Inequities in the Current Judicial Analysis of Misrepresentation of Fertility Claims

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A gender-based double standard is thriving in cases involving misrepresentation of fertility or contraceptive use. A recent California case recognized that persons who engage in sexual relations after misrepresenting their fertility are liable for any injuries their conduct causes, regardless of their sex. Despite this finding, courts, reinforcing outmoded concepts of gender roles, treat male and female tortfeasors differently in misrepresentation of fertility cases. These cases arise when a person relies on his or her sexual partner's false profession of contraceptive use or infertility, engages in sexual intercourse, and suffers harm. When a woman sues a man for this type of misrepresentation, courts are eager to award damages if she proves the "black-letter" elements of the tort of misrepresentation. When a man sues a woman for misrepresentation (or if she sues him for child support and he offers her misrepresentation as a defense), however, the courts steadfastly ignore the misrepresentation for various policy reasons.

Three policy reasons are typically offered. First, courts state that interfering in an intimate relationship between a man and a woman violates the couple's constitutional right of privacy. Second, courts observe that in the context of intimate relations certain wrongs are not remediable. Third, courts decide that the father's moral obligation toward any illegitimate children overrides his right to recover damages in tort.

Strangely, courts reject or ignore these three rationales when a woman sues a man for misrepresenting his fertility or use of contraceptives. The right of privacy, hallowed when the woman misrepresents, disappears from the judicial analysis when the man commits the same tort. The argument that there should be no remedy for misrepresentation occurring within an intimate relationship somehow loses its appeal when a female plaintiff seeks relief.

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2 The third argument typically advanced for denying relief to male victims—namely, that the duty of child support outweighs any claims or defenses based on misrepresentation.
Instead, courts are eager to award damages in such cases—typically including the costs of an abortion and other pregnancy-related expenses—when the elements of the claim are satisfied.

Rejecting paternal claims of misrepresentation and recognizing such claims when brought by women is both inconsistent and inequitable. If misrepresentation of fertility is a wrong in the context of intimate relations, it is a wrong whether the misrepresenter is a man or a woman. Treating women and men differently perpetuates the outmoded common-law notion that women need greater protection under the law than do men.

In an effort to address such an unprincipled gender-based distinction, this comment proposes a more balanced approach to misrepresentations of fertility and contraceptive use. Its thesis is that courts should allow injured plaintiffs of either gender to recover when the elements of misrepresentation are satisfied. If any illegitimate children result from the misrepresentation, the courts should fashion a remedy that fairly accommodates the interests of the tort victim and the children.

One such remedy, when the mother is the tortfeasor and the father is the victim, might take the following four-part form. First, the court would declare that the duty of child support lies primarily with the mother, and only secondarily with the father. Second, if the mother is or becomes unable to support the child, the father would assume the support obligations. Third, the mother’s use of any support payments would be monitored through the imposition of a trust fund to ensure that they are not misspent. Fourth, if the

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...has never arisen in a case brought by a female plaintiff for the following reason: in no reported decision did the female victim of misrepresentation carry her child to term.

* In Pamela P. v Frank S., 110 Misc 2d 978, 443 NYS2d 343 (1981), overruled in Pamela P. v Frank S., 59 NY2d 1, 449 NE2d 713 (1983), the court recognized this inconsistency, holding that the usual rule apportioning support between the parents must be suspended when the party requesting assistance has acted inequitably. In construing the support statutes of the applicable state, the Pamela P. court indicated that a court should be aware that the Fourteenth Amendment guarantees the right of procreative choice equally to men and women. Thus, an order in favor of the misrepresenting mother would be unconstitutional since it would invade the man’s freedom to make an independent procreative choice. The court further recognized that the state’s compelling interest in the welfare of the child required the diminution of the right to free procreative choice. Thus, any support order should consider both the mother’s misrepresentation and the needs of the child. The court held that support payments would only be required from the father if the mother’s means were inadequate to answer the child’s fair and reasonable needs.

* A trust would be established to facilitate the return of support payments to the defrauded father if the misrepresenting party’s circumstances change significantly and to ensure that the money paid by the father is used for the support of the child. Support payments would be paid to a guardian ad litem or other such person who would hold the money in trust for the child. The mother would have to submit bills and requests for funds to the
misrepresenting mother becomes solvent, the defrauded father would have a right of reimbursement for any child support payments made and/or damages caused by the misrepresentation.°

Part I of this comment explores the current judicial treatment of misrepresentation of fertility claims; Part II critiques this treatment; and Part III suggests an approach to misrepresentation of fertility claims which treats men and women equally by balancing all of the interests involved and thereby providing a more consistent and less gender-based resolution of these disputes.

I. CURRENT JUDICIAL TREATMENT OF MISREPRESENTATION OF FERTILITY

The rising percentage of illegitimate births in the United States may be attributed to the increase in premarital and extramarital sexual activity. As a result, courts must adjudicate a rising

5A Uniform Laws Annotated §311 (1987) recognizes the feasibility of the trust solution: "Upon its own motion or upon motion of either party, the court may order at any time that maintenance or support payments be made to the [clerk of court, court trustee, probation officer] as trustee for remittance to the person entitled to receive the payments."

Note that provisions in divorce decrees requiring that sums for the support of minor children be paid over to a trustee have been upheld as proper. 24 Am Jur 2d Divorce and Separation §1029. The Uniform Marriage and Divorce Act provides that the court, upon its own motion or upon the motion of either party, may order at any time that support payments be made to a trustee. Id.

° The initial suit would establish liability and support obligations. If the misrepresenting mother's circumstances change "significantly," as defined by state statute, the support obligation would be reformulated by the court. This procedure is identical to the method used to modify child-support obligations in separation agreements. Harry D. Krause, Child Support in America 18 (Michie Company, 1981). An alternative method would allow the defrauded father to attach the additional funds received by the woman based on the judgment in the initial suit. The father's right of reimbursement for past support payments would be the reverse of an action for retrospective modification of accumulated arrearages in support payments. Id at 26. Rather than cancelling overdue support payments when one of the parties has had a substantial change in circumstances, the court would merely order the misrepresenting mother to return the payments to the defrauded father. The court order would be supported by a contempt citation or other punishment similar to that used to enforce payment of child support. Id at 51-52.

Similarly, the family court in Pamela P., 110 Misc 2d at 978, overruled in Pamela P., 59 NY2d at 1, held that the order of support, in the face of misrepresentation by the mother, would be entered against the father only in the amount by which the mother's means were insufficient to meet the child's needs. Thus, at least one court has recognized that such a solution is possible to administer if circumstances so require.
number of claims and counterclaims in civil suits for misrepresentation of fertility or contraceptive use. Courts have handled such claims and counterclaims in two ways. When the man misrepresents, courts confine their analysis to whether the elements of the tort of misrepresentation are met (the “misrepresentation approach”). When the woman misrepresents, however, courts subordinate the importance of the misrepresentation to the father’s duty to support the child (the “duty to the child approach”).

