANN. § 49-15 (West 2009); OR. REV. STAT. ANN. § 109.155 (West 2009); R.I. GEN. LAWS § 15-8-1 (2003); UTAH CODE ANN. § 78B-15-305 (2008); W. VA. CODE ANN. § 48-1-244 (LexisNexis 2009).

⁶⁵ See ALA. CODE § 26-17-636(g) (LexisNexis 2009); ARK. CODE ANN. § 9-10-110 (2009); ARIZ. REV. STAT. § 25-809 (LexisNexis 2007); CAL. FAM. CODE § 7637 (West 2009); COLO. REV. STAT. ANN. § 19-4-116(3)(a) (West 2009); CONN. GEN. STAT. ANN. § 46b-172a (West 2009) (when a father comes forward as parent); FLA. STAT. ANN. § 742.031(1) (Supp. 2005); HAW. REV. STAT. ANN. § 584-15(c) (LexisNexis 2005); KAN. STAT. ANN. § 38-1121(c) (2009); MD. CODE ANN., FAM. LAW § 5-1033 (LexisNexis 2006); MINN. STAT. ANN. § 257.66(3) (West 2007); MO. ANN. STAT. § 210.841 (West 2004); MONT. CODE ANN. § 40-6-116 (2009); NEV. REV. STAT. ANN. § 126.161 (LexisNexis 2004 &

not as a duty towards the woman in her own right. The rationale behind this approach stems from the now widely accepted imperative that children of unmarried parents should not be relegated to the legal no-man's land of "illegitimacy."⁶⁶ All fifty states now require both parents to support their offspring regardless of their marital status.⁶⁷ Since a child's prebirth health cannot be disentangled from the health of his or her expectant mother, child support begins *in utero*.⁶⁸ Thus, even though the real costs of pregnancy go beyond expenses related to the health and well-being of the fetus, a straightforward interpretation of many states' laws excludes many of these costs from the man's obligations.

These laws not only underestimate the burdens of pregnancy, but they also imply that pregnancy is a liminal state significant only by reference to the child it may—but will not always—produce. Additionally, because the man's pregnancy-related liability attaches only after paternity has been established, it is almost always retroactive: a reimbursement for expenses after the child is born rather than as the expenses accrue. Thus, the woman must bear the overwhelming majority of the costs during the nine months of pregnancy and beyond, until and unless a paternity proceeding is com-

Supp. 2007); N.D. CENT. CODE § 14-20-57 (2009); OHIO REV. CODE ANN. § 3111.13 (West 2005); TENN. CODE ANN. § 36-2-311 (2005); TEX. FAM. CODE ANN. § 160.636(g) (Vernon 2008); VA. CODE ANN. § 20-49.8(A) (2008); WASH. REV. CODE ANN. § 26.26.130 (West 2005); WIS. STAT. ANN. § 767.89 (West 2009).

⁶⁶ AM. LAW INST., PRINCIPLES OF THE LAW AND FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.01 (2002) ("Historically, the law did not treat children of formal and informal relationships equally with respect to parental support. In a series of cases beginning in the late 1960s, the United States Supreme Court held that most legal distinctions between marital and nonmarital children violate the equal-protection clause of the Fourteenth Amendment. Accordingly, it is now generally accepted that children of informal and formal relationships must be treated equally with respect to the amount and duration of child support.").

⁶⁷ See Jeffery W. Santema, Annotation, *Liability of Father for Retroactive Child Support on Judicial Determination of Paternity*, 87 A.L.R.5th 361, § 1 (2002) ("The parents of a child born out of wedlock have an obligation to support the child. . . . It is the fact of paternity or maternity, not that of marriage, that obligates the parents to nourish and rear the child. Hence, the support rights of children born out of wedlock are the same as those of children born in wedlock.").

⁶⁸ See *Coxwell v. Matthews*, 435 S.E.2d 33, 34 (Ga. 1993) (holding that "the duty to protect and maintain a child includes the duty to ensure that the child receives adequate medical care prior to and during birth"). This same case mentions the lost earnings that pregnancy may spell for a woman, but it nevertheless confines the man's obligation to prenatal and birthing expenses. See *id.* (stating that were the court "to hold that the father of an out-of-wedlock child has no obligation to pay the birthing expenses of his child, that duty would fall either on the mother, whose condition, in some circumstances, might impair her earning ability, or on the state"). The concurrence in *Coxwell* also suggests that prenatal and birthing expenses should be shared as a matter of gender equity, although it does not recognize that gender equity may translate into a much broader liability. See *id.* at 35 (Sears-Collins, J., concurring) ("A healthy pregnancy and birth are essential for a healthy child. Therefore, the conclusion is inescapable that the duty to provide for a child's maintenance and protection incorporates expenses incurred by the mother due to pregnancy and birth. This is especially true in view of (a) changing family roles and the modern economic partnership concept of parenthood, (b) growing recognition that the relationship between a father and his child is important for more reasons than the provision of food, clothing, and shelter, and (c) efforts in recent years to eliminate sex discrimination.").

pleted. If no child is born, a woman who can establish paternity during pregnancy⁶⁹ *might* still be entitled to some support under one of the statutes discussed above even if she eventually miscarries, but cases addressing this issue are rare.⁷⁰

A minority of states extend a man's pregnancy-related obligations beyond the narrow scope guided by the best interests of the child to encompass duties to the woman *in her own right*. Most notably, Delaware's domestic relations statute dedicates an independent code section to the "[d]uty to support woman with child conceived out of wedlock." This provision empowers judges to allocate the costs of pregnancy and birth as they see fit:

The duty to support a woman pregnant with child conceived out of wedlock rests first upon the person by whom she became pregnant. Such support may include her necessary prenatal and postnatal medical, hospital, and lying-in expenses incident to the pregnancy and to birth of the child, and such other relief as to the court shall seem reasonable.⁷¹

Yet despite this broad statutory language, there is little indication that Delaware courts have awarded pregnant women anything in excess of the amount typically available in other states under the child support rubric: reimbursement for medical expenses directly related to pregnancy and

⁶⁹ Though technological developments have made it possible to conduct genetic testing *in utero*, such testing poses a risk to the health of both mother and fetus. See Am. Pregnancy Ass'n, Paternity Testing, <http://www.americanpregnancy.org/prenataltesting/paternitytesting.html> (last visited May 29, 2010). For this reason, a court may not order genetic testing until the child is born. A mother may, however, volunteer to pursue a prenatal test for paternity. See UNIF. PARENTAGE ACT § 502(c) & comments (amended 2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf>.

⁷⁰ *But see* C. v. L., 305 N.Y.S.2d 69, 72 (N.Y. Fam. Ct. 1969) (holding that the termination of pregnancy did not divest a woman of her right to proceed with such a claim and that the cost of a therapeutic (i.e., medically indicated) abortion can be awarded at the court's discretion as a "reasonable expense" in connection with pregnancy); *see also* Stockton v. Oldenburg, 713 N.E.2d 259, 266 (Ill. App. Ct. 1999) (Myerscough, J., concurring in part and dissenting in part) (arguing there is a broad scope to reasonable expense in connection with pregnancy that encompasses therapeutic abortion). *But see* Alice D. v. William M., 450 N.Y.S.2d 350, 353 (N.Y. Civ. Ct. 1982) (requiring actual birth as a predicate for reasonable expense award and differentiating itself from C. v. L. at 353: "mandating an actual birth as a predicate for relief in the Family Court is sound").

⁷¹ DEL. CODE ANN. tit. 13, § 504 (2009). The New York legislature has also created a separate duty that the father owes to the mother: "The father is liable to pay the reasonable expenses of the mother's confinement and such reasonable expenses in connection with her pregnancy as the court in its discretion may deem proper." FAM. CT. ACT § 514 (2010); *see* Tuer v. Niedoliwka, 285 N.W.2d 424, 426-27 (Mich. Ct. App. 1979) (distinguishing between a woman's right to reimbursement for a share of her pregnancy and confinement expense—a right which she may contract away—and her child's right to support—a right which she may not contract away); *Anonymous v. Anonymous*, 265 N.Y.S.2d 827 (N.Y. Fam. Ct. 1965) (holding that Section 514 of the New York Family Court Act authorizes a court to require the father of a child involved in a filiation proceeding to pay the cost of necessary psychiatric care where there is a patently clear causal relationship between the need for psychotherapy and the mother's pregnancy, confinement, and recovery (but refusing to do so in the case because the mother failed to sufficiently establish this relationship)).

childbirth.⁷² Delaware's Code also includes an alternative provision giving courts the authority to order a man to pay for prenatal, postnatal, and lying-in expenses as part of his *child support* obligations rather than as a financial obligation to the woman.⁷³ As we have seen, the effects of pregnancy on women's lives extend far beyond medical bills. In order to survive and thrive during and immediately following pregnancy, women need support, a lot more support than the law guarantees them.

B. Choice Is Not the Answer

Recognizing the gap between pregnant women's needs and their entitlements, feminists have worked hard to secure women's rights to contraception and abortion.⁷⁴ Their efforts over the last few decades have ushered in dramatic expansions in women's reproductive freedom through watershed cases like *Eisenstadt v. Baird*⁷⁵ and *Roe v. Wade*.⁷⁶ These advances leave some with limited sympathy for the accidentally pregnant. Considering the panoply of contraceptive options available to women today, what excuse does a woman have for waking up pregnant? Many people believe that sexual freedom comes with responsibility for the consequences. A woman who engages in sexual relations assumes the risk that she might conceive. Even once she does "fall" pregnant, a woman has a choice. If she is unprepared to take on the hardships of pregnancy and childbirth, she can abort. If she chooses to take the pregnancy to term after all, she should take care of herself. By this logic, the asymmetry in choice (women's un-

⁷² See Div. of Child Support Enforcement *ex rel.* Harper v. Barrows, 570 A.2d 1180, 1184 (Del. 1990) (stating that the court has the authority to require the incarcerated father of a child born out of wedlock to pay for post-natal expenses incurred by the mother relating to the birth of their child in the amount of \$620); DCES/J.O'C. v. D.U., 2009 Del. Fam. Ct. LEXIS 3, at *6 (Del. Fam. Ct. Mar. 18, 2009) (discussing only out-of-pocket delivery expenses in connection with a man's pregnancy-related obligation). In this case, however, the obligation fell under a parallel, retroactive child support provision (Section 513) rather than under Section 504. *Id.* Nevertheless, though the case addresses the difference in the statute of limitations applicable to the two provisions, it makes no mention of the possibility that a different monetary outcome would result from an obligation falling under one section or the other.

⁷³ DEL. CODE ANN. tit. 13, § 513(a)(3) (2009); see also DCES/J.O'C., 2009 Del. Fam. Ct. LEXIS at 5 (explaining that the Delaware statute treats pregnancy-related medical bills and retroactive child support as separate obligations under Section 504 and Section 513(a)(3) respectively, but that "where a duty of support has been determined, the Court may order the obligor to pay the cost of prenatal, postnatal and lying-in expenses, allowing the expenses Mother claims to fall under child support, not financial support for Mother").

⁷⁴ For discussions of sex-equality based arguments for reproductive freedom, see CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in FEMINISM UNMODIFIED 93 (1987); Law, *supra* note 22, at 978; Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1621–22 (1979); Siegel, *supra* note 50; Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007).

⁷⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (guaranteeing access to contraception regardless of marital status).

⁷⁶ *Roe v. Wade*, 410 U.S. 113, 153 (1973) (guaranteeing a woman's right to a first trimester abortion).

ilateral decisionmaking power over abortion) counterbalances the asymmetry in sexual risk (women's exposure to unwanted pregnancy). The two may be apples and oranges, but there is arguably a rough justice in the current rule.

This argument belittles the harms that come along with *all* of women's reproductive choices. The "problem with the rhetoric of choice," writes one author focusing on broader gender equity issues, "is that it leaves out power. Those who benefit from the status quo always attribute inequities to the choices of the underdog."⁷⁷ No form of birth control is foolproof, and effective contraception as well as abortion come at great costs, costs that are paid almost entirely by women.

For example, although pharmaceutical companies work hard to create the impression that hormonal contraception, commonly known simply as "the pill," is not only safe but good for you, its harmful side effects are incontrovertible. Documented risks include strokes, heart attacks, migraine headaches, cancer, diabetes, asthma, breast pains, vaginal dryness and infections, and loss of sexual desire.⁷⁸ According to some studies, newer "third generation" pills developed in the 1980s to reduce earlier pills' minor side effects like acne or facial hair actually double the risk of blood clots—which can result in a stroke, deep vein thrombosis, or pulmonary embolism.⁷⁹ Women who are aware of these risks presumably feel the pill's bene-

⁷⁷ ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 234 (2001). Crittenden's book provided the inspiration for the title of this Article.

⁷⁸ See A.A. Ewies, *Levonorgestrel-Releasing Intrauterine System—The Discontinuing Story*, 36 *GYNECOL ENDOCRINOL* 1 (2009); Chrisandra L. Shufelt & C. Noel Bairey Merz, *Contraceptive Hormone Use and Cardiovascular Disease*, 53 *J. AM. C. CARDIOLOGY* 221 (2009); Sasitorn Siritho et al., *Risk of Ischemic Stroke Among Users of the Oral Contraceptive Pill*, 34 *STROKE* 1575 (2003); Nat'l Cancer Inst., *Oral Contraceptives and Cancer Risk: Question and Answers*, May 4, 2006, <http://www.cancer.gov/cancertopics/factsheet/Risk/oral-contraceptives> (linking oral contraceptives to an increase in some forms of cancer and a decrease in others); *Oral Contraceptives Linked to Asthma Risk*, REUTERS, Mar. 27, 2009, <http://www.reuters.com/article/healthNews/idUSTRE52Q6PA20090327>; *Pros and Cons of the Pill Tricky For Black Women*, REUTERS, June 30, 2008, <http://www.reuters.com/article/healthNews/idUSTON07346120080630> (describing a study showing black women at a lower risk of heart disease and diabetes from oral contraceptives than white women); Geraldine Sealey, *Why I Hate the Pill*, SALON.COM, May 3, 2010, http://www.salon.com/life/feature/2010/05/03/pill_pushback ("Although a libido-destroying pill does wonders to lower your pregnancy risk, it's also done a number on my relationships, self-esteem and emotional well-being.").

⁷⁹ Ads marketing the newest invention—the "ring" (a plastic device that releases hormones directly into the vagina)—are especially misleading. The ads—which feature the slogan: "Let Freedom Ring!"—emphasize the fact that the ring contains a lower dose of hormones than most oral contraceptives. This is true, but studies suggest that the mode of delivery may increase certain risks. Since the ring, like the patch, releases hormones directly into the blood stream, the net amount of hormones absorbed by the body may be higher than those absorbed by women taking hormones orally. The company that manufactures the ring is facing over 100 pending lawsuits. See Stephanie Mencimer, *Is NuvaRing Dangerous?*, MOTHER JONES, May/June 2009, <http://www.motherjones.com/environment/2009/05/nuvaring-dangerous>. Similarly, Bayer ads presenting the pill as a beneficial "lifestyle drug"—to combat acne, headaches, and anxiety—resulted in a lawsuit by the Food and Drug Administration and the attorneys general of twenty-seven states claiming Bayer underplayed the drug's dangers. The case ended in

fits outweigh its potential harms, but in this tradeoff most of the downsides fall on the woman (although men suffer too when their partners' libido and natural lubrication are inhibited, or when the women they love suffer from more drastic side effects).

Furthermore, hormonal contraception is not accessible to all women. Pill refills can cost up to \$50 per month,⁸⁰ they require a prescription and repeated physician appointments, and they are often not covered by insurance.⁸¹ A recent study has found that "many women have difficulty preventing unintended pregnancy simply because they cannot afford the more effective, prescription methods of contraception."⁸² Despite all of the advances, birth control remains, as it was in Margaret Sanger's time, "a woman's problem."⁸³

Abortions, likewise, are hardly good for women. Whether one considers a fetus to be a life or not, every woman understands that it is at least a potential life. The decision to terminate a pregnancy, even when it represents a woman's best alternative, can be a heart-wrenching ordeal.⁸⁴ And then, of course, there are routine physical side effects like abdominal cramping, irregular bleeding, nausea, vomiting, and diarrhea.⁸⁵ When an

a settlement requiring that the company launch a \$20 million corrective ad campaign. See Natasha Singer, *A Birth Control Pill That Promised Too Much*, N.Y. TIMES, Feb. 11, 2009, at B1.

⁸⁰ Planned Parenthood, Birth Control Pills, <http://www.plannedparenthood.org/health-topics/birth-control/birth-control-pill-4228.htm> (last visited Aug. 28, 2010).

⁸¹ See Sharon Lerner, *Why Doesn't Health Care Cover Birth Control?*, DOUBLEX, Nov. 12, 2009, <http://www.doublex.com/section/news-politics/why-doesnt-health-care-cover-birth-control/>; Geraldine Sealey, *Erections Get Insurance; Why Not the Pill?*, ABC NEWS, June 19, 2002, <http://abcnews.go.com/US/story?id=91538>.

⁸² JACQUELINE E. DARROCH, JENNIFER J. FROST & LISA REMEZ, GUTTMACHER INST., IN BRIEF: IMPROVING CONTRACEPTIVE USE IN THE UNITED STATES 1, 6 (2008), available at <http://www.guttmacher.org/pubs/2008/05/09/ImprovingContraceptiveUse.pdf> ("More than one in five public providers report that the majority of their contraceptive clients have difficulty paying for visits, and another third think that such difficulties affect a sizable proportion of clients. Among private providers, more than half believe that a sizable minority of their clients have payment problems.")

⁸³ MARGARET SANGER, *WOMAN AND THE NEW RACE* 100 (1920).

⁸⁴ See Project Voice, <http://www.theabortionproject.org> (last visited Aug. 28, 2010); WebMD, Emotional Reactions After an Abortion, <http://www.webmd.com/hw-popup/emotional-reactions-after-an-abortion> (last visited Aug. 28, 2010) ("Natural hormonal changes that occur in your body during pregnancy are affected by an abortion. These hormonal changes can make you feel more emotional than usual. You may experience a spectrum of feelings, ranging from sadness, anger, and regret to guilt or relief. In fact, hormonal changes can cause depression symptoms, including sleeplessness (insomnia), sadness, tearfulness, anxiety, hopelessness, irritability, and poor concentration."). I do not, however, mean to suggest that the emotional aspects of the procedure justify abortion restrictions. For discussions of debates surrounding the woman-protective rationale for restricting abortion, see Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008), and Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010).