When following the misrepresentation approach, a court will determine whether the woman has proven the elements of misrepresentation. The elements of a misrepresentation claim are: (1) a material misrepresentation of existing fact; (2) scienter (in the case of fraudulent rather than negligent misrepresentation); (3) justifiable reliance; and (4) damages caused by the reliance. In a typical case involving misrepresentation of fertility, the court will find that: (1) the man’s misrepresentation of sterility was material;

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* See, for example, Stephen K. v Roni L., 105 Cal App 3d 640, 641, 164 Cal Rptr 618 (1980) (father’s cross-complaint to hold misrepresenting mother liable in tort dismissed); Pamela P., 59 NY2d at 4 (father’s defense that the mother had deliberately misrepresented her use of contraceptives held to have no bearing upon his duty to support his child).

7 For the scope of this comment, it is unnecessary to distinguish between negligent and fraudulent (intentional) misrepresentation. Liability in damages for misrepresentation may be based upon intent to deceive (scienter) or negligence. W. Page Keeton, ed, Prosser and Keeton on the Law of Torts ch 18 §105 at 727 (West, 5th ed 1984) (hereinafter “Prosser on Torts”). Although fraudulent misrepresentation is more culpable than negligent misrepresentation, the principle that an individual is responsible for his or her own disclosure or nondisclosure if damage results is the same in either case. See Alice D. v William M., 113 Misc 2d 940, 450 NYS2d 350 (NY Civ Ct 1982) (mother recovered on claim that father negligently misrepresented fertility when fraudulent misrepresentation could not be proven).

8 In order to satisfy the materiality element of misrepresentation, the defrauded party must be justified in taking action on the basis of the misrepresentation. Thus, if a misstatement is trivial or collateral, it is not material. The test of materiality is objective and depends upon the circumstances of the agreement itself. Prosser on Torts Ch 18 § 108 at 753 (cited in note 7).

9 Scienter and the intent to induce reliance exist when a fraud-feasor: (1) knows or believes that a matter is not as she represents it; and (2) intends that the other party should believe it and act upon it in a certain way. As long as the defendant intended to mislead, it does not matter that she acted with good motives or with the thought that she was doing the plaintiff a kindness. Id Ch 18 § 107 at 741.

10 Justifiable reliance is based on a reasonableness standard. If a reasonable person would rely on the statement or action of the defendant, then reliance is justifiable. If no reasonable person, in the light of the information apparent to her, would rely on the statement or action, the loss is not recoverable. Id Ch 18 § 108 at 750.

11 The plaintiff must have suffered substantial damage before the cause of action can arise. Courts normally attempt to compensate the defrauded party for her loss and place her in the same position as she was prior to the misrepresentation. Prosser on Torts Ch 18 §105 at 728 (cited in note 7).
(2) the defrauded woman's reliance was justifiable under the circumstances; (3) the man knew or believed that the representation was false, or that the representation was made without reasonable grounds for believing its truth; and (4) the defrauded woman suffered damages, typically including abortion or related pregnancy expenses. While the burden of proof remains with the plaintiff in these cases, courts confronted with a woman's claim of misrepresentation have not failed to award damages.

When following the duty to the child approach, by comparison, a court will ignore the mother's misrepresentation and, emphasizing the duty to support one's offspring, focus instead on the support relationship between the defrauded father and the child. This duty, typically established in a civil action, requires parents to maintain and support their child, whether legitimate or illegitimate, until the child reaches the age of eighteen. Following the duty to the child approach, a court will require the defrauded father to pay child support even when the mother has tortiously misrepresented her fertility.

In support of the duty to the child approach to misrepresentation of fertility claims, courts offer three rationales, none of which seems satisfactory. First, the courts reason that the intimate relations of men and women are protected by the right of privacy.

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13 Id.
14 All states allow actions, under either statute or case law, both to compel fathers to support their illegitimate children, and to compel parents to support their legitimate children. Most states authorize an ordinary civil suit, to be brought by the child's mother or by a public agency. Homer H. Clark, 1 Domestic Relations § 5.4 at 317 (West, 2d ed 1987).

Revised Uniform Reciprocal Enforcement of Support Act (RURES A) in 9B Uniform Laws Annotated § 9 at 432 (West 1968) states, "All duties of support . . . are enforceable by a proceeding under this Act . . . ." See also Idaho Code § 7-1056 (1979) where RURES A was adopted.

See, for example, Idaho Code § 7-1105 (1979); Ill Ann Stat ch 40, § 1204 (Smith-Hurd 1980). Courts typically fashion support orders requiring parents to support their children until the age of eighteen. However, a "divorce court has no power to continue a provision for the support of a child after he attains his majority." 24 Am Jur 2d Divorce and Separation §1049.

15 In Stephen K., 105 Cal App 3d at 641, the defendant in a paternity action, after admitting paternity, filed a cross-complaint. He alleged that he had engaged in sex with the mother in reliance upon her false representation that she was taking birth control pills. This reliance, he claimed, resulted in the birth of an unwanted baby. Although the father's claim was phrased in the language of the tort of misrepresentation, the court dismissed it on the grounds that court supervision of promises made between consenting adults in the circumstances of their private sexual conduct was improper. Interfering in this intimate relationship, said the court, would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy.
the context of a misrepresentation, however, the right of privacy should not shield intimate relations from inquiry because the state can assert a compelling interest in protecting individuals from misrepresentation.\(^{16}\) Second, courts seem to believe that the duty of a parent to support his child supersedes any claims or defenses which might arise from an act of misrepresentation. This rationale fails to account for the fact that misrepresentation is material to the assignment of support obligations between the parties.\(^{17}\) Third, courts advance the theory that not every wrong has a remedy.\(^{18}\)

\(^{16}\) A state's interest in a particular activity is compelling when that activity threatens the health, safety or welfare of its members. Wallace M. Rudolph and Janet L. Rudolph, *The Limits of Judicial Review in Constitutional Adjudication*, 63 Neb L Rev 84, 92 (1984). Louis Henkin, in *Privacy and Autonomy*, 74 Colum L Rev 1410, 1430-31 (1974), points out that a "compelling" interest has never been defined by the Supreme Court. He suggests, however, that just as we have fundamental private rights we also have fundamental public goods such as health, safety and general welfare which are protectable under the state's police power. See also *People v Mills*, 81 Cal App 3d 171, 181, 146 Cal Rptr 411 (1978) (the state has a fundamental right to enact laws which promote public health, welfare and safety, even though such laws may invade the offender's right of privacy).

The privacy interest of parties when misrepresentation has occurred is overridden by the state's interest in protecting the welfare of the parties and their right to be free from tortious injuries. J.S. Mill, *On Liberty* 131-32 (Atlantic Monthly Press, 1921). Discussing the justification for interference in the individual's privacy, Mill asserted that "for actions prejudicial to the interests of others, the individual is accountable, and may be subject ... to legal punishment, if society is of the opinion that ... [it] is requisite for its protection." Thus, the state's interest in protecting its citizens from harm is the principle underlying tort law and an individual's commission of a tort is a waiver of his right to privacy. Note also that in *Barbara A.*, 145 Cal App 3d at 381, where the female defendant filed a cross-complaint for injuries resulting from her reliance on the male plaintiff's assertion of sterility, the court concluded that the right of privacy does not insulate a person from all judicial inquiry into his or her sexual relations and imposed liability on "one sexual partner who by intentionally tortious conduct causes physical injury to the other." Further, where paternity of a child is at issue, the mother cannot refuse to answer all relevant questions about her sexual activity on the ground that it is a private matter. "Her right of privacy must yield to the 'historically important state interest of facilitating the ascertainment of truth in legal proceedings.'"

\(^{17}\) In *Linda D. v Fritz C.*, 38 Wash App 288, 687 P2d 223 (1984), an action under the Uniform Parentage Act, the court dismissed a father's counterclaim alleging that the mother misrepresented her use of birth control. The court held that the misrepresentation was irrelevant to the needs or requirements of the child or to the mother's ability to meet them. Further, it held that such a claim was not properly raised in an action where the amount of child support obligations is determined. In so holding, the court cited *Hughes v Hutt*, 500 Pa 209, 455 A2d 623 (1983), for the proposition that misrepresentation by the mother cannot provide the basis for a counterclaim in a suit establishing child support obligations where the needs of the child and the means of the parents are at issue.

\(^{18}\) See *Douglas R. v Suzanne M.*, 127 Misc 2d 745, 747, 487 NYS2d 244 (1985) (a father's support costs for an unwanted and illegitimate child did not constitute a remediable injury). In *Douglas R.*, the court reasoned that an order could not be fashioned which would effectively resolve all the issues and make the parties whole, "since relationships may take varied forms and beget complications and entanglements which defy reason." Id. Rather than risk exacerbating the initial wrong in some unanticipated way, the court concluded
But this ignores that, despite difficulties of proof, fraudulent or negligent misrepresentations in the context of intimate relations are cognizable torts with available remedies.

Underlying the three rationales is the common law presumption that women are unable to protect or support themselves and thus need additional protection from the law. At common law, a woman was awarded damages for loss of virginal status or status as a wife through actions for seduction or breach of promise to marry. Similar causes of action could not be brought by a man. Although most of these causes of action have been eliminated by "anti-heart balm" statutes, the presumption persists that women are unable to support themselves or their children without the help of a man.

The common law assumption that women are unable to support or protect themselves should be discarded. Accordingly, courts should determine child support obligations arising from misrepresentations of fertility with reference only to the actions of the parties and their duty to support their child. This analysis would require courts to ascertain whether the elements of the misrepresentation claim are satisfied without regard to the sex of the misrepresenting parent.

II. THE INADEQUACY OF THE CURRENT JUDICIAL APPROACH

The current judicial approach is inadequate in two ways. First, the policy arguments courts use to justify their inequitable treatment of men and women are improperly applied in the context of misrepresentation of fertility. Second, the reasoning underlying the rejection of a male plaintiff's misrepresentation of fertility claim is incorrect because it is based on an outmoded conception of a woman's role in society. Sections A through C of this part of the comment will examine and critique the proffered policy reasons for denying men's claims in this area.

A. The Right of Privacy

Courts apply the right of privacy rationale in misrepresentation of fertility cases in order to avoid policing promises made by consenting adults when they engage in sexual conduct. The courts interpret the Supreme Court's right of privacy jurisprudence to
mean that interference with this type of intimate relationship encourages forbidden governmental intrusion into matters affecting individual privacy. However, the jurisprudence should be read not as forbidding all governmental intrusions, but as permitting governmental intrusion into traditionally private relationships pursuant to a compelling state interest. In the misrepresentation of fertility cases, two such compelling interests exist. First, the state has a strong interest in protecting its citizens from harm caused by misrepresentation. Courts allow invasions of privacy in misrepresentation cases involving sexually transmitted diseases (STDs), as well as in criminal cases involving forcible and nonforcible sex. Second, the state’s interest in interfering with an intimate relationship is more compelling in misrepresentation of fertility cases than in misrepresentation of STD cases because in the former, a child exists; in the latter, one does not. Where a child is involved, the right of privacy argument is weaker because the state’s duty to

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20 In Stephen K., 105 Cal App 3d at 643-45, the court used the privacy argument to ignore the woman’s deliberate misrepresentation of her use of birth control. Douglas R., 127 Misc 2d at 745-48, followed the Stephen K. line of reasoning when it rejected a father’s allegation of misrepresentation by the mother as an attempted defense to payment of child support or an action for damages.

21 See generally Rudolph and Rudolph, 63 Neb L Rev 84 (cited in note 16). See also John E. Nowak, Ronald D. Rotunda and J. Nelson Young, Constitutional Law § 11.1 at 335 (West, 3rd ed 1986) (“The police power encompasses the inherent right of state and local government to enact legislation protecting the health, safety, morals or general welfare of the people within their jurisdiction”). See also Charles River Bridge v Warren Bridge Company, 36 US 420 (1837) (recognizing the need of the legislature to act and provide for the welfare of its citizens).

22 Underlying recognition of any right to privacy is the idea that society may not limit individual freedom unless it does so to prevent an individual from harming others. See generally Mill, On Liberty (cited in note 16).

23 In Kathleen K. v Robert B., 150 Cal App 3d 992, 198 Cal Rptr 273 (1984), a defendant who had infected the plaintiff with herpes was not allowed to avoid liability by alleging an invasion of his right to privacy. The court held that the right to privacy emanating from the Constitution does not protect defendants when no child is involved.

24 Courts have rejected claims that sodomy statutes are invalid on their face as invasions of a constitutional right to privacy, holding that these statutes pass constitutional muster. See, for example, Doe v Commonwealth’s Attorney for Richmond, 403 F Supp 1199 (E D Va 1975) (right of privacy limited to marital relations); State v Elliott, 89 NM 305, 551 P2d 1352 (1976) (right to privacy limited to married persons). Adultery and fornication statutes have been upheld against challenges that their enforcement is an invasion of privacy protected by the Constitution. See, for example, State v Lutz, 57 NJ 314, 272 A2d 753 (1971); State v Barr, 110 NJ Super 365, 265 A2d 817 (1970), rev’d on other grounds in State v Clark, 58 NJ 72, 275 A2d 137 (1971). Also, in Michael M. v Superior Court, 450 US 464 (1981), the Supreme Court upheld as constitutional California’s “statutory rape” law. This law defined unlawful sexual intercourse as that with a female under the age of eighteen, not the wife of the offender. The Court declared the law constitutional because the state had an interest in preventing illegitimate pregnancies.
protect and promote the welfare of its citizens is more pressing when the citizen is incapable of protecting him or herself.25

From a constitutional perspective, the cases establishing privacy as a "right" all involve the state's attempt to regulate beyond its police power26 in areas where the public has no interest. A right of privacy is a right to prevent state regulation of private activities unless the interests of a third party, normally the public at large, are harmed. A public harm exists when the state's fundamental right to protect and promote public health, welfare and safety is more compelling than the individual's right of privacy.27 For the state to exercise this police power and regulate the activities of private parties, the public must have an interest which demands protection and which has been invaded.28 In Griswold v Connecticut,29

25 "Right of privacy" means a right to engage in certain highly personal activities free from governmental regulation. This right has been applied to invalidate laws concerning reproduction, abortion, birth control and marriage where no compelling state interest justified the existence of the law. Nowak, et al, Constitutional Law § 14.26 at 684 (cited in note 21). On the other hand, the Court has recognized the state's compelling interest in protecting the health and welfare of children. In Caban v Mohammed, 441 US 380 (1979), for example, the Court acknowledged the importance of the state's interest in adoption and legitimization of children. But see Zablocki v Redhair, 434 US 374 (1978) (invalidating a statute which restricted the ability of economically poor persons to marry despite the state's interest in protecting the welfare of the children from the previous marriage). See also Roe v Wade, 410 US 113 (1973), where the Court recognized the state's strong interest in protecting prenatal life. These decisions demonstrate that when a child is concerned, the state has a significant interest in protecting that child which compels limited governmental intrusion into family relationships.