⁸⁵ Am. Pregnancy Ass'n, *Unplanned Pregnancy: Possible Physical Side Effects* (2007), <http://www.americanpregnancy.org/unplannedpregnancy/possiblesideeffects.html> (last visited Aug. 28, 2010); WebMD, Women's Health, Abortion—Before, During, and After an Abortion: When to Call a

abortion causes an infection, the long-term effects may include chronic pelvic inflammations, heightened risk of miscarriage or ectopic pregnancy, and infertility.⁸⁶ In rare cases, abortion is fatal.⁸⁷

For many women, an abortion is also hard to obtain. Though *Roe v. Wade* made abortion legal, *Roe* and its progeny did little to guarantee access to abortions,⁸⁸ and many women still are unable to obtain a speedy, safe, and affordable abortion. The overwhelming majority of U.S. counties do not have abortion providers. This means that women must travel, sometimes for hours, to the nearest clinic. Once they arrive, an abortion typically costs several hundred dollars, and public funding for abortions is limited. As a result of their difficulties reaching a clinic and raising the money for the procedure, pregnant women who are both poor and young are more likely to undergo later-term—and therefore riskier—abortions.⁸⁹

Doctor, <http://women.webmd.com/tc/abortion-before-during-and-after-an-abortion-when-to-call-a-doctor> (last visited Aug. 28, 2010).

⁸⁶ See ELIZABETH RING-CASSIDY & IAN GENTLES, WOMEN'S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE (2002). Abortion can lead to many other harmful side effects. See CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 247 (22d ed. 2005) ("Although serious complications of abortion most often occur with criminal abortion, even spontaneous abortion and legal elective abortion continue to be associated with severe and even fatal infections. Severe hemorrhage, sepsis, bacterial shock, and acute renal failure have all developed in association with abortion but at much lower frequency. Uterine infection is the usual outcome, but parametritis, peritonitis, endocarditis, and septicemia may all occur." (citations omitted)); Joel Brind et al., *Induced Abortion as an Independent Risk Factor for Breast Cancer: A Comprehensive Review and Meta-Analysis*, 50 J. EPIDEMIOLOGY & CMTY. HEALTH 481 (1996); David A. Grimes & Mitchell D. Creinin, *Induced Abortion: An Overview for Internists*, 140 ANNALS INTERNAL MED. 620 (2004).

⁸⁷ One out of 1,000,000 American women dies as a result of having an abortion at or before eight weeks. Additionally, "[t]he risk of death associated with abortion increases with the length of pregnancy . . . to one per 29,000 at 16–20 weeks—and one per 11,000 at 21 or more weeks." GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES 2 (2010), available at http://www.guttmacher.org/pubs/fb_induced_abortion.pdf. Earlier studies indicated that the risk of maternal death from abortion was much higher at all lengths of gestation. See CUNNINGHAM ET AL., *supra* note 86, at 247 (relying on studies using data collected before 2004, the authors conclude that "[l]egally induced abortion, performed by trained gynecologists, especially when performed during the first 2 months of pregnancy, has a mortality rate of only 0.7 per 100,000 procedures. The relative risk of dying as the consequence of abortion approximately doubles for each 2 weeks after 8 weeks' gestation"). For a more partisan view of the medical risks associated with abortion, see JOHN C. WILLKE & BARBARA H. WILLKE, WHY WE CAN'T LOVE THEM BOTH (1997), available at http://www.abortionfacts.com/online_books/love_them_both/why_cant_we_love_them_both.asp.

⁸⁸ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (holding that states may enact restrictions so long as these do not unduly burden women seeking an abortion); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989) (holding that non-life-saving abortions for women prepared to pay full cost may be banned in public facilities); *Harris v. McRae*, 448 U.S. 297, 316 (1980) (upholding a ruling allowing funding for medically necessary abortions to be denied unless the mother's life is in danger).

⁸⁹ See GUTTMACHER INST., *supra* note 87 ("Eighty-seven percent of all U.S. counties lacked an abortion provider in 2005; 35% of women live in those counties. . . . In 2005, the cost of a nonhospital abortion with local anesthesia at 10 weeks' gestation ranged from \$90 to \$1,800; the average amount paid was \$413. . . . Fifty-eight percent of abortion patients say they would have liked to have had their abortion earlier. Nearly 60% of women who experienced a delay in obtaining an abortion cite the time it

No state requires a man to participate in either the direct or indirect costs of abortion. The expense of the procedure itself, the lost income associated with undergoing and recovering from it, and the costs of any complications it may produce fall squarely on the woman. As one feminist put it, “[a]bortion is the last in a long line of non-choices.”⁹⁰

Setting aside communication issues,⁹¹ when lovers are married, we already recognize that there is no contradiction between a man’s obligation towards the woman with whom he conceives and her right to choose. When husband and wife disagree over abortion, the wife has the final say over the decision.⁹² And if she chooses to continue the pregnancy, she is entitled to no less support than had she followed her husband’s preference. In other words, the law in all fifty states recognizes that a wife’s right to choose does not cancel her spouse’s duty of mutual support. Precisely because no matter what she chooses it is her body that will bear the consequences, the rough justice that the law effectively strikes in marriage is that a wife gets the final say and is entitled to support while her husband gets to not be pregnant. A similar logic applies in the nonmarital context. A duty of support and reproductive choice are both compatible and fair.

C. *Sex Creates Relationship*

Leaving a pregnant woman to care for herself does make sense in two very particular situations. First, men should have no obligations vis-à-vis their sexual partners when both parties clearly agree that they have no expectation of an ongoing relationship. This might happen in the case of an explicitly casual, no-strings-attached “hookup.” It might also arise where a woman wants and intends to have a child alone and conceives with a friend

took to make arrangements and raise money. Teens are more likely than older women to delay having an abortion until after 15 weeks of pregnancy, when the medical risks associated with abortion are significantly higher. . . . Congress has barred the use of federal Medicaid funds to pay for abortions, except when the woman’s life would be endangered by a full-term pregnancy or in cases of rape or incest. Seventeen states use public funds to pay for abortions for some poor women, but only four do so voluntarily; the rest do so under a court order.”)

⁹⁰ Germaine Greer, *The Backlash Myth*, NEW REPUBLIC, Oct. 5, 1992, at 21. Greer continues, “[T]he choice to end [a pregnancy] can only be a genuine choice if the pregnant woman has other alternatives. If she will lose her lodgings and her job or her educational opportunities if she has a baby, then she has no choice at all. If her boyfriend threatens to leave her if she does not accept termination; if her parents threaten to make her a ward of court or to disown her . . . her right to choose is being ignored.” *Id.* at 23. The reproductive choices relevant to this Article relate to pregnancy prevention and termination. For a discussion of the harms associated with choices made possible by reproductive technologies (IVF and surrogacy), see JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN’S FREEDOM* (1995).

⁹¹ See *infra* Parts II.B. and III.B.1.a.

⁹² *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (holding unconstitutional the Missouri statute requiring spousal consent to an abortion, and noting 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 [relative to the man], as between the two, the balance [of the decision whether to abort] weighs in her favor”).

with the clear understanding that he will bear no responsibilities to help support her through the pregnancy. Second, a man should not be required to help support a woman with whom he conceives if the woman engaged in foul play—for example, lying about birth control. (Currently, victims of sexual fraud have limited recourse against a deceiving lover,⁹³ though scholars have argued persuasively for reform in this area.)⁹⁴ But the one-night-stand or the case of sexual deception should not define the rule applicable to all sexual encounters.

Much of nonmarital sex happens in the context of good-faith relationships. Of course many people never articulate their expectations should they conceive accidentally. Surprisingly, although there is a vast body of literature on expectations surrounding what constitutes consent to sexual contact, none of the sources I have reviewed deal with consensual lovers' ex ante expectations vis-à-vis each other regarding the unintended consequences of their activity. (A small number of studies suggest that once pregnancy occurs, unmarried male partners remain at least partially involved.)⁹⁵ In light of the fact that most pregnancies result not from birth

⁹³ *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618, 620 (Cal. Ct. App. 1980) (“[A]lthough Roni may have lied and betrayed the personal confidence reposed in her by Stephen, the circumstances and the highly intimate nature of the relationship wherein the false representations may have occurred, are such that a court should not define any standard of conduct therefor.”); *C.A.M. v. R.A.W.*, 568 A.2d 556, 556 (N.J. Super. Ct. App. Div. 1990) (affirming the lower court’s entry of summary judgment in favor of a father who had misrepresented a vasectomy prior to consensual intercourse); *Douglas R. v. Suzanne M.*, 487 N.Y.S.2d 244, 246 (App. Div. 1985) (dismissing an action by a man claiming he was defrauded by a woman who removed an intrauterine contraceptive device without informing him). *But see* *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 431 (Cal. Ct. App. 1983) (upholding a battery damages award to a woman whose reliance on a man’s fraudulent misrepresentation of sterility resulted in an ectopic pregnancy which ended in miscarriage and surgery rendering her sterile); *Alice D. v. William M.*, 450 N.Y.S.2d 350, 356–57 (N.Y. Civ. Ct. 1982) (allowing a woman to recover damages against a former partner for the costs of an abortion, loss of earning potential, and pain and suffering based on negligent misrepresentation).

⁹⁴ Chamallas, *supra* note 9; I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1158 (2008); Jill E. Evans, *In Search of Paternal Equity: A Father’s Right to Pursue a Claim of Misrepresentation of Fertility*, 36 LOY. U. CHI. L.J. 1045, 1065–92 (2005); Larson, *supra* note 9, at 380. Larson argues that “physical and emotional injuries caused by deceptive inducement into sex” should be compensable through a “sexual fraud” tort, a revitalized, modernized, feminist variation on the common law tort of seduction. Larson’s proposal is limited to “intentional, harmful misrepresentation made for the purpose of gaining another’s consent to sexual relations.” *Id.* Paula C. Murray & Brenda J. Winslett, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. ILL. L. REV. 779, 780 (arguing that where a woman intentionally deceives her partner into impregnating her, public policy considerations regarding the child’s interest should not absolve the woman of all liability towards the father); Oberman, *supra* note 9; VanderVelde, *supra* note 9 (arguing with regards to all harmful forms of “sexual connection,” including sexual fraud); Joshua Kleinfeld, Comment, *Tort Law and In Vitro Fertilization: The Need for Legal Recognition of “Procreative Injury,”* 115 YALE L.J. 237, 239–40 (2005); Anne M. Payne, Annotation, *Sexual Partner’s Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R.5th 301 (1992).

⁹⁵ One study of unmarried parents in Oakland, California, revealed that most unmarried parents were romantically involved when their child was born and that about half were living together. SARAH

control failures but from repeated acts of unprotected intercourse,⁹⁶ it is hard to believe that *more* women get pregnant from anonymous one-night-stands than from sex with a steady partner. Thus, it is safe to say that many people's baseline expectations, while diverse, are significantly higher than our default lovers-as-strangers rule, including when it comes to the costs of abortion.⁹⁷

But even if the current rule were shown to match widespread expectations, it is inappropriate as a normative matter. When heterosexual partners have sex for pleasure and pregnancy ensues, it is only fair that both parties take responsibility for the consequences. This is especially true when a gap in the parties' expectations corresponds to power imbalances within the couple.⁹⁸

There are also utilitarian reasons for allocating the price of pleasure more equitably. This is not to say that the current rule turns all men into cads. Good guys don't need external incentives to do the right thing; they

MCLANAHAN ET AL., PUB. POLICY INST. OF CAL., FRAGILE FAMILIES ONE YEAR LATER: OAKLAND, CALIFORNIA 7 (2003), available at http://www.ppic.org/content/pubs/op/op_1002smop.pdf. Approximately 80 percent of the mothers in the survey "reported that the father had contributed financial support or helped in other ways (such as providing transportation) during the pregnancy." *Id.* at 10; see also MAUREEN R. WALLER, MY BABY'S FATHER: UNMARRIED PARENTS AND PATERNAL RESPONSIBILITY 2–3 (2002) ("Approximately 33 percent of all births in the United States now occur to unmarried parents . . . [and] about half of these parents are living together at the time of their child's birth." (citation omitted)).

⁹⁶ See DARROCH ET AL., *supra* note 82, at 1 ("Slightly more than half of unintended pregnancies occur among women who were not using any method of contraception in the month they conceived, and more than four in 10 occur among women who used their method inconsistently or incorrectly. Only one in 20 are attributable to method failure."); McDONAGH, *supra* note 26, at 52–53 ("The reason women become pregnant, therefore, is not because a high probability of pregnancy is associated with any single incident of unprotected sexual intercourse, or even with a month of unprotected sex. Rather, it is because couples engage in multiple acts of sexual intercourse, thereby increasing a woman's exposure to the risk of pregnancy.").

⁹⁷ Surveys of men in abortion clinic waiting rooms reveal that most men pay for some or all of the procedure. The studies make no mention of additional costs like lost wages. See, e.g., ARTHUR B. SHOSTAK, GARY McLOUTH & LYNN SENG, MEN AND ABORTION: LESSONS, LOSSES, AND LOVE 36 (1984); Jennifer A. Reich & Claire D Brindis, *Conceiving Risk and Responsibility: A Qualitative Examination of Men's Experiences of Unintended Pregnancy and Abortion*, 5 INT'L J. MEN'S HEALTH 133, 145 (2006). Note, however, that data on how many men accompany their partner to the clinic are inconsistent. Compare Reich & Brindis, *supra*, at 135 ("One recent study found that only 22–25% of women came or left the abortion procedure with the man by whom they became pregnant." (citation omitted)), with Geoffrey P. Miller, *Custody and Couvade: The Importance of Paternal Bonding in the Law of Family Relations*, 33 IND. L. REV. 691, 711 n.111 (2000) (finding that men accompanied their partners to abortion clinics approximately half of the time (citation omitted)).

⁹⁸ Such imbalances may often be gendered in nature. Hirshman and Larson argue that "[i]n heterosexual exchanges, the male and female sexual players start from a baseline of physical inequality of strength, size and vulnerability to pregnancy." HIRSHMAN & LARSON, *supra* note 10, at 22. Accordingly, a just sex code should "establish baselines that moderate the downward spiral of unequal bargaining" by "shifting the burden of silence onto the stronger player." *Id.* at 2, 283. But even where the imbalance does not fall along gendered lines, the same principle holds: the baseline should protect the weaker party to the "sexual bargain." *Id.* at 267–68.

do their best to prevent pregnancy and when their efforts fail, they don't leave their partner in the lurch, even when their legal duties are minimal or nil. But for some men, the bottom line matters.

Studies show, for example, that adolescent men who expect to pay child support should their partner become pregnant have fewer partners, less frequent intercourse, and are more likely to use contraceptives.⁹⁹ But in some relationships men assume—sometimes reasonably—that a woman will terminate an unwanted pregnancy. How does the fact that abortion frees men not only of child support but also of any responsibility towards the woman figure into what happens in the bedroom?

Decisions about sex, contraception, and abortion take place in the shadow of the law's allocation of their attendant risks. It's only logical that one way to reduce unintended pregnancies might be to raise the stakes for men, to make sure *all* pregnancies have concrete consequences for both parties involved. Thus, increasing support for pregnant women regardless of the pregnancy's outcome will, over time, change abortion from a form of birth control that lets men off the hook into something both parties are invested in preventing. It may also reduce abortions obtained under the pressure of short-term economic considerations.¹⁰⁰

This Article does not suggest that conception should trigger a type of common-law marriage with robust long-term commitments. Rather, as explained further in Part III, when unmarried lovers conceive, the law should recognize their relationship as something that falls *in between* that of complete strangers and that of spouses,¹⁰¹ unless they agree otherwise. A lovers-as-strangers rule is not inherently wrong; it is simply the wrong default.

⁹⁹ See Chien-Chung Huang & Wen-Jui Han, *Child Support Enforcement and Sexual Activity of Male Adolescents*, 69 J. MARRIAGE & FAMILY 763, 772 (2007) [hereinafter Huang & Han, *Child Support Enforcement*]; see also Chien-Chung Huang & Wen-Jui Han, *Perceptions of Child Support and Sexual Activity of Adolescent Males*, 27 J. OF ADOLESCENCE 731 (2004) (discussing empirical studies relating to teen sexual activity, use of contraceptives, and pregnancy).

¹⁰⁰ A recent study suggests that child support enforcement decreases the incidence of abortion. Jocelyn Crowley, Radha Jagannathan, & Galo Falchettiore, *The Effect of Child Support Enforcement on Nonmarital Births and Abortion in the United States* (unpublished manuscript) (on file with author). For data on the higher incidence of abortion among poor women, see RACHEL K. JONES, LAWRENCE B. FINER & SUSHEELA SINGH, GUTTMACHER INST., *CHARACTERISTICS OF U.S. ABORTION PATIENTS*, 2008, at 1, 9 (2010), available at <http://www.guttmacher.org/pubs/US-Abortion-Patients.pdf> (“Poor women were overrepresented among abortion patients. Their relative abortion rate was more than twice that of all women in 2008 . . . and more than five times that of women at 200% or more of the poverty level . . .”); Annie Murphy Paul, *Is the Recession Causing More Abortions?*, SLATE, May 15, 2009, <http://www.doublex.com/section/health-science/recession-causing-more-abortions?page=0,0> (arguing that “financial hardship has been an ever-present motivation for ending a pregnancy”).

¹⁰¹ For a broader argument that family law should recognize and support friendships that do not resemble marriage or marriage-like relationship, see Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189 (2007).

II. RECONCEIVING CONCEPTION

Before turning to alternatives to the current rule, a deeper look at its conceptual underpinnings may help us identify not only the symptoms but also the roots of the problem. This Part suggests that the “lovers-as-strangers” rule stems from a jurisprudential orientation that views human beings as definitionally separate and distinct from one another. This bias casts us as free-floating individuals whose primary concern is maximizing privacy and autonomy. But human beings are also essentially connected to others. In disregarding our dual nature and privileging separation over connection, the law’s approach to pregnancy misses something fundamental, causing both men and women to suffer.