26 Richard A. Epstein, Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv L Rev 5, 59 (1988) ("[i]n essence, the state [under its police power] is allowed to regulate in ways that are thought generally to advance the public good, and a very low level of scrutiny is applied both to the ends sought and the connection between means and ends").

27 See generally Day-Brite Lighting, Inc. v Missouri, 342 US 421, 424 (1952) (police power protects all great public needs and is a flexible notion not confined to a narrow category); Williams v State, 444 NE2d 888, 890 (1983) ("police powers" generally concern power inherent in government to enact laws, within constitutional limits, to promote order, safety, health, morals and general welfare of society); Carroll v State, 361 S2d 144, 146 (1978) ("police power" is the sovereign right of the state to enact laws for the protection of the lives, health, morals, comfort and general welfare of its citizens).


29 In Griswold v Connecticut, 381 US 479, 497 (1965), Justice Goldberg, concurring, wrote: "'Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling ...' The law must be shown 'necessary, and not merely rationally related, to the accomplishment of a permissible state policy ...' " In Nowak, et al, Constitutional Law at 714 (cited in note 21), the authors observe that the Court's "right of privacy" decisions indicate that the state may not limit freedom of choice regarding reproductive and sexual activity unless the government can demonstrate the activity in question produces a clear social harm.

30 381 US 479 (1965).
the Supreme Court held that a state cannot criminalize the use of contraceptives by married persons and, therefore, cannot punish those who provide married persons with contraceptives or information concerning their use. The state's regulation was improper because it invaded the "area of protected freedoms" which included "the zone of privacy created by several fundamental constitutional guarantees" and extended at least to those intimacies of life which involve decisions about whether or not to have children. Further, no harm affected a public interest.\footnote{Rudolph and Rudolph, 63 Neb L Rev at 95 (cited in note 16).}

Similarly, in \textit{Eisenstadt v Baird}, the Court reiterated and emphasized the \textit{Griswold} concept of reproductive autonomy by invalidating a regulation ostensibly designed to protect health but which made contraceptives less available to unmarried than to married couples. In \textit{Roe v Wade},\footnote{405 US 438 (1972).} the reasoning of \textit{Griswold} and \textit{Eisenstadt} was extended to encompass a woman's decision to terminate or continue her pregnancy. Specifically, the \textit{Roe} court held that only a compelling state interest could justify regulation which would in any way abridge a woman's fundamental right to choose to terminate her pregnancy.

In each of these cases, the underlying rationale of the statute at issue was to prevent immorality.\footnote{410 US 113 (1973).} The idea that immorality was a sufficient basis for the regulation of private relationships in the name of health, safety and welfare arose from the English theory that society could enforce religious beliefs in the name of community, health, safety and welfare.\footnote{See Rudolph and Rudolph, 63 Neb L Rev at 93: Such statutes were a result of the anti-contraceptive Comstock Movement of the late 1800's. By the mid-twentieth century, however, the courts recognized that not only was the federal government secular, but that at least since the Civil War, state governments were also essentially secular. Hence the courts began to strike down exercises of police power in areas that were essentially private. The question before the Supreme Court in each of the cases previously cited (\textit{Griswold}, \textit{Eisenstadt}, and \textit{Roe}) was whether a secular police purpose was furthered by the statute at issue. In each instance, the Court could find none. As a result, it was determined that such legislation violated fundamental rights.} In the United States, however, police power regulation of private activities occurs only if a nexus exists between such actions and a perceived public harm.\footnote{Id at 93-95.} Immorality was a basis for regulating private relationships only if the community claimed authority over private morality. Since religion had always been the basis for claiming community control over
morality, once religious values were freed from community control, "traditional community control over private matters and morals was without foundation in the police power of the state." Hence, in each of the cases discussed above, the rationale for invalidating the statutes was the vindication of fundamental rights rather than the rejection of immorality as a justification for the exercise of state police powers.

Thus, in *Griswold* and *Eisenstadt*, the Court held that the legislation at issue was passed to control private activity in furtherance of a particular religious view of appropriate behavior and was therefore beyond the scope of the police power of the state. This does not mean that a true public harm cannot be limited merely because a religious group also considers it harmful. It simply means that the police power cannot reach private actions unless a clear nexus exists between such actions and a perceived public harm.

A right of privacy, therefore, is not absolute. Legislation permitting governmental intrusion into an individual's sexual privacy has been upheld in both criminal and civil cases. In the criminal context, courts justify widespread schemes of intrusive governmental regulation of intimacy on the ground that all people agree to such regulation to protect themselves from criminality. Statutes which govern consensual and forcible sexual acts, intercourse be-

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38 Id at 93.
37 Rudolph and Rudolph, 63 Neb L Rev at 95 (cited in note 16).
38 Id.
39 The Supreme Court has fully reviewed claims that the government punish certain consensual sexual activities between adults. In *Zablocki*, 434 US 374, the Court rejected strict scrutiny of laws regulating the traditional marriage relationship. Justice Powell, in his concurrence, noted that the power to make laws prohibiting marriages that would involve incest, bigamy, or homosexuality were assumed to be within the constitutional scope of state powers. Similarly, in *Griswold*, 381 US at 499, Justice Goldberg stated that "Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication."

Numerous states have enacted statutes that make the communication of venereal disease a crime. See, for example, Ala Code § 22-16-17 (1977) (misdemeanor); 1982 Colo Rev Stat §§ 25-4-401(2),-407 (1982) (misdemeanor); 16 Del Code Ann §§ 201, 709 (1983) (fine up to $1000 or imprisonment up to one year, or both); Nev Rev Stat § 441.290 (1981) (misdemeanor).

tween unmarried persons, spousal rape and the determination of a child's paternity, permit such intrusion despite the existence of intimacy. The intimacy invaded in the prosecution of such "acts" is the same intimacy invaded by judicial inquiry in civil cases where fertility is misrepresented. Yet courts admit the evidence in the former situation, but dismiss the claim in the latter if brought by a defrauded father. This inconsistency makes no sense since the public policy which protects an individual from harm is applicable in both the criminal and civil contexts.

In civil cases, courts have readily permitted large damage recoveries for fraudulent or negligent infection of a sexual partner with an STD. In Kathleen K. v Robert B., the court awarded damages to a plaintiff against a defendant who had represented that he was free from disease when, in fact, he was not. The court rejected both respondent's attempt to analogize his case to that of Stephen K., where a defrauded male was not allowed to claim misrepresentation of fertility to avoid paying child support, and his right of privacy argument. Relying on the reasoning in Barbara A. v John G., the Kathleen K. court concluded that governmental intrusion in an intimate relationship is only warranted where no child is involved and the only damage is to the complaining party. The court noted that the right of privacy neither insulates a

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43 Cal Ann Penal Code § 262 (West 1982).
44 See Barbara A., 145 Cal App 3d at 381, in which the court stated that "[w]here paternity of a child is at issue, the mother cannot refuse to answer all relevant questions about her sexual activity on the plea that it is a private matter." Similarly, in Fults v Superior Court, 88 Cal App 3d 899, 904, 152 Cal Rptr 210 (1979), the court indicated that the woman's right to privacy must yield to "the historically important state interest of facilitating the ascertainment of truth in legal proceedings."
45 See Crowell v Crowell, 180 NC 516, 105 SE 206 (1920) (misrepresentation leading to transmission of venereal disease gives rise to liability in tort).
47 Id at 994. The plaintiff in Kathleen K. claimed four causes of action including, "(1) negligence (alleging that respondent inflicted injury upon appellant by having sexual intercourse with her at a time when he knew, or in the exercise of reasonable care should have known that he was a carrier of venereal disease); (2) battery; (3) intentional infliction of emotional distress; (4) fraud (alleging that respondent deliberately misrepresented to appellant that he was free from venereal disease, and that appellant, relying on such representations, had sexual intercourse with respondent, which she would not have done had she known the true state of affairs)."
49 145 Cal App 3d 369. In Barbara A., the court awarded damages to the female defendant for deceit and battery from an ectopic pregnancy she suffered after engaging in intercourse with a man in reliance on his assertion that "I can't possibly get anyone pregnant." Id at 376.
person from all judicial inquiry into his sexual relations nor protects a sexual partner who causes physical injury by intentionally tortious conduct. The court found that the tortious nature of respondent's conduct combined with a compelling state interest in preventing and controlling the transmission of contagious diseases, brought the appellant's injury within the type contemplated as compensable under the Barbara A. analysis.

The court in Kathleen K. found that a constitutional right of privacy argument is misplaced in a case where the state's interest in the health of its citizens is implicated.\(^6^0\) The remainder of the court's opinion however, like the opinion in Barbara A., was defectively reasoned because the court attempted to distinguish the factual situation in Stephen K. from the facts in Kathleen K.. According to the Kathleen K. court, the right of privacy does encompass the intimacy of sexual relations from which a child results. Neither the Barbara A. nor the Kathleen K. courts, however, offered an explanation for rejecting the protection of the right of privacy where a child has not been born.\(^6^1\) Underlying this omission is the implicit recognition that when a tort has occurred, the rejection of the right of privacy argument in the context of an intimate relationship is inconsistent with the Supreme Court's vision of the right of privacy. Rather than face this inconsistency, the Kathleen K. court, without citing any support, restated the reasoning used in Stephen K.: Where a child is involved, a right of privacy argument should withstand judicial scrutiny.\(^5^2\)

This assertion does nothing to eliminate the inconsistency since the right of privacy should protect the conduct of individuals only if no compelling state interest exists. Where a child is present, a court actually has a more compelling reason to intrude into an intimate relationship where misrepresentation has occurred than where no child exists since children require greater governmental protection than do adults. The court did not distinguish the sexual relationship in Stephen K. from that in Kathleen K. and Barbara A. because it could not do so.\(^5^3\)

\(^{6^0}\) Kathleen K., 150 Cal App 3d at 996.
\(^{6^1}\) See Barbara A., 145 Cal App 3d at 378-80, and Kathleen K., 150 Cal App 3d at 994-95.
\(^{5^2}\) Kathleen K., 150 Cal App 3d at 995.
\(^{5^3}\) The line that the Kathleen K. court drew to distinguish its facts from those in Stephen K. has eluded others. In Legal View: For Courts, Bedroom Stands Ajar, LA Times Part 5 at 10 (Jan 28, 1988), Jeffrey S. Klein was puzzled that one court could deny a right to privacy where the man misrepresented (Barbara A.) while another could uphold privacy interests when the woman misrepresented (Stephen K.) or one sexual partner was infected.
A more recent case involving misrepresentation of venereal disease offers some additional guidance. In *B.N. v K.K.*, the relationship between the parties was intimate. The defendant knew that engaging in sexual intercourse with the plaintiff without disclosing his condition would likely produce severe harm to a readily and clearly identifiable person. The court distinguished *Stephen K.*, declaring a greater state power to invade privacy when the health of a third party is endangered. The court did not base its decision on these grounds however. Instead, it recognized that where one party is harmed by another party's misrepresentation, damages should be awarded to the injured party despite the intimate nature of the relationship. The court's failure to address the police power issue suggests a belief that misrepresentation between private parties justifies the court's adjudication of the dispute even in the absence of a state concern for health.

The rationale derived from the misrepresentation of disease cases supports the assertion that a right of privacy argument is improper in disputes between private parties where a tort has occurred. Although a right of privacy argument is more compelling where the misrepresentation has resulted in the birth of a child than where the misrepresentation causes the transmission of a disease, both cases involve a tortious misrepresentation by one party. The difference between these two situations is that the latter case involves duties to a child, which are distinct and separable from the duties owed by the parties to the misrepresentation. Cases where fertility has been misrepresented, therefore, can be analyzed with herpes (*Kathleen K*). The article concluded: "... [It] goes to show you that judges are often quite unpredictable, whether their cases arise in the bedroom or the boardroom."

Further, in *Sexual Matters Getting More Attention in Court*, NY Times A24 (Feb 26, 1984), David Margolick pointed out that *Kathleen K.* was originally dismissed by a judge who cited *Stephen K.* as precedent. *Barbara A.* was decided shortly thereafter. Thus, the plaintiff in *Kathleen K.* won on appeal not because her case could be reconciled with *Stephen K.*, but because the *Barbara A.* decision justified inquiry into intimate relations which had been ruled off limits by *Stephen K*.

* 312 Md 135, 538 A2d 1175 (1988). In *B.N.*, the court recognized the plaintiff's cause of action for negligent transmission of disease. The court held that a cognizable claim for negligence and fraud under Maryland law could be stated by a woman who contracted herpes from a man who knew he had the disease but failed to inform her. The court also held that if the woman could prove that her resulting emotional distress was severe, she should recover under a theory of intentional infliction of emotional distress.

* 538 A2d at 1184.

* See generally *B.N.*, 312 Md 135, and *Kathleen K.*, 150 Cal App 3d 992.

* See *Kathleen K.*, 150 Cal App 3d at 996-97 ("[the exception] to the right of privacy [is expanded] to impose liability upon 'one sexual partner who by intentionally tortious conduct causes physical injury to the other.'" Transmission of a contagious disease is the "type of personal injury" which warrants invasion of an individual's right of privacy).
according to the principles developed in misrepresentation of disease cases; the issue of support obligations to the child is properly adjudicated separately.

B. Duty of Support

The duty of parents to support their illegitimate children is recognized uniformly by the states. This duty, however, should not be the focus of the inquiry into allegations of misrepresentations of contraceptive use or fertility. At common law, however, the father of an illegitimate child was, in the absence of statute, under no legal obligation to support his child. The mother of an illegitimate child was also under no obligation to support her child. Because the common law considered an illegitimate child filius nullius (the son of no one), the courts ignored the legal aspects of the parent-child relationship. Today, all states impose a duty on parents, either by statute or through case law, to support both their legitimate and illegitimate children.