After introducing this framework, this Part illustrates its effects on another aspect of the current law of conception: communication between sexual partners. The corollary of the no-strings-attached default governing men’s responsibility vis-à-vis the consequences of pregnancy is a rule that places virtually no obligation on women to communicate with their partners about conception, abortion, or childbirth.

The final section of this Part uses norms developed by practitioners of controlled sadomasochism as a foil to expose the questionable assumptions inherent in the status quo. Whereas some S/M subcultures insist that partners who engage in activities that involve asymmetrical risks explicitly consent and agree on who bears responsibility for their potential harmful consequences, mainstream heterosexual norms assume an each-one-for-oneself baseline unless the parties are married. In other words, S/M’s codes assume a relational default while our mainstream sex code assumes that lovers are strangers. As a result, the current paradigm throws vulnerable women into a game that is ethically murkier than formal S/M—a game that involves asymmetrical risks and a no-liability default that springs to life without any explicit show of consent.

A. *Human Beings’ Dual Nature: Connected and Separate*

The current lovers-as-strangers paradigm exemplifies what Robin West sees as the hyper-individualistic starting point—the “separation thesis”—that underlies modern American jurisprudence.¹⁰² This starting point, she argues, corresponds with a philosophical worldview that places autonomy as its supreme value.¹⁰³ Under this view, man is born alone and he dies alone. His most powerful craving is to be left alone.

¹⁰² See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988). A related theory has been advanced by Linda Hirshman and Jane Larson, who employ the term “libertinism” to describe the individualistic sexual ideology that has dominated sexual politics since the 1960s. See HIRSHMAN & LARSON, *supra* note 10, at 10, 211.

¹⁰³ “[W]hat separates us,” West quotes Michael Sandel as saying, “is in some important sense prior to what connects us. . . . We are distinct individuals first, and *then* we form relationships and engage in co-operative arrangements with others.” West, *supra* note 102, at 2. Thus, under the “separation the-

West believes that the “separation thesis” is “essentially and irretrievably masculine.”¹⁰⁴ Women, unlike men, “are not essentially, necessarily, inevitably . . . separate from other human beings [Women] are ‘essentially connected.’”¹⁰⁵ West locates women’s essential connectedness in their “critical material experiences,” including pregnancy and breastfeeding.¹⁰⁶ Women value or define themselves in terms of connection, intimacy, and relationship. Their well-being can only be advanced through a system that recognizes this essential aspect of their existential reality. A jurisprudence that places autonomy as its supreme value will by definition leave women out in the cold.¹⁰⁷

But West believes that men also value connectedness. Referencing critical legal theorists, she explains that men are also harmed by the separation bias of dominant legal categories, albeit in different ways. Whereas women are naturally and constitutionally connected to others, men *crave* connection because their original state (as liberal legal theory proclaims) is one of separateness. According to West, liberal theory is wrong when it assumes that men’s primary aim is to preserve this separateness through guar-

sis,” “the inevitability of the individual’s material separation from the ‘other,’ entails, first and foremost, an existential state of . . . freedom: because the individual is *separate* from the other, he is *free* of the other.” *Id.* at 5.

¹⁰⁴ *Id.* at 2; see also HIRSHMAN & LARSON, *supra* note 10, at 10 (arguing that the individualist perspective of “libertine sexual deregulation” in the 1960s “turned women into men, sexually female, but with all the other characteristics of men: strength, independence, emotional control and separation from the consequences of reproduction”).

¹⁰⁵ West, *supra* note 102, at 2–3.

¹⁰⁶ See Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 210 (2000) (“The experience of being human, for women, differentially from men, includes the counter-autonomous experience of a shared physical identity between woman and fetus, as well as the counter-autonomous experience of the emotional and psychological bond between mother and infant. Our reproductive role renders us non-autonomous in a second, less obvious, but ultimately more far-reaching sense. Emotionally and morally women may benefit from the dependency of the fetus and the infant upon us. But *materially* we are more often burdened than enriched by that dependency. And because we are burdened, we differentially depend more heavily upon others, both for our own survival, and for the survival of the children who are part of us. Women, more than men, depend upon relationships with others, because the weakest of human beings—infants—depend upon us. Thus, motherhood leaves us vulnerable: a woman giving birth is unable to defend herself against aggression; a woman nursing an infant is physically exposed; a woman nurturing and feeding the young is less able to feed herself. Motherhood leaves us unequal. . . . To the considerable degree that our potentiality for motherhood defines ourselves, women’s lives are relational, not autonomous.”).

¹⁰⁷ West believes that both liberal and radical feminists have mistakenly adopted autonomy as their ultimate goal without asking whether it correlates with women’s experiences, desires, or capacity for happiness. She views liberal feminists’ commitment to increasing women’s choices and radical feminists’ commitment to increasing women’s power as both essentially assimilationist; they “share a vision of human being, and therefore of our subjective well-being, as ‘autonomous’” rather than connected or “relational.” *Id.* at 209–10.

antees of autonomy. Rather, men yearn to overcome their essential tion and isolation through relationship.¹⁰⁸

I do not know whether separation is essentially masculine or connection is essentially feminine, but I do believe that the ultimate conclusion West draws from these categories is crucial to the knot we are trying to unravel. Her most compelling insight is that connectedness expresses an important, undervalued truth that is critical to the happiness of both men and women. Though she emphasizes the differences between the sexes, West also thinks that both men and women are animated by both connection and separation. It is the *tension* between the two, she says, that is essential to our nature.¹⁰⁹

Applying West's insight to unintended pregnancy, the notion that human nature is centrally defined by the tension between separation and connection reveals the core problem undergirding the current rule. True, only women get pregnant, only women are capable of containing another life. But both men and women begin, at conception, in ultimate connection, contained in the body of another. Both are born in radical separation, separation rife with pain. And both go through life negotiating this contradiction, this duality—our connection to and our separation from the woman and the man who gave us life, our connection to and our separation from the lovers with whom we each play out our original script. Sometimes the Rule of Law embodies this essential contradiction,¹¹⁰ our internal tug-of-war between connection and separation. But often, and certainly in the case of conception, the law is biased in favor of separation.

In short, treating lovers who have conceived as strangers is wrong because treating all human beings as strangers is wrong. Pregnancy and the intercourse that brings it about are the *ultimate* embodiment of our essential

¹⁰⁸ See West, *supra* note 102, at 9–12; see also ALLAN G. JOHNSON, THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY 56 (1997) (“Patriarchy is grounded in a Great Lie that the answer to life’s needs is disconnection, competition, and control rather than connection, sharing, and cooperation. The Great Lie separates men from what they need most by encouraging them to be autonomous and disconnected when in fact human existence is fundamentally relational. What is a ‘me’ without a ‘you,’ a ‘mother’ without a ‘child,’ a ‘teacher’ without a ‘student’? Who are we if not our ties to other people—‘I am . . . a father, a husband, a worker, a friend, a son, a brother’? But patriarchal culture turns the truth inside out and ‘self-made-man’ goes from oxymoron to cultural ideal.” (ellipsis in original)).

¹⁰⁹ See West, *supra* note 102, at 50–58 (referencing the position of critical legal theorists Roberto Unger and Duncan Kennedy that the essential human condition is defined by a fundamental contradiction between connection and separation); see also *id.* at 70–71. West argues that the separation thesis is drastically untrue of women and not entirely true of men either: “First, it is not true materially. Men are connected to another human life prior to the cutting of the umbilical cord. Furthermore, men are somewhat connected to women during intercourse Nor is the separation thesis necessarily true of men existentially. . . . [M]en *can* connect to other human life. Men can nurture life. Men can mother. Obviously, men can care, and love, and support, and affirm life. . . . On the flip side, the ‘connection thesis’ is also not entirely true of women, either materially or existentially. Not all women become pregnant, and not all women are sexually penetrated. Women can go through life unconnected to other human life. Women can also go through life fundamentally unconcerned with other human life.” *Id.*

¹¹⁰ *Id.* at 52.

connectedness, of our vulnerability at the hands of another, of our lack of control in relationship. What do men and women want when we conceive? The law assumes that the most important things we want are autonomy, equality, and privacy. We value all of these, but *as importantly*, many of us *also* want not to be left alone.¹¹¹

B. Separation and Secrecy

So far we have focused on the current rule's allocation of the material costs of pregnancy. The relational critique sheds light on another troubling aspect of the status quo: the almost nonexistent communication duties that it places on sexual partners. The same individual-centered orientation that leaves a woman to deal with an unwanted pregnancy alone and puts minimal responsibilities on the man also gives him minimal entitlements. A woman may decide to undergo or forgo an abortion irrespective of her lover's preferences,¹¹² and with no obligation to communicate with him regardless of the nature of their relationship, including if they are married.¹¹³ Not only may a woman keep her decision to abort secret, she may conceive, carry a pregnancy to term, and raise a man's child without ever informing him.¹¹⁴ If she does inform him, she may receive retroactive child support

¹¹¹ Of course, not everybody wants the same thing. Critics of relational feminism have made this clear. See, e.g., JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 58–76 (2006) (critiquing West's cultural feminism as a form of feminist supremacy). Some women want to be left alone just as some men want to have sex and never hear from the woman again, even if she bears their child. Some lovers are indeed strangers. But that does not mean that their background assumptions should govern all. The fact that they do puts tremendous pressure on people whose sensibilities run contrary, producing dynamics that can leave both sexes feeling abused and embattled.

¹¹² See 1 AM. JUR. 2D *Abortion and Birth Control* § 25 (2009).

¹¹³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887–98 (1992); Cecily L. Helms & Phyllis C. Spence, *Take Notice Unwed Fathers: An Unwed Mother's Right to Privacy in Adoptions*, 20 WIS. WOMEN'S L.J. 1, 20 (2005) (discussing statutes that consider a man who engages in non-marital sex to be on notice of a possible pregnancy); Anne M. Payne, Annotation, *Parent's Child Support Liability as Affected by Other Parent's Fraudulent Misrepresentation Regarding Sterility of Use of Birth Control, or Refusal to Abort Pregnancy*, 2 A.L.R.5th 337, § 2(a) (1992) “[A] mother's . . . right to privacy encompasses her decision whether to terminate her pregnancy, and therefore no state may interfere with or regulate the decision to terminate in the first trimester absent a compelling interest outweighing that right. To date, the courts have refused to deem a woman's decision to bear a child despite the objections of the child's father, even where he has offered to pay for an abortion, to create an unconstitutional infringement on the father's federal or state equal protection or due process rights.” (citations omitted). But see *Kim Shayo Buchanan, Lawrence v. Geduldig: Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1245 (2007) (discussing fathers' rights advocates' recent calls for a “financial abortion” option, which would free men of the obligation to pay child support where the woman carrying his fetus refuses to abort the pregnancy); John Tierney, Op-Ed., *Men's Abortion Rights*, N.Y. TIMES, Jan. 10, 2006, at A25.

¹¹⁴ For a discussion of women's limited obligations to notify their partners of a pregnancy, see Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1061 (2002) (“State cases have held that notice is not required to unwed fathers who have not established a relationship with the child nor filed with a putative father registry, without regard for the length of time permitted by the deadline Courts have also upheld the constitutionality of the termination

reimbursements for years during which the father did not know that he had a child.¹¹⁵ The only scenario in which the women may be required to give notice is if she wishes to begin an adoption proceeding.¹¹⁶ In general, however, a man has no legally enforceable right to be informed regarding his sexual partner's conception, pregnancy, or childbirth.¹¹⁷

This rule seems reasonable insofar as it protects a woman's privacy, autonomy, and safety. But from a relational perspective, it comes at a price.

of rights when there is a failure to register regardless of the mother's identification and notification of the father.").

¹¹⁵ The statute of limitations for retroactive child support can be as long as eighteen years from the birth of the child. *State ex rel. Reitenour*, 807 A.2d 1259, 1262 (N.H. 2002) ("[O]nce paternity has been established, the father of a child born out of wedlock may be liable for past expenses associated with the mother's pregnancy and confinement. . . . Additionally, the applicable statute of limitations permits proceedings to be brought within eighteen years of the date of birth of the child in question."). In New Hampshire, the only limitation on the mother's ability to collect is the statute of limitations. *See id.* Maine, by contrast, limits a father's liability to the six-year period preceding the commencement of an action brought within the status of limitations. *See* ME. REV. STAT. ANN. tit. 19-A, § 1554 (1998).

¹¹⁶ *See* UNIF. ADOPTION ACT § 3-404, 9 U.L.A. 11 (1994); UNIF. PARENTAGE ACT § 403 (amended 2002), 10 U.L.A. 321; *see also* *Lehr v. Robertson*, 463 U.S. 248, 263–64 (1983) (holding that an unwed father's right to be notified of adoption proceedings was contingent upon his filing with the state's putative father registry). Note that indigent mothers applying for public assistance may also be forced to reveal the identity of their child's father as a condition for receiving benefits, but these requirements are grounded on the state's interest in minimizing its own liability rather than on fathers' right to know. *See* Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1070 (1995).

¹¹⁷ An additional communication-related manifestation of the separation thesis concerns the rules governing sexual fraud. As we have seen, victims of sexual fraud have limited recourse against their deceivers. The rationales behind rulings in this area focus on privacy, evidentiary challenges, reluctance to brand a child as "damage," and maintenance of child support obligations. As one opinion put it, absolving a father from the obligation to support his child would "create a new and inferior category of out-of-wedlock child based upon the circumstances of conception and would subordinate the constitutional rights and other interests of the child to those of one of the parents." *Inez M. v. Nathan G.*, 451 N.Y.S.2d 607, 609 (N.Y. Fam. Ct. 1982); *see also* *Perry v. Atkinson*, 240 Cal. Rptr. 402, 405–06 (Cal. Ct. App. 1987) (noting that concern over the child elicits a different public policy consideration than a cause of action to recover damages for severe injury resulting from misrepresentations and is not insulated from judicial scrutiny). Thus, child support statutes typically peg the amount of support owed to the child's needs and welfare and to the parents' financial capabilities, "without reference to the fault of either parent in causing conception of the child." *Payne*, *supra* note 113, at § 7(a).

Even when an action is brought subsequent to a child support determination and is clearly presented as a claim for personal recovery by one parent against the other, courts tend to interpret the claim as centrally about the child. *See* *C.A.M. v. R.A.W.*, 568 A.2d 556, 556 (N.J. Super. Ct. App. Div. 1990); *Moorman v. Walker*, 773 P.2d 887, 888 (Wash. App. 1989), *review denied*, 779 P.2d 730 (Wash. 1989). Since the child was innocent of the fraud and, courts believe, is likely to suffer should one parent be permitted to recover from the other, they often bar such claims.

But focusing on the child ignores a critical *relational* dimension of the situation. Sex is not typically like an arms-length commercial transaction: it often takes place in the context of a relationship in which people want and expect honesty. And yet, the standards governing sexual relations fall far short of those governing the most impersonal of transactions. As one commentator put it, intimate relationships are governed by a *caveat emptor* rule, a "norm of nondisclosure [that] represents a degree of complacency with regard to bald-faced lying that is almost unparalleled in the common law governing tort and contract." *Oberman*, *supra* note 9, at 889.

This price is obliquely acknowledged in jurisprudence on the interests of men whose sexual partners decide independently to undergo an abortion. Reading two such cases through the lens of separation versus connection is instructive.

Planned Parenthood of Central Missouri v. Danforth concerns whether husbands may veto their wives' reproductive choices,¹¹⁸ and *Planned Parenthood of Southeastern Pennsylvania v. Casey* concerns whether husbands are entitled to be notified prior to an abortion (among other issues).¹¹⁹ Both cases reject the control and informational interests of husbands and instead protect the woman's individual reproductive rights, but *Danforth* goes further towards acknowledging the relational tensions at play, the challenge inherent when we recognize both separate and connected aspects of human nature. Both cases deal with married couples, but their holdings apply to unmarried couples as well—if the relational interests that flow from marriage are not enough to overcome a woman's individual right to choose and to hide pregnancy, extramarital relations command even less respect.

Danforth holds that a husband may not veto his wife's decision to terminate a pregnancy. The opinion does, however, acknowledge the tension between its "separation"-privileging result and the imperatives of "connection" by recognizing "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."¹²⁰ As the Court explains,

[I]deally the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. But it is difficult to believe that the goal of fostering mutuality and trust in a marriage . . . will be achieved by giving the husband a veto power. . . . [W]hen the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and

¹¹⁸ *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (invalidating consent provisions of a Missouri statute, including requiring blanket parental consent as a condition for an unmarried minor's abortion during the first trimester based on insufficient state interest but upholding the constitutionality of the statute's reporting and recordkeeping requirements).

¹¹⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895 (1992) (invalidating part of a Pennsylvania statute that required a married woman to provide, among other things, the reason for failure to provide notice of an abortion to her husband as an unconstitutional deviation from the standards established for such reporting provisions under *Danforth*).

¹²⁰ *Danforth*, 428 U.S. at 69. The Court reasoned that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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." *Id.* at 70 n.11 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)) (internal quotation marks omitted).

immediately affected by the pregnancy, as between the two, the balance weighs in her favor.¹²¹

Danforth thus implicitly recognizes the competing pulls of connection and separation. Pregnancy affects both parties to a relationship. Ideally therefore, decisions about it should be made collectively. It is only when consensus cannot be reached that the decisionmaking balance must necessarily tip in favor of one of the two individuals. *Danforth* favors the wife, but it recognizes that pregnancy implicates husbands' interests as well. A husband who becomes a father against his will or is powerless to prevent the abortion he opposes may suffer deep, long-term, financial, psychological, and spiritual harms. A wife has the final say not because the husband has *no* say but because he has marginally *less* say, due to the fact that he is not the one who "physically bears the child."¹²²

This tripartite balancing of the lovers' interests as a couple, the man's interests as potential father, and the woman's interests as potential mother and carrier of the fetus is less prominent in the Court's reasoning in *Casey*. *Casey* struck down a state statute requiring a married woman seeking an abortion to notify her husband in advance.¹²³ I believe the outcome of *Casey* is correct: doctors who perform abortions should not be required to withhold their services from women who have not signed an affidavit indicating that they have notified their husbands. But the reasoning, while briefly recognizing the relational interests discussed in *Danforth*,¹²⁴ is overwhelmingly weighted toward separation.

Justice O'Connor's majority opinion focuses on evidence showing that a significant number of women do not notify their husbands of their decision to obtain an abortion in order to protect their own and their children's safety.¹²⁵ Though the statute at issue in the case exempted women who believed that notification would expose them to bodily injury, the exception was too narrow because it did not account for emotional harm or harm to children.¹²⁶ Also, by requiring the woman to sign an affidavit implicating her husband, the statute was blind to the dangers that victims of domestic

¹²¹ *Id.* at 71.

¹²² *Id.*

¹²³ *Casey*, 505 U.S. at 901.

¹²⁴ *Id.* at 895 ("We recognize that a husband has a 'deep and proper concern and interest . . . in his wife's pregnancy and in the growth and development of the fetus she is carrying.'" (citing *Danforth*, 428 U.S. at 69)).

¹²⁵ *Id.* at 877–79.

¹²⁶ The District Court found that

[t]he 'bodily injury' exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to . . . retaliate against her in future child custody or divorce proceedings; . . . inflict psychological intimidation or emotional harm upon her, her children or other persons; . . . inflict bodily harm on other persons such as children, family members or other loved ones; or . . . use his control over finances to deprive of necessary monies for herself or her children.

Id. at 888.

violence face when they report their abusers.¹²⁷ Thus, O'Connor concludes that "[f]or the great many women who are victims of abuse inflicted by their husbands, . . . a spousal notice requirement enables the husband to wield an effective veto over his wife's decision."¹²⁸ Therefore, "the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*."¹²⁹

The threat of violence doubtless justifies a woman's secrecy, and Justice O'Connor does a great service by turning the Court's spotlight on the unacceptably high incidence of domestic abuse and its impact on pregnant women. But women who hide their pregnancies from the men with whom they conceive do so for a range of reasons. Many, as *Casey* reports, are victims of abuse. Others may hide for different reasons: because they don't care for the man; because they want to avoid the intimacy that the conversation will create; because they are involved with another man; because they do not want to be swayed towards or away from abortion; because they are afraid of being abandoned; because they don't want to ask for empathy or help when they suspect none will be given; because they feel guilty, ashamed, responsible. Not all of these reasons justify the harm that secrecy inflicts on men and on the relationship. *Casey* missed an opportunity to make clear that when revealing her pregnancy would *not* endanger a woman, hiding it from the man is often wrong because pregnancy has relational implications.¹³⁰ It may not be practically possible to craft a law that exempts only women with good reasons for hiding their pregnancies from notifying their partners, but acknowledging the rough justice that the current rule strikes would have expressive value.

Again, some men may prefer a no-strings-attached arrangement, but others approach sex with different baseline expectations. Many men would like and actively demonstrate their desire to know of the fact of concep-

¹²⁷ See *id.* at 893 ("[T]here are millions of women in this country who are the victims of regular physical and psychological abuse at the hands of their husbands. Should these women become pregnant, they may . . . have justifiable fears of physical abuse, but may be no less fearful of the consequences of reporting prior abuse to the Commonwealth of Pennsylvania [Accordingly,] many women who are pregnant as a result of sexual assaults by their husbands will be unable to avail themselves of the exception for spousal sexual assault . . . because the exception requires that the woman have notified law enforcement authorities within 90 days of the assault, and her husband will be notified of her report once an investigation begins. If anything in this field is certain, it is that victims of spousal sexual assault are extremely reluctant to report the abuse to the government; hence, a great many spousal rape victims will not be exempt from the notification requirement." (citations omitted)).

¹²⁸ *Id.* at 897.

¹²⁹ *Id.*

¹³⁰ The final holding of the case is correct because healthcare providers at abortion clinics should not be tasked with enforcing communication obligations between lovers that should arise—as I discuss further in Part III—when a woman learns of the fact of conception, not when she prepares to terminate a pregnancy. The clinics' job is to treat women according to their individual decisions.

tion.¹³¹ They are willing and ready to help support the woman through whatever decision she makes, but they also want an opportunity to share their feelings about the pregnancy. When partners' wishes regarding abortion are diametrically opposed, the woman should have the final say: it is in the end her body that will bear the consequences, and even in marriage the wife's final preference rules. But guaranteeing this right to women may not require shutting all men out of the process entirely.

C. *Sadomasochism as Mirror*

The relational critique also reveals that the default rules governing mainstream heterosexual intercourse are surprisingly similar to the rules adopted by some practitioners of formal sadomasochism, except that "vanilla" couples tend to accept these rules far less consciously and deliberately. Nonprocreative sex is inherently risky; consenting to it therefore involves a sacrifice of sorts. Women sacrifice their bodies by popping hormones or risking pregnancy and men sacrifice control over their potential offspring. In this sense, sex can be seen as (among other things) a sacrifice ritual, a dramatic dance in which both actors find ecstasy through their respective roles—victim and victimizer, sacrificed and one for whom a sacrifice is made. Men and women each play both roles in different ways. In this exchange of power and vulnerability, "free love" resembles sadomasochism *minus* two critical components: consensual assumption of unequal risk and explicit agreement about its potential consequences.

Theorist and self-described sadist Pat Califia explains the elaborate lengths to which practitioners go to make their consent explicit:

An S/M scene is always preceded by a negotiation in which the top and bottom decide whether or not they will play, what activities are likely to occur, what activities will not occur, and about how long the scene will last. The bottom is usually given a *safe word* or *code action* she can use to stop the scene. This safe word allows the bottom to fantasize that the scene is not consensual and to protest verbally or resist physically without halting stimulation.¹³²

¹³¹ See Reich & Brindis, *supra* note 97, at 135 (noting "men articulate the importance of responsibility and may internalize expectations to behave responsibly"). Of the twenty men interviewed, three learned about their partners' pregnancies and abortions after they occurred. *Id.* at 142. These men "said that they would not have done anything to dissuade the woman from having an abortion, but they wished they could have been involved." *Id.* As one subject put it, "I felt saddened later that she never told me. She never let me in on the process of decision [making]. . . . I think if two people are involved, then two people should be involved in the process. When it comes down to the nitty gritty, I don't think any man could force a woman to have a child, but I think that it should really be talked about and should really be discussed from all angles. . . . I felt that then and I feel it now." *Id.* at 142–43 (alterations in original).

¹³² PAT CALIFIA, *Feminism and Sadomasochism*, in PUBLIC SEX: THE CULTURE OF RADICAL 165, 168 (1994); see also Lesley Hall, *Pain and the Erotic*, PAIN, <http://www.wellcome.ac.uk/en/pain/microsite/culture1.html> (last visited Aug. 28, 2010) ("[S]ubcultures of individuals interested in consensual sadomasochistic practices . . . [have] developed codes of conduct to ensure the safety of participants, embodied in the rubric 'Safe, Sane and Consensual.' . . . Far from the masochist, or 'bottom',

Because of its consensual nature, Califia stresses that “somasochism is not a form of sexual assault.”¹³³ Califia also seeks to dispel the widespread view that somasochism is essentially violent, explaining that “[s]afety is a major concern for somasochists.”¹³⁴ “The key word to understanding S/M is *fantasy*. The roles, dialogue, fetish costumes, and sexual activity are part of a drama or ritual. The participants are enhancing their sexual pleasure, not damaging or imprisoning each other.”¹³⁵ According to Califia, it is the role play of domination and submission that is critical: “[t]he exchange of power is more essential to S/M than intense sensation.”¹³⁶

Nevertheless, S/M safety codes do not necessarily mean nobody gets hurt.¹³⁷ Rather, they mean that dangers are acknowledged and knowingly assumed. S/M practitioners sometimes formalize and record the “rules” of their game in a contract which bears an uncanny resemblance to the default rule that currently governs unmarried lovers who have conceived. One such contract, for example, includes the following language:

I understand that . . . somasochistic activities involve certain real and unpredictable risks that cannot be eliminated regardless of the care taken to avoid injuries. . . . I fully assume the risks and dangers as acceptable to me . . . I understand and agree that any bodily injury, death, or loss of personal property and expenses as a result of my own intentional or negligent act(s), or the intentional or negligent act(s) of any other person(s) participating in any . . . activity, or as a result of the failure or malfunction of any piece(s) of equipment or devices, is my responsibility and I accept same.¹³⁸

This type of contract recognizes that intimacy involving inherently unequal risks demands explicit discussion regarding the allocation of potential consequences. The implicit assumption at work is that absent the agreement, parties *would* be responsible towards each other. In other words, waivers of this type presume a relational default, placing the burden to opt-out on that those who prefer a no-strings-attached rule. Not all S/M practi-

being at the mercy of the sadist, or ‘top’, it was widely claimed that the bottom controlled the scene by defining its limits; while the top was not indulging in a frenzy of violence, but consciously and attentively deploying certain practices, some of them demanding considerable skill and dexterity.”)

¹³³ CALIFIA, *supra* note 132, at 167–72.

¹³⁴ *Id.* at 168.

¹³⁵ *Id.*

¹³⁶ Califia writes that “S/M does not necessarily involve pain” but also acknowledges that “pain is a subjective experience.” *Id.* at 170.

¹³⁷ *See id.* (“Depending on the context, a certain sensation may frighten you, make you angry, urge you on, or get you hot. In many situations, people choose to endure pain or discomfort if the goal for which they are striving makes it worthwhile. Long-distance runners are not generally thought of as perverts, nor is Mother Theresa.”)

¹³⁸ NEST Rules, <http://nestgatherings.com/Default.aspx?CatID=119&CatName=NEST%20Rules%20&%20Waiver> (last visited Aug. 15, 2010).

tioners use contracts or discuss liability vis-à-vis risks, but those who do provide a useful example of what is possible.

Our current rule throws lovers who have conceived into territory that is ethically murkier than this brand of controlled, deliberate S/M—which some courts have found illegal despite its consensual nature¹³⁹—in that it *assumes* that both parties have agreed to terms along these no-liability lines. In this sense, the clearly negotiated structure of the S/M exchange, and in particular the masochist's (the "bottom's") ultimate control over the parameters of permitted activity and his or her ability to stop it at any point, may make S/M safer than "vanilla" sex, in which misunderstandings about desire, consent, pain, and pleasure abound. The S/M practitioner signing the above waiver vows that he or she "understand[s] that accidents may occur, mistakes may be made, equipment and devices may fail or malfunction."¹⁴⁰ Clear-eyed conventional couples have similarly tenuous faith in condoms and diaphragms, but unlike practitioners of controlled S/M, they are governed by a no-liability standard by default rather than by choice.

To sum up, sexual partners who conceive are not strangers. We are all connected. In sex we enact the most radical manifestation of our interconnectedness. Sex is connection, a connection that is sometimes also a conception. How might the law handle the results with greater care?

III. TOWARDS A NEW LAW OF CONCEPTION

By treating sexual partners who conceive as legal strangers, the law reinforces rather than mitigates the vulnerabilities of both men and women. The law does, however, provide an alternative form for couples who want the consequences of sex to be governed by a set of robust relational obligations. It is called marriage. The lovers-as-strangers paradigm makes a lot more sense when viewed as one element of a broader societal strategy aimed at channeling sex into an institution designed and improved over the

¹³⁹ See *People v. Samuels*, 58 Cal. Rptr. 439, 447 (Ct. App. 1967) ("[C]onsent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing or wrestling Even if it be assumed that the victim . . . did in fact . . . submit to a beating which was so severe as to constitute an aggravated assault, defendant's conduct in inflicting that beating was no less violative of a penal statute obviously designed to prohibit one human being from severely or mortally injuring another."); *State v. Collier*, 372 N.W.2d 303, 305–07 (Iowa Ct. App. 1985) (affirming Collier's assault conviction in holding that sadomasochism does not qualify as any activity to which a participant can consent to assault); *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1060 (Mass. 1980) ("The fact that violence may be related to sexual activity (or may even *be* sexual activity to the person inflicting pain on another . . .) does not prevent the State from protecting its citizens against physical harm. . . . The general rule is: 'It is settled that to commit a battery upon a person with such violence that bodily harm is likely to result is unlawful, and consent thereto is immaterial.'" (quoting *Commonwealth v. Farrell*, 78 N.E.2d 697, 705 (Mass. 1948) (emphasis in original))). *But see* *People v. Jovanovic*, 700 N.Y.S.2d 156, 167–69 (App. Div. 1999) (holding that email communications in which the complainant referred to her prior sadomasochistic activities with third parties tended to establish a likelihood of consent).

¹⁴⁰ NEST Rules, *supra* note 138.

centuries to deal with its consequences. But this strategy has brought a debatable degree of success over time, and some historians insist that the theory behind it is flawed. The central function of marriage, they argue, was to forge alliances around power and property rather than to regulate the vulnerabilities that come along with reproduction.¹⁴¹

In any case, channeling sex into marriage today is clearly ineffective. Most Americans—secular and religious alike—have nonmarital sex, and women aged 18–24 have the highest number of unintended pregnancies.¹⁴² A new approach tailored to our “postvirginal world”¹⁴³ is due.

A. *Marriage and Accidental Procreation*

“[A]n orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth,” wrote dissenting Massachusetts Supreme Court Justice Robert Cordy in *Goodridge v. Department of Public Health*¹⁴⁴ and “[t]he institution of marriage is that mechanism.”¹⁴⁵ According to Justice Cordy, marriage should be limited to heterosexuals because the *raison d’être* of marriage—

¹⁴¹ See STEPHANIE COONTZ, MARRIAGE, A HISTORY 34 (2005) (“The story that marriage was invented for the protection of women is still the most widespread myth about the origins of marriage.”); *id.* at 31 (“Probably the single most important function of marriage through most of history . . . was its role in establishing cooperative relationships between families and communities.”); see also *id.* at 34–49 (discussing the invention of marriage). NANCY F. COTT, PUBLIC VOWS 15 (2002) (“When the colonies declared independence and joined together in a new nation, a marital metaphor became . . . compelling . . . Marriage, being a voluntary and long-sustained bond, provided a ready emblem. . . . As an intentional and harmonious juncture of individuals for mutual protection, economic advantage, and common interest, the marriage bond resembled the social contract that produced government.”); E. J. GRAFF, WHAT IS MARRIAGE FOR? 61 (2004) (“Much of medieval European peasant society took it for granted that courting young men and women would go walking all night . . . so long as the couple married once she was pregnant, which is why roughly a third of brides were pregnant on their wedding day, and why most suits in ecclesiastical courts had to do with ‘pre-contracts’—one person insisting that the other, now trying to marry another, had already implicitly married her in some midnight rendezvous. . . . The Church licensed prostitutes’ guilds and collected regular dispensation fees for their trade, assuming prostitution to be the only way to stop male lust from overwhelming honorable mothers. Priests took concubines so often that by the late Middle Ages there was actually a Church fee schedule for priests’ concubines and bastards.”).

¹⁴² See *supra* note 3 and accompanying text.

¹⁴³ JOAN JACOBS BRUMBERG, THE BODY PROJECT: AN INTIMATE HISTORY OF AMERICAN GIRLS 143 (1997). Sociologists describe a “hookup culture” on college campuses that leaves students who do not participate in it on the margins of the social scene, describing themselves as “abnormal.” KATHLEEN A. BOGLE, HOOKING UP: SEX, DATING, AND RELATIONSHIPS ON CAMPUS 64–71 (2008) (describing particular college students who consciously choose not to “hook up,” their motivations for doing so, and the ostracism many who choose this route feel they face).

¹⁴⁴ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting). The case held that a bar against same-sex marriage violated the state’s constitution.

¹⁴⁵ *Id.*

regulating accidental procreation—is a nonissue for gay and lesbian lovers.¹⁴⁶

Cordy and those who follow his lead are correct that heterosexuals face unique risks; accidental procreation does demand regulation. But marriage is not the ultimate answer to the problem. Marriage fulfills many worthy functions, but as society's main mechanism for safeguarding the interests of the accidentally pregnant, it is failing.

Marriage does guarantee spouses a minimal level of mutual support. A pregnant woman married to the man with whom she conceives is thus marginally safer, as a matter of law, than a pregnant woman who is unwed.¹⁴⁷ This de jure safety, however, does not always translate into de facto benefits, and marriage may lock a woman into a harmful relationship with the only alternative—divorce—having potentially devastating economic consequences.¹⁴⁸ But even if we bracket these dangers, marriage is not the answer to the special relationship that arises with conception because accidental conception also happens outside of marriage.¹⁴⁹ It happens despite the carrots privileging spouses over unmarried couples (such as mar-

¹⁴⁶ See Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 3–4 (2009) (“Justice Cordy’s dissenting opinion [in Goodridge] presented marriage as a necessary channeling of male sexuality to useful and policed reproduction. For Justice Cordy, marriage is an institution designed to create a safe social and legal space for accidental heterosexual reproduction, a space that is not necessary for same-sex couples who, by definition, cannot accidentally reproduce. Following the publication of Goodridge, Cordy’s rationale was taken up by the majority in every other state supreme court (saving the California . . . and Connecticut . . .), and many state district and appellate courts, that heard a same-sex marriage case. Without marriage, these opinions suggest, heterosexual people would labor under the misimpression that reproduction is acceptable without a long-term commitment to parenting. By limiting marriage to opposite-sex couples—people who might accidentally reproduce through their sexual relations—the state can send a message that marriage is the proper space for reproduction and constrain an unwieldy and dangerous male (hetero)sexuality that would otherwise cause social chaos.”).

¹⁴⁷ Note however that economically dependent spouses generally have few mechanisms for enforcing their entitlements during marriage. Spouses’ economic rights generally vest at divorce. For a discussion of spouses’ limited economic rights during an ongoing marriage, see Alicia B. Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113, 144–51 (2008); see also Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 34 (1996) (Silbaugh explains that spouses’ duty of mutual support is “not directly enforceable between the parties when married. The support obligation may be enforceable during a marriage only by third party creditors who may sue one spouse for certain very narrow categories of debts . . . undertaken by the other.”). Even at divorce, while property distribution determinations may take childcare contributions into account, they do not look at pregnancy and the “labor” of childbirth for purposes of determining spouses’ contributions to the marriage.

¹⁴⁸ See FINEMAN, *supra* note 11, at 228–30 (arguing that marriage and the “sexual family”—i.e., a conception of family focused on sexual affiliation rather than on the mother/child relationship—perpetuate gender inequality); Appleton, *supra* note 5, at 296–97 (describing family law’s failure to deliver on the presumed promises of marriage).