Despite these contemporary statutory and judicially-created protections, illegitimate children remain encumbered by laws which put them at a societal disadvantage because of their status. Although statutory classifications based on illegitimacy are not considered "suspect"—thus subject to strict scrutiny—the Supreme Court has found that certain statutes violate the Equal Protection Clause. The Court has not advanced a consistent standard for finding unconstitutional laws which discriminate against illegitimate children. For the purpose of this comment, it is only im-

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58 See, for example, Iowa Code Ann § 675.1 (West 1987); Ky Rev Stat Ann § 406.011 (Baldwin 1984); Mont Code Ann § 40-6-211 (1987).
59 See, for example, Doughty v Engler, 112 Kan 583, 211 P 619 (1923).
60 See, for example, State v Tieman, 32 Wash 294, 299, 73 P 375 (1903).
61 William Blackstone, Blackstone’s Commentaries 447.
63 For example, in Labine v Vincent, 401 US 532 (1971), the Supreme Court upheld a law which allowed illegitimate children to receive equal treatment in the intestate distribution of their father's estate only if they had been formally acknowledged by the father during his life. In Lalli v Lalli, 439 US 259 (1978), the Supreme Court upheld a requirement that an illegitimate child qualifies as an heir to the father's intestate estate only if he or she received an "order of filiation" establishing paternity from a court of "competent jurisdiction" during the father's life.
64 In Levy v Louisiana, for example, the Court held that excluding illegitimate children from inheritance under wrongful death statutes violates the Equal Protection Clause. 391 US 68 (1968). But in Labine, the Court upheld a Louisiana statute which barred illegitimate children from sharing equally in the estate of a father who had acknowledged paternity. 401 US 532. All that is clear from the Court’s decisions in this area is that illegitimate children
important that the Court has articulated that certain biologically-determined rights, including the right to support, should be constitutionally recognized.\textsuperscript{55}

Thus, in the context of misrepresentation of fertility cases, a father has a duty to support his child. The existence of this duty should not, as it seems to today, blur the inquiry into the underlying tort in cases involving a misrepresentation by the mother. Rather than disregard the tortious misrepresentation by the mother, a more equitable approach to these cases would recognize the parental duty of support and the fact of misrepresentation, in that order. This approach places primary liability for the child’s care with the misrepresenting party, leaving secondary liability with the defrauded party. Thus, if the child could be supported by the mother alone, the defrauded father would not be liable for child support. If the mother could not fulfill her obligation, the father, secondarily liable, would be required to contribute to the child’s support.

C. Wrongs Without Remedies

The final judicial justification for ignoring claims of misrepresentation of fertility and awarding child support to misrepresenting mothers is that not every wrong has a remedy.\textsuperscript{66} To assert that some wrongs lack remedies begs the question; for every legal wrong, courts can provide a remedy.\textsuperscript{67} “Wrong” implies an invasion of an individual’s legally protected interests or rights. On the other hand, for every “harm” which occurs, there may not be a remedy; many types of harm have no effective form of legal redress.\textsuperscript{68}

“Harms” occurring in the context of an intimate relationship are entitled to Fourteenth Amendment protections. See Levy, 391 US at 70. It remains unclear how far these protections extend.

\textsuperscript{55} In Gomez v Perez, 409 US 535 (1973), the Court held that a state statute that withheld a right of support from illegitimate children violated the Equal Protection Clause because a right of support is a substantial benefit accorded children. According to the Court, illegitimacy, like race or sex, is a characteristic outside the control of the child and should not, therefore, subject the child to discrimination.

\textsuperscript{66} See, for example, Douglas R. v Suzanne M., 127 Misc 2d 745, 747, 487 NYS2d 244 (1985).

\textsuperscript{67} See Prosser on Torts Ch 1 §1 at 4 (cited in note 7): “It is the legal justification which must be looked to: the law will hold the defendant responsible for what the law regards as unjustified.”

\textsuperscript{68} “There are many interferences with the plaintiff’s interests, including many instances of negligently causing mere mental suffering without physical consequences or depriving the plaintiff of the benefit of a contract, for which the law will give no remedy, although the defendant has been clearly at fault.” Id.
MISREPRESENTATION OF FERTILITY

may not all have remedies. This may be due to the very nature of intimate relationships which "take varied forms and beget complications and entanglements which defy reason." But remedies should not be denied simply because they are difficult to formulate. In cases involving misrepresentation in intimate relations, courts are reluctant to award remedies for two reasons: first, because a simple remedy is unavailable and, even if fashioned, might not "effectively resolve all the issues and make the parties whole" and, second, because of the evidentiary difficulties of suits based on representations made in intimate conversations.

As a preliminary matter, it cannot be said that the mere existence of intimacy in a relationship prohibits any inquiry into the nature of the relationship. If that proposition were true, numerous illegal and ostensibly "intimate" acts including adultery, misrepresentation concerning venereal disease and rape could not be prosecuted. These acts, like misrepresentation of fertility, are wrongs that "admit of no simple remedy" and their adjudication poses evidentiary problems because the cases often consist of "an allegation and denial and little else." Further, the existence of other causes of action arising from an intimate relationship belies the argument that no remedy can be created for wrongs occurring in this context. For example, actions for loss of spousal consortium, a parent's suit for loss of her child's consortium, and paternity determination are all recognized as justiciable despite obvious evidentiary problems.

In fashioning a remedy for claims involving misrepresentation of fertility, courts need not look beyond fundamental principles of tort law. Fraudulent representations are those which coerce another person to do something against that person's will. Put differently, if another's consent to engage in an act is fraudulently obtained, a tort has occurred. Thus, in cases involving misrepresentation of fertility, a tort is committed when one individual entices another into intercourse by misrepresenting facts which, if known by the other, would alter that person's desire to engage in

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68 Douglas R., 127 Misc 2d at 747.
69 Id.
70 Id.
71 Douglas R., 127 Misc 2d at 747. The court added that "[t]o find that such a suit would appeal solely to the prejudices and sympathies of the trier of fact is to state the obvious; proof by a preponderance of evidence would be exceedingly difficult." Id.
72 Note, Fraud Between Sexual Partners Regarding the Use of Contraceptives, 71 Ky L J 593, 602 (1982-83).
73 See People v Evans, 85 Misc 2d 1088, 1097-98, 379 NYS 912, 918-19 (1975).
74 See generally Prosser on Torts Ch 18 at 725-70 (cited in note 7).
sexual relations.

The fundamental issue in these cases, then, is whether consent of the complaining party can be proven. The existence or lack of consent is also the primary issue in disputes involving misrepresentation of STD and annulment of marriage due to misrepresentation of a material fact by one party. Courts fashion remedies in these cases to protect innocent individuals from harms caused by misrepresentation, despite the intimacy of the relationship in which the tort occurred. There is no reason why the same protections cannot be extended to individuals harmed by misrepresentations about fertility or contraceptive use.