¹⁴⁹ See COONTZ, *supra* note 141, at 112.

riage-based tax benefits)¹⁵⁰ and despite the sticks discouraging nonmarital sex (like social pressures in religious communities)¹⁵¹ and sex under the age of consent (statutory rape laws).¹⁵² Historically, in fact, rather than guaranteeing all pregnant women a minimal level of support, marriage *limited* men's responsibility to just one of their companions.¹⁵³

In any case, while marriage used to be "the only option for a socially sanctioned intimate relationship,"¹⁵⁴ most Americans today have sex outside of marriage¹⁵⁵ during their teens.¹⁵⁶ Even the abstinence movement within

¹⁵⁰ Appleton, *supra* note 5, at 273 ("By licensing marriage and attaching to it material and status-based benefits, the state singles out the favored, 'legitimate' site for sexual activity, and clearly communicates its preference for monogamy."); Shari Motro, Op-Ed., *Single and Paying for It*, N.Y. TIMES, Jan. 25, 2004, at 15.

¹⁵¹ See generally NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES 42–44 (2010).

¹⁵² For an overview of statutory rape law, see Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 111–16 (2007).

¹⁵³ "[I]n the English legal tradition," for example, explain Kerry Abrams and Peter Brooks, "[m]arriage . . . functioned not as a check on the wildness of male heterosexuality but as a way for men to maintain sexual freedom without adverse financial consequences." Abrams & Brooks, *supra* note 146, at 9. Marriage obviously provided no protections to mistresses, prostitutes, or slaves. See Larson, *supra* note 9, at 389–90 ("Victorian . . . conventions of female sexual modesty protected 'respectable' women only at the expense of prostitutes, enslaved women, and domestic servants, against whom male sexual interest was redirected.").

Some might counter that the benefits of marriage protect women by deterring extramarital sex, thereby reducing the instances of pregnancies out of wedlock. Some feminists also believe that over much of history, channeling sex into marriage and punishing extramarital sex through criminal fornication laws produced a net benefit for women. See HIRSHMAN & LARSON, *supra* note 10, at 276 ("Given natural and social vulnerabilities in sex and reproduction, the weighty and mutual obligations of socially enforced marriage was a better outcome than most women could have expected from sexual bargaining on their own. . . . [L]aws against fornication generally elevated the status of women in history by increasing the price that men paid for heterosexual access."); KRISTIN LUKER, TAKING CHANCES: ABORTION AND THE DECISION NOT TO CONTRACEPT 116 (1975) ("It is in the area of sanctioned sexuality that women suffer the most dramatic loss of bargaining power in courtship. Under the traditional taboos surrounding intercourse for the first half of [the twentieth] century, sanctioned sexual expression was a scarce commodity and one which was a powerful inducement to marriage. In general . . . the stricter the norms against premarital intercourse, the more valuable sex becomes as a currency of bargaining in the marriage market."). In light of the prevalence of nonmarital sex today, however, the relevance of these objections is largely historical.

¹⁵⁴ Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 225.

¹⁵⁵ See CAHN & CARBONE, *supra* note 151, at 60 ("Social science research . . . suggests that well over 90% of all adults engage in sex before they marry.") As Cahn and Carbone show, the main cultural divide in America today seems to be not between unmarried youth who abstain and those who are sexually active. Rather, the main division is in how people tend to handle an unplanned pregnancy. Conservatives tend toward the "shotgun wedding"; liberals are more likely to terminate the pregnancy. See generally LAUREN F. WINNER, REAL SEX: THE NAKED TRUTH ABOUT CHASTITY 14–19 (2005) (detailing the prevalence of "sexual sin in contemporary Christendom").

¹⁵⁶ *Facts on American Teens' Sexual and Reproductive Health*, GUTTMACHER INST. (Jan. 2010), <http://www.guttmacher.org/pubs/FB-ATSRH.html>. For a related discussion, see Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and*

conservative Christian communities has delayed the age of first intercourse only marginally.¹⁵⁷ Some studies have shown that teens who take chastity pledges are also less likely to use birth control, presumably because “the use of birth control implies that one thought about sex beforehand; one *planned* for it.”¹⁵⁸

Not only does marriage fail to deter accidental procreation, but the solution it offers young people who marry *because* of an accidental pregnancy—the preferred fallback in conservative communities—may also be less than ideal. A “shotgun marriage” will guarantee the woman a baseline level of support,¹⁵⁹ but early marriages (particularly those “compelled by an improvident pregnancy”)¹⁶⁰ are more likely than other marriages to end in divorce.¹⁶¹ Furthermore, the financial and emotional costs of dissolving a failed marriage may outweigh the temporary security it provides during pregnancy.¹⁶² Thus when pregnancy is accidental, couples whose actual emotional relationship is not one of lifelong commitment may be better

2001, 38 PERSP. ON SEXUAL & REPROD. HEALTH 90, 92–93 (2006), available at <http://www.guttmacher.org/pubs/psrh/full/3809006.pdf>; Henshaw, *supra* note 3, at 27.

¹⁵⁷ See WINNER, *supra* note 155, at 17 (“In 2001, a study of 6,800 students showed that virgins who took the [True Love Waits abstinence] pledge were likely to abstain from sex for eighteen months longer than those who did not take the pledge. This . . . means simply that a lot of abstinence pledgers are having sex at nineteen instead of eighteen.”); Heather D. Boonstra, *Advocates Call for a New Approach After the Era of ‘Abstinence-Only’ Sex Education*, 12 GUTTMACHER POL’Y REV. 6, 8 (2009), available at <http://www.guttmacher.org/pubs/gpr/12/1/gpr120106.html>. In addition to her critique of current abstinence programs, Winner’s book aims—through personal sexual accounts, theological references, and an honest discussion of cultural trends—to provide modern Christians with a compelling argument for the admittedly challenging imperative of abstinence until marriage.

¹⁵⁸ *Id.* More broadly, rather than functioning as an insurance policy against unintended procreation, marriage is more commonly the form of choice for couples who *intend* to conceive. “Many people today marry,” write Kerry Abrams and Peter Brooks, “once they think they have found the person they want to procreate with, not because they have decided to have sex for the first time and want to insure themselves against ‘accidents,’ but because they have been (irresponsibly?) engaging in sex for quite some time and only now are ready to settle down and have a child.” Abrams & Brooks, *supra* note 146, at 32.

¹⁵⁹ The scope of this Article is limited to unmarried conception, but the treatment of pregnancy in marriage and divorce law is also lacking.

¹⁶⁰ CAHN & CARBONE, *supra* note 151, at 60.

¹⁶¹ See *id.* at 26 (“[D]ivorce risk . . . increases with younger age of marriage, lower economic status, and having a baby either prior to marriage or within the first seven months after marriage. Accordingly, family strategies that either emphasize marrying young, or marriage as the solution to an improvident pregnancy[,] are likely to increase rates of divorce, all other things being equal.”).

¹⁶² Marriage provides a useful way to formalize intimate relations between lovers who would choose to marry regardless of the risk of procreative accidents. By standardizing a basket of rights and responsibilities between adults who intend to unite for life, it absolves couples of the need to deliberate and negotiate over every aspect of their union. Its maximalist one-size-fits-all defaults designate spouses as each others’ primary beneficiaries, caretakers, guardians, agents, and representatives in all aspects of life—financial, medical, spiritual. In this capacity, spouses replace parents and siblings as a person’s most significant legal relation. Though pregnancy and co-parenting are life-altering undertakings, marriage binds people to a broader, more extensive commitment than is needed to protect lovers who conceive and their unplanned children.

served by an intermediate status that is calibrated to their situation.¹⁶³ The “shotgun” practice is thus at best an incomplete answer to the problem.

Justice Cordy concludes that

[A]side from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child The alternative, a society without the institution of marriage . . . would be chaotic.¹⁶⁴

But since marriage does not always link intercourse, procreation, and responsibility, and since it does not always fill the void by binding a man to the woman with whom he conceived, the blinkered reliance on marriage to solve the problem is misplaced. A society without an institution that fulfills these critical functions is indeed chaotic. It is the society in which we now live.

B. *Matching Love Law to Love Life*

What might a fairer law of conception look like? In love law—as in love life—one size does not fit all. Relations between unmarried lovers who conceive might therefore be handled differently depending on the type of intercourse that produced the pregnancy. Again, this Article is concerned with pregnancies that result from sex that is consensual and involves no fraud or deceit. For our purposes, two types of consensual, good-faith sex might be distinguished—consensual sex that creates a set of baseline relational obligations, and consensual sex in which the parties expect and intend for there to be no strings attached. The former might serve as the basis for our default legal sex code, a code premised on contractual or equity-based principles; the later might inform an alternative for those who wish to opt for a lovers-as-strangers rule.

1. *The Relational Default.*—Nonmarital intimate relationships used to inhabit a legal no-man’s land. Over the past few decades, however, courts and legislatures have begun to recognize unmarried partners who live together as forming a unique type of relationship under theories that parallel

¹⁶³ See CAHN & CARBONE, *supra* note 151, at 59 (“[M]arriage at younger ages is a risky enterprise. It has historically required a high degree of community-reinforced socialization into marital roles—including stereotypical gender roles, male financial contributions and female dependence—to succeed. New research emphasizes that full emotional maturity does not occur until the mid-twenties, and the less than fully mature early twenties brain (especially if male) is primed for risk taking and sexual experimentation. At the same time, the modern economy provides fewer opportunities for the men who are ready to start families in their early twenties to move into productive employment.”); see also HIRSHMAN & LARSON, *supra* note 10, at 276 (“Rather than try to force sexual actors into marriage, we choose to modify that anarchic state of nature that characterizes nonmarital sexual bargaining.”). *But see* Scott, *supra* note 154, at 235 (“[E]ven broken marriages provide financial and relationship benefits for dependent family members.”).

¹⁶⁴ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

contractual and equity-based theories of marriage. Where a couple formalizes their domestic partnership and then one partner abandons the other, relief to the abandoned partner may be granted under contract principles.¹⁶⁵ Where a couple has made no explicit agreement formalizing their commitment, many jurisdictions nevertheless recognize that a partnership was formed and provide protections when the relationship breaks down under either an implied contract theory¹⁶⁶ or an equity-based status approach.¹⁶⁷

A similar logic might apply to sexual partners who conceive, whether or not they live together. From a contractual perspective, partners who conceive might be recognized under the rubric of a distinct legal relationship because, in many instances, an agreement to assume mutual obligations of support and communication can be inferred. Even where such an agreement cannot be inferred, sexual partners who conceive should be legally responsible towards each other as a normative matter.

In general, the relationship status of sexual partners who conceive might be founded on two guiding principles: (1) communication obligations surrounding conception should take the parties' individual interests as well as their relational interests into account; and (2) responsibilities for the costs

¹⁶⁵ See Scott, *supra* note 154, at 255 (“Under ordinary contract principles, courts should enforce agreements between cohabiting parties dealing with property distribution and support. Many courts have adopted this view in recent years and have been ready to enforce these contracts. If a couple has an express written agreement, enforcement is usually straightforward. Sometimes, even without a writing, substantial evidence exists of the couple’s agreement that property acquired during the union would be shared or that one party would provide post-dissolution support.”).

¹⁶⁶ See Scott, *supra* note 154, at 256 (“Courts’ responses to financial claims by cohabitating parties based on conduct rather than express promise have been mixed. In general, contracts implied in fact will be legally enforced if the conduct is promissory—that is, if it is sufficiently clear to demonstrate an understanding between the parties that an obligation exists.” (footnote omitted)). Scott has gone as far as arguing that contract principles justify a standard default imposing marriage-like commitments on couples who live together for many years and conduct themselves as married. As long as they have not explicitly contracted otherwise, she argues, “an agreement to assume marital obligations can be inferred.” Scott, *supra* note 154, at 258; see also Shahar Lifshitz, *Married Against Their Will* 11–13 (Bar-Ilan Univ. Pub. L. and Legal Theory Working Paper Series, Paper No. 06-09, 2009), available at <http://ssrn.com/abstract=1352043> (explaining two models of implicit contractual relationships between cohabitating couples).

¹⁶⁷ A minority of jurisdictions and the American Law Institute’s *Principles of Family Dissolution* reject the contractual approach in favor a status-based solution. Contract is seen as a poor vehicle for regulating intimate relations for two main reasons. First, as ALI chief reporter Ira Ellman put it, “people do not think of their intimate relationships in contract terms.” Ira Ellman, “Contractual Thinking” Was Marvin’s *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1373 (2001). Second, the contract rubric fails to address the equitable claims of abandoned partners where no implied agreement can be reasonably inferred. *Id.* at 1372 n.39. But see Scott, *supra* note 154, at 262–63 (“[A] contractual framework is compatible with liberal values, and thus has a normative appeal that the status-based A.L.I. approach lacks. The proposed default rules rest on realistic assumptions about the intentions of many couples in informal unions, while at the same time offering protection to naïve parties whose expectations may not be shared by their partners.”). The better, more honest reason for imposing marital obligations on domestic partners, the argument goes, is fairness. See Lifshitz, *supra* note 166, at 13–16 (describing different rationales for the status model’s equation of marital obligations and cohabitation).

of pregnancy, childbirth, miscarriage, and abortion broadly conceived should be equitably shared by both partners. Again, the goal of this Article is to start a conversation. What follows are a range of possible parameters for structuring a new relational default.

a. Communication.—As we have seen, the lovers-as-strangers paradigm translates into a default that gives men almost no entitlement to be informed of conception. When sex takes place in the context of a good-faith nonviolent relationship, the law thus disregards a basic and legitimate relational value. The status quo is also problematic because of the distinctions it draws between rich and poor. The current rule gives financially independent women a *carte blanche* to hide pregnancy and birth while applying a mandatory disclosure policy to women who are unable to shoulder the costs of childcare alone.¹⁶⁸ While it is true that the policy requiring indigent women applying for public assistance to identify the father of their child is rooted in a concern for public funds, not for the relational interests of the father, the result effectively distributes privacy privileges based on economics.

Ideally, men and women who engage in the type of sex that results in pregnancy—usually repeated acts of unprotected intercourse—will either share a no-strings-attached understanding or they will both feel safe discussing an unintended pregnancy. But for many women, notifying their partner of conception spells danger.¹⁶⁹ It may also undermine a woman's right to choose if once notified, the man pressures or coerces her to undergo or forego an abortion.¹⁷⁰ Even if the woman faces no such dangers, placing all of the communication burden on her would require her to proactively contact a man who may have no legitimate interest in the matter—for example, a man who demonstrated no relational commitment beyond the sexual encounter. Nevertheless, a default that gives no consideration whatsoever to nonviolent men's interest in knowing about a pregnancy goes too far.

One possibility for a more balanced approach is to design a limited notice system modeled on the registry system some states use to determine when a putative father must be notified of a mother's intention to place their child up for adoption.¹⁷¹ Specifically, the act of intercourse could put a man

¹⁶⁸ See *supra* note 116 and accompanying text.

¹⁶⁹ See *supra* notes 125–129 and accompanying text.

¹⁷⁰ The fact that some women are coerced into having abortions does not, however, justify abortion restrictions. See also Law, *supra* note 22, at 1034–35 (arguing that a statute requiring a pregnant woman to notify the man who impregnated her of the fact of the pregnancy, while preferable to abortion-only notification policies, would be indefensibly oppressive to women). See generally Siegel, *supra* note 84, at 1687–92 (explaining how the woman-protective antiabortion argument blends feminist arguments with traditional gender stereotypes).

¹⁷¹ I credit Susan Appleton with this idea (which she suggested without necessarily endorsing). For a recent discussion of putative father registries, see Laura Oren, *Unmarried Fathers and Adoption: "Perfecting" or "Abandoning" an Opportunity Interest*, 36 CAP. U. L. REV. 253, 266–67 (2007) ("By

on a kind of constructive notice of the possibility of conception.¹⁷² It would place the burden on him to either remain involved in the woman's life so as to be able to observe any changes in her body or to register as a putative father in a public registry. Upon such registration, the woman would be notified, which would then shift the burden to her to notify the man of conception—either promptly after she learns of it or once the pregnancy has progressed beyond a certain stage. A man who fails to register would forfeit his right to know of the pregnancy. Where notification might endanger the woman or others, she would be free to keep the pregnancy secret regardless of whether the man registered.

This Article does not address the ideal mechanism for administering this “danger” exception, but it is worth noting that the challenges it poses are not novel. When indigent mothers apply for public assistance, they are often required to identify the father of their child as a condition for receiving benefits unless doing so would expose them to danger.¹⁷³ The Pennsyl-

2007, at least thirty-four states had adopted one form or another of putative father registry. . . . Typically, they permit registration before the birth of the child and no later than thirty days after. . . . The consequences of not registering can be strikingly different from one state to another. In some states, any putative father who wants to be notified about a possible adoption proceeding must register or lose the opportunity for notice and objection. In others, the statute requires due diligence to identify and notify putative fathers, including those who have failed to register.”); *see also* 750 ILL. COMP. STAT. ANN. 50/12.1 (West 2009) (“The Department of Children and Family Services shall establish a Putative Father Registry for the purpose of determining the identity and location of a putative father of a minor child who is, or is expected to be, the subject of an adoption proceeding, in order to provide notice of such proceeding to the putative father. . . . [F]ailure to timely register with the Putative Father Registry (i) shall be deemed to be a waiver and surrender of any right to notice of any hearing in any judicial proceeding for the adoption of the child, and the consent or surrender of that person to the adoption of the child is not required, and (ii) shall constitute an abandonment of the child and shall be prima facie evidence of sufficient grounds to support termination of such father’s parental rights under this Act.”); *Lehr v. Robertson*, 463 U.S. 248, 250–51 (1983) (“The State of New York maintains a ‘putative father registry.’ A man who files with that registry demonstrates his intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that child. . . . In addition to the persons whose names are listed on the putative father registry, New York law requires that notice of an adoption proceeding be given to several other classes of possible fathers of children born out of wedlock—those who have been adjudicated to be the father, those who have been identified as the father on the child’s birth certificate, those who live openly with the child and the child’s mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child’s mother before the child was six months old.”).

¹⁷² *See, e.g.*, UTAH CODE ANN. § 78B-6-110(1)(a) (West 2008) (putting putative fathers on constructive notice once they have engaged in sexual intercourse); VA. CODE ANN. § 63.2-1250(E) (2008) (“Any man who has engaged in sexual intercourse with a woman is deemed to be on legal notice that a child may be conceived and the man is entitled to all legal rights and obligations resulting therefrom. Lack of knowledge of the pregnancy does not excuse failure to timely register. In the event that the identity and whereabouts of the birth father are reasonably ascertainable, written notice of the existence of an adoption plan and the availability of registration with the Putative Father Registry shall be provided by certified mailing to the man’s last known address.”).

¹⁷³ *See* Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN’S L.J. 367, 368–69 (2000).

vania statute struck down by *Casey* also contained a similar exception for women in danger of bodily injury.¹⁷⁴ Unfortunately, these exceptions have been poorly crafted and ineffectively applied.¹⁷⁵ Protecting pregnant women against violence is of paramount importance, but I am not convinced that the most effective way to do so over time is through the minimal support and communication defaults of the lovers-as-strangers paradigm. Even a minimally enforceable rule directing a woman to notify the man only if he makes the first proactive relational step (by remaining involved with her or contacting a public registry) and only if she subjectively believes doing so is safe and wise would carry a positive expressive value; it would replace the current disregard for a man's relational interests with a clear normative priority for connection over separation.

b. Support.—Pregnancy's effects on a woman's health, career, and education produce real costs that, to the extent they are not supported by public funds,¹⁷⁶ should be borne by both a woman and the man with whom she conceives. Quantifying these costs is difficult, but the alternative—effectively valuing them at zero—is unacceptable.¹⁷⁷ Two broadly conceived approaches to determining the extent of men's financial obligations might be considered. First, pregnancy-related obligations might be based on the costs of each particular pregnancy. Alternately, pregnant women might be entitled to a standard award based on average pregnancy costs adjusting for certain objective variables like the length of the pregnancy. Either of these alternatives might integrate an additional element keyed to men's financial profile designed to increase their incentives to prevent pregnancy.

Both approaches present valuation challenges. Fortunately, we need not start our pregnancy-valuation discussion from scratch. Negligence awards in wrongful pregnancy cases¹⁷⁸ in which a botched sterilization pro-

¹⁷⁴ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 908–09 (2002).

¹⁷⁵ See *id.* at 888 (“The ‘bodily injury’ exception could not be invoked by a married woman whose husband, if notified, would, in her reasonable belief, threaten to (a) publicize her intent to have an abortion to family, friends or acquaintances; (b) retaliate against her in future child custody or divorce proceedings; (c) inflict psychological intimidation or emotional harm upon her, her children or other persons; (d) inflict bodily harm on other persons such as children, family members or other loved ones; or (e) use his control over finances to deprive of necessary monies for herself or her children.”); Fontana, *supra* note 173, at 380–87 (discussing the cooperation requirement and good cause exceptions to that requirement in several federal and state laws and the insufficient protections they provide to potential victims of domestic violence).

¹⁷⁶ Again, the role of the state in supporting dependents generally, and pregnant women in particular, is outside the scope of this Article.

¹⁷⁷ See generally Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 *YALE J.L. & FEMINISM* 81 (1997).

¹⁷⁸ Wrongful pregnancy cases, also referred to as wrongful conception cases, are usually cases that involve a failed sterilization, abortion, or other contraception procedure or prescription which, due to a health care provider or pharmacist's negligence, results in an unwanted pregnancy. Martha C. Romney & Dorothy Duffy, *Medicine and Law: Recent Developments*, 25 *TORT & INS. L.J.* 351, 358 (1990).

cedure leads to an unplanned pregnancy and surrogate motherhood compensation arrangements¹⁷⁹ provide useful starting points. Naturally, many of the issues that determine the awards in the tort and surrogacy contexts are different from the issues affecting sexual partners who conceive. Wrongful pregnancies are the fault of negligent surgeons, while surrogate mothers volunteer to bear a planned child for another family—both are very different from the relational situation with which we are concerned. Nevertheless, the in-depth examinations of the real costs of pregnancy in these contexts are instructive.

Most jurisdictions' wrongful pregnancy recovery allowance covers prenatal and postnatal medical expenses, including expenses of any complications associated with the pregnancy or birth *as well as* the mother's pain and suffering during the pregnancy and delivery.¹⁸⁰ Some jurisdictions also allow recovery for lost wages during pregnancy, delivery, and a postnatal period.¹⁸¹ Finally, in some jurisdictions women may be compensated for emotional distress¹⁸² and any permanent impairment suffered by the mother as a result of the pregnancy, the delivery, or subsequent corrective proce-

¹⁷⁹ On the legality of surrogate motherhood arrangements, see Bridget J. Crawford, *Taxing Surrogacy*, in CHALLENGING GENDER INEQUALITY IN FISCAL POLICY MAKING (Åsa Gunnarsson et al. eds., forthcoming 2010) (manuscript at 2), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422180 ("Only a small number of states expressly permits or prohibits surrogacy. In New Hampshire, Florida and Ohio—to name just three—paid surrogacy agreements are enforceable, but they are subject to stringent regulations. In contrast, in New York and at least five other states, paid surrogacy agreements are void, unenforceable and potentially subject to criminal penalties. Most states, however, occupy a 'middle ground', with limited or no statutory or case law authority that speaks to the validity or enforceability of surrogacy contracts and with no civil or criminal prohibition either.").

¹⁸⁰ See *Boone v. Mullendore*, 416 So. 2d 718, 721 (Ala. 1982) (allowing for the recovery of damages against a doctor held negligent in a "wrongful pregnancy" case based on the mother's physical pain and suffering, mental anguish, her husband's loss of consortium, and medical expenses incurred by the parents as a result of the pregnancy); *Coleman v. Garrison*, 327 A.2d 757, 761–62 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975) (allowing damages in a wrongful pregnancy suit for pain and suffering due to pregnancy, cost of a tubal ligation, loss of consortium, and medical expenses related to pregnancy).

¹⁸¹ See *Kingsbury v. Smith*, 442 A.2d 1003, 1006 (N.H. 1982); *Beardsley v. Wierdsman*, 650 P.2d 288, 292 (Wyo. 1982).

¹⁸² See *Smith v. Gore*, 728 S.W.2d 738, 751–52 (Tenn. 1987) ("In assessing these damages, the jury may consider the reason for which Plaintiff underwent the pregnancy avoidance technique. Other considerations may include the age of the parent or parents, marital status, the number of other children for whom the parent or parents are already responsible, and the economic condition of the parent or parents. The degree of distress could be amplified by a combination of these factors."); *Miller v. Johnson*, 343 S.E.2d 301, 305 (Va. 1986). Indeed, in some cases even the woman's "struggle whether to rear, place for adoption, or terminate the pregnancy" is reimbursable. *Gore*, 728 S.W.2d at 752. See also *White v. United States*, 510 F. Supp. 146, 149 (D. Kan. 1981) (upholding the potential recoverability of damages for emotional and mental anguish, provided the requisite physical injury or willful, malicious, or wanton conduct accompanies it); *Weintraub v. Brown*, 470 N.Y.S.2d 634, 641–42 (Sup. Ct. 1973) (allowing recovery for a mother's emotional distress resulting from the actual or anticipated physical pain and suffering associated with pregnancy and delivery following an unsuccessful vasectomy).

dures.¹⁸³ Wrongful pregnancy cases also provide for recovery if the woman chooses to terminate the pregnancy.¹⁸⁴

Compensation agreements between surrogate mothers and intended parents account for the fact that the real costs to the woman exceed the actual medical bills she incurs during and immediately following the pregnancy by tens of thousands of dollars. In addition to compensation for the service of carrying the intended parents' child, surrogates often receive additional allowances to cover miscellaneous expenses associated with pregnancy, such as maternity clothing, child care for existing children, lost wages, and meals.¹⁸⁵ The intended parents also generally cover all medical costs not reimbursed by insurance, as well as life insurance premiums for the birth mother.¹⁸⁶ When a surrogate mother miscarries or undergoes a medically necessary abortion, she is paid a prorated portion of her fee for the period of time during which she carried the fetus, as well as an additional amount for her pain and suffering.¹⁸⁷

¹⁸³ See *Flax v. McNew*, 896 S.W.2d 839, 843–45 (Tex. App. 1995) (holding that a mother may potentially recover damages resulting from an unsuccessful sterilization procedure based on permanent scars, pain, suffering, and physical impairment). Jurisdictions differ, however, on whether the tortfeasor doctor may also be held liable for the costs of raising a child. Most states have found that the birth of a normal, healthy, albeit unwanted child is not a compensable injury. See *Boone v. Mullendore*, 416 So. 2d 718, 721–23 (Ala. 1982); *Flowers v. Dist. of Columbia*, 478 A.2d 1073, 1077–78 (D.C. 1984); *Byrd v. Wesley Med. Ctr.*, 699 P.2d 459, 465–67 (Kan. 1985); *C.S. v. Neilson*, 767 P.2d 504, 516 (Utah 1988); *James G. v. Caserta*, 332 S.E.2d 872, 876–78 (W. Va. 1985); *Bruce Keplinger & James J. Cramer, Wrongful Pregnancy: A House Divided*, 23 TORT & INS. L.J. 496, 501–05 (1988). That said, a minority of jurisdictions do allow for recovery of child rearing expenses. See, e.g., *Hartke v. McKelway*, 707 F.2d 1544, 1552–53 (D.C. Cir. 1983); *Univ. of Ariz. Health Sci. Ctr. v. Super. Ct.*, 667 P.2d 1294, 1301 (Ariz. 1983); *Stills v. Gratton*, 127 Cal. Rptr. 652, 658–59 (Ct. App. 1976); *Ochs v. Borrelli*, 445 A.2d 883, 884–85 (Conn. 1982); *Jones v. Malinowski*, 473 A.2d 429, 435 (Md. 1984); *Green v. Sudakin*, 265 N.W.2d 411, 412–13 (Mich. Ct. App. 1978) (holding that public policy considerations could not warrant physicians' exemption from the consequences of failing to notify a patient that they had not performed an agreed-upon sterilization procedure); *Sherlock v. Stillwater Clinic*, 260 N.W.2d 169, 175–76 (Minn. 1977).

¹⁸⁴ See *Gore*, 728 S.W.2d at 752.

¹⁸⁵ See *Surrogate Mothers, Inc., Approximate Expenses*, <http://www.surrogatemothers.com/expense.html> (last visited Aug. 28, 2010).

¹⁸⁶ See *Circle Surrogacy, Payment/Bills*, <http://www.circlesurrogacy.com/surrogate/faq.html#Payments> (last visited Aug. 28, 2010).

¹⁸⁷ See *Shelley M. Tarnoff, When Things Go Wrong: Pregnancy Termination in Surrogacy*, OPTS, June 1, 2010, <http://www.opts.com/pgterm.htm> (“If the surrogate undergoes a therapeutic abortion or spontaneous abortion, according to the terms of the agreement, she is usually paid a pro rata portion of her fee, calculated by multiplying her total fee by a fraction, the numerator of which is the number of days of pregnancy and the denominator of which is the normal term of pregnancy. Additionally, a fee of \$500.00 is often paid to the surrogate for undergoing a therapeutic abortion, selective reduction, amniocentesis or other invasive procedure to compensate her for associated pain and suffering.”); see also *Alex Kuczynski, Her Body, My Baby*, N.Y. TIMES MAG., Nov. 30, 2008, at 42 (“The typical cost for gestational surrogacy . . . would be anywhere from \$30,000 to \$60,000 The fees to the surrogate would be paid out in monthly installments, not in one lump sum at the end. In this way the surrogate would be reimbursed for her monthly gestational responsibilities even if the pregnancy ended in miscarriage. No money ever changes hands directly between the intended parents . . . and the surrogate. All

Because pregnancy and childbirth may bring a woman both emotional and physical joy,¹⁸⁸ a question arises as to whether these positive effects should offset her physical and emotional pain for valuation purposes. This poses obvious difficulties, but omitting pain and suffering entirely is also problematic, especially in the cases of women suffering from debilitating postpartum depression, women who miscarry, and women who undergo a traumatic abortion. Possible solutions include setting a standard limited award for the pain and inconvenience of pregnancy or to omit pain from the calculation except for in exceptional cases. In any case, even if pain and suffering are taken out of the picture entirely, the real costs of pregnancy will almost certainly exceed the child-support type paradigm currently in force.

Once the costs of a given pregnancy are calculated, they might be allocated based on an equal division principle or on a formula that accounts for differences in the parties' marginal utility of wealth.¹⁸⁹ The main advantages of equal division are its simplicity and predictability. Marginal utility-based division, by contrast, is cumbersome, but it has the potential to allocate costs more equitably than a rigid equal division standard. Because it keys each partner's obligation to his or her financial situation, the method ensures that both parties are significantly affected and it eliminates perverse incentives that may arise when parties differ in wealth.

But both of these methods presume that the diverse physical and psychic costs of pregnancy can be easily plugged into a formula. In reality, translating them into a dollar amount may be more of an art than a science, and some cases may present alternative, nonmonetary opportunities. A third alternative for allocating the subjective costs of a particular pregnancy is by using a judicial case-by-case discretionary approach similar to equita-

the money goes into an escrow account . . . , and a third party pays out the monthly fees. [Intended parents] and surrogates are discouraged from discussing money. This is partly to remove the air of commercialism from the proceedings.”)

¹⁸⁸ See *Welcome to Orgasmic Birth*, *supra* note 21.

¹⁸⁹ The marginal utility method would lessen the woman's burden and increase the man's such that both suffer a *comparable* loss. The result would mitigate the woman's burden only to the point at which the man would “share her pain.” For example, a wealthy woman's pregnancy-related costs expressed in dollars would typically be high because her low marginal utility of wealth makes her pain “worth more,” so she requires more dollars to be made whole. But if she conceives with a man of modest means she would be entitled only to a small fraction of her total loss, an amount roughly balancing the parties' loss relative to their overall circumstance. A poor woman who conceives with a rich man would be entitled to an amount close to but never exceeding her experienced loss, which will be much lower in dollars than the loss of the rich woman. (The poor woman's high marginal utility of wealth means that she requires less to be made whole.) Only where both parties are equally wealthy will the payment equal half of the woman's loss.

This method would therefore increase the deterrence potential of the new default rule, protect poor men from the risk of devastating losses (should they accidentally impregnate a rich woman), as well as limit rich men's risk exposure in the face of gold diggers. A woman who might be tempted to abuse the law in order to extract a large payment from a rich man will quickly realize that she will never be able to recover more than her own true costs.

ble distribution at divorce. Under this approach, judges would have the freedom to impose an equitable allocation based on their own consideration of relevant factors.

The pros and cons of this case-by-case method track the pros and cons of discretionary approaches to divorce.¹⁹⁰ The main advantage is that it would allow decisionmakers to tailor a solution to the specific facts and circumstances of the case.¹⁹¹ Relevant factors might include the parties' age, dependents, and behavior leading up to and following the conception. The main disadvantage of the discretionary approach is that it creates an opening for the legal system's separation bias to creep back into the allocation through individual decisionmakers.¹⁹² It would also be highly uncertain, time consuming, and costly. These drawbacks could lower the chances that parties would seek to enforce their entitlements in the first place.

Finally, instead of attempting to value the costs associated with each pregnancy, miscarriage, and abortion, women could be entitled to a standard support allowance upon conception and continuing for the duration of the pregnancy. This allowance might be based on an estimate of the average costs of pregnancy, and it might vary based on objective factors like the length of the pregnancy and the woman's age. It might also take into account the parties' relative wealth, producing the same advantages discussed in this connection above without the burden of case-by-case valuations.

It is important to stress that neither the notification nor the cost sharing principle should change a woman's right to make the ultimate decision about whether to take a pregnancy to term. Just as a husband's objection to his wife's decision does not diminish his spousal support duties, the proposed duties triggered by consensual intercourse between unmarried partners should be unaffected if the parties' reproductive preferences diverge.¹⁹³

2. *Opportunity to Opt Out.*—The relational default proposed above is clearly not appropriate for all sexual partners. Some partners want to have sex with the mutual understanding that nothing more is expected. Others wish to conceive but want no financial or legal relationship with each other.

¹⁹⁰ For a discussion on the drawbacks of broad judicial discretion over divorce, see AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.09 cmt. a (2000); see also Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1119 (1989) (“[D]ivorce doctrines that allow for substantial judicial discretion generally operate to women’s disadvantage The absence of clear-cut legal standards also affects the negotiation process in ways that disadvantage the economically weaker party, generally the woman, in a divorce. Finally, the lack of precise standards . . . may drive up the costs associated with divorce, particularly attorneys’ fees, which again penalizes the economically weaker spouse.”).

¹⁹¹ For example, decisionmakers could possibly consider the parties’ relative fault, age, dependents, and behavior following conception.

¹⁹² I credit Corinna Lain for this insight.

¹⁹³ For further discussion of the impact of mandatory pregnancy support on choice, see *infra* Part III.C.5.

Partners who truly desire no-liability sex should be permitted to play by their own rules, but the onus should be on them to make these rules explicit.

At first glance, this suggestion may seem out of touch with reality. Many, perhaps most, casual partners' expectations regarding unintended pregnancy remain unarticulated for a range of reasons. Some do not want to think about the risks, others simply trust each other, and still others remain silent because they don't want to imply that they don't trust each other. As one colleague put it, talking about pregnancy before sex can be a "buzz kill."

But Internet dating culture tells a different story. Some sites, for example, are explicitly devoted to users looking for "casual encounters"¹⁹⁴ or "friends with benefits."¹⁹⁵ Dating sites with a more diverse membership base include preset options allowing users to signal the type of connection they are looking for. OKCupid's standard questionnaire, for example, includes: "Which of these options most closely describes what you're looking for in your next relationship? Someone to come home to. Someone to go out with. Someone for tonight." It also asks users to indicate whether they believe in monogamy and whether they believe contraception is "morally wrong."¹⁹⁶ And almost all dating sites and personals venues provide a space in which users can describe their preferences in their own words. The Urban Dictionary now includes definitions for euphemisms commonly used in such forums, including "NSA"—no strings attached.¹⁹⁷

Thus, while the suggestion that casual partners make their expectations clear before sex may seem jarring at first, plenty of people are already doing just that. Indeed, as online dating grows and evolves, in addition to changing norms among its direct users it may create opportunities for new codes among those meeting offline as well. If a relational default becomes law,

¹⁹⁴ Craigslist hosts such listings under categories named "missed connections" and "casual encounters" for various geographical areas. See, e.g. Craigslist: Atlanta Classifieds for Jobs, Apartments, Personals, For Sale, Services, Community, <http://www.atlanta.craigslist.org> (last visited Aug. 28, 2010).