The remaining concern in misrepresentation of fertility cases is whether the evidentiary problems posed by intimate relationships are insurmountable. Similar evidentiary problems have been overcome in both misrepresentation of STD and annulment cases. In the former, courts have uniformly held that a person's consent to sexual intercourse is vitiated by the partner's concealment of the risk of infection with a transmittable disease or infestation with vermin.

Although most American annulment cases were heard in the first half of the twentieth century, the principles applied to justify judicial intrusion into intimate relationships then are still workable today. Despite the intimate nature of the marital relation, courts generally held that misrepresentation of a material issue implicit in the marriage contract, such as the willingness to have normal and natural sexual relations, was sufficient ground to

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76 See, for example, B.N. v K.K., 312 Md 135, 538 A2d 1175 (1988), and Kathleen K. v Robert B., 150 Cal App 3d 992, 198 Cal Rptr 273 (1984). In both cases, transmission of an STD vitiated the consent of the defrauded party and established the liability of the misrepresenting party.

77 See, for example, Mitchell v Mitchell, 136 Me 406, 11 A2d 898 (1940).


79 See DeVall v Strunk, 96 SW 2d 245 (Tex Civ App 1936) (single woman, seduced by the promise of marriage, had an action in battery against a man who infected her with crab lice); Crowell v Crowell, 180 NC 516, 518, 105 SE 206 (1920) (wife could maintain an action for battery or fraud against her husband for infecting her with venereal disease); State v Lankford, 29 Del 594, 596 (1917) (man convicted of battery for fraudulently concealing venereal disease and infecting wife). More recently, courts have recognized a cause of action for fraudulent or negligent misrepresentation of herpes. See generally B.N. v K.K., 312 Md 135; Kathleen K., 150 Cal App 3d 992.

80 See, for example, Gerwitz v Gerwitz, 66 NYS 2d 327 (1945); Hafner v Hafner, 66 NYS 2d 442 (1946); Mitchell v Lloyd 126 Me 503, 140 A 182 (1928); Mitchell v Mitchell, 136 Me 406, 11 A2d 898 (1940). But see In re Marriage of Naguit, 104 Ill App 3d 709, 443 NE2d 296 (1982), and Louis v Louis, 124 Ill App 2d 325, 260 NE2d 469 (1970).
void a marriage.\(^2\) And in one case, the court's analysis of the misrepresentation question was unaffected by the issue of child support. In *Mitchell v Mitchell*,\(^3\) the court annulled a marriage because the husband had relied upon a pregnant woman's false and fraudulent statement that he was the father of her child. Because the status of the child might have been affected by the result, the *Mitchell* court acknowledged that the dispute was unlike actions where only the interests of the parties are at stake.\(^4\) Despite the "vital" interest of society in the child, however, the court declared that "the rules of law generally applicable to ordinary actions of deceit may be applied."\(^5\)

Moreover, the evidentiary problems in annulment cases are no easier to solve than those in the cases where fertility or contraceptive use has been misrepresented. In most annulment cases, witnesses or writings supporting or opposing the alleged misrepresentation were rare.\(^6\) Just as in misrepresentation of fertility cases, the trier of fact often rendered a decision based exclusively on the allegations of the two parties.\(^7\) Because the evidentiary difficulties are no more troubling in the context of misrepresentation of fertility than in annulment cases, this concern cannot fully explain judicial reluctance to address the former but not the latter.\(^8\)

\(^2\) See, for example, *Gerwitz*, 66 NYS2d at 327; *Hafner*, 66 NYS2d at 442; *Craun v Craun*, 300 F2d 737 (DC Cir 1962) (husband's concealment of the fact that marital cohabitation was scheduled to take place in a one-bedroom apartment already occupied by two other couples who were living together meretriciously and one couple who was married, constituted fraud and justified the annulment of their unconsummated marriage); *In re Marriage of Naguit*, 104 Ill App 3d at 709 (declaring that fraudulent misrepresentation of willingness to consummate marriage constitutes ground for a declaration of invalidity).

\(^3\) 136 Me at 418-22.

\(^4\) Id.

\(^5\) Id.

\(^6\) See, for example, *Mitchell*, 136 Me at 418; *Roper v Roper*, 100 Cal App 2d 650, 224 P2d 53 (1950); *Goff v Goff*, 52 Cal App 2d 23, 125 P2d 848 (1942); *Boyce v McKenna*, 221 Mich 204, 178 NW 701 (1920).

\(^7\) See cases cited in preceding note.

\(^8\) Other factors might be: the common law prohibition against fornication, 2 Am Jur 2d Adultery and Fornication § 8; and the presumption that men control sexual relations, *Prosser on Torts* Ch 22 §124 at 917 (cited in note 7) (suggesting that the "idea that one spouse can recover for an act the other spouse has willingly consented to is perhaps better suited to an era that regarded one spouse as the property of another"). At common law, one who committed a crime could not raise misrepresentation as a defense or bring an action arising out of the illegal activity. See Richard A. Epstein, Charles O. Gregory and Harry Kalven Jr., *Cases and Materials on Torts* 21 (Little Brown and Company, 4th ed 1984): The minority view at common law—the position adopted by the American Law Institute in the Restatement of Torts §60 (now Restatement (Second) of Torts §60 with cross-reference to §892C(1))—was that as far as civil liability of the actor in such cases is concerned, consent by the other party is a defense. This rule gives
Finally, the argument that there should be no inquiry into the mechanics of intimate relationships is particularly weak when applied to relationships that have ended. Courts are reluctant to settle disputes in ongoing marital relationships because of a preference for internal adjustments made without judicial interference. Courts are not similarly hesitant, however, about addressing claims arising out of either unmarried cohabitation or divorce. Similarly, judicial involvement in misrepresentation of fertility cases does not interfere with family autonomy or the sanctity of marriage because the autonomy or sanctity either was never established or is no longer desired. The arguments against judicial interference in short-term relationships such as “one-night stands” are even less compelling because these relations do not resemble marriages or long-term cohabitations.

III. A PROPOSED APPROACH TO MISREPRESENTATION OF FERTILITY CLAIMS

Judicial failure to separate the misrepresentation and duty to the child arguments into their constituent parts has resulted in a mishandling of misrepresentation of fertility cases. The failure to separate liability based on a status relationship from liability based on a misrepresentation has been aggravated by the courts' apparent susceptibility to gender stereotypes. As a result, misrepresenting males pay all of the expenses of a defrauded female. Misrepresenting females, by contrast, pay none of the expenses of the defrauded male. This disparity in results is inequitable.

effect to the equitable maxim “ex turpi causa non oritur actio,” or no action shall arise out of an improper or immoral cause.

Despite concern for preventing fornication and adultery, courts have rejected the rule in misrepresentation of STD cases. See generally B.N. v K.K., 312 Md 135, 538 A2d 1175 (1988); Kathleen K. v Robert B., 150 Cal App 3d 992, 198 Cal Rptr 273 (1984).

Henry M. Hart and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 364, (Tentative ed 1958). Hart and Sacks labeled the theory that family autonomy should be maintained without outside interference the “Living Tree” policy. The “Living Tree” policy expresses “the value of autonomy” by opposing judicial relief when the particular association, such as a family, is in a better position than the courts to work out its problems and “pursue their own course.”