¹⁹⁵ See Friends with Benefits, <http://findfriendswithbenefits.com> (last visited Aug., 2010).

¹⁹⁶ See OKCupid, <http://www.OKCupid.com/questions/ask> (last visited May, 30, 2010) (users must create an account to access this page). JDate.com asks users to indicate whether they are looking for a date, a friend, marriage, marriage and children, a long-term relationship, or an activity partner. JDate.com—The Leading Jewish Singles Network! Explore the Possibilities, <http://www.jdate.com/Applications/Registration/Registration.aspx> (last visited Aug. 28, 2010). FriendFinder.com advertises itself as providing "personals for fun, friends, & love." Friendfinder: Have Fun, Meet People, & Find Love, <http://www.friendfinder.com> (last visited Aug. 28, 2010).

¹⁹⁷ See Urban Dictionary, NSA, <http://www.urbandictionary.com/define.php?term=nsa> (last visited May 27, 2010) ("No Strings Attached, but it doesn't refer to a type of relationship, but to the willingness/desire to have sex without the necessity of a relationship. NSA means lets have some fun without creating any obligations beyond the moment. We do what we do tonight and dont [sic] ever have to see each other again. But without the negative connotation of one-night stand, even if that is what it is." One of the examples supplied reads: "Single successful individual with no time to spend in the bars looks for NSA relationship.—*craigslist*").

we may discover that people's capacity for clarity when it comes to intimacy is more developed than we have come to expect and accept.

Where expectations are not discussed, however, the default rule should reflect equitable norms by imposing the communication and support obligations described above. As in the premarital context, unconscionable opt-out agreements should be unenforceable as a matter of public policy. Importantly, the partners' decision to opt out of the relational default should not affect their responsibilities vis-à-vis their child.¹⁹⁸

C. Open Questions

Well-intentioned legal reforms have a history of backfiring.¹⁹⁹ Perhaps the delicate relationship between unmarried sexual partners may be one of the areas in which the best thing the law can do is stay out. "Sexuality is a murky realm of contradiction and ambivalence," writes Camille Paglia.

It cannot always be understood by social models, which feminism . . . insists on imposing on it. . . . It cannot be "fixed" by codes of social or moral convenience, whether from the political left or right. For nature's fascism is greater than that of any society. There is a[n] . . . instability in sexual relations that we may have to accept.²⁰⁰

¹⁹⁸ Child support would continue to begin *in utero*. As we have seen, disentangling pregnancy-related expenses incurred for the benefit of a future child from costs borne by the woman in her own right necessarily forces arbitrary line drawing. Anything that might add to a pregnant woman's stress could affect the fetus's health and well-being. Georgia Justice Hunt's dissent in *Coxwell v. Matthews* captures the view that requiring lovers who conceive to share the price of pleasure broadly conceived leads to a slippery slope, an unlimited class of expenses for which men might be obligated to pay. See *Coxwell v. Matthews*, 435 S.E.2d 33, 35 (Ga. 1993) (Hunt, J., dissenting) ("The majority states the truism that prenatal care for a child has an impact on postnatal care. So, too, do a myriad of other things such as: food, shelter, and clothing for the mother, childbirth classes for the mother, exercise classes for the mother, classes or courses to assist the mother to stop smoking, drinking, etc. Without any of these, the born child's life might be an 'uphill climb.'"). Still, similar line-drawing challenges permeate all child support determinations; a mother's well-being cannot be completely separated from her child's. The findings of scholars and advocates dedicated to crafting the ideal child support regime should thus inform the proper determination of *in utero* costs that may and may not be waivable.

¹⁹⁹ But see Orly Lobel, *The Paradox of Extra Legal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 942 (2007) ("[T]he risks of extralegal cooptation are similar to the risks of legal cooptation."); see also Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1409–12 (2009) (arguing that the right to abortion constitutionalized in *Roe v. Wade* legitimated a minimalist state response to the problems of pregnant women indirectly hurting the cause of reproductive justice).

²⁰⁰ CAMILLE PAGLIA, *SEXUAL PERSONAE: ART AND DECADENCE FROM NEFERTITI TO EMILY DICKINSON* 13 (1990); see also KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR AND FEMINISM*, at xv (1994) ("[T]he preoccupation with sexual rules represents an almost utopian faith in our ability to create a safe sexual world [O]ur intense concern with definitions of sexual harassment over the past few years demonstrates a deep-felt desire for—and belief in—a neat separation between sex and danger. In this time of sexual suspicion, changing roles, and disease, we seem to believe that somewhere out there is an instruction manual, a potent mixture of law and etiquette, that will tell us how to lead our sexual lives.").

Paglia may be right, but as Blackstone observed long ago, it is often tempting to think of the status quo as natural.²⁰¹ In reality, a no-strings-attached sex code is no closer to the state of nature than the relational default I have introduced. Neither is neutral, and maintaining the current rule is a choice—a choice that contradicts most people’s sensibilities and produces unfair and socially harmful results.

The relational default, however, raises many new questions as well as new opportunities. Again, my goal is to start a conversation where none exists, not to present a fully developed proposal. In this section I explore five open questions as an opening for what I hope will become a larger debate.

1. Impact on Sexual Behavior.—First, how would a relational default change sexual behavior *ex ante*? Under the current paradigm the pill and legal abortions are often seen as liberating to women; by separating intercourse from reproduction they purportedly allow women—like men—to enjoy sex for its own sake.²⁰² This is at least partially true, but the pill and abortion rights also exacerbate sexual inequality.²⁰³ Whereas men bear *some* responsibility for a pregnancy taken to term once paternity is established, they bear *no* responsibility for the side effects of contraceptives or abortion. This fundamental asymmetry remains in the shadows due in part to pharmaceutical companies’ successful campaign to obscure the dangers of the pill²⁰⁴ and to women’s reluctance to discuss their abortion experiences publicly.²⁰⁵ Together, these create the impression that love can be free for all. As we have seen, love is not free, and the myth that it is jeopardizes *all* women both before and after conception. Before conception, the myth of free love ratchets up the pressure towards intercourse.²⁰⁶ After conception, it gives men an out.²⁰⁷

²⁰¹ As Blackstone said, “we often mistake for nature what we find established by long and inveterate custom.” 2 WILLIAM BLACKSTONE, COMMENTARIES *11.

²⁰² See Deirdre English, *The Fear That Feminism Will Free Men First*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 477, 480 (Ann Snitow et al. eds., 1983).

²⁰³ See *id.* at 477 (“[S]o far, sexual freedom has usually meant a man’s right to love and leave a pregnant or economically dependent woman.”).

²⁰⁴ See *supra* notes 78–79 and accompanying text.

²⁰⁵ Project Voice, a website that publishes abortion stories online, is trying to break this silence. See Project Voice, About Us, http://www.theabortionproject.org/html/about_us.php (last visited Aug. 15, 2010).

²⁰⁶ See Bell Hooks, *Ending Female Sexual Oppression*, in FEMINIST THEORY: FROM MARGIN TO CENTER 147, 148–50, 152–56 (1984) (“The focus on ‘sexual liberation’ has always carried with it the assumption that the goal of such effort is to make it possible for individuals to engage in more and/or better sexual activity. Yet one aspect of sexual norms that many people find oppressive is the assumption that one ‘should’ be engaged in sexual activity. This ‘should’ is one expression of sexual coercion.”).

²⁰⁷ As one conservative scholar put it, “[a]bortion coerces women to handle crises that they did not create alone. Yet the men, who are at least equally responsible for the crisis, are relieved of any concern, torment, anguish, or responsibility by a woman’s choice of abortion. Indeed, the ultimate irony of abortion is that it inherently lets men off the hook.” Lynne Marie Kohm, *Sex Selection Abortion and the*

The mismatch between a law that assumes love can be free and women's reality that it is not may also have something to do with why radical feminists associate intercourse with violence and violation even when it is consensual. Most notably, Catharine MacKinnon and Andrea Dworkin have argued that even as between the bad choices available to women today, freedom to choose the least bad option (indeed, to make any authentic choices about sex) is illusory.²⁰⁸ Male dominance and female submission, in their view, are essential elements of sexuality itself.²⁰⁹ "Whatever intercourse is," says Dworkin, "it is not freedom."²¹⁰

Critics of these feminists have condemned them for infantilizing women who truly desire sex and belittling the suffering of the victims of "real rape."²¹¹ Their supporters claim they have been misunderstood and miscon-

Boomerang Effect of a Woman's Right to Choose: A Paradox of the Skeptics, 4 WM. & MARY J. WOMEN & L. 91, 122–23 (1997); see also English, *supra* note 202, at 479 ("The anti-feminist woman is right about one crucial thing: the other woman's right to have an abortion does affect her. It does something very simple and, to many women, very upsetting: it takes away their ability *not* to choose. Where abortion is available, the birth of every baby becomes a willed choice, a purposeful act. And that new factor destroys the set of basic assumptions on which many traditional marriages have been based. It breaks the rules and wrecks the game. . . . Remember the rules of the old game? They began with this: men did not get to have sex with women . . . unless they married them In other words, sex was supposed to incur a major responsibility for men—as it did for women."); *id.* at 481 ("If a woman gets pregnant, the man who twenty years ago might have married her may feel today that he is gallant if he splits the cost of an abortion.").

²⁰⁸ MacKinnon believes that women have so-called consensual intercourse with men because they are trapped in the false consciousness of a culture that teaches them that the only measure of a woman's worth—her very identity—is through her capacity for sexual violation. See Catharine MacKinnon, *Pleasure Under Patriarchy*, in THEORIES OF HUMAN SEXUALITY 65, 65–70, 75 (James H. Geer & William T. O'Donohue eds., 1987).

²⁰⁹ "When acts of dominance and submission," writes Catharine MacKinnon, "up to and including acts of violence, are experienced as sexually arousing, as sex itself, that is what they are. The mutual exclusivity of sex and violence is preserved in the face of this evidence by immunizing as 'sex' whatever causes a sexual response and by stigmatizing questioning it as repressive, knowing that what is thereby exempted includes humiliation and brutality and molestation and murder as well as rape by any definition. Violence is sex when it is practiced as sex. If violation of the powerless is part of what is sexy about sex, as well as central to the meaning of male and female, the place of sexuality in gender and the place of gender in sexuality need to be looked at together. When this is done, sexuality appears as the interactive dynamic of gender as an inequality." MacKinnon, *The Art of the Impossible*, in FEMINISM UNMODIFIED, *supra* note 74, at 1, 6. In Dworkin's words:

A woman has a body that is penetrated in intercourse The discourse of male truth . . . calls that penetration *violation*. . . . *Violation* is a synonym for intercourse. . . . Physically, the woman in intercourse is a space inhabited, a literal territory occupied literally: occupied even if there has been no resistance, no force; even if the occupied person said yes please, yes hurry, yes more. Having a line at the point of entry into your body that cannot be crossed is different from not having any such line; and being occupied in your body is different from not being occupied in your body.

ANDREA DWORKIN, *Occupation/Collaboration*, in INTERCOURSE 154, 168 (2006), available at <http://www.nostatusquo.com/ACLU/dworkin/Intercourse1.html>.

²¹⁰ DWORKIN, *supra* note 209, at 181.

²¹¹ For debates surrounding the definition of rape, see MARK COWLING, DATE RAPE AND CONSENT 20–32 (1998); CAMILLE PAGLIA, SEX, ART, AND AMERICAN CULTURE 64–65 (1992); ROIPHE, *supra*

strued. In any case, their message and its interpretations have resonated broadly—garnering passionate followers and equally passionate opponents.²¹² One reason for this resonance might be that the intercourse-equals-rape formulation, though misattributed,²¹³ taps into a widespread, yet unarticulated, discontent. By trivializing the asymmetry in sexual risk—celebrating the pill as the great equalizer and framing abortion as a privilege²¹⁴—the current paradigm creates a cognitive dissonance of sorts in women’s lived experience. The slogans tell women they are free, but they are still vomiting through their pregnancies, hemorrhaging through their abortions, losing their libido under the pill.

MacKinnon and Dworkin associate sexual intercourse with violence because it involves penetration, subjugation, and lack of control.²¹⁵ But perhaps women who associate intercourse with violence also do so, perhaps *primarily*, because intercourse makes women pregnant and unwanted pregnancy is violent. Unwanted pregnancy is violent, effective contraception is violent, and abortion is violent. A sexually active woman who doesn’t want to be a mother gives something up in sex that men never have to put on the line.²¹⁶

note 200, at 79–82; ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 2 (2003); Robin West, *Sex, Law and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 221, 247 n.1 (Alan Wertheimer & William Miller eds., 2010); Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 348 (1996); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Martha R. Mahoney, *Whiteness and Women*, in *Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 229–30 (1993); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 427–28 (1984); Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 395 (1993).

²¹² A Lexis search of law journals including the phrase “all sex is rape” and MacKinnon and Dworkin yields over sixty hits that include a broad diversity of views.

²¹³ See Catharine A. MacKinnon, *Pornography Left and Right*, 30 HARV. C.R.-C.L. L. REV. 143, 143 (1995) (book review) (“In a telling convergence between left and right, Rush Limbaugh, a conservative commentator, recently said that I say ‘all sex is rape,’ repeating a lie that Playboy, a glossy men’s sex magazine with liberal politics and literary pretensions, has been pushing for years.”).

²¹⁴ See Greer, *supra* note 90, at 21 (“It is typical of the contradictions that break women’s hearts that when they availed themselves of their fragile right to abortion they often, even usually, went with grief and humiliation to carry out a painful duty that was presented to them as a privilege.”).

²¹⁵ MacKinnon does write that “[p]regnancy and the capacity for pregnancy are broadly and deeply connected to many of women’s experiences of second-class status.” See MACKINNON, SEX EQUALITY, *supra* note 44, at 395. However, her greater emphasis on the act of intercourse itself occludes this central point.

²¹⁶ Germaine Greer expresses a related view: “In order that vaginas can be always and everywhere accessible to the male, women are expected to insert devices into the uteri or to take steroids on a daily basis. This is interpreted as having the power to choose their reproductive destiny when it is no such thing. IUDs provoke infection and heavy bleeding; pills alter the whole metabolism. To accept contraception is to choose between two unacceptable alternatives, forced pregnancy or temporary infertility with a greater or lesser degree of present discomfort or malaise and unknown and unguessable long-term consequences.” Greer, *supra* note 90, at 22.

For couples who want to have children, by contrast, the asymmetry can run in the opposite direction if the woman’s experience of pregnancy is a positive one. See *Orgasmic Birth*, *supra* note 21.

Sex is complicated. Men and women who don't want babies choose to have sex anyway for a variety of reasons—sometimes wholeheartedly, sometimes with ambivalence and fear. The critical difference is that when women choose sex they are choosing something fundamentally different from what men are choosing when they choose sex. Women are choosing something that, along with whatever benefits they hope to gain from it, has a much higher chance of hurting their bodies.²¹⁷ Men and women are *unequal* in sex because for women, sex is tinged with something else, a biological difference that adds a sacrificial layer.²¹⁸

²¹⁷ It may not be surprising, therefore, that in many instances women are more vigilant than their male partners about birth control. Cf. Huang & Han, *Child Support Enforcement*, *supra* note 99, at 773–74 (finding that men are more likely to contracept if they expect to be on the hook for child support). Women who do not want to conceive and who choose or agree to unprotected sex nevertheless often do so in the context of relationships characterized by deep-seated power imbalances. See MACKINNON, *supra* note 74, at 94–95 (“[A]bortion’s proponents and opponents share a tacit assumption that women significantly do control sex. . . . Sexual intercourse . . . cannot simply be presumed coequally determined [when] women feel compelled to preserve the appearance . . . of male direction of sexual expression, as if male initiative itself were what we want, as if it were that which turns us on. Men enforce this. It is much of what men want in a woman. . . . Under these conditions, women often do not use birth control because of its social meaning, a meaning we did not create. Using contraception means acknowledging and planning the possibility of intercourse, accepting one’s sexual availability, and appearing non-spontaneous. It means appearing available to male incursions.”); see also Ine Vanwesenbeeck, *The Context of Women’s Power(lessness) in Heterosexual Interactions*, in NEW SEXUAL AGENDAS 171, 176 (Lynne Segal ed., 1997). Vanwesenbeeck discusses a study of young women in the Netherlands and the UK showing that “[y]oung women are still to a large extent guided by conceptions of sexuality as utterly romantic and as natural and spontaneous. Their ideas about sexuality are often formulated very vaguely in terms of ‘attraction’ and ‘ecstasy,’ ideals which do not provide them with concrete operational rules on how to get there. Planning and preparation do not go with romance. Images of romance and spontaneity prevent young women from explicitly formulating personal wishes, and prevent them even more from negotiating them. Negotiation is often perceived as ‘being difficult,’ which is exactly what young women seeking sexual pleasure do not want to be, which means that competent negotiation may only add an extra burden in a situation where sexual pleasure is altogether hard to get and difficult enough as it is. In the romantic image of sex, where it all has to happen spontaneously and ‘naturally,’ the initiative is often left to ‘luck,’ to circumstances, to ‘being taken by surprise’ or to the other person . . . young women still express a lot of ambivalence concerning sex.” *Id.* Vanwesenbeeck also discusses a study of prostitutes which concluded that “[c]onsistent condom use with clients can be considered an indicator of control over prostitution contact proceedings. Every prostitute wants to use condoms, and giving in on that points to a lack of control, generally speaking. So what is the context in which prostitutes become risk-takers where condom use is concerned? . . . [R]isk takers . . . differ significantly from other prostitutes [in that] [t]hey worked under more stressful conditions, both in terms of financial need and in terms of working routines. . . . More of them were drug-users and their level of well-being was lower on a range of different criteria: they reported more dissociative experiences, more psychosomatic complaints, more problems that can be put together under the label of ‘social insecurity’ and, quite importantly, much less job satisfaction. Last, but definitely not least, they had experienced more victimization, both in childhood and in adult life, both off and on the job. They were also younger and more often born outside the Netherlands.” *Id.* at 173.