See Alice D. v William M., 113 Misc 2d 940, 946, 450 NYS2d 350 (1982) (man misrepresenting sterility held liable for all expenses resulting from a negligent misrepresentation to his female sexual partner; the court found the man breached his duty to give accurate information on the subject of his sterility).

The courts in Stephen K. v Roni L., 105 Cal App 3d 640, 642, 164 Cal Rptr 618 (1980), and Pamela P. v Frank S., 59 NY2d 1, 1, 449 NE2d 713 (1983), rejected claims by male paternity defendants premised on the mother's misrepresentation regarding fertility. In Stephen K., the paternity defendant cross-claimed against the mother for misrepresenta-
Applied equitably, the law governing misrepresentation would award damages to a plaintiff regardless of sex only when he or she could prove the elements of misrepresentation. Courts currently handle the situation properly when no child results from the misrepresentation by recognizing that a tort has occurred. Under those circumstances, the malfeasor is responsible for all damages that proximately result, a principle that is fundamental to tort law. The defrauded party in any bargained-for transaction has a cause of action in fraud and has a right to actual and consequential damages for the money he has lost or has been required to pay out as a result of the fraud.

Where a child is involved, the analysis of misrepresentation of fertility cases must also include consideration of the child's welfare. For courts to altogether ignore an alleged misrepresentation by the woman because a child's welfare is concerned, however, is to reject the idea that women are in fact capable of supporting their own children and are no longer "servants" of their husbands, fathers or lovers. In solving the problem of child support obligations when one party has misrepresented his or her fertility, courts have failed to resolve two issues: duty to the child and duty to the other party. Instead, courts confuse the bargained-for transaction with the well-established notion that a parent has a duty to support his

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9 See Prosser on Torts Ch 18 §105 at 732 (cited in note 7): "Where the defense is set up... by way of affirmative counterclaim, it in no way operates in avoidance of the transaction, but seeks relief analogous to that afforded by a tort action of deceit, and therefore should be governed by the requirements of that action."


98 Id at 949.

97 Prosser on Torts Ch 18 §110 at 767 (cited in note 7).

"The tort action for fraudulent misrepresentation originated from the treatment in contract law of bargained-for transactions. Prosser on Torts Ch 18 §105 at 726 (cited in note 7). The solution proposed by this Comment requires analysis of misrepresentation of fertility cases as traditional misrepresentation cases. Thus, parties misrepresenting fertility have a tort action for fraud because, as in contract law, the terms of their "bargained-for transaction" have been breached. Although most courts would not view meretricious sexual conduct between two people as a bargained-for transaction, judicial recognition of misrepresentation as a claim or defense in this context indicates a willingness to apply fraud principles to misrepresentation regarding use of birth control or sterility. See generally Alice D., 113 Misc 2d at 940; Barbara A., 145 Cal App 3d at 369."
or her child.

Four parties are involved in the support of a child born as a result of a woman's fraudulent misrepresentation: the misrepresenting mother, the child, the state, and the defrauded father. Among these parties, the two innocent actors are the state and the child. A court must choose among the state, the misrepresenting mother and the defrauded father to determine who should pay support. Although the defrauded father appears innocent, he has a nondelegable duty to his child which is unchanged by the fact that recovery may be had from the misrepresenting mother. Between the state and the defrauded father, therefore, the defrauded father should pay. But this is true only if the misrepresenting mother is incapable of supporting the child alone. Just as in cases where the male misrepresenter has been found liable for the consequential damages of his misrepresentation, the defrauded father's payments for the child are part of the consequential damages caused by the mother and, therefore, should be recoverable from her. When a child is born from the act of intercourse, the misrepresenting mother normally has custody. Courts confuse the relationship between the defrauded father and the child with the relationship between the defrauded father and the misrepresenting mother because money must go to the misrepresenting mother in order to reach the child.

One can properly examine the problem in the abstract by assuming that the misrepresenting mother does not have custody of the child and is unable alone to support the child. If that is true, the defrauded father must pay support for the child, since, as between the state and he, the state is more innocent. To compensate for the wrong the defrauded father has suffered, however, he may sue the misrepresenting mother for damages. The defrauded father should pay child support to the misrepresenting mother who has custody, but the misrepresenting mother should not be free to spend the money as she wishes. The payment to the misrepresenting mother puts her in the position of a trustee for the child. Her expenditures must be monitored and accounted for to the defrauded father. Finally, if the misrepresenting mother acquires money, perhaps through a testamentary bequest, the defrauded fa-

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97 See Barbara A., 145 Cal App 3d at 385, and Alice D., 113 Misc 2d at 949-51. Both cases allowed recovery for abortion and other pregnancy-related expenses.

ther should be able to recover previous child support payments and sue for the consequential damages of the misrepresentation.99

Rather than bring the action for damages against the misrepresenting party during the paternity action, the obligation to support should be established first, and then the defrauded party should sue for damages or an accounting of the support money in either the same or a separate action.100 This solution addresses the concern that a party may try to avoid support obligations and simultaneously considers the interests of both parties, the child and the state. Moreover, this approach alleviates any equal protection concerns because it does not unfairly punish either party. Finally, by assigning primary and secondary responsibility for support of the child to, respectively, the defrauding and defrauded parties, this approach ensures that the child will receive adequate support.

CONCLUSION

The sex of a party who misrepresents fertility is irrelevant to the determination of liability for support. Thus, the current judicial treatment of misrepresentation of fertility cases is inequitable since the decisions result in an uneven distribution of liability based on the sex of the misrepresenting party. An equitable apportionment of liability under these circumstances is simply a two-step process. First, if a child exists, the court establishes that the misrepresenting party has primary liability for the support of that child and that the defrauded party has secondary liability. Second, the court puts in place a system which monitors the financial stability of the misrepresenting party so that an increase in the

99 The solution proposed by this comment was first suggested in Smith v Price, 74 NC App 413, 328 SE2d 811 (1985), where recovery to the defrauded father from the misrepresenting mother was denied. The court denied recovery for two reasons: The claim was brought in a civil action to establish paternity; and the father was attempting to avoid child support obligations completely. Id at 442. The Smith court did, however, suggest that the father’s claim “might be appropriate in some circumstances.” Id.

100 Paternity is adjudicated for the child’s benefit. Therefore no counterclaim should be allowed against the child. Instead, the defrauded party should bring a claim against the misrepresenting party and her property. Since a counterclaim is inappropriate in this situation and jurisdiction over the parties has been established, there is no reason to have separate trials. This assumption follows the reasoning of the Advisory Committee to the Federal Rules of Civil Procedure which advocates joining claims whenever possible in order to promote efficient and accurate verdicts. 28 USCA Federal Rules of Civil Procedure 14-21 (1981). Instead of a counterclaim, the defrauded party should bring an action to determine whether the defrauded or misrepresenting party should have primary financial responsibility for the support of the child. However, this action would be subsidiary to the main action adjudicating the rights of the child to support where both parties are considered responsible.
wealth of that party will result in the return of child support payments to the defrauded party in addition to a payment of damages. This solution avoids the tortured analysis the courts currently use to justify inequitable treatment of men and women. It recognizes that when a misrepresentation of fertility results in the birth of a child, that child must not suffer. At the same time, it acknowledges that men and women are equally responsible for torts they commit.