²¹⁸ West posits a related concept in her discussion of the psychological survival mechanisms that women develop to deal with the pervasive threat of acquisitive and violent male sexuality. She suggests that many women control the danger and suppress the fear of being raped by redefining themselves as “giving selves.” The “giving self” consents to sex, but her consent is first and foremost an act of self sacrifice. See West, *supra* note 106, at 172 (“[A] woman or girl who has defined herself as ‘giving’ and

Some women are prepared to shoulder this burden alone; they have sex fully expecting to take care of themselves should an unwanted pregnancy occur. But for women who expect more, the knowledge of the asymmetrical risk combined with the cultural and legal disregard for it can make consensual sex *feel like* rape. This may occur during an encounter that is consensual but not fully desired.²¹⁹ It might also occur in the aftermath of such an encounter, especially when it results in an unwanted pregnancy for which the man is unwilling to share responsibility. Consensual sex is not rape, but when a woman grows to expect equality in sex and then discovers that when it comes to the unintended consequences of sex she is essentially on her own, she may well experience sex generally as abusive.

The relational default chips away at this basic asymmetry by changing the bargaining backdrop of every sexual encounter. Typically, men and women negotiate about sex in “private, dispersed, and unofficial circumstances . . . almost entirely beyond the power of the state to regulate directly.”²²⁰ A relational default fills this gap, dampening the negative effects of unequal bargaining *indirectly*. In chilling casual sex unless both parties clearly intend to embrace casual consequences, the proposal breathes life into one of the now aspirational aims of marriage without forcing ill-matched partners into a lifelong bond; it links intercourse with responsibility for men and women alike. Perhaps it will also result in fewer unintended pregnancies, just as higher enforcement of child support has done. The

her sexuality as ‘that which is to be given,’ . . . will never experience the anxious, ambiguous fear of rape by a ‘date.’ But nor will she experience consensual sex as pleasurable, or if she does, it will be only incidentally so. She consents to sex for his, not for her pleasure. The sex which is the culmination of these dates will be consensual, but it will also be uncomfortable, unpleasant, painful or dangerous. It will invite venereal disease (genital sex); bleeding and hemorrhaging (anal sex); gagging and nausea (deep oral sex); bruises, lacerations and welts (somasochistic sex); and unwanted pregnancy. The giving self will not experience this pain as a reason to withhold consent, for she is not, by self-definition, a being who consents to sexual encounters for her own pleasure or withholds consent if she foresees pain. She unquestionably consents, but not to satiate her own desires. She consents to satiate the desires and feed the pleasure of the other.”)

See also SYLVIA WALBY, *THEORIZING PATRIARCHY* 125 (1990) (discussing “accomodatory strategies towards sexuality”); Vanwesenbeeck, *supra* note 217, at 175 (describing research on young women in the Netherlands and the United Kingdom showing a lack of having sex for its own sake, instead focusing on their male partners’ satisfaction and needs, often at the expense of their own sexual pleasure).

²¹⁹ The distinction between consensual relationship-implicating sex and consensual no-strings-attached sex which I proposed above is, I believe, a legally useful distinction. A related distinction, more elusive but as important from an emotional standpoint, is a distinction Robin West has drawn between consensual welcomed sex and sex that is consensual but unwelcomed, consensual sex that is not fully wanted or desired. West argues that the now dominant consensual/nonconsensual distinction serves us well insofar as it demarcates nonconsensual sex as wrong. It has also misled us, however, by implicitly legitimizing all acts of consensual sex. In fact, consensual sex that is unwanted—which is far more common than rape, and which is the only kind of sex many girls and women know—carries with it serious and generally unrecognized harms. It tends to be physically painful, emotionally abusive, and alienating. See West, *Sex*, *supra* note 211; West, *supra* note 106, at 153–54, 214.

²²⁰ HIRSHMAN & LARSON, *supra* note 10, at 23.

truth is that when men share in the price of pleasure, they do a better job of minimizing its risks.²²¹

2. *The Commodification Danger.*—To be sure, changes to the relational default also raise potential dangers. One such danger is that the more equitable rule will pressure women—especially poor women—to effectively sell no-strings-attached sex for a price, commodifying the pregnancy support entitlement. That is, it may incentivize a type of exchange resembling prostitution, which is illegal in most states.²²²

One way to prevent this potential result would be to declare that the transfer of more than a de minimus amount of property from one lover to the other would invalidate an opt-out agreement. But how should the appropriate “de minimus amount” be set? Should paying for a date or a weekend retreat invalidate opt-out? What about a man who helps his lover pay for groceries, rent, medication? What if he buys her jewelry or brings gifts for her children?

Even if we could satisfactorily resolve these line drawing questions, invalidating opt-out when it appears to be paid for raises a pro-commodification objection²²³: if the law provides a woman with a pregnancy-related entitlement, she should be free to sell that entitlement for a price she believes is fair. After all, if every time a woman has sex she risks her health, why shouldn’t she be paid? And why shouldn’t men be able to limit their risk exposure by paying a sort of insurance premium upfront? By vesting an entitlement in the woman where there was none before, the law would correct the fundamental imbalance. What any particular woman chooses to do with that entitlement—whether before or after conception—is her choice. Even if the price of each opt-out agreement falls short of the potential costs of pregnancy, if a woman has multiple partners and if the market works efficiently, over time these payments will add up to an amount that should roughly match her subjective risk. In this context, however, the market is especially unlikely to work efficiently.

²²¹ See *supra* notes 99–100 and accompanying text.

²²² Prostitution—like the sale of body parts—is illegal because, among other reasons, we believe that the existence of a market in these things will ultimately harm sellers. A market in sex or body parts, the anti-commodification argument goes, will lead to “desperate exchanges,” pressuring the poor into a type of transaction that fundamentally undermines their “personhood.” Prostitution opponents also argue that it harms third parties. For a discussion of the costs of prostitution to participants as well as third parties, see Debra Satz, *Markets in Women’s Sexual Labor*, 106 *ETHICS* 63, 77–81 (1995).

²²³ For a discussion of the dangers of the commodification critique of women’s non-market labor, see Silbaugh, *supra* note 177, at 83–84 (“[G]ender equality requires us to take the economics of home labor seriously. . . . [A]s long as so many of women’s activities remain non-market and as long as women’s economic welfare is a concern of feminists, economic analysis of non-market activities is affirmatively desirable. My objective is to show what can be gained by allowing economics to inform, without dominating, the discourse on policy and doctrine surrounding home labor. Concern over women’s lives becoming entirely commodified seems by comparison an abstract worry.”).

In other words, the commodification danger raises the familiar and much debated “double bind”; both alternatives are potentially harmful.²²⁴ For this reason, the most balanced approach is to craft a default support obligation with an opt-out alternative providing, however, that opt-out agreements may be voidable for unconscionability.

3. *Expressive Function of the Relational Default.*—A third issue is that the formal legal obligations I propose might interfere with more organic, informal arrangements that may ultimately produce more harmonious relationships.²²⁵ In most instances, however, a formal legal process would never enter the picture. People would largely continue to conduct their sexual and reproductive lives in private, but their choices and relationships would take place in the shadow of a more equitable legal norm. Over time, women will likely feel more entitled and men will feel more obligated. This dynamic, for example, will absolve an economically vulnerable woman from having to be a supplicant, dependant on the magnanimity of her male partner for support in a situation where basic fairness requires shared responsibility. A relational default is not a punishment; it reflects a basic moral obligation. The existence of the new regime might still drive some couples into legal conflict where common decency and compromise would have produced a better overall result. But on the whole, a clear standard of shared responsibility would hopefully influence a social norm that would produce fairer results for greater numbers.

4. *Diminishing Anxiety.*—A legally prescribed relational baseline also has the potential to alleviate anxieties surrounding sex and its repercussions for both men and women. By failing to hold men accountable to the women with whom they conceive, the lovers-as-strangers default fails to provide them with a standard, a set of guidelines, a ballpark prescription of what “being a good guy” entails. While the fact that men are legally per-

²²⁴ The “double bind” of the commodification/noncommodification dilemma was first identified by Margaret Jane Radin in her seminal essay, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1915–17 (1987); see also VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* (2007) (arguing that economic negotiation and exchange lurks, unacknowledged, in the background of many intimate relationships). For a more recent review of commodification debates, see Margaret Jane Radin & Madhavi Sunder, *The Subject and Object of Commodification*, in *RETHINKING COMMODIFICATION* 8 (Martha M. Ertman & Joan C. Williams eds., 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=582641. For an argument in favor of freedom of contract in the related area of genetic parenthood, see Cohen, *supra* note 94, at 1162–84 (arguing for a waivable right not to be a genetic parent).

²²⁵ This has clearly been one of the unintended consequences of policies requiring mothers applying for public assistance to identify the father of their child as a condition for receiving benefits. See Fontana, *supra* note 173; Bridget Remington, *It Takes a Father? Conforming with Traditional Family Values as a Condition of Receiving Welfare: Morals Reform and the Price of Privacy*, 32 STETSON L. REV. 205, 223–27 (2002). This is why the relational default I propose, unlike child support, would be fully waivable, including where the woman receives public assistance.

mitted to weasel out of any responsibility drives some men to do just that,²²⁶ at the opposite extreme, the absence of a clear standard drives others to make excessively heroic sacrifices in a futile effort to expiate their guilt. The current law of conception also leaves women to write their own rules on when and whether to disclose an unintended pregnancy.²²⁷ The relational default will likely diminish this uncertainty, spelling out clear normative principles for mutual responsibility and support.

5. *Backlash.*—Finally, like many legal reforms, the new paradigm raises the possibility of backlash. Women themselves have often played a part in trivializing the burdens of pregnancy, and for good reason. Women have a vested interest in obscuring the suffering associated with their reproductive capacities because of the very real danger that calling attention to it will disempower them.²²⁸ Pregnancy-related impairments have and continue to deter employers from hiring women²²⁹ and focus on the risks of abortion may play into the hands of those who wish to re-criminalize it.²³⁰ Some fifteen years after *Danforth* established a wife's right to abortion regardless of her husband's preferences and just a few months before the Court would make its decision in *Casey*, a Gallup poll found that seventy-three percent of Americans believed a wife should be required to obtain her husband's consent to undergo an abortion.²³¹ Perhaps admitting the relational perspective is simply too dangerous for women?

²²⁶ Even in these cases, the results may harm the men as much as they harm their lovers. For a discussion of the moral, psychological, and spiritual risks to injurers who knowingly deny responsibility for harms they have caused, see Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 932–37 (2005).

²²⁷ For a popular culture illustration of the dilemma, see *Sex in the City: Coulda, Woulda, Shoulda* (HBO television broadcast Aug. 5, 2001).

²²⁸ See Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1701 (1990) (“When we single out pregnancy . . . for ‘special treatment,’ we fear that employers will not hire women. But if we do not accord special treatment to pregnancy, women will lose their jobs. If we grant special treatment, we bring back the bad old conception of women as weaker creatures; if we do not, we prevent women from becoming stronger in the practical world.”).

²²⁹ For this reason, some feminists opposed the Pregnancy Discrimination Act's definition of pregnancy as a “disability.” See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 41 (2003).

²³⁰ More broadly, some feminists fear that harping on our reproductive suffering may revive Victorian prejudices of women as the “gentler” race in need of protection through male-enforced restrictions. See, e.g., Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 807–09, 820–21 (1989). One commentator has dubbed those who advocate laws of this type “protective feminists.” See Cathy Young, *The New Madonna/Whore Syndrome: Feminism, Sexuality, and Sexual Harassment*, 38 N.Y.L. SCH. L. REV. 257, 262 (1993) (“The ‘new feminism,’ in its preoccupation with the sexual ‘harm’ inflicted on women by men—pornography, sexual harassment, and rape (all of which are conflated into a single ‘continuum’ of sexual violence)—inevitably mirrors and reinforces traditional paternalism toward women. It might be appropriate, then, to characterize the ‘new feminists’ as ‘protective feminists.’”).

²³¹ See BARRY FRIEDMAN, THE WILL OF THE PEOPLE 354 & n.314 (2009) (citing Frank Newport & Leslie McAneny, *Whose Court Is It Anyway?: O'Connor, Kennedy, Souter Position Reflects Abortion Views of Most Americans*, 322 GALLUP POLL MONTHLY 51 (1992)).

Pro-choice readers may worry in particular that requiring men to share pregnancy and abortion costs may jeopardize hard won advances securing women's rights to abortion. Some fringe men's rights groups are already seeking to challenge mandatory child support rules by giving men the right to a so-called financial abortion.²³² These advocates believe that by paying his pregnant partner a sum equal to the cost of an abortion a man should be able to "buy" his way out of child support obligations even if she chooses to bear the child. The relational default may indeed add fuel to the fire by imposing further obligations on men whose partners conceive, although no legal authority takes their claims seriously.²³³ Just as spouses' duty to support each other does not give them veto power over each other's medical choices, a man's duty to participate in the costs of an unintended pregnancy should not give him effective veto power over a woman's right to choose an abortion.

Furthermore, the concern that mandatory pregnancy support will increase abortions collapses a critical distinction. While it's true that once men have to pay they will have *a* say, that does not mean they will have *the final* say over abortion. Opening the door to greater male participation in women's reproductive decisions is dangerous only if we assume that the imbalance of power so heavily tilts towards the man that he will always steamroll the woman's preferences. But preliminary data on the influence of child support enforcement on the incidence of abortion suggests that the opposite may be true.²³⁴ To be sure, the concern that once men participate in the costs of pregnancy they may pressure women to have (or not to have) an abortion is relevant in some cases. It is *possible* that these cases justify a

²³² See Buchanan, *supra* note 113, at 1245; Tierney, *supra* note 113; Sherry F. Colb, *Should Men Have the Right to a "Financial Abortion"? A Biological Father Cries Sex Discrimination When Forced to Pay Child Support for an Unwanted Baby*, FINDLAW, Mar. 21, 2006, <http://writ.news.findlaw.com/colb/20060321.html>; Stephanie Fairington, *The Parent Trap: Paternal Rights and Abortion*, ELLE.COM, May 17, 2010, <http://www.elle.com/Life-Love/Society-Career-Power/The-Parent-Trap-Paternal-Rights-and-Abortion>. For *New York Times* readers' comments on the issue, see Readers' Comments to A Father's Reproductive Rights: What happens when a man makes his intentions clear before a child is conceived or born?, <http://community.nytimes.com/comments/parenting.blogs.nytimes.com/2010/05/17/a-fathers-reproductive-rights/?sort=newest> (last visited Aug. 15, 2010) (many commenters asserting that a man should have no right to prevent a woman from having an abortion and should be required to pay child support for a child he does not want, while some argue a man's opposition to a woman's decision to take a pregnancy to term should exempt him from having to pay child support).

²³³ Payne, *supra* note 113, § 2(a) ("To date, the courts have refused to deem a woman's decision to bear a child despite the objections of the child's father, even where he has offered to pay for an abortion, to create an unconstitutional infringement on the father's federal or state equal protection or due process rights.").

²³⁴ The number of abortions *falls* as the expectation that men will have to pay child support rises because women are "encouraged by the potential economic security that the father may provide." Crowley, *supra* note 100, at 22. A similar dynamic may lead pregnant women considering an abortion because they are worried about loss of income due to their pregnancy to take it to term once they know additional pregnancy support will be coming.

lovers-as-strangers default, but over the long haul the current rule may do more harm than good. “Protecting” women by assigning to them most of the material burdens of pregnancy and abortion perpetuates the perception that pregnancy is a woman’s problem. Pregnancy that results from consensual sex where the parties have not agreed on a no-strings-attached type arrangement concerns both parties to the act. The law should treat it accordingly.

Gender neutral laws can have gendered effects when they operate in the context of a gendered world. The notion that conception is a private problem has radically different implications for men and for women. Society is moving closer to acknowledging and addressing the multiple complexities of reproduction—that pregnancy can be debilitating *and* that a world that enables pregnant workers to keep their jobs is better than one that confines them to the private sphere; that abortion is potentially harmful *and* it may still be a woman’s best option. My hope is that bringing women’s reproductive realities out of the shadows will advance, rather than threaten, their freedoms. The alternative—remaining silent—implicitly endorses a view of “reproductive freedom” that leaves women to bear the burdens of pregnancy alone.

CLOSING REMARKS

I have suggested that sex creates a unique type of relationship, and that sex that results in pregnancy extends this relationship. But the law treats lovers as strangers. It treats nonprocreative sex through an ideological framework of separation rather than connection, of free love rather than mutual responsibility. The current default contradicts mainstream expectations about sex and basic intuitions about fairness. Instead, this Article proposes a new relational paradigm that establishes minimal notification and support obligations between sexual partners who conceive.

The relational default requires further study before it can be implemented. In the meantime, however, we don’t need the law to start changing our lives.²³⁵ Each one of us—as individuals and lovers, siblings and friends, teachers and parents—can start now by asking: what is our own personal law of conception? What do we want it to be? Have we chosen the rules that govern our love lives deliberately, or have we adopted them passively, unreflectively? These are difficult questions to ask. Going along without asking is easier. Going along doesn’t ruin the moment, but each time we put on the blinders we drift further from our intuitive capacity to listen and

²³⁵ In the context of discussing the utopian nature of her theory, Martha Fineman writes: “The production of practical suggestions is not the only justification for theory, however. Sometimes re-visioning, even if utopian, is valuable simply because it forces us to look at old relationships in new lights and thereby understand some things about how we perceive the natural or normal, as well as how we create the deviant.” See FINEMAN, *supra* note 11, at 232.

to feel for the answers. Going along distances us; it distances us from ourselves and it distances us from our lovers.

Asking these questions and talking about them openly will not merely clear the air of misunderstandings. The process of asking and sharing has the potential itself to begin to sensitize us to our own and to our lovers' true desires. It may help us to identify what inspires and what deadens, what lifts and what oppresses, what heals and what injures. And it may lead us to be more mindful about our choices.

In life there are no guarantees. Men and women who do not want children have sex anyway despite the wild roll-of-the-dice that it entails. This is the fundamental risk at the heart of making love. This is the true price of pleasure, a price no law can erase. But the law can—indeed it inevitably does—set the baseline. It is up to us to decide where.

